



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

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Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

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DECISION ON OBJECTIONS TO THE ADMISSIBILITY OF WITNESS, VICTIM AND CIVIL PARTY STATEMENTS AND CASE 001 TRANSCRIPTS PROPOSED BY THE CO-PROSECUTORS AND CIVIL PARTY LEAD CO-LAWYERS

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CHEA Leang
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Accused
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1. INTRODUCTION

1. The Chamber is seised of requests by the Co-Prosecutors and Civil Party Lead Co-Lawyers (“Lead Co-Lawyers”) to put witness and Civil Party statements,¹ victim complaints,² Civil Party applications and related material³ (collectively, “statements”) and Case 001 transcripts before the Chamber.⁴ The NUON Chea Defence and KHIEU Samphan Defence (“NUON Chea” and “KHIEU Samphan”, respectively) object.⁵

2. BACKGROUND

2. On 19 April 2011, the Co-Prosecutors proposed 1,819 statements and 69 Case 001 transcripts.⁶ On the same date, the Lead Co-Lawyers proposed 8,110 statements.⁷ On 22 July

¹ The Co-Prosecutors and Lead Co-Lawyers propose various written statements to be admitted in place of oral testimony including written records of interviews conducted by the Co-Investigating Judges, statements taken by the Co-Prosecutors during the Preliminary Investigation and statements taken or collected by DC-Cam and various other entities.

² Under the Internal Rules, victims may lodge a complaint with the Co-Prosecutors alleging the commission of crimes. Such complaints are processed by the Victims’ Unit and forwarded to the Co-Prosecutors. They must include the identity of the complainant, the subject of the complaint, a summary of the alleged criminal acts, details of potential witnesses and any evidence in the possession of the complainant (Internal Rule 49 and Practice Direction on Victims’ Participation, Article 2).

³ In order to be admitted as Civil Parties, victims must file an application with the Victims’ Unit which then forwards the application to the Co-Investigating Judges. The application must clearly identify the Civil Party and demonstrate a personal injury as a direct consequence of an alleged crime. Thus Victims’ Unit reports, evidence of an injury suffered, evidence in the possession of the applicant and other material accompanies and/or forms part of a Civil Party application (Internal Rule 23*bis*; Practice Direction on Victims’ Participation, Article 3).

⁴ Lead Co-Lawyers’ Response to Trial Chamber Directives on the Tendering into Evidence of Civil Party Written Statements & Other Documents, E223/2/7, 4 March 2013 (“Civil Parties Revised Request”), Strictly Confidential Annex 1(a), E223/2/7.1, Confidential Annex A, E223/2/7/1.1; Co-Prosecutors’ Submission of Revised Annexes 12 and 13 of their Rule 80(3) Trial Document List (Witness Statements and Complaints), E278, 9 April 2013 (“OCP Revised Request”), Annex 12, E278.3 (“Revised Annex 12”), Annex 13, E278.4 (“Revised Annex 13”) incorporating Annex 11 – CF1 Trial Transcripts, E9/31.1 (“Annex 11”); *see also* Co-Prosecutors’ Combined Response to Defence Objections to the Admission of Witness Statements, Complaints and Transcripts, E277/1, 27 May 2013 (“OCP Reply”); Lead Co-Lawyers’ Consolidated Response to Defence Objections on the Admissibility of Written Statements in Lieu of Oral Testimony, E277/2, 10 June 2013 (“Civil Parties Reply”).

⁵ Preliminary Response to Co-Prosecutors’ Further Request to Put Before the Chamber Written Statements and Transcripts, E96/8/1, 8 November 2012 (“NUON Chea Preliminary Response”); Submission regarding Legal Standards for Admission of Written Statements in Lieu of Oral Testimonies pursuant to Rule 92, E277, 9 April 2013 (“KHIEU Samphan Response”); Objections to Requests to Put Before the Chamber Written Statements and Transcripts, E223/2/8, 26 April 2013 (“NUON Chea Response”); Supplementary Annexes in Connection with Objections to Statements and Transcripts, E223/2/8/1, 29 April 2013 (“NUON Chea Supplementary Response”), Annex 1, E223/2/8/1.2, Annex 2, E223/2/8/1.3, Annex 3, E223/2/8/1.1 (collectively, “Annexes 1-3”); Mr. KHIEU Samphan’s Objections to Admitting Certain Written Statements Proposed by the Co-Prosecutors and the Civil Parties in Lieu of Oral Testimony, E208/5, 26 April 2013 (“KHIEU Samphan Supplementary Response”), Annex 1, E208/5.1, Annex 2, E208/5.2, Annex 3, E208/5.3, Annex 4, E208/5.4, Annex 5, E208/5.5, Annex 6, E208/5.6, Annex 7, E208/5.7 (collectively, “Annexes 1-7”).

⁶ Co-Prosecutors’ Rule 80(3) Trial Document List, E9/31, 19 April 2011, paras 1, 19-21 (“OCP April 2011 Lists”), Annex 11 – CF1 Trial Transcripts, E9/31.11, Annex 12 – Witness Statements, E9/31.12, Annex 13 – Complaints, E9/31.13. *Mc G*

2011, the Lead Co-Lawyers reduced the number of proposed statements to those made by the 3,866 Civil Parties admitted in Case 002.⁸ In the first decision on the admissibility of documentary evidence, issued on 9 April 2012, the Chamber admitted, among other evidence, 197 statements and six Case 001 transcripts relevant to proof of historical background, as well as communication and administrative structures.⁹

3. In a decision issued on 20 June 2012 (“Statements Decision”), the Chamber, referring to procedural rules established at the international level, decided that, subject to certain conditions, written statements and transcripts were admissible absent the opportunity for confrontation in place of oral testimony.¹⁰ The Chamber directed the parties to review their lists of statements by 27 July 2012 in accordance with the admissibility criteria set out in the Statements Decision, to specify the evidentiary purpose of each statement or category of documents (particularly where specific reasons are alleged which justify the admission of statements which go to proof of acts or conduct of the accused without in-court examination of their authors) and to consider proposing a representative sample of each type of evidence where this evidence is voluminous or essentially repetitive.¹¹ On 15 June 2012 and 5 July 2012, the Co-Prosecutors proposed statements relevant to population movement phases one and two.¹² On 27 July 2012, the Co-Prosecutors submitted a list of more than 1,500 statements and transcripts, incorporating by reference those proposed in relation to population movement phases one and two.¹³ The Lead Co-Lawyers also indicated that they no longer

⁷ Civil Party Lead Co-Lawyers’ Lists of Documents and Exhibits (Annexes 7 and 8), E9/32, 19 April 2011, para. 13.

⁸ Civil Party Lead Co-Lawyers’ Revised List of Documents and Exhibits Relevant to the First Four Trial Segments, E109/2, 22 July 2011.

⁹ Decision on Objections to Documents Proposed to be Put Before the Chamber in the Co-Prosecutors’ Annexes A1-A5 and to Documents Cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01, E185, 9 April 2012 (“Documents Framework Decision”), Annex A, E185.1, pp. 19-37, 41-48 (admitting statements taken by DC-Cam and other entities, written records of interviews taken by the Co-Investigating Judges and statements taken by the Co-Prosecutors).

¹⁰ Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents before the Chamber, E96/7, 20 June 2012 (“Statements Decision”), paras 20-33, disposition.

¹¹ Statements Decision, paras 34-36, disposition. In the interests of expeditious proceedings, the Chamber clarified that the parties must indicate by 27 July 2012 all statements they propose in relation to Case 002/01 (Co-Prosecutors’ Request to Admit Witness Statements Relevant to Population Movement Phases 1 and 2 (E208 and E208/2) and IENG Sary Response (E208/1), E208/3, 19 July 2012 (“July 2012 Memorandum”), para. 3).

¹² Co-Prosecutors’ Request to Admit Witness Statements Relevant to Phase I of the Population Movement, E208, 15 June 2012 (“Phase 1 Request”); Co-Prosecutors’ Request to Admit Witness Statements Relevant to Phase II of the Population Movement and Other Evidentiary Issues, E208/2, 5 July 2012 (“Phase 2 Request”); *see also* IENG Sary’s Response to the Co-Prosecutors’ Request to Admit Witness Statements Relevant to Phase I of the Population Movement, E208/1, 27 June 2012.

¹³ Co-Prosecutors’ Further Request to Put before the Chamber Written Statements and Transcripts with Confidential Annexes 1-16, E96/8, 27 July 2012 (“OCP July 2012 Request”), paras 4, 6, 38, Annex 9, E96/8.10. KHIEU Samphan later requested the Chamber to order the Co-Prosecutors to revise their lists of proposed statements (Submission in Support of Mr. IENG Sary’s Request E221, and Request for the Trial Chamber to

proposed any victim complaints, but still sought the admission of statements made by all 3,866 Civil Parties admitted in Case 002.¹⁴

4. On 8 October 2012, the Chamber extended the scope of Case 002/01 to include executions of former Khmer Republic officials at Tuol Po Chrey.¹⁵ On 19 October 2012, the Chamber therefore ordered the parties to indicate all additional evidence they sought to put before the Chamber in relation to Tuol Po Chrey or population movement phases one and two no later than 30 November 2012.¹⁶ The Chamber further notified the Co-Prosecutors that only those statements available in all official languages would be considered. The Co-Prosecutors were directed to advise the Chamber and parties, at the earliest opportunity, if certain statements proposed in the OCP July 2012 Request would no longer be tendered.¹⁷ The Chamber also ordered the Lead Co-Lawyers to identify a representative sample of statements relating to all trial segments and available in all official languages no later than 4 March 2013.¹⁸ The deadline for objections to proposed statements was 26 April 2013.¹⁹ NUON Chea filed a Preliminary Response on 8 November 2012.²⁰

5. On 23 November 2012, the Co-Prosecutors proposed the additional evidence they deemed relevant to the execution of Khmer Republic officials at Tuol Po Chrey and

Order the Co-Prosecutors to Revise the List of Written Statements They are Seeking to Put before the Chamber in Lieu of Oral Testimony, E223, 29 August 2012, paras 6-22). The Co-Prosecutors again requested that all statements identified in the OCP July 2012 Request be admitted (Co-Prosecutors' Response to KHIEU Samphan's Request to Revise Corroborative Evidence Lists, E223/1, 10 September 2012 ("September 2012 Request")).

¹⁴ Civil Party Lead Co-Lawyers' Response to the Decision on the Co-Prosecutors' Rule 92 Submission regarding the Admission of Written Statements and Other Documents before the Trial Chamber (E96/7), and to Memorandum E208/3, including Confidential Annexes 1 and 2, E208/4, 27 July 2012 ("Civil Parties Request"), para. 17 and p. 15 (arguing, *inter alia*, that "civil party applications form a distinct category of written statements which cannot be treated as witness statements and which, by their nature, cannot be subject to an *a priori* restriction to a representative sample").

¹⁵ Notification of Decision on Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163) and Deadline for Submission of Applicable Law Portion of Closing Briefs, E163/5, 8 October 2012, para. 3. On 29 March 2013, after the Supreme Court Chamber annulled the Trial Chamber's severance order, the Trial Chamber again limited the scope of Case 002/01 to the factual allegations described in the Indictment as population movement phases one and two, crimes against humanity committed in their course and executions of Khmer Republic officials at Tuol Po Chrey (T., 29 March 2013, pp. 2-4; *see also* Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, E284, 26 April 2013).

¹⁶ Forthcoming Document Hearings and Response to Lead Co-Lawyers' Memorandum concerning the Trial Chamber's Request to Identify Civil Party Applications for Use at Trial (E208/4) and KHIEU Samphan Defence Request to Revise Corroborative Evidence Lists (E223), E223/2, 19 October 2012 ("October 2012 Memorandum"), para. 4.

¹⁷ October 2012 Memorandum, para. 9; Response to Motions E246 and E185/1/1 and Other Sundry Requests concerning Documents and Deadlines, E246/1, 13 February 2013 ("February 2013 Memorandum"), para. 3.

¹⁸ October 2012 Memorandum, paras 12-13.

¹⁹ October 2012 Memorandum, para. 14; February 2013 Memorandum, para. 1.

²⁰ NUON Chea Preliminary Response; *see also* IENG Sary's Motion to Join NUON Chea's Preliminary Response to Co-Prosecutors' Further Request to Put before the Chamber Written Statements and Transcripts, E96/8/2, 21 November 2012.

population movement phases one and two, declining to include any written statements to avoid “overlapping” with previous requests.²¹ On 3 December 2012, considering the admissibility criteria applicable to written statements and transcripts, the Chamber, in its second decision pertaining to documentary evidence, admitted ten Case 001 transcripts and two statements proposed by the Co-Prosecutors as proof of matters other than the acts and conduct of the Accused as charged.²²

6. The Lead Co-Lawyers filed a revised list of 520 statements on 4 March 2013.²³ On 9 April 2013, KHIEU Samphan made submissions on the legal standards governing the admission of statements in place of oral testimony.²⁴ On the same day, the Co-Prosecutors proposed a revised list of 1,109 statements and transcripts indicating which allegedly contained evidence relevant to proof of the acts and conduct of the Accused as charged.²⁵ On 26 April 2013, NUON Chea and KHIEU Samphan responded.²⁶ NUON Chea filed further objections on 29 April 2013.²⁷ The Co-Prosecutors and Lead Co-Lawyers filed consolidated responses to all Defence objections on 27 May 2013 and 10 June 2013, respectively.²⁸

7. Between 6 and 19 June 2013, the parties were notified of the witnesses previously requested by the parties that the Chamber would not call in Case 002/01.²⁹ On 13 June 2013, the Chamber held the final trial management meeting in Case 002/01 to discuss all outstanding matters, including the remaining witnesses to be called and evidence to be admitted.³⁰ On 17 June 2013, NUON Chea filed additional objections concerning the admission of any evidence relating to the execution of Khmer Republic officials at Tuol Po

²¹ Co-Prosecutors’ Response to the Trial Chamber’s Request to Indicate Additional Documents Relevant to the Population Movement and Tuol Po Chrey Trial Segments and Motion for Scheduling of Documentary Hearings, E223/2/1, 23 November 2012 (“November 2012 Request”), paras 6-7.

²² Decision on Objections to Documents Proposed to be Put before the Chamber in Co-Prosecutors’ Annexes A6-A11 and A14-20 and by the Other Parties, E185/1, 3 December 2012 (“December 2012 Decision”), paras 10, 17 and Annex C (E185/1.3), pp. 25, 43, 94-95; *see also* Annex 11.

²³ There were 566 documents originally listed in Annexes 1(a) and 1 of the Civil Parties Revised Request. As noted in the Civil Parties Reply, however, 46 documents were French translations of other proposed statements.

²⁴ KHIEU Samphan Response.


²⁵ The Co-Prosecutors proposed 874 statements in Revised Annex 12 (E278.3 includes 650 statements of witnesses whom the OCP did not propose to testify in Case 002/01 and 11 statements of deceased witnesses), 166 complaints in Revised Annex 13 (E278.4) and 69 transcripts in Annex 11 (E9/31).

²⁶ NUON Chea Response; KHIEU Samphan Supplementary Response.

²⁷ NUON Chea Supplementary Response.

²⁸ OCP Reply; Civil Parties Reply.

²⁹ Schedule for the Final Document and Other Hearings in Case 002/01, for the Questioning of the Accused and Response to Motion E263 and E288/1, E288/1/1, 17 June 2013; Email from Ms. Susan LAMB, Subject: Advance Notification of Additional Witnesses to be Summoned in Case 002/01 in Response to the Parties’ Requests at the Final TMM, E292, 19 June 2013; *see also* Annex II: Individuals requested by the parties in relation to Case 002/01 but not ultimately heard before the Trial Chamber (sent as an advance courtesy copy to the parties by the Trial Chamber Senior Legal Officer on 6 June 2013).

³⁰ Trial Management Meeting, T., 13 June 2013 (“TMM”). 

Chrey contained in the statements of persons not called to testify in Case 002/01 and requesting that six witnesses be summonsed.³¹ The Co-Prosecutors responded on 25 June 2013, solely with respect to NUON Chea's submissions on the admissibility of written statements in place of oral testimony.³² NUON Chea replied on 1 July 2013.³³

8. On 17 July 2013, the Co-Prosecutors requested that the Defence confirm its objections concerning written statements which the Defence has relied upon in questioning witnesses before the Chamber.³⁴ KHIEU Samphan and NUON Chea both confirmed their prior objections to the admissibility of written statements in place of oral testimony.³⁵ Further, on 23 July 2013, NUON Chea requested the Chamber to summons 111 witnesses who made statements concerning the targeting of Khmer Republic officials in the event those statements were admitted.³⁶ The Co-Prosecutors and the Civil Party Lead Co-Lawyers responded.³⁷ That same day the Chamber denied the request to summons those 111 witnesses notifying the parties that its reasoning would follow.³⁸

3. SUBMISSIONS

3.1. Submissions concerning the OCP and Civil Parties Revised Requests

9. In the OCP Revised Request, the Co-Prosecutors propose 1,109 allegedly cumulative and reliable statements and transcripts relevant to both those factual allegations within the scope of Case 002/01 and to all Closing Order crimes sites and Democratic Kampuchea policies. The Co-Prosecutors submit that some statements relevant to facts beyond the scope of Case 002/01 are nevertheless essential in order to satisfy their burden of proof in relation to joint criminal enterprise policies and the contextual elements of crimes against humanity.³⁹ The Co-Prosecutors indicate that these statements are not proposed as proof of the acts or

³¹ Urgent Request to Summons Key Witnesses in Respect of Tuol Po Chrey, E291, 17 June 2013 ("NUON Chea TPC Request").

³² Co-Prosecutors' Response to NUON Chea's "Urgent Request to Summons Key Witnesses in Respect of Tuol Po Chrey", E291/1, 25 June 2013 ("OCP TPC Response").

³³ Reply to Co-Prosecutors' Response to Urgent Request to Summons Key Witnesses in Respect of Tuol Po Chrey, E291/1/1, 1 July 2013 ("NUON Chea TPC Reply").


³⁴ T., 17 July 2013, pp. 61-62.

³⁵ T., 17 July 2013, pp. 62-67; Sixth and Final Request to Summons TCW-223, E236/5/1/1, 22 July 2013 ("NUON Chea TCW-223 Request"), paras 17-21.

³⁶ T., 23 July 2013, pp. 51-54, 59-60; *see also* Request to Summons Witnesses in Respect of Alleged Policy of Targeting Khmer Republic Officials, E291/2, 25 July 2013 ("NUON Chea Summons Request").

³⁷ T., 23 July 2013, pp. 54-58 (Co-Prosecutors), 58-59 (Lead Co-Lawyers).

³⁸ T., 23 July 2013, pp. 67-68.

³⁹ OCP July 2012 Request, paras 30-34; OCP Revised Request, paras 28-30; OCP Reply, paras 31-44, 69-70, 73; *see also* OCP TPC Response, paras 7-8. 

conduct of the Accused as charged thus their admission, absent the opportunity for examination, is not precluded.⁴⁰ The Co-Prosecutors, however, do propose to redact information relating to the acts and conduct of the Accused from 220 statements.⁴¹

10. The Co-Prosecutors further argue that the standards set out in the Statements Decision correctly adapted international procedural rules concerning the admission of witness statements to the context of the ECCC and should be interpreted strictly.⁴² The Co-Prosecutors argue that considerations beyond whether a statement goes to proof of the acts and conduct of the Accused as charged should be considered in assigning weight, not in determining admissibility.⁴³ They argue that the Defence implicitly waived their objections to the admission of certain statements going to proof of the acts and conduct of the Accused as charged by using them during the questioning of various witnesses. The Co-Prosecutors request the Chamber to take this into account in its decision concerning the admissibility of written statements.⁴⁴ They suggest, however, that the Chamber consider hearing those witnesses whose statements go to proof of the acts and conduct of the Accused.⁴⁵ Further, they argue that all statements made by deceased witnesses should be admitted in the interests of justice and regardless of whether they contain evidence going to proof of the acts and conduct of the Accused as charged.⁴⁶ Finally, the Co-Prosecutors identify various statements of witnesses and Civil Parties who have appeared before the Chamber, requesting that those not yet admitted be put before Chamber.⁴⁷

11. The Lead Co-Lawyers propose 520 allegedly cumulative and relevant statements contained in Civil Party applications and related material, but submit that none are tendered for the purpose of proving the acts and conduct of the Accused as charged.⁴⁸ They argue that, until Defence objections are resolved, they are unable to differentiate between admissible and inadmissible portions of a statement. In any event, they claim that no evidence should be excluded in its entirety on the basis that only portions thereof are admissible.⁴⁹ The Lead Co-Lawyers suggest, however, that the Chamber hear any Civil Party whose testimony goes to

⁴⁰ OCP July 2012 Request, paras 2, 15-17; OCP Reply, paras 28-30.

⁴¹ OCP Revised Request, paras 4-5, 32-33; OCP Reply, paras 21, 24, 64; *see also* TMM, pp. 86-87.

⁴² OCP Reply, paras 2, 13-27, 63-68, 74-76; *see also* OCP TPC Response, para. 9.

⁴³ OCP TPC Response, para. 5.

⁴⁴ T., 17 July 2013, pp. 61-2.

⁴⁵ OCP Revised Request, paras 34-38, 40-41; *see also* TMM, pp. 86-87.

⁴⁶ OCP Revised Request, paras 5, 20; OCP Reply, paras 58, 71.

⁴⁷ OCP Revised Request, paras 2, 5.

⁴⁸ Civil Parties Request, paras 19-23, 28, 34-41; Civil Parties Revised Request, para. 9; Civil Parties Reply, paras 26-30.

⁴⁹ Civil Parties Reply, paras 31-35. *MAF*

proof of the acts and conduct of the Accused as charged upon request by the Defence.⁵⁰ Additionally, the Lead Co-Lawyers argue that the review of Civil Party applications by the Co-Investigating Judges and Pre-Trial Chamber during the investigation phase demonstrate their *prima facie* reliability.⁵¹ Finally, the Lead Co-Lawyers submit that Defence objections are untimely and lack specificity.⁵²

12. NUON Chea argues that, when deciding whether or not written statements and transcripts may be admitted in place of oral testimony, the Chamber adopted the criteria set out in ICTY Rule 92*bis* without limit and must therefore, in accordance with the jurisprudence and rules of the *ad hoc* tribunals, require a witness to attest to the veracity of a statement, consider whether a statement goes to criminal conduct that is “highly proximate” or concerns “live issues”, and exclude statements containing evidence of the acts and conduct of the accused as charged and “evidence proximate to the Accused”, even if also relevant to another purpose.⁵³ NUON Chea argues that various statements are not cumulative of live testimony before the Chamber and should be excluded on this basis.⁵⁴ NUON Chea submits that the number of statements proposed is unmanageably large, that the Co-Prosecutors have failed to make timely and adequate reductions and that most of the proposed statements have limited relevance.⁵⁵ NUON Chea also argues that the institutional objectives of DC-Cam and the reliability of statements taken by the Office of the Co-Prosecutors (“OCP”) and entities external to the ECCC should result in their exclusion. Further, he submits that the admission of OCP statements and Case 001 transcripts would violate the principle of equality of arms and the admission of Case 001 transcripts would impede the ability of the Chamber to be impartial in Case 002.⁵⁶

13. KHIEU Samphan submits that all witness statements related to the acts and conduct attributable to the Accused or to “live issues” between the parties must be excluded where no opportunity for cross-examination has been provided.⁵⁷ KHIEU Samphan defines “live issues” as structures, the existence and policies of a joint criminal enterprise, the threshold

⁵⁰ Civil Parties Request, para. 48.

⁵¹ Civil Parties Request, paras 2-3, 14, 24-27; Civil Parties Reply, paras 18-25.

⁵² Civil Parties Reply, paras 2, 11-17.

⁵³ NUON Chea Preliminary Response, paras 5-36, 40; NUON Chea Response, paras 7-14, 31, 34-39, 44; NUON Chea Supplementary Response, para. 4-6, 9, Annexes 1-3; *see also* NUON Chea TPC Request, para. 36.

⁵⁴ NUON Chea Response, paras 24-30; *see also* NUON Chea TPC Request, paras 8, 36; NUON Chea TPC Reply, paras 3-6, 8.

⁵⁵ NUON Chea Preliminary Response, paras 37-39; NUON Chea Response, paras 15, 17-23.

⁵⁶ NUON Chea Preliminary Response, paras 40-46; NUON Chea Response, paras 40-42, 45-52.

⁵⁷ KHIEU Samphan Response, paras 14-17, 37, 43-45; KHIEU Samphan Supplementary Response, paras 17-23, 43, Annexes 1-7; *see also* TMM, p. 85. *TC 82*

requirements of crimes against humanity and the displacement of the population.⁵⁸ KHIEU Samphan also objects to the admission of statements outside the scope of Case 002/01, uncorroborated statements, written records of interviews unaccompanied by an audio recording on the case file and all statements taken by external entities.⁵⁹

14. In response to a request by the Co-Prosecutors, both NUON Chea and KHIEU Samphan confirmed their respective objections to the admissibility of written statements, submitting that use of statements during examination of a witness by the Defence has no bearing on the admissibility of such statements in place of oral testimony.⁶⁰

3.2. Submissions concerning NUON Chea's "Request to Summons Witnesses in Respect of Alleged Policy of Targeting Khmer Republic Officials"

15. NUON Chea argues that, based in part on contradictions in the evidence of other witnesses before the Chamber, statements concerning the targeting of Khmer Republic officials are systematically unreliable and fail to support a pattern of widespread executions demonstrating a Democratic Kampuchea policy.⁶¹ Further, NUON Chea argues that, considering that he was waiting for the Chamber to notify the parties which written statements would be admitted, his application is timely and satisfies the reasonable diligence requirements set out in Internal Rule 87(4). On these bases, NUON Chea requests the Chamber to summons 111 witnesses who made statements concerning the targeting of Khmer Republic officials in the event those statements are admitted.⁶²

16. The Co-Prosecutors argue that this request is untimely and challenges the sufficiency and reliability of evidence which would more appropriately be addressed in final submissions.⁶³ The Lead Co-Lawyers endorse the position of the Co-Prosecutors arguing that the request is a delaying tactic and that the calling of further witnesses is unnecessary.⁶⁴

⁵⁸ KHIEU Samphan Response, paras 18-43; KHIEU Samphan Supplementary Response, paras 24-26, 43.

⁵⁹ KHIEU Samphan Response, paras 34-45; KHIEU Samphan Supplementary Response, paras 14, 27-41, 43, Annexes 1-7.

⁶⁰ T., 17 July 2013, pp. 62-67; NUON Chea TCW-223 Request, paras 19-21.

⁶¹ NUON Chea Summons Request, paras 9-20; T., 23 July 2013, pp. 51-54, 59-60.

⁶² NUON Chea Summons Request, paras 21-25; T., 23 July 2013, pp. 51-54, 59-60.

⁶³ T., 23 July 2013, pp. 54-58.

⁶⁴ T., 23 July 2013, pp. 58-59. *MSD*

4. FINDINGS

4.1. Legal Framework

17. Written statements or transcripts which go to proof of the acts and conduct of an accused as charged in the indictment shall, subject to limited exceptions, be regarded as “not allowed under the law” pursuant to Internal Rule 87(3)(d) and are inadmissible for this purpose, unless the Defence has been accorded the opportunity of in-court examination of their authors.⁶⁵ Provided, however, that statements and transcripts are relevant to proof of matters other than the acts and conduct of the Accused as charged and otherwise satisfy Internal Rule 87(3), it is in the interests of justice and expeditious proceedings that such evidence be admitted.⁶⁶ Further, the admission of evidence is not precluded where a witness is deceased, cannot be traced with the exercise of reasonable diligence or is unavailable due to threats, intimidation or other improper interference.⁶⁷

18. Factors in favour of admitting statements and transcripts in place of oral testimony include the genuine absence of the opportunity for confrontation (due to the death, medical inability to testify orally or impossibility, with reasonable diligence, to trace the author of the statement), the cumulative nature of the evidence and whether the evidence goes to proof of threshold elements of international crimes (such as the widespread or systematic nature of an attack), crime base, victim impact, historical background or administrative structures.⁶⁸ The Chamber notes that, in adopting the standards set out in the Statements Decision, it did not also adopt wholesale the technical and detailed requirements of ICTY Rules 92*bis*, 92*ter* or 92*quater*.⁶⁹

⁶⁵ Statements Decision, paras 21-22.

⁶⁶ Statements Decision, paras 23-33; *see also Prosecutor v. Milošević*, Decision on Admissibility of Prosecution Investigator’s Evidence, ICTY Appeals Chamber (IT-02-54-AR73.2), 30 September 2002 (“First Milošević Decision”), para. 18; *Prosecutor v. Milošević*, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements, ICTY Appeals Chamber (IT-02-54-AR73.4), 30 September 2003 (“Second Milošević Decision”), paras 14, 19; *Prosecutor v. Prlić et al.*, Decision on Appeals against the Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, ICTY Appeals Chamber (IT-04-74-AR73.4), 23 November 2007 (“Prlić Appeal Decision”), paras 55 (“as a matter of principle nothing bars the admission of evidence that is not tested or might not be tested through cross-examination”), 57, 60-62 (finding no error in admitting evidence of the acts and conduct of the accused to be evaluated later in light of the whole trial record).

⁶⁷ Statements Decision, paras 32-33.

⁶⁸ Statements Decision, paras 17, 24, 25, 32, 34, disposition.

⁶⁹ The ICTR, ICTY, STL, ICC and SCSL all recognize the general principle that the evidence of a witness has limited probative value absent the opportunity for confrontation. The technical and detailed provisions in ICTY Rules 92*bis*, 92*ter* and 92*quater*, however, are not identically reflected in the rules of the other

19. The Chamber further clarifies that the “acts and conduct” standard adopted in the Statements Decision applies only to a statement or transcript that, “on its face and taken by itself”, goes to proof of the personal acts and conduct of the Accused as charged.⁷⁰ To interpret this standard to exclude statements and transcripts going to proof of matters other than the personal acts and conduct of the Accused as charged – for example, proof of “pivotal” issues in the Co-Prosecutors’ case, “live” matters in dispute or the acts and conduct of organisations and bodies to which the Accused belonged, persons with whom he was associated or “proximate” subordinates – “would effectively denude [this standard of] any real utility”.⁷¹ Instead all objections and submissions on this basis, in conjunction with the criteria set forth in the Statements Decision, shall be taken into consideration at the conclusion of the trial in assigning weight to all statements and transcripts put before the Chamber.⁷² As the Chamber has emphasised previously, the absence of oral testimony and opportunity for confrontation are relevant considerations in assessing what, if any, probative value and weight may be accorded to statements or transcripts admitted in place of oral testimony.⁷³

20. In addition to the criteria set out in the Statements Decision, all proposed evidence must be *prima facie* relevant and reliable and otherwise satisfy the requirements of Internal Rule 87(3). Evidence cited in the Closing Order paragraphs included within the scope of Case 002/01 are entitled to a presumption of relevance and reliability (including authenticity) and

international(ised) courts. Accordingly, they cannot be considered a standard of international procedure automatically applicable in the unique context of any other international(ised) court (*Prosecutor v. Bemba*, Judgment on the Appeals of Mr. Jean-Pierre Bemba Gombo and the Prosecutor against the Decision of Trial Chamber III entitled “Decision on the Admission into Evidence of Materials Contained in the Prosecution’s List of Evidence”, ICC Appeals Chamber (ICC-01/05-01/08), 3 May 2011, para. 56). The Chamber therefore disregards submissions based on the technical and detailed requirements in the ICTY Rules (NUON Chea Preliminary Response, paras 2, 5-10; NUON Chea Response, paras 8-14; OCP Revised Request, para. 17).

⁷⁰ Statements Decision, paras 21-22, 30-31; see also *Prosecutor v. Galić*, Decision on Interlocutory Appeal concerning Rule 92bis(C), ICTY Appeals Chamber (IT-98-29-AR73.2), 7 June 2002 (“*Galić* Appeal Decision”), paras 9-11, 15, 18.

⁷¹ *Galić* Appeal Decision, paras 8-9; *Prosecutor v. Karemera et al.*, Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, ICTR Appeals Chamber (ICTR-98-44-AR73(C)), 16 June 2006, para. 52; see also NUON Chea Preliminary Response, fn. 29 citing, *inter alia*, *Prosecutor v. Karadžić*, ICTY Trial Chamber (IT-95-5/18-T), Decision on Prosecution’s Second Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony pursuant to Rule 92bis, 18 March 2010, paras 44-49.

⁷² Statements Decision, paras 17, 25, 28, 32, 34, disposition; see also *Ndindabahizi v. Prosecutor*, Judgement, ICTR Appeals Chamber (ICTR-01-71-A), 16 January 2007, para. 98; *Prosecutor v. Fofana and Kondewa*, Judgment, SCSL Appeals Chamber (SCSL-04-14-A), 28 May 2008, para. 448 (“debates over the admissibility of evidence at trial assist the Chamber to better ascertain the context of the evidence and to assess its relevance and probative value”); *Prosecutor v. Martić*, Decision on Appeal against the Trial Chamber’s Decision on the Evidence of Witness Milan Babić, ICTY Appeals Chamber (IT-95-11-AR73.2), 14 September 2006 (“*Martić* Appeal Decision”), paras 15, 23.

⁷³ Statements Decision, paras 25, 27, 29 see also *Prosecutor v. Aleksovski*, Decision on Prosecutor’s Appeal on Admissibility of Evidence, ICTY Appeals Chamber (IT-95-14/1), 16 February 1999, paras 14-15, 27. *1482*

statements taken during the judicial investigation are entitled to a presumption of reliability.⁷⁴ Throughout the proceedings, the parties have been ordered to limit proposed evidence to that directly relevant to Case 002/01.⁷⁵ The Chamber, however, has admitted evidence relevant to Democratic Kampuchea policies and crime sites outside the scope of Case 002/01, usually when this evidence is adduced as part of directly relevant evidence and/or concerns the impact of crimes on victims.⁷⁶

21. Concerning the *prima facie* reliability of proposed evidence, the Chamber notes that alleged defects in statements taken during the judicial investigation must be identified with sufficient particularity and have clear relevance to the trial.⁷⁷ Objections concerning the circumstances under which a statement was taken, such as the motive of a source or whether an interview was audio-recorded, go beyond its *prima facie* reliability and shall be considered in assigning weight in light of the entire body of evidence at the conclusion of the trial.⁷⁸ In this regard, the Chamber consequently notes that reliability concerns inherent in statements taken by the Co-Prosecutors during the Preliminary Investigation and Case 001 transcripts where the interests of the parties are distinct from that in Case 002, are factors relevant to the final assessment of evidence, not its admissibility. Contrary to NUON Chea's submissions otherwise, however, the role the Co-Prosecutors played in the Preliminary Investigation and other cases does not impact the equality of arms so long as all parties have procedural equality in *presenting* their case.⁷⁹ Moreover, under the ECCC legal framework, the Preliminary Investigation conducted by the Co-Prosecutors does not play a major role in the pre-trial phase, where instead the Judicial Investigation, which necessarily follows the Preliminary

⁷⁴ Statements Decision, para. 26; December 2012 Decision, para. 9a; Decision on NUON Chea Request for a Rule 35 Investigation regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews, E142/3, 13 March 2012, paras 6-15.

⁷⁵ Statements Decision, paras 34-35; October 2012 Memorandum, para. 7; *see also* 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. 2; Consolidated Schedule of Witnesses and Experts for Early 2013, E236/4, 8 January 2013, para. 2.

⁷⁶ Statements Decision, para. 29; Notice of the Trial Chamber's Disposition of Remaining Pre-Trial Motions (E20, E132, E134, E135, E124/8, E124/9, E124/10, E136 and E139) and Further Guidance to the Civil Party Lead Co-Lawyers, E145, 29 November 2011, p. 3; 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 and E676/2), E267/3, 2 May 2013 ("Statements on Suffering Decision"), paras 14-18.

⁷⁷ Statements Decision, para. 26; *see also* December 2012 Decision, para. 9-f (objections lacking sufficient specificity shall be rejected).

⁷⁸ Statements Decision, paras 26-29; December 2012 Decision, paras 9(d), 9(f), 13-14; *Prlić* Appeal Decision, paras 45, 52; *see also* OCP Reply, paras 77-82.

⁷⁹ *Nahimana et al. v. Prosecutor*, Judgement, ICTR Appeals Chamber (ICTR-99-52-A), 28 November 2007, para. 173; *Jespers v. Belgium*, No. 8493, Eur. Comm'n H.R., 27 D.R. [1981] 61, p. 87. *re ad*

Investigation, is crucial and offers a wide range of rights to all parties.⁸⁰ Finally, the Chamber has already determined that its adjudication of Case 001 does not impact its ability to be impartial in Case 002.⁸¹

22. All evidence not previously on the case file and/or not included on the parties' Internal Rule 80(3) lists constitutes new evidence subject to the heightened admissibility requirements of Internal Rule 87(4). A party must demonstrate, by reasoned submission, that new evidence was not available prior to the opening of the trial and/or could not have been discovered and presented earlier with the exercise of reasonable diligence. New evidence must also be conducive to ascertaining the truth and meet the requirements of Internal Rule 87(3).⁸²

4.2. Analysis

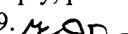
4.2.1. Statements and Transcripts of Available Witnesses Proposed in Place of Oral Testimony

23. Both the Co-Prosecutors and Lead Co-Lawyers acknowledge that various proposed statements and transcripts contain evidence relating to the acts and conduct of the Accused as charged, but stress that they are not seeking the admission of those statements for the purpose of proving the acts and conduct of the Accused.⁸³ The Statements Decision precludes the admission of statements or transcripts of available witnesses that go to proof of the personal acts and conduct of the Accused as charged. Nothing, however, precludes the admission of statements or transcripts that may contain evidence relating to the acts and conduct of the Accused as charged when those documents are proposed and ultimately relied upon for purposes other than proving the personal acts and conduct of the Accused, including the

⁸⁰ During the Judicial Investigation, the Defence, like other parties, has access to the case file, including to material collected during the Preliminary Investigation. In this regard, the Chamber notes that the Co-Prosecutors have a continuing obligation to diligently disclose all exculpatory information (Internal Rule 53). Further, the Defence may request that the Co-Investigating Judges undertake investigative action or submit a reasoned application to nullify any part of the proceedings due to defect (Internal Rules 55(10) and 76). Finally, the Chamber notes that the Co-Prosecutors are forbidden from conducting their own investigations once the Preliminary Investigation is concluded and therefore, before the Accused is first charged and becomes a party to the proceedings.

⁸¹ Decision on IENG Thirith, NUON Chea and IENG Sary's Applications for Disqualification of Judges NIL Nonn, Silvia CARTWRIGHT, YA Sokhan, Jean-Marc LAVERGNE and THOU Mony, E55/4, 23 March 2011, paras 17, 20; *see also* OCP Reply, para. 83.

⁸² Decision Concerning New Documents and Other Related Issues, E190, 30 April 2012, paras 16-23, 38.

⁸³ OCP Revised Request, paras 4-5, 32-33; OCP July 2012 Request, paras 2, 15-17; OCP Reply, paras 21, 24, 28-30, 64; Civil Parties Request, paras 19-23, 28, 34-41; Civil Parties Revised Request, para. 9. 

credibility of other evidence on the record.⁸⁴ Accordingly, the Chamber dismisses the Defence requests to exclude all statements and transcripts containing evidence relating to the acts and conduct of the Accused or to “live” and “pivotal” issues insofar as these objections concern statements or transcripts relevant to proof of matters other than the personal acts and conduct of the Accused as charged. All Defence submissions and objections, however, will be considered in assigning weight, if any, to each statement and transcript in the verdict.

24. The Co-Prosecutors propose to redact information relating to the acts and conduct of the Accused from 220 statements, the majority of which are proposed as proof of matters other than the acts and conduct of the Accused as charged.⁸⁵ The Defence claims insufficient opportunity to review these proposed redactions.⁸⁶ The Chamber notes, first, that 67 of the statements proposed for redaction have already been put before the Chamber in un-redacted form and some have already been used in conjunction with the evidence of various witnesses and Civil Parties.⁸⁷ Further, KHIEU Samphan previously proposed at least 11 of these statements for admission.⁸⁸ KHIEU Samphan and/or NUON Chea also earlier requested the appearance before the Court of at least 20 of the witnesses who made statements now proposed for redaction.⁸⁹ In turn, the Chamber considers that some of the portions proposed for redaction may prove exculpatory or may qualify, modify or otherwise affect the credibility of the statements as a whole or other evidence already before the Chamber.⁹⁰ The Chamber therefore declines to order the redactions proposed by the Co-Prosecutors. The Chamber, however, will consider these proposed redactions, in conjunction with all other submissions and objections, in assigning weight, if any, to these statements in the verdict.

⁸⁴ Statements Decision, paras 20-21, 30-31; First *Milošević* Decision, para. 18; Second *Milošević* Decision, paras 14, 19.


⁸⁵ OCP Revised Request, paras 4-5, 32-33 (proposed redactions were highlighted in red and made accessible to the Chamber and parties on Zylab).

⁸⁶ NUON Chea Response, para. 43; KHIEU Samphan Supplementary Response, para. 10.

⁸⁷ E3/102; E3/1568; E3/1605; E3/1714; E3/185; E3/2073; E3/348; E3/351; E3/353; E3/354; E3/36; E3/360; E3/361; E3/362; E3/363; E3/364; E3/365; E3/376; E3/378; E3/382; E3/385; E3/387; E3/389; E3/390; E3/396; E3/3962; E3/397; E3/398; E3/399; E3/401; E3/412; E3/415; E3/416; E3/419; E3/420; E3/421; E3/422; E3/425; E3/426; E3/437; E3/44; E3/46; E3/462; E3/463; E3/465; E3/466; E3/467; E3/468; E3/469; E3/470; E3/471; E3/472; E3/473; E3/474; E3/506; E3/509; E3/521; E3/545; E3/546; E3/59; E3/68; E3/70; E3/71; E3/72; E3/79; E3/87; E3/96.

⁸⁸ D232/89; D94/10; D94/12 (E3/476); D201/7 (E3/385); D210/5 (E3/387); D125/164 (E3/365); D199/20 (E3/96); D233/14 (E3/412); D91/6; D94/6 (E3/473); IS 19.224.

⁸⁹ TCW-82; TCW-92; TCCP-21; TCW-231; TCW-295; TCW-301; TCW-410; TCW-425; TCW-326; TCW-748; TCCP-178; TCW-540; TCW-591; TCW-663; TCW-681; TCW-698; TCW-724; TCW-729; TCW-787; TCW-788. These witnesses were not ultimately called before the Chamber.

⁹⁰ *Galić* Appeal Decision, para. 46. 

25. The Chamber has identified 24 proposed statements, including 16 proposed for redaction, that are directly relevant to Case 002/01 only insofar as they go to proof of the acts and conduct of the Accused as charged. The Chamber therefore denies the request to admit these statements (Confidential Annex B, Section 1).

26. The Chamber finds, however, that 1,114 statements and transcripts are cumulative of each other and/or other evidence, including the live evidence of witnesses and Civil Parties, already on the record and are *prima facie* relevant to proof of matters within the scope of Case 002/01 other than acts and conduct of the Accused as charged.⁹¹ These factors weigh in favour of admission. The Chamber also recalls that statements and transcripts cited in the footnotes of the Closing Order included within the scope of Case 002/01 have already been afforded a presumption of reliability and relevance and statements taken during the judicial investigation have also been afforded a presumption of reliability. Further, all Defence objections to the reliability of the proposed statements and transcripts concern the circumstances under which they were taken including whether an interview was audio-recorded or refer to an alleged motive behind statements taken by OCP investigators, DC-Cam personnel and other entities external to the ECCC.⁹² These objections go beyond the *prima facie* reliability of the proposed statements and shall be considered in assigning weight, if any, in the verdict and not at the admissibility stage. The Chamber consequently admits 1,114 statements and transcripts of available witnesses in place of oral testimony (Confidential Annex A, Section 1).⁹³

27. The Chamber notes that various statements and transcripts of available witnesses were already assigned an E3 number in previous document decisions or following their

⁹¹ There is no requirement, as NUON Chea suggests, that cumulative evidence must confirm or corroborate other evidence concerning similar facts, rather cumulative evidence must relate to similar facts. To consider otherwise would impede the interests of justice limiting the Chamber and parties to one version or one account and preventing the admission of statements and transcripts contradicting live testimony (Statements Decision, para 24; *see also Prosecutor v. Mladić*, Decision on Prosecution Motion to Admit Evidence pursuant to Rule 92bis: Witness RM-159, ICTY Trial Chamber (IT-09-92-T), 28 June 2013, para. 10 (noting that the fact that a statement is contradictory to other evidence on the record “is no ground for denying admission”); *Prosecutor v. Nizeyimana*, Decision on Prosecutor’s Interlocutory Appeal of Decision Not to Admit Marcel Gatsinzi’s Statement into Evidence Pursuant to Rule 92bis, ICTR Appeals Chamber (ICTR-00-55C-AR73.2), 8 March 2011, para. 13). Accordingly, the Chamber rejects the Defence objections in this regard (NUON Chea Response, paras 24-30; NUON Chea TPC Request, paras 8, 36; NUON Chea TPC Reply, paras 3-6, 8). Regarding relevance, the Chamber notes that various statements are directly relevant to the impact of crimes on victims even though they are otherwise relevant only to matters outside the scope of Case 002/01. As a matter of practice, the Chamber has admitted victim impact evidence even if it falls outside the scope of Case 002/01 (Statements on Suffering Decision).

⁹² NUON Chea Preliminary Response, paras 40-46; NUON Chea Response, paras 40-42, 45-52; KHIEU Samphan Response, paras 34-45.

⁹³ Insofar as these statements and transcripts were previously assigned E3 numbers in previous document decisions and/or during the testimony of various witnesses, the Chamber confirms that E3 number, finding that these statements and transcripts satisfy the standard applicable to written statements and transcripts. *MBR*

presentation in court, but were not included in the OCP Revised Request or Civil Parties Revised Request.⁹⁴ The Chamber already determined that these statements and transcripts were *prima facie* relevant and reliable in accordance with Internal Rule 87(3). Insofar as they were admitted as proof of matters other than the personal acts and conduct of the Accused as charged, the Chamber now confirms that they are indeed put before the Chamber and satisfy the admissibility criteria applicable to written statements.

28. Finally, the Chamber rules that insofar as any statement or transcript of available witnesses contains evidence relevant to proof of the acts and conduct of the accused as charged, it will not rely on this information in order to prove the Accused's personal acts or conduct as charged in Case 002/01.⁹⁵

4.2.2. Statements of Deceased Witnesses

29. The Co-Prosecutors propose to put before the Chamber the statements of deceased witnesses as proof of various matters at issue in Case 002/01, including the acts and conduct of the Accused as charged.⁹⁶ On the basis of party submissions and after reviewing the relevant documentation, the Chamber is satisfied that the witnesses who made the statements identified in Confidential Annex A, Section 2 are deceased.⁹⁷ The Chamber recalls that statements of deceased witnesses and Civil Parties are admissible, including for the purpose of proving the acts and conduct of the Accused as charged, if they are *prima facie* relevant and reliable and they otherwise satisfy the requirements of Internal Rule 87(3).⁹⁸ The Chamber notes, however, that statements of deceased witnesses and Civil Parties, although admissible as proof of the acts and conduct of the Accused as charged, may have limited probative value and a conviction may not be based solely or decisively thereupon.

30. After reviewing the proposed statements, the Chamber finds that the ten statements made by deceased witnesses, including those cited in the footnotes of the Closing Order and therefore afforded a presumption of relevance, are *prima facie* relevant to Case 002/01. Further, all Defence objections to the reliability of the proposed statements and transcripts go

⁹⁴ *see e.g.* Documents Framework Decision, Annex A, pp. 19-37, 41-48.

⁹⁵ Statements Decision, paras 19, 21.

⁹⁶ OCP Revised Request, para. 31; Revised Annex 12, Section D.

⁹⁷ The Chamber is entitled to conclude on the basis of submissions alone that a witness or Civil Party is deceased (*Galić* Appeal Decision, para. 33; *Martić* Appeal Decision, para. 28). Since the filing of the OCP Revised Request, the Chamber was notified that another witness whose statement was proposed in place oral testimony was in fact deceased (*see* Death Certificate of TCW-699, E292/1/3.1, 21 June 2013).

⁹⁸ Statements Decision, paras 32-33.

beyond their *prima facie* reliability.⁹⁹ These objections shall nonetheless be considered in assigning weight, if any, to this evidence in the verdict. The Chamber further finds that all statements – including those cited in the relevant footnotes of the Closing Order and/or taken during the judicial investigation and therefore afforded a presumption of reliability – are *prima facie* reliable. Accordingly, the Chamber admits ten statements made by deceased witnesses (Confidential Annex A, Section 2).¹⁰⁰

4.2.3. Other Documents

31. The Chamber identified 24 documents in Revised Annex 12 that do not qualify as witness or Civil Party statements including speeches and interviews by POL Pot during the Democratic Kampuchea era, a speech given by a former UNICEF officer, the transcript of an historical documentary and reports concerning attempts to locate missing persons (Confidential Annex A, Section 3).¹⁰¹ The heightened admissibility standard set out in the Statements Decision applies only to written statements and transcripts and does not affect the admissibility of any other evidence. Thus these 24 documents need only be *prima facie* relevant and reliable pursuant to Internal Rule 87(3).

32. The Chamber finds that these documents, including those cited in the footnotes of the Closing Order, are *prima facie* relevant to Case 002/01. Additionally, all Defence objections to the reliability of the proposed documents concern the context in which they were taken, such as the true motive of the sources and/or the purpose behind documents originating from sources external to the ECCC.¹⁰² These objections go beyond the *prima facie* reliability of the proposed evidence and shall be considered in assigning weight, if any, in the verdict. After reviewing these proposed documents, the Chamber finds that they are also *prima facie* reliable. Accordingly, the Chamber admits these documents (Confidential Annex A, Section 3).

⁹⁹ The Defence objects to the reliability of statements unaccompanied by a recording on the case file and statements taken by OCP investigators, DC-Cam personnel and other entities external to the ECCC (NUON Chea Preliminary Response, paras 40-46; NUON Chea Response, paras 40-42, 45-52; KHIEU Samphan Response, paras 34-45).

¹⁰⁰ Insofar as these statements and transcripts were previously assigned E3 numbers in previous document decisions and/or during the testimony of various witnesses, the Chamber confirms that E3 number, finding that these statements and transcripts satisfy the standard applicable to written statements and transcripts.

¹⁰¹ This evidence was prepared in the ordinary course by persons with interests other than testifying before a court and therefore cannot be characterised as witness or Civil Party statements (T., 17 May 2012, pp. 76-77; *Galić* Appeal Decision, paras 28-31; see also OCP Reply, para. 57).

¹⁰² NUON Chea Preliminary Response, paras 40-46; NUON Chea Response, paras 40-42, 45-52; KHIEU Samphan Response, paras 34-45.

4.2.4. Proposed Evidence of Facts outside the Scope of Case 002/01

33. The Co-Prosecutors and Lead Co-Lawyers request the admission of statements and transcripts they concede go beyond the scope of Case 002/01 (although allegedly essential to proving general policies, context and the threshold elements).¹⁰³ NUON Chea and KHIEU Samphan object.¹⁰⁴

34. The Chamber finds that 122 statements, transcripts and other documents concern factual allegations falling outside the scope of Case 002/01. These statements and transcripts were not cited in the relevant footnotes of the Closing Order included within the scope of Case 002/01 and are therefore afforded no presumption of relevance. The Chamber further considers that these statements and transcripts are not essential in order for the Co-Prosecutors to discharge their burden of proof in relation to the policies of the joint criminal enterprise alleged in the Closing Order or in relation to the alleged widespread and systematic nature of the attack on the civilian population. Indeed, the 1,399 statements and transcripts admitted by this decision (Confidential Annex A), in addition to being directly relevant to Case 002/01, comprise a cumulative and representative sample of all crimes sites and Democratic Kampuchea policies identified in the Case 002 Closing Order. The Chamber consequently denies the request to admit 122 statements and transcripts that are repetitive and beyond the scope of Case 002/01 (Confidential Annex B, Section 2).

4.2.5. New Evidence (Internal Rule 87(4))

4.2.5.1. OCP Revised Request

35. The Co-Prosecutors propose 15 statements taken in conjunction with the investigations in Cases 003 and 004 and not included in their Internal Rule 80(3) lists of evidence.¹⁰⁵ These statements were made between July 2010 and September 2011 and were disclosed to the parties in Case 002 on 2 February 2012.¹⁰⁶ They were only proposed for admission, however, in the OCP Revised Request on 9 April 2013. The Chamber recalls that, pursuant to Internal Rule 87(4), a party must demonstrate that it exercised reasonable diligence in discovering and

¹⁰³ OCP July 2012 Request, paras 8-12, 18-19, 20-28, 30-34; OCP Revised Request, paras 3, 24, 28-30, 42; Civil Parties Revised Request, para. 9.

¹⁰⁴ KHIEU Samphan Response, paras 34-45; NUON Chea Preliminary Response, paras 37-39; NUON Chea Response, paras 15, 17-23.

¹⁰⁵ OCP Revised Request, para. 2; Revised Annex 12.

¹⁰⁶ International Co-Prosecutor's Disclosure to Trial Chamber of Case 002 Witness Statements in Cases 003 and 004 in Compliance with Trial Chamber Memorandum E127/4, 2 February 2012, E127/5. *Handwritten initials*

presenting evidence not available prior to the opening of the trial and/or not included on the Internal Rule 80(3) lists. The Co-Prosecutors make no reasoned submissions pursuant to Internal Rule 87(4). The Chamber therefore finds that the Co-Prosecutors have failed to demonstrate reasonable diligence in discovering and/or presenting this new evidence proposed for incriminating purposes more than two years after the Co-Prosecutors had access to it and more than a year after it was first disclosed to the Chamber and the parties.

36. Considering, however, that four of these new statements were made by witnesses who testified in Case 002/01, during which an opportunity for adversarial challenge was afforded to the Defence, the Chamber finds that it is in the interests of justice that these statements be evaluated together with the live testimony of these witnesses. The Chamber therefore places these four statements on the case file and puts them before the Chamber (Confidential Annex A, Section 4). The Chamber declines to put the remaining new statements on the case file and denies the request to admit them (Confidential Annex B, Section 3).

4.2.5.2. *NUON Chea's "Request to Summons Witnesses in Respect of Alleged Policy of Targeting Khmer Republic Officials"*

37. In the event certain statements concerning the targeting of Khmer Republic officials are admitted in place of oral testimony, NUON Chea requests the Chamber to summons the 111 witnesses who made these statements.¹⁰⁷ The Chamber notes that one of these witnesses was previously proposed by NUON Chea and seven were previously proposed by the Co-Prosecutors.¹⁰⁸ The Chamber has already determined which witnesses would not be called at trial.¹⁰⁹ Accordingly, in relation to these eight witnesses, the Defence is effectively requesting the Chamber to reconsider its prior decision not to call them. No new facts are alleged. The

¹⁰⁷ NUON Chea Summons Request, paras 9-20; T., 23 July 2013, pp. 51-54, 59-60. NUON Chea identifies the witnesses he requests to summons, as well as the relevant statements in Annex A to his request (Annex A: Witnesses Cited by CIJs and Co-Prosecutors in Connection with Alleged Policy to Target Lon Nol Soldiers and Officials for Execution, E291/2.1).

¹⁰⁸ NUON Chea previously proposed TCW-38. The Co-Prosecutors previously proposed TCW-79, TCW-155, TCW-160, TCW-298, TCW-347, TCW-380 and TCW-486.

¹⁰⁹ Schedule for the Final Document and Other Hearings in Case 002/01, for the Questioning of the Accused and Response to Motion E263 and E288/1, E288/1/1, 17 June 2013; Email from Ms. Susan LAMB, Subject: Advance Notification of Additional Witnesses to be Summoned in Case 002/01 in Response to the Parties' Requests at the Final TMM, E292, 19 June 2013; see also Annex II: Individuals requested by the parties in relation to Case 002/01 but not ultimately heard before the Trial Chamber (sent as an advance courtesy copy to the parties by the Trial Chamber Senior Legal Officer on 6 June 2013). *NSP*

Chamber finds inadmissible NUON Chea's request to reconsider its refusal to summons these eight witnesses.¹¹⁰

38. In relation to the remaining 103 witnesses NUON Chea proposes to summons, the Chamber notes that NUON Chea has been on notice since April 2011 that the Co-Prosecutors sought to put before the Chamber in place of oral testimony the statements of all witnesses now proposed by the Defence. After the Chamber issued the Statements Decision on 20 June 2012, the Co-Prosecutors notified the Chamber and parties of the revised lists of statements they proposed in July 2012 and April 2013.¹¹¹ NUON Chea's decision not to propose these witnesses earlier, despite being on notice that their statements may be admitted in place of oral testimony since April 2011, does not constitute reasonable diligence in discovering and proposing this evidence, particularly at this late stage of the trial. NUON Chea therefore fails to satisfy the requirements of Internal Rule 87(4). The Chamber denies this request.

39. In any event, the Chamber notes that all but one of the statements made by witnesses now proposed by NUON Chea and included in the OCP Revised Request have been admitted.¹¹² Where statements, such as these, satisfy certain conditions, the Chamber has already determined that it is in the interests of justice and expeditious proceedings that they be admitted in place of oral testimony thus permitting the Chamber to dispense with the appearance of their authors.¹¹³

4.2.6. Further Impediments to the Opportunity for Adversarial Challenge

40. The Co-Prosecutors propose 32 statements and transcripts in the OCP Revised Request of April 2013 that were identified in the OCP April 2011 Lists, but were not included in the OCP July 2012 Request (Confidential Annex B, Section 4).¹¹⁴ The Chamber ordered the

¹¹⁰ Considering that the Internal Rules do not provide for reconsideration of Trial Chamber decisions, this Chamber does not entertain applications concerning matters upon which it has already ruled. Instead, parties may appeal a decision at the appropriate time or file a fresh application before this Chamber when justified by new circumstances (Decision on IENG Sary's Request for Reconsideration of the Trial Chamber Decision on the Accused's Fitness to Stand Trial and Supplemental Request, E238/11/1, 19 December 2012, para. 7; *see also* Case 001, Appeal Judgement, F28, 3 February 2012, para. 491)

¹¹¹ Statements of all proposed witnesses were included in the April 2011 List, all but one were included in the OCP July 2012 Request (D108/6/15) and all but nine were included in OCP Revised Request filed in April 2013 (D108/6/15, D232/86, D125/66, E190.1.63, D125/96, D125/116, D25/26, D125/120 and D125/89).

¹¹² IS 19.149 is excluded on the basis that the Co-Prosecutors failed to exercise reasonable diligence in presenting this statement (*see* Section 4.2.6 and Confidential Annex B, Section 4).

¹¹³ Statements Decision, paras 23-33.

¹¹⁴ These 32 statements and transcripts were made by witnesses who have not appeared before the Chamber and have not been previously admitted. The Chamber is mindful that additional statements and transcripts were included in Revised Annex 12 and Revised Annex 13 but not in the OCP July 2012 Request. These, however,

parties to file revised lists of statements and transcripts proposed for admission in place of oral testimony by 27 July 2012.¹¹⁵ In October 2012, the Chamber further directed the Co-Prosecutors to indicate, at the earliest opportunity, if certain statements would no longer be tendered and ordered that all objections to the OCP July 2012 Request be filed by 26 April 2013.¹¹⁶ The Co-Prosecutors have not previously indicated their intention of proposing statements beyond those identified in the OCP July 2012 Request. Instead, they twice affirmed – including after the extension of the scope of Case 002/01 to include executions of Khmer Republic officials at Tuol Po Chrey – that the OCP July 2012 Request, incorporating the Phase 1 Request and Phase 2 Request, was the operative and final list of proposed statements and transcripts.¹¹⁷ It was only on 9 April 2013, more than eight months after the filing of the OCP July 2012 Request and approximately two weeks before the deadline set by the Chamber for the parties to file objections, that the Co-Prosecutors filed the OCP Revised Request including, but failing to identify, those statements and transcripts not proposed in the OCP July 2012 Request.

41. Accordingly, the Chamber finds that, with regard to the 32 documents belatedly included in the OCP Revised Request in April 2013, the Co-Prosecutors failed to act with reasonable diligence, thus impeding the opportunity for effective adversarial challenge as required by Internal Rule 87. The Chamber consequently denies the request to admit them (Confidential Annex B, Section 4).

42. The Chamber additionally notes that Civil Party application D22/3246 was classified as ‘strictly confidential’ until 12 August 2013. On 17 June 2013, the concerned Civil Party’s lawyers requested re-classification and simultaneously withdrew a previous request for protective measures.¹¹⁸ The Chamber dismissed this request for protective measures on 28 June 2013 and re-classified D22/3246 as ‘confidential’ on 12 August 2013.¹¹⁹ Roughly five

were either made by witnesses who appeared before the Chamber and/or were previously put before the Chamber and assigned an E3 number. Under such circumstances, the Chamber considers that the parties had sufficient notice and opportunity for adversarial challenge in relation to these documents despite their belated submission by the Co-Prosecutors for consideration in conjunction with the criteria set out in the Statements Decision.

¹¹⁵ Statements Decision, paras 34-36, disposition. On 19 July 2012, in the interests of expeditious proceedings, the Chamber clarified that the parties must indicate by 27 July 2012 all statements they propose in relation to Case 002/01 (July 2012 Memorandum, para. 3).

¹¹⁶ October 2012 Memorandum, paras 9, 14.

¹¹⁷ September 2012 Request; November 2012 Request, paras 6-7.

¹¹⁸ Letter Withdrawing Civil Party Requests for Protective Measures, E2/21, 17 June 2013.

¹¹⁹ Disposition of all Requests for Protective Measures Sought in Case 002/01 and Response to Co-Prosecutors’ Request for the Recall of Civil Party SAR Sarin and an Order for a Formal Assessment of the Need for Protective Measures (E286), E293, 28 June 2013, para. 9. *Mezner*

months earlier, on 4 March 2013, the Lead Co-Lawyers undertook “to make appropriate inquiries and await a final determination on the status of protective orders” so that ‘strictly confidential’ statements to which the other parties did not have access could be re-classified or removed from the Civil Parties Revised Request.¹²⁰ By failing to seek re-classification or to remove D22/3246 from the Civil Parties Revised Request prior to the deadline for written objections on 26 April 2013 – as the Lead Co-Lawyers previously indicated they would – the Chamber considers that the Lead Co-Lawyers failed to exercise reasonable diligence in presenting D22/3246. Neither the Defence nor the Co-Prosecutors had access to this statement prior to filing their objections to, and submissions concerning, statements proposed in place of oral testimony or indeed until re-classification of D22/3246 by the Chamber on 12 August 2013. Absent the opportunity for effective adversarial challenge, the Chamber denies the request to admit D22/3246 (Confidential Annex B, Section 5).

4.2.7. Statements and Transcripts of Witnesses and Civil Parties who have Appeared before the Chamber

43. The Co-Prosecutors and Lead Co-Lawyers request the admission of 247 statements and transcripts made by witnesses and Civil Parties who have appeared before the Chamber. When a given witness or Civil Party appears, the Defence has the opportunity to confront them with prior statements and transcripts. These statements need not satisfy the criteria set out in the Statements Decision. Instead, they need only satisfy the general admissibility requirements set out in Internal Rule 87(3).

44. The Chamber is satisfied that these statements and transcripts of witnesses and Civil Parties who have appeared before the Chamber are *prima facie* relevant and reliable. It is furthermore in the interests of justice that such statements be considered in conjunction with the other evidence of a witness or Civil Party. Insofar as these statements and transcripts were not previously put before the Chamber, the Chamber now admits the prior statements of witnesses and Civil Parties who have appeared before the Chamber and will assess at the conclusion of the proceedings and on a case-by-case basis their probative value (Confidential Annex A, Section 5).

¹²⁰ Civil Parties Revised Request, para. 10. *ME SR*

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

GRANTS the requests by the Co-Prosecutors and Lead Co-Lawyers to put before the Chamber the statements and transcripts identified in Confidential Annex A;

DENIES the requests by the Co-Prosecutors and Lead Co-Lawyers to put before Chamber the statements and transcripts identified in Confidential Annex B;

DENIES the request by NUON Chea to summons an additional 111 witnesses (E291/2);

REMINDS the parties that all evidence must be available in all three official languages of the ECCC by the filing of the Closing Briefs; and

DECLARES that the criteria outlined in this decision, as well as all submissions and objections, shall be considered by the Chamber when assessing the probative value and thus weight, if any, to be accorded to all statements and transcripts put before the Chamber in the verdict. *JK*

Phnom Penh, 15 August 2013
President of the Trial Chamber



JK

Nil Nond