

**BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**REQUEST FOR CLARIFICATION CONCERNING DECISION ON ADMISSIBILITY
OF WITNESS STATEMENTS, COMPLAINTS AND TRANSCRIPTS AND FOR
EXTENSION OF THE DEADLINE FOR CLOSING SUBMISSIONS**

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The Co-Lawyers for Nuon Chea ('the Defence') hereby submit the instant request for clarification of the status of the Trial Chamber's decision concerning the admissibility of written statements into evidence and for an extension of the deadline in which to file closing submissions:

I. PROCEDURAL HISTORY

1. On 15 June 2011, the Co-Prosecutors sought a declaration from the Trial Chamber that all witness statements are admissible into evidence provided they are relevant and probative.¹ All defence teams objected, arguing that, pursuant to Cambodian law, the express language of the Internal Rules and the prior assurances of the Co-Investigating Judges, statements were inadmissible absent an opportunity for cross-examination at trial.²
2. One year later, and eight months after the beginning of the trial, the Trial Chamber held that procedural rules established at the international level pertaining to the admissibility of witness statements applied to proceedings at the ECCC ('Statements Decision').³ Among other aspects of the legal regime adopted by the Chamber, evidence of acts and conduct of the accused was deemed inadmissible.⁴ The Chamber instructed the Co-Prosecutors and the civil parties to file revised lists of statements for admission into evidence in accordance with these requirements. The Chamber also instructed the civil parties and the Co-Prosecutors to endeavor to reduce the number of statements they sought to admit.⁵
3. On 15 June, 5 July and 27 July 2012, the Co-Prosecutors and civil parties filed their revised lists. The Co-Prosecutors indicated that they were unable to reduce the volume of statements for which they sought admission and argued that those statements were admissible in their entirety, including evidence of acts and conduct of the accused.⁶ The civil parties sought admission of 3,866 civil party applications.⁷

¹ Document No. **E-96**, 'Co-Prosecutors Rule 92 Submission Regarding the Admission of Written Statements before the Trial Chamber', 15 June 2011.

² See e.g., Document No. **E-96/1**, 'Response to OCP Submission Regarding the Admission of Written Witness Statements', 21 July 2011.

³ Document No. **E-96/7**, 'Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber', 20 June 2012 ('Statements Decision').
⁴ Statements Decision, para. 22.

⁵ Statements Decision, para. 35(c).

⁶ Document No. **E-96/8**, 'Co-Prosecutors' Further Request to Put Before the Chamber Written Statements and Transcripts with Confidential Annexes 1 to 16', 27 July 2012, para. 17; Document No. **E-208**, 'Co-Prosecutors' Request to Admit Witness Statements Relevant to Phase I of the Population Movement', 15 June 2012; Document No. **E-208/2**, Co-Prosecutors' Request to Admit Witness Statements Relevant to

4. On 29 August 2012, the Khieu Samphan defence filed a request seeking an order from the Trial Chamber that the Co-Prosecutors and civil parties reduce the number of statements tendered for admission. The Khieu Samphan defence noted the breadth of the material at issue and the Co-Prosecutors' failure to reduce it, the numerous defects already uncovered in witness statements on the case file, and the inconsistent availability of those statements in all three official languages of the ECCC. Under these circumstances, they urged the Chamber to conclude that Khieu Samphan's right to a fair and expeditious trial required the Co-Prosecutors to revise their existing requests for admission.⁸
5. On 19 October 2012, the Trial Chamber dismissed the objections of the Khieu Samphan defence in relation to defects in the judicial investigation and set a timetable for the translation of all remaining witness statements and complaints into all three languages.⁹ The Chamber did not address the request of the Khieu Samphan defence to instruct the Co-Prosecutors and the civil parties to reduce the number of statements tendered into evidence, nor the Co-Prosecutors' apparent failure to comply with a directive of the Chamber. The Chamber instructed the civil parties to further particularize the relevance of the statements for which they continued to seek admission and to file a revised list by 4 March 2013. The Chamber indicated that defence teams should file objections by 26 April 2013.¹⁰
6. On 8 November 2012, the Nuon Chea defence filed a preliminary response to the Co-Prosecutors' requests to admit statements, complaints and transcripts into evidence. The Defence argued, *inter alia*: (i) that the standards set by the Trial Chamber in the Statements Decision did not accord with procedural rules established the international level, which that decision purported to adopt; (ii) that further specification in relation to certain aspects of the test set out in the Chamber's decision was required, including in relation to the definition of the phrase 'acts and conduct of the accused' and the admissibility of unredacted statements containing inadmissible evidence; and (iii) that the volume of statements tendered into evidence by the Co-Prosecutors was unnecessarily

Phase 2 of the Population Movement and Other Evidentiary Issues with Confidential Annexes I, II and III and Public Annex IV', 5 July 2012.

⁷ Document No. **E-208/4.1**, 'Civil Party Lead Co-Lawyers' Response to the Decision on the Co-Prosecutors' Rule 92 bis 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', 27 July 2012, ERN 00842448-00842463.

⁸ Document No. **E-223**, 'Submission in Support of Mr. Ieng Sary's Request E221, and Request for the Trial Chamber to Order the Co-Prosecutors to Revise the List of Written Statements they are Seeking to Put Before the Chamber in Lieu of Oral Testimony', 29 August 2012.

⁹ Document No. **E-223/2**, Memorandum from Trial Chamber, 19 October 2012 ('October Memo'), para. 9.

¹⁰ October Memo, paras 12-14.

large and a dramatic departure from standing practice at international courts.¹¹ Accordingly, the Defence sought clarification in relation to the applicable legal standards and preliminary rulings in relation to selected categories of documents.

7. Shortly thereafter, the Co-Prosecutors sought permission to respond to all defence submissions concerning witness statements in one consolidated response, sometime after 26 April 2013.¹² The Chamber granted that request, in effect declining to provide the relief sought by the Nuon Chea defence in advance of the applicable deadlines.¹³
8. On 16 November 2012, the Co-Prosecutors reiterated their position that they did not anticipate being able to ‘drastically’ reduce the number of statements tendered for admission.¹⁴ On 22 November 2012, the Co-Prosecutors indicated that any reductions that could be made would be filed by 15 February 2013, ‘thus leaving more than two months for other parties to consider further objections’.¹⁵ On 24 January 2013, the Co-Prosecutors reversed their earlier position and indicated that ‘we may be able to reduce the original lists by 40% and possibly more. This will, in turn, significantly reduce the workload for all the parties in reviewing these statements and formulating any objections thereto.’¹⁶ The Co-Prosecutors also revised the date on which they anticipated filing their reduced list of statements to 25 February 2013.
9. On 8 February 2013, the Supreme Court Chamber annulled this Chamber’s prior decision to sever the Closing Order, without prejudice to the possibility of renewed severance under certain conditions.¹⁷ On 14 February 2013, the Co-Prosecutors sought permission from this Chamber to file their final list of witness statements two weeks after the Chamber rendered its’ final decision in relation to the scope of the trial. The Chamber declined and instructed the Co-Prosecutors to proceed as scheduled.¹⁸ On 29 March 2013, the Trial Chamber provided advance notice of its intention to re-sever the Closing Order and reinstate Case 002/01 as it existed prior to the Supreme Court Chamber’s decision.¹⁹ Twelve days later, on 9 April 2013, the Co-Prosecutors filed a revised list of statements, reducing to 1,050 the number tendered into evidence. The Co-Prosecutors also reversed

¹¹ Document No. **E-96/8/1**, ‘Preliminary Response to Co-Prosecutors’ Further Request to Put Before the Chamber Written Statements and Transcripts’, 8 November 2012.

¹² Email from William Smith to Parties, 16 November 2012.

¹³ Email from Susan Lamb to Parties, 16 November 2012.

¹⁴ Email from William Smith to Parties, 16 November 2012.

¹⁵ Email from William Smith to Parties, 22 November 2012.

¹⁶ Email from William Smith to Parties, 24 January 2013.

¹⁷ Document No. **E-163/5/1/13**, ‘Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision Concerning the Scope of Case 002/01’, 8 February 2013.

¹⁸ Email Exchange between William Smith and Susan Lamb, 14-15 February 2013.

¹⁹ Document No. **E-1/206.1**, ‘Transcript of Trial Proceedings’, 29 March 2013.

their position that evidence of acts and conduct of the accused was admissible. Accordingly, they made available to the parties for the first time proposed redactions from 220 of the remaining 1,050 statements.²⁰

10. On 26 April 2013, the Nuon Chea and Khieu Samphan defences filed their final objections in accordance with the Chamber's timetable. Having received the Co-Prosecutors' redactions 16 days earlier, the Defence argued that it had not had sufficient notice for adversarial debate in relation to those redactions, that those redactions should be disregarded by the Chamber, and that all of those statements should be excluded from evidence.²¹
11. On 13 June 2013, the Trial Chamber indicated that a decision in relation to the admissibility of witness statements, complaints and transcripts would be issued within two to three weeks, and that 'approximately 1,500 written statements will shortly receive E3 classifications once this decision and its annexes are finalized.'²²
12. On 22 July 2013, the Defence circulated a courtesy copy of a request to hear new witnesses on the basis of the Chamber's apparent decision to admit 1,500 statements into evidence. The Defence argued that these statements were likely to include many or all of the statements cited by the CIJs and the Co-Prosecutors in support of their allegation that a policy to execute soldiers and officials of the Khmer Republic existed in April 1975.²³ The Defence argued that it was entitled to cross-examine these witnesses in light of the potential importance of the testimony included in their witness statements. The Defence further argued that, since cross-examination was required only because the witness statements were likely to be admitted, its' request was filed at the earliest possible opportunity, and was therefore timely. The Chamber denied that request on 23 July 2013 for lack of due diligence.²⁴

II. ARGUMENT

13. At every stage of the proceedings, both the Nuon Chea and Khieu Samphan defence teams have acted diligently – indeed, well in advance of the Chamber's deadlines – to

²⁰ Document No. **E-278**, 'Co-Prosecutors' Submission of Revised Annexes 12 and 13 of their Rule 80(3) Trial Document List (Witness Statements and Complaints)', 9 April 2013.

²¹ Document No. **E-223/2/8**, 'Objections to Requests to Put Before the Chamber Written Statements and Transcripts', 26 April 2013, paras 17-19, 31-33, 43; Document No. **E-223/2/8/1**, 'Supplementary Annexes in Connection with Objections to Statements and Transcripts', 29 April 2013.

²² Document No. **E-1/207.1**, 'Transcript of Trial Proceedings', 13 June 2013, p. 26:11-12.

²³ Document No. **E-291/2**, 'Request to Summons Witnesses in Respect of Alleged Policy of Targeting Khmer Republic Officials', 25 July 2013.

²⁴ Document No. **E-1/227.1**, 'Transcript of Trial Proceedings', 23 July 2013, pp. 67:22-68:7.

seek rulings in relation to the admissibility of the thousands of pages of unexamined witness testimony tendered into evidence by the parties. As early as July 2011, the defence teams argued that if the admissibility of witness statements was to be determined pursuant to the rules in place at the *ad hoc* tribunals, an individualized assessment of each statement would be required prior to admission.²⁵ In November 2012, the Nuon Chea defence developed that argument in detail.²⁶

14. After two years of delay attributable in no way to any of the Accused, the defence teams were given 16 days to formulate their objections from the time that the Co-Prosecutors' final requests for admission were filed. The Co-Prosecutors ignored direct instructions from the Chamber in relation to that process at least twice over the course of that period.²⁷ The Chamber appears to have sanctioned that conduct by deciding to admit all, or nearly all of the Co-Prosecutors' statements. Under these circumstances, the Chamber's decision has already violated the right of the Accused to adversarial debate, and hence to confront the evidence against him. The Chamber aggravated the seriousness of that violation by delaying its admissibility determinations until this late date, and then relying on that delay to deny the Defence's request to challenge newly admitted statements in open court.²⁸
15. With closing submissions looming, and no decision yet forthcoming, there is now an ongoing violation of the right of the Accused to adequate time and facilities to prepare a defence. Even if it is to be assumed that on 13 June 2013 the Chamber indicated its' intention to admit the overwhelming majority of the statements into evidence, numerous ambiguities remain which are presently and will continue to prejudice Nuon Chea's ability to prepare his closing submissions. In particular, the Defence is not yet in possession of:
 - a. the Chamber's final determinations concerning both the general standards to be applied in determining the scope of 'acts and conduct of the Accused' or its' line-by-line assessment of such evidence which may be contained in the statements tendered into evidence by the Co-Prosecutors;
 - b. the Chamber's reasoning for its' apparent decision to admit all (or nearly all) of the statements tendered into evidence by the civil parties notwithstanding their

²⁵ Document No. **E-96/3**, 'Ieng Sary's Response to the Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber & Request for a Public Hearing', 22 July 2011, paras 22-27.

²⁶ See para. 8, *supra*.

²⁷ See paras 3, 9, *supra*.

²⁸ See para. 12, *supra*.

failure to redact evidence of acts and conduct of the Accused, or its' line-by-line assessment of such evidence which may be contained in each of those statements;

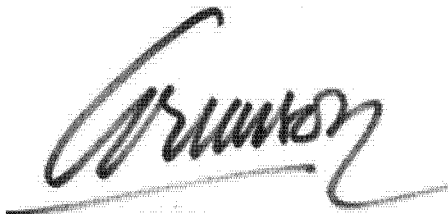
- c. the Chamber's determinations in relation to objections against smaller categories of documents, such as statements taken by the Co-Prosecutors²⁹ or those which concern Tuol Po Chrey,³⁰ which might still be deemed inadmissible by the Chamber notwithstanding the indication provided on 13 June 2013; or
- d. the Chamber's determinations in relation to objections against individual documents, which might still be deemed inadmissible by the Chamber notwithstanding the indication provided on 13 June 2013.

16. The time required to review the Chamber's decisions could by itself occupy the Nuon Chea defence for weeks. On the current schedule, the Nuon Chea defence is already overextended and working at full capacity. The task of reviewing the Chamber's decisions would, at this stage, cause serious prejudice to Nuon Chea's ability to prepare a defence, and compound the existing violation of the right to confront the evidence against him.

17. For these reasons, the Defence respectfully requests that the Chamber:

- a. Urgently provide a concrete timeline for the issuance of a decision in relation to all defence objections against the admissibility of witness statements, complaints and transcripts;
- b. Urgently issue said decision, including a detailed annex listing all admitted documents with individualized reasoning in relation to each document against which specific objections were lodged, and attaching redacted versions of every document deemed to include evidence of acts and conduct of the accused showing with specificity the admissible portions; and
- c. Declare the hearing of the evidence in Case 002/01 closed no earlier than the date on which said decision is issued and affix the deadline for all parties' closing submissions no earlier than six weeks from that date.

CO-LAWYERS FOR NUON CHEA



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²⁹ Document No. E-223/2/8, 'Objections to Requests to Put Before the Chamber Written Statements and Transcripts', 26 April 2013, paras 45-46.

³⁰ Document No. E-291, 'Urgent Request to Summons Key Witnesses in Respect of Tuol Po Chrey', 17 June 2013, paras 34-39.