

**BEFORE THE SUPREME COURT CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**



**FILING DETAILS**

**Case No:** 002/19-09-2007-ECCC/SC

**Party Filing:** Co-Prosecutors

**Filed to:** Supreme Court Chamber

**Original Language:** English

**Date of Document:** 19 December 2014

**CLASSIFICATION**

**Classification of the document**

**suggested by the filing party:** STRICTLY CONFIDENTIAL

**Classification by Supreme Court Chamber:** ស្ងប់ស្ងៀម/Strictly Confidential

**Classification Status:**

**Review of Interim Classification:**

**Records Officer Name:**

**Signature:**

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**CO-PROSECUTORS' RESPONSE TO NUON CHEA'S THIRD REQUEST TO  
CONSIDER AND OBTAIN ADDITIONAL EVIDENCE IN CONNECTION WITH  
THE APPEAL AGAINST THE TRIAL JUDGMENT IN CASE 002/01**

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## I. INTRODUCTION

1. The Co-Prosecutors hereby respond to the Third Request to Consider and Obtain Additional Evidence filed by the Nuon Chea Defence.<sup>1</sup> As set forth below, the Defence Request misrepresents both the evidence contained in the new Case 004 interview and the timing and status of the Co-Prosecutors' fulfillment of their disclosure obligations. The witness statement relied upon by the Defence, while highly relevant to Case 002/02 and Case 004, contains nothing relating to either Tuol Po Chrey or the forced evacuation of Phnom Penh. The Defence assertion that this witness may have evidence relating to the execution of Lon Nol soldiers at Tuol Po Chrey is entirely speculative, and falls far short of the requirements of ECCC Internal Rule 108(7), which only allows the admission of new evidence that could have been a "decisive factor" in the appealed decision. Nor does the interview provide general support for the Defence assertion that Zone Secretary Ros Nhim acted autonomously in committing crimes in the Northwest Zone. To the contrary, this witness testifies that crimes committed in that Zone, such as the purge and arrest of Zone cadres, were directed and decided by the Party Centre leaders in Phnom Penh.

## II. RESPONSE

### A. The Defence Has Failed to Identify Any Evidence that Could Have Been a "Decisive Factor" in Reaching the Judgement in Case 002/01

2. Internal Rule 108(7) sets a high standard for the admission of new evidence in appeal proceedings, requiring that the requested additional evidence "could have been a decisive factor in reaching the decision at trial." This standard is consistent with international practice at the ICTY Appeals Chamber, which has consistently rejected the admission of additional evidence at the appellate stage, even if relevant to a material issue, where it is not convinced the proposed evidence could have led to a different verdict.<sup>2</sup> In *Kupreškić*, the Appeals Chamber described the reasoning for this position as follows:

<sup>1</sup> F2/4 Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, 25 November 2014 [*notified to the parties on 5 December 2014*].

<sup>2</sup> *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreskić to Admit Additional Evidence (ICTY Appeals Chamber), 26 February 2001 at paras. 32, 38, 41, 44, 48; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Judgment (ICTY Appeals Chamber), 23 October 2001 at paras. 64-66, 68; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-A, Decision on Ante Gotovina's and Mladen Markac's Motion for the Admission of Additional Evidence on Appeal (ICTY Appeals Chamber), 2 October 2012 at paras. 25, 27, 29; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision

*While the right to a full appeal process is of the utmost importance, this right must be carefully balanced against the equally important requirement that the appeal be dealt with expeditiously; it is patently contrary to the interests of justice for the appeals process to become overly long and protracted or to deteriorate into a second trial in which the old trial strategies and omissions can be revisited.<sup>3</sup>*

3. The Case 004 statement of [REDACTED] contains no evidence relating to the Tuol Po Chrey executions for which the Accused have been convicted. Indeed, the Defence admit that the witness' interview "makes no reference to the treatment of Khmer Republic personnel, the Pursat town hall or Tuol Po Chrey."<sup>4</sup> The Defence assertion that he is a "critical witness with regard to Tuol Po Chrey" is thus gross hyperbole.<sup>5</sup> Rather than relying on actual evidence, the Defence Request is based purely on speculation that because [REDACTED] [REDACTED] [REDACTED] he must have knowledge of who was responsible for the Tuol Po Chrey killings.<sup>6</sup> In addition to not knowing whether the witness has any relevant knowledge of Tuol Po Chrey, the Defence also do not know whether such knowledge would be inculpatory or exculpatory in nature.<sup>7</sup>
4. A request to call and hear testimony from a new witness at the appellate stage cannot be based on mere speculation that he may have relevant information. An appeal of a judgment is not a trial *de novo*. In order to satisfy Rule 108(7), the Defence must show that there *is* evidence which could have been a "decisive factor" in the Trial Chamber's Judgment. This burden is not met by speculation that a witness *may* have such evidence.<sup>8</sup>

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on Drago Nikolic's First Motion for Admission of Addition Evidence on Appeal Pursuant to Rule 115 (ICTY Appeals Chamber), 19 November 2013.

<sup>3</sup> *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreskić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B) (ICTY Appeals Chamber), 8 May 2001 at para. 3 ("Kupreškić May 2001 Decision").

<sup>4</sup> **F2/4** Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, para. 26.

<sup>5</sup> *Id.* at page 7.

<sup>6</sup> *Id.* at para. 17 ["[REDACTED] almost certainly knows whether Ruos Nhim ordered the execution of soldiers and officials at Tuol Po Chrey"], para. 26 [asserting that the witness is "likely to be in possession of first-hand information"].

<sup>7</sup> *Id.* at para. 17 ["testimony from [REDACTED] on any of these issues, no matter what its content, would overwhelm the probative value of the evidence already on record"].

<sup>8</sup> See *Kupreškić* May 2001 Decision at para. 5 [a party cannot "simply request that a particular person be summoned to give evidence at the appellate stage"]; *Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Decision On Appellant Jean-Bosco Barayagwiza's Motion For Leave To Present Additional Evidence Pursuant To Rule 115 (ICTR Appeal Chamber), 5 May 2006 at para. 20; *Prosecutor v. Momcilo Krajišnik*, Case No. IT-00-39-A, Decision on Momcilo Krajišnik's Motion to Present

5. Moreover, the Defence misstates the time period during which the witness served as the [REDACTED]. Contrary to the Request,<sup>9</sup> the witness did not hold this position during the time period the crimes at Tuol Po Chrey were committed – i.e., immediately after 17 April 1975. Rather, he states in his interview that he held the position [REDACTED]<sup>10</sup> As the witness left Democratic Kampuchea [REDACTED] [REDACTED] at least six months after the executions of the Lon Nol soldiers at Tuol Po Chrey. The Co-Prosecutors also observe that this witness was located in [REDACTED] not Pursat, and thus was based in an entirely different province than the location of the Tuol Po Chrey crimes. As such, even the Defence’s speculation about the “likely” knowledge of this witness is unreliable and based on incorrect factual premises.
6. The Co-Prosecutors further submit that the evidence of this witness relating to the relationship between Northwest Zone Secretary Ros Nhim and the Party Centre leaders in Phnom Penh, including Nuon Chea, does not support the Defence and would not have changed the Trial Chamber’s decision in Case 002/01. The [REDACTED] [REDACTED] establishes that the rift between Ros Nhim and the Party Centre occurred in 1978, and was the result of the Party Centre’s purge and arrest of the cadres from the Northwest Zone. Specifically, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] (S-21 records confirm that over 1,200 Northwest Zone cadres were detained

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Additional Evidence and to Call Additional Witnesses Pursuant to Rule 115, and to Reconsider Decision not to Call Former Counsel (ICTY Appeals Chamber), 6 November 2008 at para. 25 [dismissing request to call witness where appellant failed to provide documentation from the witness establishing the testimony that would impact the verdict].

<sup>9</sup> F2/4 Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, para. 17 [stating that the witness [REDACTED]

<sup>10</sup> F2/4.1.1 Written Record of Interview of [REDACTED] A94.

<sup>11</sup> *Id.* at A12.

<sup>12</sup> *Id.* at A165 [describing a trip to Vietnam “at the end of 1975,” and stating that “after my return from Vietnam, I was assigned a new task as [REDACTED]

<sup>13</sup> F2/4.1.1 Written Record of Interview of [REDACTED] [REDACTED]

and executed at the security office that reported directly to the CPK leadership in Phnom Penh, with the vast majority of those arrests taking place between July 1977 and March 1978.<sup>14</sup>) The witness also makes clear that [REDACTED]

[REDACTED]

[REDACTED]<sup>15</sup> The only reasonable inference from this evidence is that Ros Nhim was not plotting against the Centre and was taken by surprise when Nuon Chea and others in the leadership targeted him for arrest.

- 7. In regards to the relationship that existed between Ros Nhim and the Party Centre as of 1975 (the time of the crimes for which the Accused were convicted in Case 002/01), the statement of this witness supports the conclusion of the Trial Chamber that Nhim reported to, received instructions from and was acting in concert with the Party Centre.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>17</sup>

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>18</sup>

[REDACTED]

<sup>14</sup> E3/531 List entitled “Annex 49 - S-21 Prisoners coming from the Northwest Zone; D288/6.68.50 Chart entitled “Arrests from Northwest Zone by Month.”

<sup>15</sup> F2/4.1.1 Written Record of Interview of [REDACTED] E3/3989 S-21 Confession of Muol Sambath *alias* Ros Nhim, 14 June 1978.

<sup>16</sup> F2/4.1.1 Written Record of Interview of [REDACTED] E1/55.1 Transcript, 28 March 2012, Kaing Guek Eav *alias* Duch, 13.50.23 to 13.55.12; E1/61.1 Transcript, 09 April 2012, Kaing Guek Eav, 10.03.41 to 10.06.02; E3/355 Kaing Guek Eav OCIJ Statement, at ENG 00242874; E3/67 Norng Sophang OCIJ Statement, at ENG 00483967-68; E3/43 Noem Sem OCIJ Statement, at ENG 00365659. Pâng resided at and oversaw K-7, the Party Centre messenger office on the riverside near the Royal Palace, to which all letters from the Zones were delivered: E3/64 Norng Sophang OCIJ Statement, at ENG 00334047-49; E3/24 Rochoem Ton *alias* Phy Phunon OCIJ Statement, at ENG 00223584; E3/464 Tha Sot OCIJ Statement, at ENG 00226110-11 [also stating that Pâng regularly met with Khieu Samphan]; E1/72.1 Transcript, 3 May 2012, Phean Kean, 09.59.12 to 10.02.41; E3/33 Oeun Tan OCIJ Statement, at ENG 00235131; E3/2766 OCIJ Map, at ENG 00429179 [showing location of “K-7 Messenger Unit”].

<sup>17</sup> F2/4.1.1 Written Record of Interview of [REDACTED]

<sup>18</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

8. The statement of this witness does not support the Defence assertion that Zone Secretary Ros Nhim acted autonomously in committing crimes in the Northwest Zone, and instead demonstrates that crimes committed in that Zone were directed by the Party Centre. In relation to the purge of the Northwest Zone, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

9. The Defence also engages in speculation in regards to [REDACTED]

[REDACTED]

[REDACTED] The Defence speculates that this witness must have been plotting against the Party Centers leaders as of 1975.<sup>25</sup> However, there is no reason to conclude that [REDACTED]

[REDACTED]

[REDACTED] There is also no showing by the Defence of how evidence that a

<sup>19</sup> F2/4 Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, para. 29 [noting that the interview does not reference Tram Kak or Kraing Ta Chan, and questioning “the reason for the disclosure of this document at this stage of the proceedings”].

<sup>20</sup> D427 Closing Order, 15 September 2010, para. 320, 1397-1401.

<sup>21</sup> E319/5.1 Annex E – New Witness Statements Relevant to Tram Kak Cooperatives & Kraing Ta Chan Security Centre, [REDACTED]

<sup>22</sup> F2/4.1.1 Written Record of Interview of [REDACTED]

[REDACTED]

<sup>23</sup> *Id.* at A46.

<sup>24</sup> *Id.* at A21, A31 [REDACTED]

<sup>25</sup> F2/4 Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, para. 19 [“it is *extremely likely* that he was acting pursuant to Ruos Nhim’s instructions or with his acquiescence”], para. 24 [asserting without any factual basis or support that [REDACTED] kept “hidden from Pol Pot and Nuon Chea”].

<sup>26</sup> F2/4.1.1 Written Record of Interview of [REDACTED]

[REDACTED]

█ have been a “decisive factor” in the Trial Chamber’s Judgment.

**B. The Co-Prosecutors Have Fulfilled Their Disclosure Obligations**

10. For the reasons stated above, the Co-Prosecutors submit that the statement of █ does not contain exculpatory evidence relevant to the Case 002/01 appeal. The fact he did not testify in Case 002/01 thus could not have been a decisive factor in the judgment, and the proffered evidence does not meet the requirements of Rule 108(7). However, the statement is highly relevant to the issues to be adjudicated in Case 002/02, and appropriate action was thus taken to seek the disclosure of that statement (and others) to the Case 002 parties, as described below.
11. The International Co-Prosecutor (“ICP”) first became aware of the contents of the █ witness statement after being provided the English translation on 11 February 2014. The ICP thereafter commenced a review of on-going OCIJ interviews for material that should be disclosed to Case 002. On 1 May 2014, the ICP filed a request asking the Co-Investigating Judges to authorize the disclosure to Case 002 of 231 witness interviews. A second motion was filed on 5 May 2014 requesting leave to disclose 94 interviews and other documents. On 8 May 2014, the International Co-Investigating Judge (“ICIJ”) denied the ICP’s requests, finding that the interest of “maintaining the integrity and confidentiality of the ongoing investigation” outweighed the need for disclosure of the material at that time. The Co-Prosecutors notified the Trial Chamber and Case 002 Accused of the disclosure requests and the ICIJ’s ruling in the Co-Prosecutors’ Rule 80(3) disclosures that were filed in May and June 2014, and stated that they would reiterate those disclosure requests as soon as a date was set for the commencement of the Case 002/02 trial.<sup>27</sup>
12. In accordance with the commitment made in their Rule 80 filings, the Co-Prosecutors renewed their disclosure requests promptly following the Trial Chamber’s 19 September 2014 Scheduling Order setting a date for the commencement of evidentiary hearings in Case 002/02.<sup>28</sup> On 16 October 2014, the ICIJ notified an order authorizing the disclosure of 33 Case 004 interviews, including the witness statement that is the

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<sup>27</sup> █  
 E305/13 Co-Prosecutors’ Rule 80(3) Trial Document List, 13 June 2014, para. 8-9; E305/6 Co-Prosecutors’ Proposed Witness, Civil Party and Expert List and Summaries for the Trial in Case File 002/02, 9 May 2014, para. 23-24.

<sup>28</sup> E316 Scheduling Order for Hearing on the Substance in Case 002/02, 19 September 2014.

- subject of this motion. The ICP immediately made those interviews available to the Defence and Civil Parties,<sup>29</sup> and on the following day filed a formal disclosure of the interviews to Case 002.<sup>30</sup>
13. Notwithstanding their knowledge of this procedural history and the ICP's diligent efforts to obtain leave to disclose this and other Case 003 and 004 interviews,<sup>31</sup> the Defence falsely assert to this Chamber that the ICP failed to "seek disclosure of his evidence to the parties for nine full months while the drafting of the Judgment was underway."<sup>32</sup> Moreover, in complaining about the delay in receiving this statement, the Nuon Chea Defence fail to disclose to this Chamber that they refused to accept delivery of the Case 004 witness statements for nearly three weeks, as part of the Defence 'boycott' and refusal to participate in the Case 002/02 trial proceedings.<sup>33</sup> The Nuon Chea Defence only accepted delivery of the Case 004 interviews, including the statement of [REDACTED] after the Trial Chamber ruled that they were "deemed to have received the additional witness and Civil Party statements on 16 October 2014" notwithstanding their refusal to accept service.<sup>34</sup> The Khieu Samphan Defence refused to take delivery of the Case 004 interviews disclosed by the Co-Prosecutors until the week of 15 December 2014.<sup>35</sup>
14. The Case 003 and 004 witness statements which the ICP has requested be disclosed to the Case 002 parties include interviews relevant to subjects such as the purge of the Northwest Zone, the role of Zone leaders such as Ros Nhim, Sao Phim and Ta Mok, and the relationship between Zone leaders and the Party Centre. The Co-Prosecutors are well aware of their obligation to request disclosure of any statements containing exculpatory evidence relevant to Tuol Po Chrey or other issues in the Case 002/01 appeal. Substantial time and resources have been devoted to the review and identification of Case 003 and 004 interviews that should be disclosed to Case 002, and

<sup>29</sup> **E319/3.1** Notice of Refusal of Acceptance; **E319/3.2** Notice of Refusal of Acceptance [describing how on the afternoon of 16 October 2014, binders of the interviews were delivered to counsel for the Accused, who refused to accept those documents]; **E319/3.3** Disclosure of Confidential Case File Materials and Acknowledgement of Receipt and Conditions of Use, 16 October 2014 [signed by International Lead Co-Lawyer for Civil Parties].

<sup>30</sup> **E319** International Co-Prosecutor's Disclosure of Statements from Case File 004, 17 October 2014.

<sup>31</sup> See **E319** International Co-Prosecutor's Disclosure of Statements from Case File 004, 17 October 2014, para. 2-4; **E305/13** Co-Prosecutors' Rule 80(3) Trial Document List, 13 June 2014, para. 8-9.

<sup>32</sup> **F2/4** Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, para. 31.

<sup>33</sup> **E319/3.1** Notice of Refusal of Acceptance, 16 October 2014; **E319/4.1** Acknowledgement of Receipt and Conditions of Use, 4 November 2014 [signed by Victor Koppe "under protest"].

<sup>34</sup> **E322** Scheduling Order for Evidentiary Proceedings, 3 November 2014, at ENG 01034560.

<sup>35</sup> **E319/3.2** Notice of Refusal of Acceptance.



requests have already been filed with the Co-Investigating Judges for leave to disclose such statements. The Co-Prosecutors will continue this process as further interviews are posted in Cases 003 and 004, until the completion of the investigations in those cases.

15. There is thus no need for this Chamber to “order the Co-Prosecutors to conduct a review of the Case 003 and 004 case files and seek permission from the ICIJ to disclose” potentially exculpatory material, as requested by the Defence.<sup>36</sup> The review that has already been conducted by the Co-Prosecutors is broader than the request of the Nuon Chea Defence, which is limited to interviews of witnesses “who worked directly with Ruos Nhim” or which concern “Northwest Zone opposition to Pol Pot and Nuon Chea prior to 6 January 1979.”<sup>37</sup> The Co-Prosecutors note, at the same time, that the interview subjects defined by the Defence extend to interviews that, while relevant to Case 002/02, would have no exculpatory relevance to the Case 002/01 appeal, as is the case with the statement of [REDACTED]. Evidence of a rift that emerged in the latter part of 1977 and 1978, when the Party Centre sent troops and cadres to arrest, execute and replace the leaders of the Northwest and East Zones, is neither relevant to this appeal nor evidence that would have changed the Trial Chamber’s Judgment in Case 002/01.
16. Accordingly, contrary to the suggestion that the Co-Prosecutors sought to conceal this witness from the Defence, the Co-Prosecutors specifically requested approval from OCIJ to disclose his interview to the Case 002 parties on 1 May 2014, and included him as a proposed trial witness in their Rule 80 witness lists that were filed in Case 002/02 on 9 May 2014.<sup>38</sup> [REDACTED] was proposed as a Case 002/02 trial witness because

<sup>36</sup> **F2/4** Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, para. 33-34.

<sup>37</sup> *Id.* at para. 33.

<sup>38</sup> **E305/6** Co-Prosecutors’ Proposed Witness, Civil Party and Expert List and Summaries for the Trial in Case File 002/02, 9 May 2014, para. 23 [stating that some witnesses had been identified by a “pseudonym such as OCP-01” because their evidence “only came to the attention of the Co-Prosecutors through interviews conducted by the Co-Investigating Judges, and which are presently classified as confidential. The International Co-Prosecutor filed requests to the International Co-Investigating Judge to disclose these interviews to the Trial Chamber and the Parties ...”]; **E305/6.4** Annex III – OCP Updated Witness, Civil Party and Expert Summaries, 9 May 2014, at ENG 00986576 [Proposed Trial Witness No. 10 identified as “OCP-01” and described as [REDACTED]]

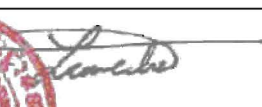
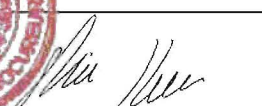
[REDACTED] **E319/5.1** Annex E – New Witness Statements Relevant to Tram Kak Cooperatives & Kraing Ta Chan Security Centre, No. 25 [noting that [REDACTED] was the proposed trial witness previously identified as “OCP-01”]

his evidence is highly relevant to key issues to be adjudicated in that trial, specifically: internal purges of CPK cadres; deportation of the Vietnamese from Democratic Kampuchea; and the role of the Accused.<sup>39</sup> The Supreme Court Chamber should thus be aware that the Co-Prosecutors expect this witness to testify as part of the Case 002/02 trial proceedings.

### III. CONCLUSION

17. The Supreme Court Chamber is not an investigative body, and the appeal of the Case 002/01 Judgment is not a trial *de novo*. The Defence cannot prolong the proceedings by seeking the testimony of any witness who may have information relevant to the numerous factual issues addressed in the Trial Chamber's Judgment. As was the case with their two prior filings, the Third Request does not satisfy the requirements of Rule 108(7). The witness statement that is the subject of the motion has little relevance to the crimes for which the Accused was convicted in Case 002/01, and what relevance it does have would only have added further weight to the Trial Chamber's conclusion that the Northwest Zone reported to and took directions from the Party Centre. The proffered evidence certainly could not have been a "decisive factor" that would have changed the Case 002/01 Judgment.
18. Accordingly, for the reasons set forth above, the Co-Prosecutors respectfully request that the Supreme Court Chamber deny the Nuon Chea Defence Request to obtain and consider additional evidence.

Respectfully submitted,

Date	Name	Place	Signature
19 December 2014	CHEA Leang Co-Prosecutor	Phnom Penh	
	Nicholas KOUMJIAN Co-Prosecutor		

<sup>39</sup> **E301/9/1** Decision on Additional Severance of Case 002 and Scope of Case 002/02, 4 April 2014, para. 35, 42; **E301/9/1.1** Annex: List of Paragraphs and Portions of the Closing Order Relevant to Case 002/02 [incorporating paragraphs 320, 794-796 and 1397-1401 of Closing Order as part of Case 002/02]; **E315** Decision on Sequencing of Trial Proceedings in Case 002/02, 12 September 2014, para. 14.