Defense Challenges Admission of 1350 Witness Statements In Lieu of Oral Testimony

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The Co-Prosecutors are seeking to admit over 1350 witness statements in lieu of in-court testimony and examination in Case 002/01 at the Extraordinary Chambers in the Courts of Cambodia (ECCC). Of these, approximately 400 were taken by non-court entities in the years prior to the start-up of the Court.[1] The Prosecutors say their request assists the effective management of a massive criminal case and the search for truth.[2] The Defense teams are challenging the request as a violation of fair trial rights. Most recently, the Nuon Chea team filed a motion arguing that the enormous number of statements at issue, the types of information they contain, and, with regard to statements collected by entities other than the Court, their lack of formal certification, are inconsistent with international practice previously endorsed by the ECCC Trial Chamber.

In June 2011, the Prosecutors first sought admission of written statements and transcripts in lieu of oral testimony. Addressing the lack of an applicable ECCC rules provision authorizing this practice, they argued, "The Chamber should take guidance from the rules established at the international level, and tailor them to the procedure applicable before the ECCC."[3]

In June 2012, the Trial Chamber ruled on their request. It said it has "broad discretion" to consider all relevant and probative evidence put before it, qualified only by Internal Rule 87(3), which allows it to reject evidence that is:

a. irrelevant or repetitious;
b. impossible to obtain within a reasonable time;
c. unsuitable to prove the facts it purports to prove;
d. not allowed under the law; or
e. intended to prolong proceedings or is frivolous.

After determining that the accused's right to confrontation is not absolute, the Chamber found that the rules of internationalized courts allowing submission of written statements without confrontation strike "an appropriate balance between the Accused's fair trial rights and the

[1] For example, the Documentation Center of Cambodia, which has amassed the largest collection of documentation authored by and related to the Khmer Rouge regime, "conducted over 10,000 interviews with Khmer Rouge cadres, their family members, and victims across the country" between 2000-07. It "began by looking at the [Communist Party of Kampuchea] biographies in [its] documentary files to identify the names, birthplaces and other basic information on thousands of former Khmer Rouge cadres. Teams of researchers moved from province to province, locating and interviewing many of the individuals in question." Description of Promoting Accountability Project, *at* http://www.d.dccam.org/Projects/Promoting/Promoting_Accountability.htm.

[2] Co-Prosecutors' Further Request to Put before the Chamber Written Statements and Transcripts, ¶ 3 (July 27, 2012). *See* Expert Commentary on Legal Filings: Admissibility of Witness Statements In Lieu of Oral Testimony, *at* http://www.cambodiatribunal.org/blog/2012/07/expert-commentary-legal-filings-admissibility-witness-statements-lieu-oral-testimony.

[3] Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements before the Trial Chamber, ¶ 35 (June 15, 2011) [hereinafter Co-Prosecutors' Rule 92 Submission].

efficiency of the proceedings" in the context of mass crimes.[4]

The International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda allow the admission of written statements in lieu of oral testimony that "goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment." For example, ICTY Rule 92*bis*(A) sets forth a list of factors both in favor and against admission; subrule (B) lists the formalities required if admission is considered appropriate, including a written declaration by the witness that the content of his/her statement is true and correct and a written declaration from a legally authorized witness verifying the circumstances under which the statement was taken; and subrule (C) provides that, after hearing party arguments regarding the factors listed in (A), the Trial Chamber will decide whether or not to require the witness to appear in court for cross-examination regarding his/her statement.

The Nuon Chea team argues that if the ECCC adopts the factors to be weighed both for and against admission in ICTY Rule 92*bis*(A), it must also rigorously apply the restrictions in (B) and (C), as these "are integral to the regime, which was intended to function as a coherent whole." It says that, if these restrictions were applied, most of the Prosecution's statements would be excluded.[5]

The team emphasizes that, to its knowledge, no international mass crimes proceeding has accepted written testimony into evidence on a scale remotely close to the Prosecution request. For example, it says it has found no international criminal case where a party "sought to introduce more than 130 such statements in one motion." It argues that the structure of ICTY Rule 92*bis*, which envisions an admissibility determination under subrule (A), potentially followed by cross-examination under subrule (C), "demonstrates that the drafters did not anticipate requests for admission so large that the witnesses could never conceivably be called to testify." The impossibility of confrontation, it claims, is the inevitable consequence of the "unprecedented volume of material" the Prosecution seeks to include.[6]

The team also challenges the content of the statements the Prosecution seeks to admit, arguing that much of the content is inadmissible under ICTY practice because cross-examination is necessary for statements going to "criminal conduct which is 'highly proximate' to the accused" or "any 'live issue' between the parties[.]" Moreover, it says that portions of many statements impermissibly speak to the acts or conduct of the accused and are therefore inadmissible without time-consuming redactions.[7]

With regard to witness statements taken by entities external to the ECCC, such as NGOs and researchers, the Nuon Chea team argues that all statements in this category are inadmissible

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[4] Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents before the Trial Chamber, ¶¶ 17, 20 (June 20, 2012) [hereinafter June 20 Decision].
[5] Preliminary Response to the Co-Prosecutors' Further Request to Put before the Chamber Written Statements and Transcripts, ¶ 5 (Nov. 8, 2012) [hereinafter Preliminary Response].
[6] *Id.* ¶¶ 3, 9 fn. 18.
[7] *Id.* ¶¶ 12, 15, 18-22. *See, e.g.*, Prosecutor v. Perisic, Case No.IT-04-81-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92*Bis*, ¶¶ 12, 14 (Trial Chamber, Oct. 2, 2008) (regarding "proximity to accused" and "live issues").

because they do not meet the formal attestation requirements of Rule 92*bis*(B).[8] This subrule "provides a method by which the contents of a written statement may be verified by the witness."[9] The witness declaration serves the same purpose as "an oral attestation by the witness if he is in court"[10] and "[p]arties are not limited to securing certification by a Presiding Officer [of the court], but may also have such declaration witnessed in accordance with the law and procedure of a State."[11] According to ICTY jurisprudence these formalities are obligatory: "It is permissible for a Chamber to provisionally admit a written witness statement under Rule 92*bis*, pending completion of the formal requirements of Rule 92*bis*(B); however, the witness statement is not fully admitted until those requirements are met." [12] Nevertheless, there is an exception for admission of statements of unavailable persons if the court "finds from the circumstances in which the statement was made and recorded that it is reliable."[13]

The ECCC Co-Prosecutors have argued that statements collected outside of the judicial investigation "have strong indicia of reliability," but noted the Trial Chamber might consider (1) "whether certification such as that provided in Subrule 92*bis*(B) … would be appropriate"; (2) "whether [such] statements may be admitted if the witnesses are deceased or cannot be located with reasonable diligence"; or (3) whether "to provisionally admit statements subject to certification," such as by seeking "clarification from researchers as to the circumstances in which the statements were taken or requir[ing] the filing of additional proof of reliability, such as contemporaneous notes or audio recordings."[14]

Thus far, Trial Chamber has ruled only that statements not collected under judicial supervision

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[8] Preliminary Response, ¶¶ 40, 46. ICTY Rule 92*bis*(B) states in full:

> If the Trial Chamber decides to dispense with the attendance of a witness, a written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief and
> (i) the declaration is witnessed by:
> (a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or
> (b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and
> (ii) the person witnessing the declaration verifies in writing:
> (a) that the person making the statement is the person identified in the said statement;
> (b) that the person making the statement stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct;
> (c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and
> (d) the date and place of the declaration.
> The declaration shall be attached to the written statement presented to the Trial Chamber.

[9] Prosecutor v. Karadzic, Case No. IT-95-5/18-T, Decision on Accused's Request to Admit Supplemental Statement of Witness KDZ407, ¶ 1 (Trial Chamber, June 1, 2012) (citation omitted) [hereinafter Karadzic Case].

[10] Prosecutor v. S. Milosevic, Case No. IT-02-54-AR73.4, Separate Opinion of Judge Shahabuddeen Appended to Appeals Chamber's Decision Dated 30 September 2003 on Admissibility of Evidence-in-Chief in the Form of Written Statements, ¶ 7 (Appeals Chamber, Oct. 31, 2003).

[11] Prosecutor v. Ngirabatware, Case No ICTR-99-54-T, Decision on Defense Motion to Declare Written Statements Admissible and for Leave for Certification of these Written Statements by a Presiding Officer, ¶ 22 (Trial Chamber, Apr. 11, 2011).

[12] Karadzic Case, ¶ 5.

[13] ICTY Rule 92*quarter*.

[14] Co-Prosecutors' Rule 92 Submission, ¶¶ 39-40.

"enjoy no presumption of reliability."[15] At the same time, the Chamber said it would accept proposals to admit such statements, together with any indicia of reliability.[16] The Chamber will now have to determine whether the formalities of ICTY Rule 92*bis*(B) should be adapted to ECCC proceedings (potentially excluding the bulk of the non-ECCC derived statements), seek out the interviewees to determine if they are available for cross-examination, or accept alternative proof of reliability. Whatever the outcome, the Chamber faces a prodigious task in assessing each of the enormous number of documents at issue in light of international practice.

[15] Notably, the Trial Chamber specifically distinguished contemporaneous Khmer Rouge documents collected by the Documentation Center of Cambodia, which have been accorded "a presumption of relevance and reliability, including authenticity … following a review of its archival policies and practices." June 20 Decision, ¶ 29 fn. 48.
[16] *Id*. ¶ 29.