



Trial Chamber Admits 1399 Written Statements and Transcripts in Lieu of Oral Testimony

Anne Heindel, Legal Advisor –Documentation Center of Cambodia
August 23, 2013

Last week the Trial Chamber issued its final decision on the admissibility of written statements and transcripts in lieu of oral testimony—an issue long contentious in Case 002/01 at the Extraordinary Chambers in the Courts of Cambodia.¹ Having substantially reduced the number of documents they originally sought to have admitted, the Civil Party Lead Co-Lawyers requested 520 civil party statements, and the Co-Prosecutors requested 1,109 witness statements and Case 001 transcripts. The *Nuon Chea* and *Khieu Samphan* defense teams challenged the content, scope, and reliability of these documents, and the *Nuon Chea* team requested the oral testimony of over a hundred witnesses whose statements discuss the targeting of Khmer Republic officials²—an issue of great significance regarding the accused’s potential responsibility for executions at Tuol Po Chrey contemporaneous with the evacuation of Phnom Penh on April 17, 1975.

At least 220 of the Co-Prosecutor’s proposed statements include evidence relevant to proving the acts and conduct of the accused as charged. The *Nuon Chea* team argued that, in accordance with the criteria applied by the *ad hoc* tribunals (the International Criminal Tribunals for Rwanda and the Former Yugoslavia), the Chamber must exclude all statements including such evidence, as well as “‘evidence proximate to the Accused’, even if also relevant to another purpose.” According to the *Khieu Samphan* team, excluded statements must also include those relating to “live issues” between the parties, such as “structures, the existence and policies of a joint criminal enterprise, the threshold requirements of crimes against humanity and the displacement of the population.”³

In its decision, the Trial Chamber notes:

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’ ... and are inadmissible for this purpose, unless the Defense has been accorded the opportunity of in-court examination of their authors.

Exceptions may be made for statements that are *prima facie* relevant and reliable to provide other matters, in particular when there is no opportunity for confrontation because a witness is

¹ See, e.g., Expert Commentary on Legal Filings: Defense Challenges Admission of 1350 Witness Statements In Lieu of Oral Testimony (Nov. 19, 2012) & Admissibility of Witness Statements In Lieu of Oral Testimony (July 31, 2012) at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

² Decisions 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 ¶¶ 6, 8 (Aug. 15, 2013).

³ *Id.* ¶¶ 9, 12, 13.

deceased or cannot be found, or the requested evidence is cumulative or proves the contextual elements of international crimes.⁴

The Chamber clarified that the “acts and conducts” standard “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” and does not extend to “pivotal” prosecution issues, “live” matters in dispute, “the acts and conduct of organizations and bodies to which the Accused belonged, [or] persons with whom he was associated or ‘proximate’ subordinates[.]” These issues go to weight, not admissibility. The Trial Chamber rejected the admission of 24 statements it found relevant *only* for proving acts and conduct of the accused as charged and admitted 1114 documents it found “cumulative of each other and/or other evidence” and *prima facie* relevant to Case 002/01 issues other than the acts and conduct of the accused. To the extent that these documents also contain evidence proving the acts and conduct of the accused, the Chamber “will not rely on this information in order to prove the Accused’s personal acts or conduct as charged in Case 002/01.” Moreover, any objections to their unreliability due to the circumstances under which they were taken or the institutional interests of the interviewers—such as the Co-Prosecutors or the Documentation Center of Cambodia—will be considered in assessing their weight, if any in the verdict.⁵

Although some of the statements and transcripts proposed by the prosecution are relevant only to issues falling outside the scope of the Case 002/01 charges, the Co-Prosecutors argued that their admission was “essential in order to satisfy their burden of proof in relation to joint criminal enterprise policies and the contextual elements of crimes against humanity.” The Trial Chamber noted that evidence generally had to be relevant to policies and crime sites charged in Case 002/01; however, information falling outside this scope could be admitted, “usually” when it is “adduced as part of directly relevant evidence and/or concerns the impact of crimes on victims.” Nevertheless, the Chamber excluded the 122 documents it found to concern allegations not at issue in Case 002/01, ruling that they were “not essential” for the Co-Prosecutors to meet their burden of proof and were repetitive with other admitted documents.⁶

In total, the Trial Chamber admitted 1399 statements and transcripts in lieu of oral testimony. The *Nuon Chea* team has long argued that if the ECCC adopted the admissibility approach of the *ad hoc* tribunals, “an individualized assessment of each statement would be required prior to admission.” For that reason, they sought a “line-by-line assessment” of the evidence that may be contained in each admitted statement.⁷ Although the Trial Chamber did not address this argument directly, it emphasized that in adopting the *ad hoc* courts’ admissibility standards “it did not ... also adopt wholesale [their] technical and detailed requirements.”⁸

The Trial Chamber rejected the *Nuon Chea* team’s request—based on alleged contradictions in the testimony of previous trial witnesses—to call 110 witnesses whose admitted statements

⁴ *Id.* ¶¶ 17-18, 20, 23, 29.

⁵ *Id.* ¶¶ 19, 26, 28, 32.

⁶ *Id.* ¶¶ 9, 20, 34.

⁷ Request for Clarification Concerning Decision on Admissibility of Witness Statements, Complaints and Transcripts and for Extension of the Deadline for Closing Submissions, ¶¶ 13, 15 (Aug. 9, 2013).

⁸ Trial Chamber Decision, *supra* note 2, ¶ 19.

discuss the targeting of Khmer Republic officials. A few of the requested witnesses had been previously rejected, and the rest were not requested early enough in the proceedings. The Chamber emphasized that the *Nuon Chea* team had “been on notice since April 2011” of the statements the Co-Prosecutors sought to place before the Chamber in lieu of oral testimony⁹— although the Tuol Po Chrey crime site (the only one addressing the targeting of Khmer Republic officials) was not added until October 2012 and the scope of charges at issue in Case 002/01 became final only last month.¹⁰

Days before the Trial Chamber ruling, the *Nuon Chea* team argued that, with the deadline “looming” for closing arguments, the lack of finality regarding which documents would be admitted had created an “ongoing violation of the right of the Accused to adequate time and facilities to prepare a defence.” Moreover, once the decisions were announced, “[t]he time required to review [them] could by itself occupy the Nuon Chea defense two weeks” and at this stage would “cause serious prejudice to Nuon Chea’s ability to prepare a defense[.]” The team therefore asked to have the deadline for closing submissions extended to no earlier than six weeks from the date the admissibility decision was issued.¹¹ The Trial Chamber’s ruling did not address this request.

⁹ *Id.* ¶ 38.

¹⁰ See 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, ¶ 3 (Oct. 8, 2012); Decision on Immediate Appeals Against Trial Chamber’s Second Decision on Severance of Case 002 - summary of reasons (July 23, 2013).

¹¹ Nuon Chea Request for Clarification, *supra* note 7, ¶¶ 15-17. See also Confirmation on Deadlines for Closing Briefs and Schedule for Closing Statements (July 24, 2013) (setting September 12, 2013, as the deadline for closing briefs).