

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC **Party Filing:** Co-Prosecutors

Filed to: Trial Chamber **Original Language:** English

Date of document: 9 April 2012



CLASSIFICATION

**Classification of the document
suggested by the filing party:**

PUBLIC with ONE PUBLIC AND
TWO CONFIDENTIAL Annexes

Classification by Trial Chamber: សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

**CO-PROSECUTORS' SUBMISSION OF REVISED ANNEXES 12 AND 13
OF THEIR RULE 80 (3) TRIAL DOCUMENT LIST
(WITNESS STATEMENTS AND COMPLAINTS)**

Filed by:

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Distributed to:

Trial Chamber
Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

Civil Party Lead Co-Lawyers
PICH Ang
Elisabeth SIMONNEAU FORT

Copied to:

Accused
NUON Chea
KHIEU Samphan

Lawyers for the Defence
SON Arun
Victor KOPPE
KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN
Jacques VERGÈS

I. INTRODUCTION AND OVERVIEW OF REVISED ANNEXES

1. In response to the Trial Chamber's ruling on the principles governing the admissibility of witness statements, as well as its request that the parties reduce the number of witness statements they seek to put before the Chamber,¹ the Co-Prosecutors hereby submit revised versions of Annexes 12 and 13 of their original Rule 80 (3) Document List, containing: a) witness statements taken by the Office of the Co-Investigating Judges (OCIJ), external researchers and non-ECCC entities (Annex 12); and b) complaints received by the Co-Prosecutors during the judicial investigation in this case (Annex 13).
2. The Revised Annex 12 contains 874 statements, comprising: a) 857 statements originally included in Annex 12; b) two additional statements admitted by the Chamber since the commencement of the trial;² and c) 15 written records obtained by OCIJ in Cases 003 and 004 after the filing of the Co-Prosecutors' Rule 80 (3) Document List and included in a recent disclosure by the Co-Prosecutors.³ The Revised Annex 13 contains 166 complaints. Combined, the two Revised Annexes contain **1,040** documents (a reduction of over 43 per cent from the original combined total of **1,829**). Of these 1,040 documents, 170 are statements or complaints of witnesses who have already testified, and should therefore be admitted irrespective of the Co-Prosecutors' request. They are included in this filing for completeness (see Section A of Revised Annexes 12 and 13).
3. The selection of these documents is based on the scope of Case 002/01 as determined by the Chamber's severance decision of 29 March 2013.⁴ Given that the reasons for this decision are not available as at the time of writing, the Co-Prosecutors reserve their right to further revise Annexes 12 and 13 if necessary once the full written reasons are issued.
4. Within the 1,040 statements and complaints in the Revised Annexes, the Co-Prosecutors have identified a total of 220 documents which contain evidence that goes to proof of the acts and conduct of the Accused as charged in the Closing Order (hereinafter, "evidence of the acts and conduct of the Accused"), **and** whose authors have not testified as at the time of writing. Noting the Chamber's ruling on the admissibility of such evidential material,

¹ E223/2 Trial Chamber Memorandum: 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), 19 October 2012, para. 9; E96/7 Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, 20 June 2012, para. 35(c) (hereinafter "E96/7 Witness Statement Decision").

² E190.1.405 and E190.1.406.

³ These statements are easy to identify as their document numbers start with "E127/5.1."

⁴ Draft Case 002 Transcript, 29 March 2013, p.4.

the Co-Prosecutors have produced copies of these documents in which the passages containing evidence of the acts and conduct of the Accused have been highlighted for consideration and possible exclusion by the Court (please refer to Section IV(A) below), if the witnesses do not testify before the close of the trial. Some of the individuals in this group have already been selected by the Chamber to testify.

5. The Co-Prosecutors submit that the 1,040 documents (including all attachments thereto) listed in the Revised Annexes 12 and 13 should be admitted as they are relevant to the issues before the Chamber, and reliable. These documents should be admitted as follows:
 - a. Admitted in full where:
 - i. the authors of the statements will have testified during the course of the trial, or where the authors are deceased or no longer available (regardless of whether or not the statements contain evidence of the acts and conduct of the accused); and
 - ii. the authors will not have testified and the statements do not contain evidence of the acts and conduct of the Accused.
 - b. Admitted excluding the highlighted portions (acts and conduct of the Accused), where the witnesses are available, but do not testify in the course of this trial.

Annex A to this filing contains an overview of Annexes 12 and 13, and illustrates how the various categories of the statements and complaints can be identified.

6. The Chamber appears to have adopted a different approach to the related Annex 11 of the Co-Prosecutors' Rule 80 (3) Document List (Case 001 transcripts), by admitting a number of documents listed in that Annex and not requiring the exclusion of portions related to the acts and conduct of the Accused (Section III(C) below). The Co-Prosecutors request the Chamber to now admit all the remaining Annex 11 documents.

II. PROCEDURAL HISTORY

7. On 28 January 2011, the Co-Prosecutors filed their list of proposed witnesses, experts, and civil parties to be heard at trial.⁵ They indicated that some individuals were not included in this list on the basis that their written statements would be introduced into evidence.⁶ The Co-Prosecutors filed their Rule 80 (3) Document List on 19 April 2011.⁷ That list included

⁵ E9/4 Co-Prosecutors' Rule 80 Expert, Witness and Civil Party Lists, Including Confidential Annexes 1, 2, 3, 3A, 4 and 5, 28 January 2011.

⁶ Ibid, para. 10.

⁷ E9/31 Co-Prosecutors' Rule 80 (3) Trial Document List, 19 April 2011.

Case 001 transcripts (Annex 11), witness statements taken by the Co-Investigating Judges and other individuals / organisations (Annex 12), and complaints received during the judicial investigation (Annex 13).

8. On 15 June 2011, the Co-Prosecutors filed a Rule 92 submission regarding the admission of written witness statements in lieu of oral testimony.⁸ They submitted, *inter alia*, that: a) the Accused do not have an absolute right to summon and examine witnesses at trial; b) the Trial Chamber has the discretion to admit witness statements without summoning all witnesses to testify at trial; and c) in exercising its discretion, the Chamber should be guided by several considerations, including the applicable international principles (such as those applying to statements containing evidence of the acts and conduct of the Accused) as well as the civil law procedure applicable at the ECCC.⁹ The defence teams opposed the Co-Prosecutors' submission¹⁰ while the Civil Parties supported it.¹¹ On 10 August 2011, the Co-Prosecutors replied to the responses.¹²
9. On 22 September 2011, the Trial Chamber severed Case 002 into a series of trials, the first of which (Case 002/01) was to include the factual allegations relating to: a) the historical background, authority structure, military structure and communications of the Communist Party of Kampuchea (CPK) / Democratic Kampuchea (DK), the roles of the Accused in the CPK / DK, and the policies alleged to have formed part of the joint criminal enterprise described in the Closing Order (combined – “First Phase”); and b) crimes alleged to have been committed as part of the events described as population movements phase 1 and 2 (Second Phase).¹³ The Second Phase was subsequently expanded to include some of the allegations concerning executions at Toul Po Chrey.¹⁴

⁸ **E96** Co-Prosecutors' Rule 92 Submission regarding the Admission of Written Statements before the Trial Chamber, 15 June 2011.

⁹ *Ibid.*

¹⁰ **E96/1** Response to OCP Submission Regarding the Admission of Written Statements, 21 July 2011; **E96/4** Observations in Response to Co-Prosecutors' Submission Regarding the Admission of Written Statements, 22 July 2011.

¹¹ **E96/5** Civil Party Lead Co-Lawyers Response in Support of the Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Statements Before the Trial Chamber, 22 July 2011, para. 6.

¹² **E96/6** Co-Prosecutors' Reply to the Responses Regarding the Admission of Written Witness Statements Before the Trial Chamber, 10 August 2011.

¹⁴ **E163/5** Trial Chamber Memorandum: 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, 8 October 2012.

¹⁴ **E163/5** Trial Chamber Memorandum: 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, 8 October 2012.

10. In January 2012 the Chamber held hearings on the admissibility of documents in **Annexes 1 - 5** of the Co-Prosecutors' Rule 80 (3) Document List.¹⁵ In January and February, the Chamber heard testimonies in relation to the provenance of evidence collected from the Documentation Centre of Cambodia (DC-Cam).¹⁶ In March 2012, the Chamber held hearings on the admissibility of documents listed in **Annexes 6 - 11** and **14 - 20**.¹⁷ The admissibility hearings focused on documents relevant to the First Phase, which in fact encompassed the majority of documents in the above-mentioned annexes.¹⁸
11. On 9 April 2012, the Trial Chamber issued its decision on the admission of First Phase documents listed in **Annexes 1 - 5**, admitting all but 12 documents.¹⁹ On 30 April 2012, the Chamber issued a decision placing on the case file 444 of the 448 "new" documents dispersed throughout the Annexes in the Co-Prosecutors' Rule 80 (3) Document List (documents which were not on the Case File at the time of the filing of the list).²⁰
12. On 20 June 2012, the Trial Chamber ruled on the Co-Prosecutors' 15 June 2011 submission concerning the admission of witness statements.²¹ It held that neither the applicable international jurisprudence nor the ECCC's legal framework provide an absolute or unqualified right for the Accused to require the attendance at trial of witnesses whose statements may be put before the Chamber.²² The Chamber considered that the legal framework and jurisprudence of the *ad hoc* tribunals "strike an appropriate balance between the Accused's fair trial rights and the efficiency of the proceedings, notably in relation to the expeditiousness of the trial."²³ Applying these principles, the Chamber

¹⁵ **E1/27.1** Transcript of Proceedings, 16 January 2012; **E1/28.1** Transcript of Proceedings, 17 January 2012; **E1/29.1**, Transcript of Proceedings, 18 January 2012.

¹⁶ **E1/31.1** Transcript of Proceedings 23 January 2012; **E1/32.1** Transcript of Proceedings, 24 January 2012; **E1/33.1** Transcript of Proceedings, 25 January 2012; **E1/37.1** Transcript of Proceedings, 1 February 2012; **E1/38.1** Transcript of Proceedings, 2 February 2012; **E1/39.1** Transcript of Proceedings, 6 February 2012.

¹⁷ **E1/46.1** Transcript of Proceedings, 12 March 2012; **E1/47.1** Transcript of Proceedings, 13 March 2012; **E1/48.1** Transcript of Proceedings, 14 March 2012; **E1/49.1** Transcript of Proceedings, 15 March 2012; see also E172/5 Updated Memorandum for next document hearing, 2 March 2012.

¹⁸ See **E109/4** Co-Prosecutors' Response to the Trial Chamber's Request for Documents Relating to the First Phase of Trial, 22 July 2011, at para. 3.

¹⁹ **E185** Decision on Objections to Documents Proposed to be put before the Chamber on 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, 9 April 2012, p. 17.

²⁰ **E190** Decision Concerning New Documents and Other Related Issues, 30 April 2012, paras. 24(a)(i), 27, 28; see also **E190.1** Annex: New Documents Identified by the Parties in their Revised Document Lists of July 2011.

²¹ **E96/7** Witness Statement Decision, para. 18-19.

²² *Ibid*, at para. 17.

²³ *Ibid*, at para. 20.

essentially held that written statements may be admitted without the appearance of their authors if they do not contain evidence of the acts and conduct of the Accused.²⁴

13. On 15 June and 5 July 2012 the Co-Prosecutors filed requests to admit OCIJ written records of interview relevant to phases 1 and 2 of the population movements.²⁵ On 27 July 2012, the Co-Prosecutors filed a further request to put before the Chamber additional witness statements, transcripts and complaints they considered relevant to Case 002/01.²⁶
14. On 19 October 2012, the Trial Chamber set the deadline of 26 April 2013 for any objections to evidence submitted in the form of witness statements or transcripts.²⁷ In November 2012 the Co-Prosecutors informed the Chamber and the parties, by email, that they were reviewing Annexes 12 and 13 with a view to reducing the number of proposed statements and complaints. The Co-Prosecutors requested permission to file a consolidated response to all objections to these Annexes. The Chamber accepted that proposal and set a deadline for the response of one month after the filing of all objections, or 24 May 2013, whichever date is sooner.²⁸
15. On 3 December 2012, the Trial Chamber issued its decisions on the Co-Prosecutors' First Phase **Annexes 6 - 11** and **14 - 20**, admitting all but seven documents listed therein.²⁹
16. On 8 February 2013, the Supreme Court Chamber annulled the Trial Chamber's 22 September 2011 severance order and the consequent decisions and memoranda.³⁰ On 13 March 2013, the Trial Chamber announced orally its new severance decision which includes in the scope of Case 002/01 the same three sites which were included prior to the annulment of the first severance. The Chamber has reserved its reasons for this decision.

²⁴ Ibid, at para. 22.

²⁵ **E208** Co-Prosecutors' Request to Admit Witness Statements Relevant to Phase 1 of the Population Movement, 15 June 2012; **E208/2** Co-Prosecutors' Request to Admit Witness Statements Relevant to Phase 2 of the Population Movement and Other Evidentiary Issues with Confidential Annexes I, II, III and Public Annex IV.

²⁶ **E96/8** Co-Prosecutors' Further Request to Put Before the Chamber Written Statements and Transcripts with Confidential Annexes 1 to 16, 27 July 2012.

²⁷ **E223/2** 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), 19 October 2012, at para. 14.

²⁸ **E246/1** Memorandum: Response to Motions E246 and E185/1/1 and other sundry requests concerning documents and deadlines, 13 February 2013, at para. 1.

²⁹ **E185/1** Decision on Objection to Documents Proposed to be Put Before the Chamber in Co-Prosecutors' Annexes A6-A11 and A14-A20 and by the Other Parties, 3 December 2012; **E185/1.3** Annex C-Documents Proposed by the Co-Prosecutors.

³⁰ **E163/5/1/13** Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 8 February 2013.

III. APPLICABLE LAW

A. Rules of the *ad hoc* Tribunals

17. Rule 92*bis* of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) provides for the admission of statements or transcripts in lieu of oral testimony where the statements do not go to proof of the acts and conduct of an accused as charged in the indictment. It requires the Chamber to consider whether, in addition to admitting a statement, it should require the witness to appear for examination. Rule 92*ter* allows the admission of statements or transcripts (including those containing evidence of the acts and conduct of the accused) where the witness is present in court, confirms the accuracy of the statement, and is available for examination by the Judges and the defence. Rule 92*quater* permits the admission of statements or transcripts of individuals who have died or can no longer be traced, or by reason of a medical condition are unable to testify orally.

B. Trial Chamber's Holdings

18. As noted in the Procedural History, the Trial Chamber has found these rules to strike an appropriate balance between the rights of the Accused to a fair trial and the need to ensure that proceedings are conducted expeditiously. Taking these rules and the related case law of the *ad hoc* tribunals as guidance, the Chamber made the following holdings:
- a. "written statements or transcripts proposed to be put before the Chamber 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;"³¹
 - b. "where statements instead go to proof of matters other than the acts or conduct of the accused (and are deemed *prima facie* relevant, reliable and not otherwise excluded under the Internal Rule 87(3) criteria), the Chamber will find admissible the evidence of an individual in the form of a written statement or transcript without requiring their attendance at trial and may under certain conditions rely on this material... [F]actors in favour of admitting and affording some probative value and thus weight to evidence...include whether this evidence:
 - i. is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
 - ii. relates to relevant historical, political or military background, concerns crime-base evidence or goes to proof of threshold elements of international crimes (such as the existence of an international armed conflict or the widespread or systematic nature of an attack);
 - iii. consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;
 - iv. concerns the impact of crimes upon victims; or
 - v. is impossible to subject to confrontation because its author has subsequently died, or can no longer with reasonable diligence be traced, or is medically unable to testify orally."³²

³¹ E96/7 Witness Statement Decision, at para. 22.

³² Ibid, at paras. 23, 24.

19. The Chamber additionally held that statements taken by OCIJ are entitled to a presumption of reliability, and that objections to them must allege defects with sufficient particularity and have clear relevance to the trial.³³ The Chamber held that statements of witnesses taken by entities external to the ECCC were not entitled to a similar presumption of reliability, but still may be admitted.³⁴
20. In relation to statements of witnesses who are unavailable, the Trial Chamber noted that the principles applicable at the international level permit the admission of evidence of witnesses who have died, or who can no longer be traced, or who by reason of a bodily or mental condition are unable to testify orally.³⁵ Where these statements go to the acts and conduct of the accused, their admission is not barred, but rather that element has been considered as a factor that weighs against admission.³⁶

C. Trial Chamber's Additional Holdings Regarding Case 001 Transcripts

21. The Trial Chamber found that Case 001 transcripts contain inherent indicia of reliability,³⁷ and further held:

“[T]he legal framework of other internationalized tribunals have (sic), subject to certain conditions, also permitted the use of transcripts...where the evidence of that individual in a later trial would be repetitious of their previous testimony, even if it goes to proof of the acts and conduct of the accused. In order to safeguard the expeditiousness of trial proceedings in Case 002, parties may, in accordance with this practice, therefore propose to admit transcripts of evidence from Case 001 where a rehearing of the evidence of that individual would be likely to be repetitious of their prior evidence, *where that witness is available to appear in court for cross-examination if required, and where he or she attests that the transcript in question accurately reflects what the witness would say if examined*” (emphasis added).³⁸

For completeness, the Co-Prosecutors note that the provisions of the *ad hoc* tribunals referred to by the Chamber in the above passage relate to *both* transcripts and statements.³⁹

22. Subsequent to this ruling, in its decision concerning **Annexes 6 - 11** and **14 - 20**, the Chamber admitted a number of Case 001 transcripts (Annex 11) containing evidence of the acts and conduct of the Accused.⁴⁰ In doing so, the Chamber appears to have provided an alternative to the procedure described in paragraphs 17 and 20 above.

³³ Ibid, at para. 26.

³⁴ Ibid, at para. 29.

³⁵ Ibid, at para. 32.

³⁶ Ibid, at para. 32.

³⁷ Ibid, at para. 29.

³⁸ Ibid, at para. 31.

³⁹ See Section III(A) above – Rule 92*ter*.

⁴⁰ E185/1 Decision on Objections to Documents Proposed to be Put Before the Chamber in Co-Prosecutors' Annexes A6-A11 and A14-A20 and by the Other Parties, 3 December 2012, at paras. 5(v) and (ix), and 17. The transcripts which have been admitted, and which contain evidence of the acts and conduct of the Accused, include **D288/4.26.1 (E3/2983)** – see references to the Accused at ERNs 00334501, 00334509, 00334512 and 00334519, **D288/4.27.1 (E3/2984)** – see references to the Accused at ERNs 00336866-7, 00336869,

23. In light of this latter decision on Annex 11, the Co-Prosecutors have not undertaken the same review of transcripts for identification of evidence relating to the acts and conduct of the Accused as that done in relation to statements and complaints (see Section IV below).⁴¹ However, the Co-Prosecutors are at the Chamber's disposal should a different approach be considered more appropriate for the Annex 11 documents.
24. In any event, the Co-Prosecutors respectfully request the Chamber to admit the remainder of Annex 11. The Co-Prosecutors do not propose a further reduction to this Annex given the high degree of reliability of the evidence and its relevance to findings of joint criminal enterprise (JCE), policy, and CPK / DK Authority Structure. A removal of the transcripts may also undermine a proper understanding of other S-21 evidence which has already been admitted (in Annexes 9, 10 and 11). It should be noted that a significant reduction in the testimonial evidence relating to S-21 has been effected by the Co-Prosecutors' removal of more than 100 statements relating to S-21 from Annex 12.

D. Response to Defence Objections

25. The Nuon Chea defence have raised objections to, and sought clarification about, the Trial Chamber's ruling, in particular as it relates to the operation of ICTY Rule 92bis,⁴² the admission of statements without the attendance of witnesses where the statements contain both admissible and inadmissible information,⁴³ and the types of information that constitute evidence of the acts and conduct of the Accused.⁴⁴ The Co-Prosecutors note these arguments and have briefly touched on some elements of them below, only to the extent necessary to explain the approach in the revision of Annexes 12 and 13. In order to prevent repetitious argumentation, the Co-Prosecutors reserve their position on the substantive legal issues and will respond fully after all defence objections are filed.⁴⁵

00336888-9, 00336932-3, and **D288/4.74.1 (E3/2985)** – see references to the Accused at ERN 00378508, 00378511-2, 00378517-9, and 00378536.

⁴¹ The Co-Prosecutors submit that it would be incongruous to have a set of transcripts admitted without identified sections relating to the acts and conduct of the Accused, and a second set that had been so analyzed. For reasons of uniformity, therefore, the Co-Prosecutors have not highlighted any portions of the remaining Annex 11 transcripts that may relate to the acts and conduct of the Accused. However, the Co-Prosecutors are prepared to identify such portions of the Annex 11 transcripts within a period of seven days should the Trial Chamber so request.

⁴² **E96/8/1** Preliminary Response to Co-Prosecutors' Further Request to Put Before the Chamber Written Statements and Transcripts, 8 November 2012, at paras. 6-13.

⁴³ *Ibid.*, at paras. 15-16

⁴⁴ *Ibid.*, at paras. 23-36.

⁴⁵ **E246/1** Memorandum: Response to Motions E246 and E185/1/1 and other sundry requests concerning documents and deadlines, 13 February 2013, at para. 1.

IV. THE CO-PROSECUTORS' APPROACH IN REVISING ANNEXES 12 AND 13

A. Statement Selection / Identification of Evidence Relating to the Accused

26. As indicated in paragraph 2, following an extensive review, the Co-Prosecutors have reduced the number of statements and complaints listed in Annexes 12 and 13 by over 43 per cent. A total of 1,040 statements and complaints are now proposed. As noted in paragraph 2, the Revised Annex 12 includes 17 new statements which were not available at the time of the filing of the Co-Prosecutors' Rule 80 (3) Document List.
27. The selection of the statements and complaints included in the Revised Annexes is based on the following methodology:
- a. Statements and complaints containing evidence directly relevant to Case 002/01 issues are included;
 - b. Representative samples of statements and complaints are included for crime sites in the Closing Order which do not form part of Case 002/01;⁴⁶ and
 - c. Other statements no longer deemed relevant to Case 002/01 have been removed.
28. The Co-Prosecutors respectfully submit that the admission of these statements and complaints is entirely consistent with the principles outlined by the Chamber (Section III(B) above). These documents contain important crime base evidence and evidence of the impact of crimes on victims. They are of a cumulative nature as they corroborate the testimonial and other evidence already before the Chamber. They also relate to contextual elements of crimes (for example, policies and structures of CPK / DK). Many statements also provide probative evidence regarding the historical background to the crimes.
29. A further reason for the inclusion of the representative samples described in paragraph 26(b) is to assist the Co-Prosecutors in discharging their onus of proof in relation to the existence of policies which formed part of the alleged JCE and (as an element of Crimes Against Humanity) a widespread or systematic attack against the civilian population of Cambodia. The Chamber has included these issues in the current trial.⁴⁷ The Co-Prosecutors submit that the admission of a small, representative sample of statements relating to each crime site included in the Closing Order is both reasonable and necessary.

⁴⁶ These samples are statements whose authors the Co-Prosecutors have proposed as trial witnesses for case 002 crime sites. As such, they are representative of a larger body of evidence available for each site.

⁴⁷ See, for example, E124/7.3 List of Paragraphs and Portions of the Closing Order Relevant to Case 002/01, Amended Further to the Trial Chamber's Decision on IENG Thirith's Fitness to Stand Trial (E138) and the Trial Chamber's Decision on Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163).

These documents will corroborate evidence of the nature, systematicity and scope of the crimes, and thus support the ascertainment of the truth with respect to the policies described in the Closing Order.

30. For ease of reference, a column entitled “Primary point of relevance” has been added in the Revised Annexes 12 and 13 (see also Annex A for an overview). This provides a general indication of the primary reason for the inclusion of each statement, but should by no means be considered as the only relevant reason. For example, statements relevant to a security centre will have that security centre noted as the primary point of relevance because they are representative samples of statements for that crime site. At the same time, they would be relevant to findings of policy, JCE and authority structure.
31. As noted in paragraph 2, the 1,040 statements / complaints being put forward in this filing include 170 documents (169 statements and 1 complaint) containing statements of witnesses who have already testified in this trial (Section A of the Revised Annexes). A further 11 documents are statements of witnesses who are deceased or whom the Chamber has deemed unavailable (Section D of Revised Annex 12). These documents are *prima facie* admissible in accordance with the Trial Chamber’s rulings.
32. Within the remaining 859 statements / complaints, there are a total of 220 documents (194 statements and 26 complaints) which contain evidence of the acts and conduct of the Accused. The Co-Prosecutors have produced electronic copies of these files, in which the portions containing evidence of the acts and conduct of the Accused have been identified by red highlighting (these statements are included in Sections B and C of Revised Annexes 12 and 13, and identified by a “Y” in the “Redacted Statement (Y/N)” column in these tables).⁴⁸ This enables the Chamber to review the documents and consider whether the highlighted portions are inadmissible. It also enables the defence to make specific objections should they choose to do so. This approach has been endorsed at the ICTY.⁴⁹ The documents have been placed on a shared electronic portal to which the Chamber and

⁴⁸ The actual number of files is higher because a) in some cases the Case File contains both an English summary of a DC Cam statement and a full version (the latter being a verbatim transcription of an audio recording); and b) some complaints contain more than one document that refer to the Accused.

⁴⁹ *The Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Admission of Evidence Pursuant to Rule 92 bis (A) of the Rules (Brix-Andersen), 23 January 2008, para. 15; *see also Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision Regarding Requests for Protective Measures and Prosecution’s Notices of Compliance with the Trial Chamber’s 7 October 2010 Decision, 7 December 2010, paras. 7-9 (indicating the Trial Chamber reviewed the material and then instructed the Prosecution as to redaction); *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution’s Confidential Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 bis, 12 September 2006, paras. 30, 56 (same).

the lawyers appearing in Case 002 have access. They can be accessed from the Zylab home page, under the *Case 002/01 OCP-proposed redacted statements* link. The Co-Prosecutors are not proposing that these statements be placed on the Case File at this stage, as that would cause unnecessary duplication. Instead, the Chamber may wish to place the final version of the “redacted” statements on the Case File once it has ruled on defence objections and the prosecution response.

33. For reasons of efficiency, at this stage, the 220 “redacted” documents are only produced in English. Given that all parties have a level of English language capacity, the relevant passages in Khmer and French can be identified quickly. Once a final decision is made on admission, redacted versions can be prepared in all three languages.

B. Acts and Conduct of the Accused

34. In their identification of passages which contain evidence of the acts and conduct of the Accused, the Co-Prosecutors have followed the principles set out below, which principles emerge from the jurisprudence endorsed by this Chamber.
35. The *ad hoc* tribunals have held that the phrase “acts and conduct of the accused” must be given its “ordinary meaning,” that is “deeds and behaviour of the accused himself and not the acts and conduct of his co-perpetrators and/or subordinates.”⁵⁰ The International Criminal Tribunal for Rwanda Appeals Chamber has held that:

“Rule 92bis excludes the acts and conduct of the Accused as charged in the Indictment which establish his responsibility for the acts and conduct of others, but does not exclude the acts and conduct of others

⁵⁰ *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 *bis* of the Rules; and Order for Reduction of Prosecution Witness List, 11 December 2006, para. 10; *Prosecutor v. Goran Hadžić*, IT-04-75-T, Decision on Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *bis* and Prosecution Motion to Admit GH-139’s Evidence Pursuant to Rule 92 *bis*, 24 January 2013 (hereinafter “Hadžić Decision”), para. 15; *Prosecutor v. Naser Orić*, IT-03-68-T, Decision on Defence Motion to Admit the Evidence of a Witness in the Form of a Written Statement Pursuant to Rule 92*bis*, 6 December 2005, p. 3 (“acts and conduct of the accused’ should be given its ordinary meaning, namely ‘deeds and behavior of the accused’ *stricto sensu* and not extended to acts and conduct of subordinates or co-perpetrators” (internal citations omitted)); *Prosecutor v. Naser Orić*, IT-03-68-T, Decision on Defence Motion for the Admission of the Witness Statement of Avdo Husejnović Pursuant to Rule 92*bis*, 15 September 2005, p. 3 (“the phrase ‘acts and conduct of the accused as charged in the indictment’ in Rule 92*bis*(A) of the Rules is a plain expression and should be given its ordinary meaning, that is, deeds and behaviour of the accused”); *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, First Decision on Prosecution’s Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92*bis*, 12 June 2003, para. 17 (“[N]one of the proposed Rule 92 *bis* witnesses makes any direct mention of either of the Accused, and therefore the evidence to be admitted through these witnesses does not go directly to ‘acts and conduct of the accused as charged in the indictment’.”).

for which the Accused is alleged to be responsible, for example, the acts and conduct of co-perpetrators or subordinates.”⁵¹

36. The phrase includes evidence of the acts and conduct of the accused which tends to prove that:
- a. the accused committed (that is, personally perpetrated) any of the crimes;
 - b. the accused planned, instigated, or ordered the crimes;
 - c. the accused otherwise aided and abetted those who committed the crimes in the planning, preparation, or execution of those crimes; or
 - d. in a superior or command responsibility case, the accused:
 - i. was a superior to those who actually committed the crimes;
 - ii. knew or had reason to know that those crimes were about to be or had been committed by his or her subordinates;
 - iii. failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.⁵²
37. Where a JCE is alleged, the phrase encompasses evidence of any act or conduct of the accused upon which the Prosecution relies to establish that the accused either: (a) participated in the JCE or (b) shared with the person who actually did commit the crimes the requisite intent for those crimes.⁵³
38. This evidence is to be distinguished from evidence of the acts and conduct of others who committed the crimes for which the accused is alleged to be responsible (such as his / her immediately proximate subordinates). Such evidence is not inadmissible as a result of Rule 92bis. Rather, its admission, at the *ad hoc* Tribunals, requires a consideration of whether the Chamber should exercise its discretion to call the witnesses to testify in person.⁵⁴

⁵¹ *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules; and Order for Reduction of Prosecution Witness List, 11 December 2006, para. 10; Hadžić Decision at para. 15.

⁵² Hadžić Decision at para. 15; *Prosecutor v. Naser Orić*, IT-03-68-T, Decision on Defence Motion for the Admission of the Witness Statement of Avdo Husejnović Pursuant to Rule 92bis, 15 September 2005, p. 3; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, First Decision on Prosecution’s Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92bis, 12 June 2003, para. 9.

⁵³ *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules; and Order for Reduction of Prosecution Witness List, 11 December 2006, para. 13; Hadžić Decision at paras. 15-16; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, First Decision on Prosecution’s Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92bis, 12 June 2003, para. 11.

⁵⁴ Hadžić Decision at para. 15, 29; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, First Decision on Prosecution’s Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92bis, 12 June 2003, para. 12.

C. Selection of Witnesses Who Should be Called to Testify

39. The above review process, and the Co-Prosecutors' analysis of the status of the case has revealed that additional witnesses should be called because of the value of the acts and conduct evidence they could provide (or because of their value to other pivotal aspects of the case), and to ensure that the Accused have an opportunity to test that evidence. The Co-Prosecutors identified these witnesses in a recent motion which set out a proposed plan for the completion of the trial.⁵⁵ The statements / complaints of these witnesses (excluding those relating to S-21) are listed in Section B of Revised Annex 12 and 13. They include (in Annex 12) the statements of two proposed defence witnesses.
40. With respect to other statements containing evidence of the acts and conduct of the Accused (Section C of Revised Annexes 12 and 13), it is open to the Chamber to adopt the abridged procedure it has approved in relation to transcripts (as per Rule 92*ter* of ICTY), whereby witnesses can be summoned to give very brief evidence in chief (to confirm the truth of their statements as they relate to the Accused), and then examined by the Chamber and the defence. This would permit the admission of some of the probative evidence which would otherwise be excluded.
41. As stated in paragraphs 34 - 38 above, the exclusionary rules applicable at the international level relate only to evidence of the acts and conduct of the Accused themselves. The Tribunals have been clear that, where evidence goes to the acts and conduct of subordinates of the Accused, it is within a court's discretion to admit that evidence without requiring the relevant witness to testify. In exercising this discretion, Trial Chambers have considered whether the evidence is too "pivotal to the Prosecution case" and whether the subordinate is "too proximate to the accused" to allow the statement to be admitted without examination.⁵⁶

⁵⁵ E273 Co-Prosecutors' Proposed Trial Schedule (With Confidential Annex A), 27 March 2013 – see Annex A in E273.1 for a list of the witnesses.

⁵⁶ *The Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Decision on Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *bis* and Prosecution Motion to Admit GH-139's Evidence Pursuant to Rule 92 *bis*, 24 January 2013, at para. 18; *The Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92*bis*, 12 June 2003, at para. 12; *The Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Decision on Defence Motion to Admit the Evidence of a Witness in the Form of a Written Statement Pursuant to Rule 92*bis*, 6 December 2005, at p. 3; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 *bis* of the Rules[,] and Order for Reduction of Prosecution Witness List, 11 December 2006, para. 12; see also Rule 92(C).

V. ISSUE OF WITNESS ATTESTATION

42. The Co-Prosecutors note that the Trial Chamber did not require witness attestation as provided in ICTY Rule 92*bis*(B).⁵⁷ The Co-Prosecutors agree with this approach, as it appropriately accommodates the underlying rationale of Rule 92*bis* within the structure and circumstances of the ECCC. For example, it takes due account of the fact that most of the statements and complaints in Annexes 12 and 13 were collected not by the parties or domestic law enforcement agencies (unlike the case at the *ad hoc* tribunals), but rather by court staff and external organizations seeking to create a historical record. The requirement for attestation is also superfluous where numerous statements have other indicia of reliability. For example, DC Cam statements are complete verbatim transcripts of audio recordings of interviews and there can be no credible suggestion of improper influencing of the witnesses (some of these statements also contain exculpatory evidence). The Chamber's approach also appears to take account of the fact that all statements, by virtue of their placement on the Case File, have already undergone judicial review within OCIJ.

VI. STATUS OF TRANSLATIONS

43. The majority of documents listed in the Revised Annexes 12 and 13 are available in the official languages of the Court: all but two are available in Khmer; all are available in English; and all but 37 are available in French. In some cases, partial or summary translations are currently available, while full translations are in progress. Over the past two years, the Co-Prosecutors have worked closely with the Interpretation and Translation Unit (ITU) to ensure that all the documents are translated. Unfortunately, ITU has had to extend deadlines on several occasions due to its limited resources and competing priorities.

44. On 28 February 2013, the Co-Prosecutors filed a request that the Trial Chamber establish a procedure for the admission of documents that have not been translated into all three official languages.⁵⁸ The Co-Prosecutors recall that, as confirmed by the Pre-Trial Chamber, there is no requirement, either in Cambodian or international law, for all evidence to be translated into all three official languages of the Court. Given the high percentage of translations of Annex 12 and 13 documents which are already available, and the small number of pending translations which should be completed shortly, the Co-Prosecutors invite the Chamber to admit all of the documents now. In the present circumstances, there can be no credible suggestion of a lack of fairness to the Accused.

⁵⁷ E96/7 Witness Statement Decision 20 June 2012.

⁵⁸ E223/2/6 Co-Prosecutors' Request to Establish a Procedure Regarding Admission of Documents not Translated in all ECCC Languages, 28 February 2013.

VII. CONCLUSION & REQUEST

45. The Co-Prosecutors respectfully request the Trial Chamber to:

- a. Summon the remaining witnesses whose statements are listed in Section B of Revised Annexes 12 and 13, to ensure that their evidence (particularly regarding the acts and conduct of the Accused) can be considered by the Chamber in ascertaining the truth;
- b. Consider whether additional witnesses whose statements contain evidence of the acts and conduct of the Accused (Section C of Revised Annexes 12 and 13) should be heard by way of an abbreviated procedure (as per ICTY Rule 92*ter*);
- c. Admit all the statements and complaints listed in Annexes 12 and 13 as follows:

In full:


- i. (unless already admitted) where the authors of the statements will have testified during the course of the trial (Section A and B of the Revised Annexes);
- ii. where the authors are deceased or no longer available (Section D of Revised Annex 12); and
- iii. where the authors will not have testified during the trial and where the statements do not contain evidence of the acts and conduct of the Accused (Section C of Revised Annexes 12 and 13).

Excluding the highlighted portions:

- iv. where the authors will not have testified before the Chamber and where the statements / complaints contain evidence of the acts and conduct of the Accused (Section C of Revised Annexes 12 and 13).

- d. Admit in full the remaining documents in Annex 11.

Respectfully submitted,

Date	Name	Place	Signature
9 April 2013	Chea Leang Co-Prosecutor	Phnom Penh	
	Andrew Cayley Co-Prosecutor		