

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

**FILING DETAIL**

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**OBJECTIONS TO REQUESTS TO PUT BEFORE THE CHAMBER WRITTEN  
STATEMENTS AND TRANSCRIPTS**

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## I. INTRODUCTION

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 ('OCP Original Request').<sup>1</sup> On 20 June 2012, 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').<sup>2</sup> The Co-Prosecutors thereafter sought admission of witness statements, victim complaints and 40 days of testimony from the trial in Case 001 into evidence ('OCP Further Request').<sup>3</sup> The civil parties sought admission of 3,866 civil party applications.<sup>4</sup>
2. On 19 October 2012 the Trial Chamber instructed the civil parties to file revised versions of their lists of complaints by 4 March 2013 and to further particularize the relevance of statements for which they continued to seek admission ('October Memo'). The Chamber further indicated that defence teams were entitled to file objections until 26 April 2013.<sup>5</sup>
3. On 8 November 2012, the Defence filed a preliminary response to the Co-Prosecutor's requests ('Preliminary Response').<sup>6</sup> The Preliminary Response made detailed submissions concerning the legal regime in place at the *ad hoc* tribunals and the effect of that regime on the admissibility of selected, broad categories of statements. The Defence sought clarification from the Chamber as to the applicable law and a declaration that certain categories of statements were inadmissible.<sup>7</sup>
4. On 16 November 2012, the Co-Prosecutors sought permission to respond all defence submissions concerning witness statements in one consolidated response, sometime after

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<sup>1</sup> Document No. **E-96**, 'Co-Prosecutors Rule 92 Submission Regarding the Admission of Written Statements before the Trial Chamber', 15 June 2011, ERN 00706071-00706086 ('OCP Original Request').

<sup>2</sup> 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, ERN 00812146-00812163 ('Statements Decision').

<sup>3</sup> 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, ERN 00828859-00828873; Document No. **E-208**, 'Co-Prosecutors' Request to Admit Witness Statements Relevant to Phase 1 of the Population Movement', 15 June 2012, ERN 00816842-00816851; Document No. **E-208/2**, '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' (together, 'OCP Further Request').

<sup>4</sup> 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.

<sup>5</sup> Document No. **E-223/2**, Memorandum from Trial Chamber, 19 October 2012, ERN 00852923-00852926 ('October Memo').

<sup>6</sup> 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 ('Preliminary Response').

<sup>7</sup> Preliminary Response, para. 47.

26 April 2013.<sup>8</sup> The Chamber granted that request, in effect declining to provide clarification as to the applicable law in advance of the applicable deadlines.

5. On 4 March 2013, the civil parties filed a revised list of victim complaints for which they sought admission at trial.<sup>9</sup> On 9 April 2013, the Khieu Samphan defence filed its objections to the Co-Prosecutors' statements ('Khieu Samphan Objections').<sup>10</sup> On 10 April 2013, the Co-Prosecutors filed a revised list of statements, which reduced the number of statements they sought to admit into evidence and redacted from 220 of those statements evidence of the acts and conduct of the accused ('Final Request').<sup>11</sup>

## II. RELEVANT LAW

### A. The Preliminary Response States the Correct Legal Test

#### i – The Legal Principles in the Preliminary Response Reflect the Law of the *ad hoc* Tribunals

6. The Preliminary Response includes detailed submissions as to the legal regime governing the admission of statements in place of live testimony at the *ad hoc* tribunals ('ICTY/R Rule 92bis').<sup>12</sup> The Defence incorporates those submissions herein by reference.
7. The Defence notes that the Co-Prosecutors agree with the Preliminary Response that the importance of evidence in a witness statement to the prosecution's case and its proximity to the accused are both relevant to the question of whether that statement may be admitted without cross-examination.<sup>13</sup> Indeed, courts routinely consider those factors prior to admitting a statement without cross-examination and have developed extensive guidelines in applying them.<sup>14</sup> The 'principal criterion' in that analysis 'is the overriding obligation of a Chamber to ensure a fair trial.'<sup>15</sup> As the Co-Prosecutors have recently argued and the

<sup>8</sup> Email from Bill Smith to Parties, 16 November 2012.

<sup>9</sup> Document No. E-223/2/7, 'Lead Co-Lawyers' Response to Trial Chamber Directives on the Tendering into Evidence of Civil Party Written Statements & Other Documents (with Confidential & Strictly Confidential Annexes)', 4 March 2013, ERN 0892286-0892299.

<sup>10</sup> Document No. E-277, 'Conclusions relatives au droit applicable au versement aux débats de déclarations écrites en lieu et place de témoignages oraux déposées en application de la règle 92', 9 April 2013, ERN 00897796-00897814 ('Khieu Samphan Objections').

<sup>11</sup> 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, ERN 00897846-00897861 ('OCP Final Request').

<sup>12</sup> Preliminary Response, paras 6-16, 23-27.

<sup>13</sup> OCP Final Request, para. 41.

<sup>14</sup> Preliminary Response, paras 12-13.

<sup>15</sup> *Prosecutor v. Sikirica et al.*, IT-95-8-T, 'Decision on Prosecution's Application to Admit Transcripts Under Rule 92 bis', 23 May 2001; *Prosecutor v. Brdjanin and Talic*, IT-99-36-T, 'Public Version of the Confidential Decision on the Admission of Rule 92 bis Statements Dated 1 May 2002', 23 May 2002, para. 11; *Prosecutor v. Milsoevic*, IT-02-54-T, 'Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92bis', 21 March 2002, para. 7.

Supreme Court Chamber held, a discretionary decision is reversible if it fails to take account of relevant considerations.<sup>16</sup>

ii – The Legal Principles in the Preliminary Response Should be Adopted by This Chamber

8. The Statements Decision holds that the admission of written statements at the ECCC is governed by the rules in place at other internationalized courts. The Chamber explained:

The legal framework and jurisprudence of the *ad hoc* tribunals and other internationalized tribunals have weighed numerous factors when deciding whether to admit evidence in the form of written statements or transcripts without requiring their authors to be present in court for examination. In the context of trials of mass crimes, the Trial Chamber considers these rules and jurisprudence to 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.<sup>17</sup>

9. On that basis, the legal principles set forth in the Preliminary Response, which reflect the law of the *ad hoc* tribunals, ought to control. Indeed, the Statements Decision never acknowledges any deviation from international practice. Yet the Statements Decision is inconsistent with the law of the *ad hoc* tribunals in significant ways. The Statements Decision holds that statements which do not contain evidence of the acts and conduct of the accused are admissible absent cross-examination without first considering the factors relevant to whether cross-examination is required.<sup>18</sup> The decision furthermore does not expressly accord with the certification requirement reflected in ICTY/R Rule 92*bis*(B).<sup>19</sup> These departures from international standards are unwarranted.

10. First, procedures at the ECCC are based primarily on Cambodian law.<sup>20</sup> Deviations from Cambodian law may only be made in accordance with the narrow exceptions provided for in Article 12(1) of the ECCC Agreement and Article 33*new* of the ECCC Law. Those provisions, on which the Statements Decision relied,<sup>21</sup> permit the Chamber to seek guidance in 'procedural rules established at the international level.' The scheme set out in the Statements Decision does not accord with any such procedural rules. The Chamber would therefore act beyond the limits of its jurisdiction in enforcing it.

<sup>16</sup> Document No. **E-163/5/1/1**, 'Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 with Annex I and Confidential Annex II', 7 November 2012, ERN 00859078-00859107, paras 21-41; 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, ERN 00885759-00885785, paras 35-36, 39-40, 44.

<sup>17</sup> Statements Decision, para. 20.

<sup>18</sup> Statements Decision, para. 25.

<sup>19</sup> Statements Decision, para. 29.

<sup>20</sup> ECCC Agreement, Art. 12(1) ('The procedure shall be in accordance with Cambodian law.');

ECCC Law, Art. 33*new* (trials shall be conducted 'in accordance with existing procedures in force').

<sup>21</sup> Statements Decision, fn. 37.

11. Second, the scheme set out by the Chamber is inconsistent with the minimum requirements of the right to a fair trial and thus with Article 33<sup>new</sup> of the ECCC Law.<sup>22</sup> The Statements Decision cited law from multiple sources in that regard, including the ICCPR, the European Court and the *ad hoc* tribunals.<sup>23</sup> The Chamber held that the ICCPR guarantees to the accused an ‘opportunity to question and challenge witnesses against them at some stage of the proceedings.’<sup>24</sup> That opportunity was denied during the investigation for the explicit reason that cross-examination would be available at trial:

Although confrontation at this stage of the proceedings fulfills the fundamental right of an accused person to examine or have examined the witnesses against him, as outlined in Article 14(e) of the [ICCPR], there is no absolute right to such confrontation at the judicial investigation. *For that reason, Rule 83(2) recognises the right of the accused person to examine, at the trial stage, any witness against him with whom he was not confronted during the judicial investigation. Thus, taken as a whole, the proceedings ensure full respect for the requirements of the ICCPR.*<sup>25</sup>

12. The European jurisprudence cited by the Chamber in the Statements Decision holds that the right of an accused to confront any particular witness is determined by the importance of the evidence to the case as a whole and the extent to which it was relied upon by the trial court.<sup>26</sup> The procedures in place at the *ad hoc* tribunals offer the accused the opportunity to make precisely that case: to persuade the court that the significance of the evidence in question is too great to permit admission without cross-examination.<sup>27</sup> Indeed, as the Co-Prosecutors observe, the *ad hoc* tribunals invoked the European Court

<sup>22</sup> ECCC Law, Art. 33<sup>new</sup> (ECCC ‘shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights’). *See also, Dimar Sibgatullin v. Russia*, ECtHR Application No. 1413/05, ‘Judgment’, 24 April 2012, para. 57 (Accused is entitled to ‘follow up on the manner in which the witness had been questioned by the investigator [and] test the credibility of his accusers.’).

<sup>23</sup> Statements Decision, para. 19.

<sup>24</sup> Statements Decision, para. 19.

<sup>25</sup> Document No. **A-110/1**, Memorandum from Co-Investigating Judges, 10 January 2008, ERN 00157729-00157730, p. 2 (emphasis added). The Defence sought representation at judicial interviews from the outset of the investigation and complained repeatedly and loudly about shortcomings in the methods of the investigation. *See* Document No. **A-110**, Letter re ‘Conduct of the Investigation’, 20 December 2007, ERN 00157351-00157352; Document No. **D-171/2**, ‘Notice of Joinder to Ieng Sary’s Third Request for Investigative Action’, 9 June 2009, ERN 00337488-00337489; Document No. **E-234/2**, ‘Notice of Joinder to Ieng Sary’s Request E-234’, 02 November 2012, ERN 00858861-00858876, fn. 17 (citing a series of prior requests for investigation concerning the methods of the judicial investigators).

<sup>26</sup> *Delta v. France*, ECtHR, Application No. 11144/85, ‘Judgment’, 19 December 1990, para. 37 (violation of Art. 6(3) of ECHR because courts relied on statements of witnesses whose appearance was sought by defence but refused); *Unterpertinger v. Austria*, ECtHR, Application No. 9120/80, ‘Judgment’, 24 November 1986, paras 32-33 (although written statements did not constitute the only evidence before the trial court, conviction was based ‘mainly’ on written statements of witnesses the accused was not entitled to examine); *A.S. v. Finland*, ECtHR, Application No. 40156/07, ‘Judgment’, 28 September 2010, paras 48-75 (evidence ‘normally’ should be given during public proceedings; although ‘certain measures’ are appropriate to protect a child victim, in this case there was no direct evidence other than the statement in respect of which the accused was not able to cross-examine).

<sup>27</sup> *See* Preliminary Response, paras 12-13.

in articulating their procedural scheme.<sup>28</sup> That scheme expresses the content of the fundamental right of confrontation in the context of a mass-crimes trial.

13. Third, there is no basis on which to deviate from the law of the *ad hoc* tribunals to account for the supposedly impartial nature of the judicial investigation.<sup>29</sup> The French system, from which Cambodian procedure derives, guarantees to the Accused a right of confrontation at the investigative stage.<sup>30</sup> The CIJs, both of civil law pedigree, conditioned the denial of that right on an absolute right of confrontation at the trial stage, a standard even higher than the one in place at the *ad hoc* tribunals.

### iii – The Chamber Retains Substantial Discretion Pursuant to the Statements Decision

14. The Statements Decision holds that after the Chamber concludes that a written statement does not contain evidence of the acts and conduct of the accused it must then determine in the exercise of its discretion whether it ought to be admitted.<sup>31</sup> All of the considerations cited in the Preliminary Response are relevant to that analysis and may properly form the basis of a decision not to admit a statement into evidence.<sup>32</sup>

### **B. Unnecessarily Cumulative Statements are Inadmissible**

15. The Defence concurs with the defence for Khieu Samphan that the Chamber is entitled to reject written statements where the evidence contained therein is ‘unnecessarily cumulative’ of other statements or evidence before the Chamber.<sup>33</sup> According to the *Blagojevic* Trial Chamber, the Chamber ‘may exclude evidence if the probative value is

<sup>28</sup> See OCP Original Request, para. 11.

<sup>29</sup> See OCP Original Request, paras 31-32 (suggesting that the Chamber should take account of the civil law nature of the proceedings and the supposedly impartial judicial investigation). These considerations are of course irrelevant as to any statement not taken by the Office of the Co-Investigating Judges.

<sup>30</sup> See French Code de Procédure Pénale, Art. 120 (‘Le juge d’instruction dirige les interrogatoires, confrontations et auditions. Le procureur de la République et les avocats des parties et du témoin assisté peuvent poser des questions ou présenter de brèves observations.’), Art. 82.1 (‘Les parties peuvent, au cours de l’information, saisir le juge d’instruction d’une demande écrite et motivée tendant à ce qu’il soit procédé à leur audition ou à leur interrogatoire, à l’audition d’un témoin, à une confrontation ou à un transport sur les lieux, à ce qu’il soit ordonné la production par l’une d’entre elles d’une pièce utile à l’information, ou à ce qu’il soit procédé à tous autres actes qui leur paraissent nécessaires à la manifestation de la vérité.’).

<sup>31</sup> Statements Decision, para. 24.

<sup>32</sup> *Prosecutor v. Galic*, IT-98-29-AR73.2, ‘Decision on Interlocutory Appeal Concerning Rule 92bis(C)’, 7 June 2002 (‘Galic Decision’), para. 13; *Prosecutor v. Brdjanin and Talic*, IT-99-36-T, ‘Public Version of the Confidential Decision on the Admission of Rule 92 bis Statements Dated 1 May 2002’, 23 May 2002, para. 14; *Prosecutor v. Bagosara et al.*, ICTR-98-41-T, ‘Decision on Prosecutor’s Motion for the Admission of Written Witness Statements Under Rule 92bis’, 9 March 2004, para. 14.

<sup>33</sup> Khieu Samphan Objections, para. 49 (citing *Prosecutor v. Krajisnik*, IT-00-39-T, ‘Order Relating to Prosecution Application to Admit Evidence Pursuant to Rule 92bis’, 19 July 2004, p. 2). See also *Prosecutor v. Prlic et al.*, ‘Order Clarifying 92 bis Decision and Order of 7 March 2010’, 8 July 2010, p. 5 (‘it is incumbent on the Prljak defence to exercise particular vigilance when selecting written statements or transcripts for admission pursuant to Rule 92 bis’; setting a limit of 20 statements of no more than 30 pages each).

substantially outweighed by the need to ensure a fair trial.<sup>34</sup> This feature of the Rule 92bis analysis has similarly been adopted by Chambers at ICTR.<sup>35</sup>

### III. ARGUMENT

#### A. These Objections are Timely

16. The Chamber fixed a deadline of 26 April 2013 for objections to documents tendered pursuant to the Statements Decision.<sup>36</sup> The present Objections are therefore timely.

#### B. Most of the Statements Tendered by OCP are Inadmissible

##### i – OCP Failed to Provide Timely and Adequate Reductions in Statements Tendered

17. Before proceeding to describe specific categories of objections, the Defence observes that the number of statements tendered by the Co-Prosecutors remains unmanageably large. As the Defence noted in its Preliminary Response, the number of statements tendered by the Co-Prosecutors dwarfs by many times the largest Rule 92bis submission ever made at an international court.<sup>37</sup> Despite numerous opportunities to reduce the volume of those statements, the Co-Prosecutors have failed to do so on a timely or adequate basis.

18. In April 2011, the Co-Prosecutors sought the admission of 1,829 witness statements and complaints into evidence in relation to the entirety of Case 002.<sup>38</sup> On 20 June 2012, this Chamber directed the parties to avoid seeking to introduce ‘voluminous or essentially repetitive material’, and accordingly to seek to reduce the number of statements tendered for admission.<sup>39</sup> The Co-Prosecutors nevertheless continued to seek the admission of more than 1,582 statements, or 86% of their total body of evidence, in relation to Case 002/01 alone.<sup>40</sup> The Chamber noted in October 2012 that the Co-Prosecutors had not significantly reduced the number of statements tendered, ‘despite being asked to do so.’<sup>41</sup>

<sup>34</sup> *Prosecutor v. Blagojevic and Jokic*, 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. 20.

<sup>35</sup> *Prosecutor v. Bagosara et al.*, ICTR-98-41-T, ‘Decision on Prosecutor’s Motion for the Admission of Transcripts Under Rule 92bis’, 21 May 2004, para. 10; *Prosecutor v. Rukundo*, ICTR-2001-70-T, ‘Decision on Defence Motion to Present Additional Witnesses and to File Documentary Evidence Prior to the Close of its Case’, 30 November 2007, para. 12.

<sup>36</sup> October Memo, para. 14.

<sup>37</sup> Preliminary Response, para. 3.

<sup>38</sup> OCP Final Request, para. 2.

<sup>39</sup> Statements Decision, para. 35.

<sup>40</sup> Document No. **E-96/8.2**, ‘Annex 1 – Witness Statements: Corroborative Evidence’, 27 July 2012, ERN 00859386-00859406 (listing 1,354 statements tendered for admission); Document No. **E-208.4**, ‘Annex IV’, 15 June 2012, ERN 00817029-00817029 (listing 177 witnesses whose statements were tendered for admission); Document No. **E-208/2.3**, ‘Annex III’, 5 July 2012, ERN 00822498-00822499 (listing 51 witnesses whose statements were tendered for admission).

<sup>41</sup> October Memo, para. 9.

19. Throughout January and February 2013, the Co-Prosecutors kept the parties abreast of continuing efforts to reduce that list of statements, indicating that ‘40%, and possibly more’ might be removed.<sup>42</sup> The deputy international co-prosecutor noted that this reduction would ‘significantly reduce the workload for all the parties in reviewing these statements and formulating any objections thereto.’<sup>43</sup> Shortly after the Supreme Court Chamber annulled this Chamber’s decision to sever the Case 002 trial, the Co-Prosecutors proposed delaying the procedures described in the Statements Decision and the October Memo.<sup>44</sup> The Chamber declined.<sup>45</sup> The Co-Prosecutors nevertheless chose not to file a revised list until 10 April 2013.<sup>46</sup> Even that list includes 1,040 statements, many of which continue to be of limited or no relevance to the proceedings.<sup>47</sup>

#### ii – Evidence Outside the Scope of Case 002/01 is Inadmissible

20. A substantial number of the statements tendered concern crime base evidence beyond the scope of Case 002/01. The limited probative value of those statements is outweighed by their voluminous character and the consequent difficulty in ensuring the right to a fair trial. They are therefore all inadmissible.

*The statements are of limited relevance*

21. The Chamber has long limited in-court testimony to subjects within the scope of Case 002/01.<sup>48</sup> Evidence of events outside the scope has been allowed only where relevant to administrative or military structures.<sup>49</sup> Contrary to the Co-Prosecutors’ claim,<sup>50</sup> the Chamber has expressly excluded policies outside the scope of Case 002/01 from the

<sup>42</sup> Email from Bill Smith to Parties, 24 January 2013.

<sup>43</sup> Email from Bill Smith to Parties, 24 January 2013.

<sup>44</sup> Email from Bill Smith to Parties, 14 February 2013.

<sup>45</sup> Email from Susan Lamb to Parties, 14 February 2013.

<sup>46</sup> OCP Final Request, paras 2, 4.

<sup>47</sup> See paras 20-33, *infra*.

<sup>48</sup> Document No. **E-145**, Memorandum from Trial Chamber, 29 November 2011, ERN 00756549-00756551, pp. 2-3. See also, e.g., Document No. **E-172/10**, Memorandum from Trial Chamber, 28 March 2012, ERN 00793936 (defining scope of testimony as to particular witnesses); Document No. **E-172/27**, Memorandum, from Trial Chamber, 15 June 2012, ERN 00816394-0081635 (similar); Document No. **E-1/173.1**, ‘Transcript of Trial Proceedings’, 21 February 2013, ERN 00890050-00890119, p. 22:7-11 (Co-Prosecutor noting that examination outside the scope of Case 002/01 is limited to certain witnesses).

<sup>49</sup> See e.g., Document No. **E-1/177.1**, ‘Transcript of Trial Proceedings’, 8 April 2013, ERN 00899302-00899397, pp. 19:13-21:13 (objection to questions beyond the scope overruled because relevant to structure); Document No. **E-1/159.1**, ‘Transcript of Trial Proceedings’, 13 January 2013, ERN 00879818-00879927, pp. 91:22-93:9 (similar); Document No. **E-1/150.1**, ‘Transcript of Trial Proceedings’, 7 December 2012, ERN 00870086-00870205, pp 1:23-2:5 (President reminding parties to examine only as to evacuations policy and administrative structures); Document No. **E-1/35.1**, ‘Transcript of Trial Proceedings’, 30 January 2012, ERN 00775428-00775523, pp. 59:13-19 (civil party attorney noting that questions are posed only for the purpose of establishing structure).

<sup>50</sup> OCP Final Request, para. 29.



present trial.<sup>51</sup> These limits logically apply with yet greater force to written statements, which are tendered primarily to corroborate live testimony.<sup>52</sup>

22. It is apparent that both the Co-Prosecutors' and the civil parties' requests to admit statements extends well beyond the limits of relevance delineated by the Chamber. Until just two weeks ago, the Co-Prosecutors were seeking to admit an overwhelming majority of the witness statements originally tendered into evidence prior to the severance of the Closing Order.<sup>53</sup> Their Final Request still seeks to admit evidence of all five alleged policies of Democratic Kampuchea and crime base evidence from nearly every crime site in the Closing Order.<sup>54</sup> The civil parties have sought the admission of similarly varied evidence.<sup>55</sup>
23. The Co-Prosecutors nevertheless claim that evidence beyond the scope of Case 002/01 is relevant to establish the existence of JCE policies and of a widespread and systematic attack.<sup>56</sup> They argue that facts outside the scope of the present trial are relevant as circumstantial evidence in relation to Case 002/01.<sup>57</sup> None of those submissions raise issues that do not bear on the scope of live testimony and should be considered foreclosed by standing rules concerning the scope of testimony permitted before the Chamber.<sup>58</sup>

*The statements are not cumulative to oral testimony*

24. As the Chamber has recognized, courts are required to consider the cumulative nature of witness statements relative to live in-court testimony.<sup>59</sup> The Co-Prosecutors identified some such testimony in relation to certain categories of facts beyond the scope of Case 002/01 in the annexes to their Further Request to admit statements. That evidence is, however, alternately irrelevant, contradictory and inconsistent with the Closing Order.
25. *Targeting of Buddhists (Annex 13)*: Yun Kim testified that the majority of pagodas were not destroyed<sup>60</sup> and that the prohibition on Buddhism was part of a general ban on

<sup>51</sup> Document No. **E-124/7.3**, 'Annex', ERN 00852356-00852358, points 1(vii)(limiting JCE policies to population movement phases I and II and targeting of Khmer Republic officials), 3(a) (limiting participation in common purpose to phases I and II movement of the population and targeting of Khmer Republic officials).

<sup>52</sup> OCP Original Request, para. 33(d); OCP Further Request, para. 38(b).

<sup>53</sup> See para 18, *supra*.

<sup>54</sup> See Document No. **E-278.2**, 'Overview of Revised Annexes 12 and 13', 10 April 2013, ERN 00897842-00897845.

<sup>55</sup> Document No. **E-223/2/7.2**, 'Annex 1', 4 March 2013, ERN 00892301-00892487.

<sup>56</sup> OCP Further Request, para. 12.

<sup>57</sup> OCP Original Request, paras 30-34.

<sup>58</sup> See para. 21, *supra*.

<sup>59</sup> Statements Decision, para. 24.

<sup>60</sup> Document No. **E-1/88.1**, 'Transcript of Trial Proceedings', 19 June 2012, pp. 50:25-51:17.

religious practice.<sup>61</sup> Sao Sarun testified that Buddhist practice was not prohibited by the Khmer Rouge but that the pagodas had all been eradicated by the American bombardments.<sup>62</sup> Khiev Neou testified that the practice of Buddhism continued for close to two years after the 17 April 1975<sup>63</sup> and that monks disrobed voluntarily without the use of force or coercion.<sup>64</sup> So Hong testified that he never saw punishment imposed for refusal to abandon religion, that Buddhists were not considered enemies, and that monks disrobed voluntarily prior to 1975 to join the resistance.<sup>65</sup> Ny Kan testified that pagodas were destroyed by the aerial bombardment, causing monks to join the resistance. He had ‘not heard or witnessed any ban – prohibition – concerning these religious practice.’<sup>66</sup>

26. *Targeting of Cham (Annex 14)*: Yun Kim testified that he never learned about a Cham-specific policy and that the Cham were treated identically to other Khmer.<sup>67</sup> Khiev Neou stated that he had no information about the Khmer Rouge policy toward the Cham.<sup>68</sup>

27. *Targeting of Vietnamese (Annex 15)*: Sao Sarun spoke of one incident in which Vietnamese persons were transported back to Vietnam<sup>69</sup> but testified to having no knowledge of larger policies or orders.<sup>70</sup> He also testified repeatedly that he received instructions from the Party Center to ‘resist’ the Vietnamese in the context of their invasion of Cambodia.<sup>71</sup> Klan Fit testified that he was cautioned on the one hand not to refer to the Vietnamese as ‘Yvon’ but on the other hand that they were enemies.<sup>72</sup> The Vietnamese were described as enemies more frequently beginning in 1976 or 1977 as Vietnam was accused of crossing into Cambodian territory.<sup>73</sup>

28. *Regulation of Marriage (Annex 16)*: Yun Kim testified that soldiers married he believed the women had exercised their free consent.<sup>74</sup> Sao Sarun similarly testified that marriages took place with the consent of the families and ‘most important’ the couple had to love

<sup>61</sup> Document No. E-1/88.1, ‘Transcript of Trial Proceedings’, 19 June 2012, pp. 54:24-55:6.

<sup>62</sup> Document No. E-1/82.1, ‘Transcript of Trial Proceedings’, 6 June 2012, pp. 48:10-49:4.

<sup>63</sup> Document No. E-1/90.1, ‘Transcript of Trial Proceedings’, 21 June 2012, pp. 10:21-11:12.

<sup>64</sup> Document No. E-1/90.1, ‘Transcript of Trial Proceedings’, 21 June 2012, pp. 13:23-14:25.

<sup>65</sup> Document No. E-1/66.1, ‘Transcript of Trial Proceedings’, 23 April 2012, pp. 29:23-30:20.

<sup>66</sup> Document No. E-1/78.1, ‘Transcript of Trial Proceedings’, 30 May 2012, p. 28:2-24.

<sup>67</sup> Document No. E-1/88.1, ‘Transcript of Trial Proceedings’, 19 June 2012, pp. 54:15-57:2; Document No. E-1/89.1, ‘Transcript of Trial Proceedings’, 20 June 2012, pp. 21:16-22:2.

<sup>68</sup> Document No. E-1/90.1, ‘Transcript of Trial Proceedings’, 21 June 2012, pp. 13:23-14:9.

<sup>69</sup> Document No. E-1/82.1, ‘Transcript of Trial Proceedings’, 6 June 2012, pp. 42:17-43:7.

<sup>70</sup> Document No. E-1/82.1, ‘Transcript of Trial Proceedings’, 6 June 2012, pp. 78:14-19, 84:12-85:25.

<sup>71</sup> Document No. E-1/84.1, ‘Transcript of Trial Proceedings’, 11 June 2012, p. 7:11-22; Document No. E-1/85.1, 12 June 2012, ‘Transcript of Trial Proceedings’, pp. 56:12-57:10.

<sup>72</sup> Document No. E-1/17.1, 6 December 2011, ‘Transcript of Trial Proceedings’, pp. 87:19-88:17.

<sup>73</sup> *Id.*

<sup>74</sup> Document No. E-1/88.1, ‘Transcript of Trial Proceedings’, 19 June 2012, pp. 60:15-62:7; Document No. E-1/89.1, 20 June 2012, ‘Transcript of Trial Proceedings’, pp. 20:11-21:14.

each other.<sup>75</sup> The CPLCL noted that ‘he said there were no forced marriages’.<sup>76</sup> The only reference to marriage in Khiev Neou’s testimony appears to concern his own.<sup>77</sup>

29. As the Rules of Procedure and Evidence at both the ICTY and ICTR make clear, a statement is ‘cumulative’ to oral testimony if it concerns ‘similar facts’.<sup>78</sup> The mere fact that a statement concerns the same general subject matter as the incidental testimony of a handful of witnesses is *prima facie* insufficient to satisfy that standard. Indeed, the Co-Prosecutors have urged the Chamber to admit cumulative evidence precisely because it ‘merely’ corroborates oral testimony heard at trial.<sup>79</sup> In fact the reverse is true, which turns the rationale for admitting the evidence on its head.<sup>80</sup>
30. Similar observations can be made with regard to Annexes 10 and 11 to the Co-Prosecutors’ Further Request, which concern co-operatives and worksites, and security centers and execution sites, respectively. The Co-Prosecutors fail to specify the ‘facts’ to which the witnesses identified in those annexes have testified or how the statements they seek to admit concern ‘similar’ such facts.<sup>81</sup> As the Defence has previously argued,<sup>82</sup> the Closing Order describes a wide variety of security centres, execution sites, co-operatives and worksites, each of which had widely different objectives, methods, authority structures, linkages to the center, food supplies and discipline policies.<sup>83</sup> The premise of the Co-Prosecutor’s argument – that any statement about a security center or co-operative is cumulative to the arbitrary selection of testimony concerning security centers and co-operatives heard *viva voce* by the Chamber – should be rejected.

*Admission of the statements would require a burdensome individualized assessment*

31. Each statement requires an individualized assessment with regard to evidence of acts and conduct of the Accused as well as all of the factors relevant to whether cross-examination is required.<sup>84</sup> Both the Chamber<sup>85</sup> and the Co-Prosecutors<sup>86</sup> have recognized the importance of adversarial debate prior to the admission of written statements.

<sup>75</sup> Document No. E-1/82.1, ‘Transcript of Trial Proceedings’, 6 June 2012, pp. 67:4-72:21; Document No. E-1/85.1, ‘Transcript of Trial Proceedings’, 12 June 2012, pp. 28:25-29:16.

<sup>76</sup> Document No. E-1/85.1, ‘Transcript of Trial Proceedings’, 12 June 2012, p. 35:1-3.

<sup>77</sup> Document No. E-1/90.1, ‘Transcript of Trial Proceedings’, 21 June 2012, pp. 66:7-67:25.

<sup>78</sup> See ICTY Rule 92bis(A)(i)(a); ICTR Rule 92bis(A)(i)(a).

<sup>79</sup> OCP Original Request, para. 33(d); OCP Further Request, para. 38(b).

<sup>80</sup> See Preliminary Response, para. 13(c)-(e)(evidence being contested factors against admission without cross).

<sup>81</sup> See ICTY Rule 92bis(A)(i)(a); ICTR Rule 92bis(A)(i)(a).

<sup>82</sup> Document No. E-1/172.1, ‘Transcript of Trial Proceedings’, 20 February 2013, ERN 00889786-00889915, pp. 13:17-14:25.

<sup>83</sup> Document No. D-427, ‘Closing Order’, 15 September 2010, ERN 00604508-00605246 (‘Closing Order’), paras 302-739.

<sup>84</sup> Chambers routinely evaluate the substance of each statement in order to assess the relevant factors. See e.g., *Prosecutor v. Popovic et al.*, IT-05-88-T, ‘Decision on Prosecution’s Confidential Motion for Admission of

32. The Co-Prosecutors have, however, imposed an unreasonable burden on the Defence in that regard. The Defence could not have been expected to devote sufficient resources to review nearly two thousand statements in light of the Co-Prosecutors' indications that over 40% of those statements were likely irrelevant, and that an abridged list was forthcoming. Both defence teams acted proactively to seek reductions at a much earlier stage of the proceedings.<sup>87</sup> Yet the Co-Prosecutors chose not to act until 10 April 2013.
33. The Chamber is entitled to refuse to admit written statements where their probative value is outweighed by the need to ensure a fair trial, including the right to an expeditious proceeding.<sup>88</sup> At this stage, review of each statement by both Chamber and the Defence would cause unacceptable delay, whereas admission without such review would violate the right of the Accused to examine the witnesses against him.<sup>89</sup> In light of the limited evidentiary value of statements which primarily concern facts beyond the scope of Case 002/01, the Chamber should exclude them in their entirety.

iii – Evidence of Administrative, Command and Communication Structures is Inadmissible

34. The Chamber should exercise its discretion to exclude any evidence of structure. That evidence does not concern the threshold elements of international crimes, the impact of crimes on victims, the ethnic composition of the population or crime-base evidence. In light of Nuon Chea's position in the CPK hierarchy and the modes of liability with which he is charged, structures in Democratic Kampuchea extend far beyond political or military 'background'. Rather, they constitute the principal evidence of the alleged linkages between Nuon Chea and the crimes charged.
35. The prosecution has not shown that the evidence they seek to admit is 'cumulative' to live testimony heard thus far at trial.<sup>90</sup> Very few witnesses have testified to having had first-hand knowledge of the actual authority structures or operations of the Party, as opposed

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Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92bis', 12 September 2006; *Prosecutor v. Haradinaj et al.*, IT-04-84bis-PT, 'Decision on Prosecution's Motion for Admission of Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis', 22 July 2011. Often the Chamber undertakes its own analysis *proprio motu* independent of defence objections. See e.g., *Prosecutor v. Perisic*, IT-04-81-T, 'Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 bis', 2 October 2008, para. 21.

<sup>85</sup> October Memo, paras 9, 12.

<sup>86</sup> OCP Final Request, para. 32.

<sup>87</sup> Preliminary Response; Document No. **E-223**, 'Submissions 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, ERN 00846203-00846210.

<sup>88</sup> See para. 15, *supra*.

<sup>89</sup> See para 6-13, *supra*.

<sup>90</sup> See witnesses identified in: Document No. **E-96/8.5**, 'Annex 4 Administrative Structures (Centre)', ERN 00829192; Document No. **E-96/8.6**, 'Annex 5 Administrative Structures (National)', ERN 00829193; Document No. **E-96/8.7**, 'Annex 6 Communications Structure', ERN 00829194; Document No. **E-96/8.8**, 'Annex 7 Military Structure', ERN 00829195.

to the formal positions of senior leaders. For instance, Saut Toeung did not know anything about Nuon Chea's role other than that he was 'a cadre'.<sup>91</sup> When asked how Nuon Chea 'administered people or things', he responded 'we only knew things we were supposed to know.'<sup>92</sup> He did not know which leaders from the provinces met with senior leaders in Phnom Penh, where they met, which leaders in Phnom Penh they met with or what it was they discussed.<sup>93</sup> The only substantive evidence of any reporting relationship was that he delivered letters between Duch and Nuon Chea five times in one month.<sup>94</sup>

36. So Hong testified that he had no first-hand information about the membership of the standing or central committees. He knew nothing about the 'internal arrangements' of those entities, of meetings between senior leaders after 1975, or of Nuon Chea's role, including in relation to security.<sup>95</sup> He described himself as an 'ordinary combatant' who never attended meetings of the Central Committee<sup>96</sup> and could not describe the structure of the Communist Party of Kampuchea.<sup>97</sup> Ny Kan identified Nuon Chea as an 'upper uncle', but knew nothing more about his title, role, or the locations in which he worked.<sup>98</sup> He was a 'lower-level cadre' and 'did not know the organizational structure at the upper level.'<sup>99</sup> Pean Khean testified that Pol Pot and Nuon Chea, among others, were present at K-1 and K-3 but that he did not know anything about the substance of their work, the existence of the Standing Committee, or their meetings with others.<sup>100</sup> Duch testified repeatedly that his role in and knowledge during Democratic Kampuchea was 'confined to' S-21.<sup>101</sup>

<sup>91</sup> Document No. **E-1/64.1**, 'Transcript of Trial Proceedings', 19 April 2012, p. 49:9-17.

<sup>92</sup> Document No. **E-1/64.1**, 'Transcript of Trial Proceedings', 19 April 2012, p. 72:4-16.

<sup>93</sup> Document No. **E-1/63.1**, 'Transcript of Trial Proceedings', 18 April 2012, pp. 53:6-54:5. *See also*, Document No. **E-1/64.1**, 'Transcript of Trial Proceedings', 19 April 2012, pp. 68:24-70:5 (knew that Nuon Chea sometimes called cooperative chiefs and sector committees to study in Phnom Penh but not whether 'Nuon Chea [took] any measures' in relation to them).

<sup>94</sup> Document No. **E-1/64.1**, 'Transcript of Trial Proceedings', 19 April 2012, pp. 13:22-21:16.

<sup>95</sup> Document No. **E-1/66.1**, 'Transcript of Trial Proceedings', 23 April 2012, pp. 67:17-72:16. *See also id.*, pp. 39:21-40:7 (prior to liberation of Phnom Penh, did not know what senior leaders talked about when they met or about the plan to attack Phnom Penh), p. 47:5-11 (similar); Document No. **E-1/69.1**, 'Transcript of Trial Proceedings', 26 April 2012, pp. 3:22-4:10 (he assumed senior leaders knew each other's work because he saw them together but 'did not know the details or nature of their work'); Document No. **E-1/70.1**, 'Transcript of Trial Proceedings', 30 April 2012, p. 74:12-19.

<sup>96</sup> Document No. **E-1/66.1**, 'Transcript of Trial Proceedings', 23 April 2012, p. 72:22-25.

<sup>97</sup> Document No. **E-1/70.1**, 'Transcript of Trial Proceedings', 30 April 2012, p. 63:6-8.

<sup>98</sup> Document No. **E-1/77.1**, 'Transcript of Trial Proceedings', 29 May 2012, pp. 30:12-32:11. *See id.*, p. 16:11-13 ('normally, we did not know the decision of the upper echelon').

<sup>99</sup> Document No. **E-1/78.1**, 'Transcript of Trial Proceedings', 30 May 2012, pp. 16:2-17:6.

<sup>100</sup> Document No. **E-1/72.1**, 'Transcript of Trial Proceedings', 3 May 2012, pp. 27:18-28:7; Document No. **E-1/73.1**, 'Transcript of Trial Proceedings', 17 May 2012, pp. 15:20-17:18.

<sup>101</sup> Document No. **E-1/61.1**, 'Transcript of Trial Proceedings', 9 April 2012, ERN 00800388-00800514, pp. 1:24-2:9 (during the regime, function, knowledge and movements were limited to S-21); Document No. **E1-51.1**, 'Transcript of Trial Proceedings', 20 March 2012, ERN 00792960-00793045, pp. 42:9-43:14 (similar); Document No. **E1-60.1**, 'Transcript of Trial Proceedings', 5 April 2012, ERN 00799802-00799922, pp. 67:2-20, 73:1-21, 82:24-83:25. Other witnesses identified by the Co-Prosecutors testified similarly. *See* E1/78.1, p. 90:20-91:5 (Sakim Lmut testifying that his knowledge of Khieu Samphan, Ieng Sary, Pol Pot and

37. As this selection of testimony shows, most witnesses have limited to no knowledge of the inner workings of the CPK.<sup>102</sup> They have accordingly not given evidence of ‘structure’ but of specific facts within the limited scope of their knowledge which the prosecution characterizes as pertaining to structure. The Co-Prosecutors have not specified the portions of live testimony which concern ‘structure’ or with sufficient specificity the facts contained in witness statements which are ‘similar’ to that testimony. If there are practical difficulties in doing so as a consequence of the volume of material which the Co-Prosecutors seek to admit into evidence, the Chamber should not relax the stringency of its review to accommodate that fact.<sup>103</sup>
38. Questions of structure are furthermore essential to the present trial and therefore constitute ‘live issues’ which may not be admitted in written form without cross-examination.<sup>104</sup> Many of the statements and transcripts tendered also concern structures at the highest levels of Democratic Kampuchea and implicate individuals alleged to have been closely proximate to Nuon Chea.<sup>105</sup>
39. The Defence accordingly objects to admission without cross-examination of any evidence of administrative, military or communication structures.

iv – Statements Taken by DC-Cam and Other Entities External to the ECCC are Inadmissible

40. Statements taken by DC-Cam require cross-examination.<sup>106</sup> The Director and Deputy Director of DC-Cam both testified that DC-Cam took statements not merely ‘to create a historical record’<sup>107</sup> but to compile evidence against the Accused.<sup>108</sup> As the Co-Prosecutors observe, statements at the *ad hoc* tribunals are typically taken by parties to the proceedings or domestic law enforcement, all of whom are officers of the court.<sup>109</sup> DC-Cam is an independent non-governmental organization with obligations only to its constituencies – which include largely victims – and an institutional belief in Nuon

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Nuon Chea was limited because he was at the lower level and the important tasks were handled at the upper level), 91:10-22 (never heard of Office 870 or 71).

<sup>102</sup> Those limitations are systematic in Democratic Kampuchea due to the ‘secrecy surrounding the CPK Centre.’ See Closing Order, para. 929.

<sup>103</sup> See Preliminary Response, paras 3-4 (no other international criminal prosecution has ever required the admission of this many written statements); para. 18, *supra*.

<sup>104</sup> Preliminary Response, paras 32-34.

<sup>105</sup> Preliminary Response, paras 28-36.

<sup>106</sup> Preliminary Response, paras 40-45.

<sup>107</sup> OCP Final Response, para. 42.

<sup>108</sup> Preliminary Response, paras 42-43.

<sup>109</sup> OCP Final Request, para. 42.

Chea's guilt.<sup>110</sup> These considerations should weigh heavily against admission without cross-examination.<sup>111</sup>

41. The existence of audio recordings of DC-Cam interviews is irrelevant. Cross-examination is necessary to challenge the witness's version of events and advance alternative theories.<sup>112</sup> DC-Cam interviews failed to credibly investigate the responsibility of lower-level officials, a key prong of Nuon Chea's defence.<sup>113</sup> Those concerns are not alleviated by the existence of audio recordings, which merely confirm the accuracy of the transcript.
42. DC-Cam statements are also inadmissible, along with any other statement not taken by representatives of the OCIJ, Co-Prosecutors or civil parties, because they were not witnessed by an officer of the court as required by ICTY/R Rule 92bis(B).<sup>114</sup> Such exclusion is mandated by the case law of the *ad hoc* tribunals.<sup>115</sup>

#### v – Other Objections Raised in the Preliminary Response

43. *Acts and conduct of the accused*: For reasons already stated, redactions filed by the Co-Prosecutors on 10 April 2013, ten months after reductions in the volume of material tendered were ordered by the Chamber (and five months after these specific redactions were sought by the Defence), did not provide sufficient notice to allow for adversarial review.<sup>116</sup> Those statements are accordingly inadmissible in full.<sup>117</sup>
44. *Conduct proximate to the accused*: Statements containing evidence proximate to the Accused are inadmissible.<sup>118</sup>

#### **C. The Admission of Statements Taken by OCP Investigators Would Violate the Equality of Arms**

45. In addition to and separate from the bases for exclusion provided for in the Statements Decision, any statement taken by an OCP investigator is inadmissible pursuant to Rule 87(3)(d) because to admit it would constitute a violation of the equality of arms. The equality of arms guarantees to Nuon Chea “a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial

<sup>110</sup> Preliminary Response, paras 43-44.

<sup>111</sup> ICTY Rule 92bis(A)(ii)(b); ICTR Rule 92bis(A)(ii)(b).

<sup>112</sup> 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, ERN 00718446-00718461, para. 4.

<sup>113</sup> Preliminary Response, para. 44.

<sup>114</sup> Preliminary Response, para. 14.

<sup>115</sup> Preliminary Response, para. 14 & fn. 37.

<sup>116</sup> See paras 18-19, *supra*.

<sup>117</sup> See Preliminary Response, paras 11, 15-16, 18-27.

<sup>118</sup> See Preliminary Response, paras 12-13, 28-36.

disadvantage vis-a-vis his opponent.”<sup>119</sup> That ‘fundamental [...] principle’ is recognized by the Internal Rules, the ECCC Law, the ICCPR and this Trial Chamber.<sup>120</sup>

46. The ECCC framework prohibits any party from performing its own investigation.<sup>121</sup> Although that limitation applies to all parties, the prosecution is permitted to conduct preliminary investigations in connection with its Introductory and Supplementary Submissions.<sup>122</sup> Such investigations are unavailable to the defence. The imbalance between the parties is therefore manifest; it is also substantial, since it would permit one party but not the other to select witnesses, choose questions and lead examinations, and then having done so, to tender the product of those examinations into evidence.

#### **D. Case 001 Transcripts are Inadmissible**

47. The Co-Prosecutors have sought admission of transcripts from 40 days of hearings during the Case 001 trial.<sup>123</sup> Those proceedings were held before the very same Chamber hearing the present case and litigated by the same Office of the Co-Prosecutors (with substantially similar staff). Under these conditions, the admission of transcripts would violate the equality of arms and the right to an independent and impartial tribunal.
48. ECCC jurisprudence holds that the judges of the Trial Chamber are not disqualified from presiding over the Case 002 trial notwithstanding their participation in Case 001 because they are presumed capable of assessing anew any conclusions made in the Case 001 judgment.<sup>124</sup> The Chamber is accordingly required to undertake an ‘independent review’ of ‘the evidence that is presented in *this* case.’<sup>125</sup>
49. However, under the circumstances such an ‘independent review’ is not possible. The testimony tendered into evidence by the Co-Prosecutors was elicited before this Chamber, in some cases over several days. The Chamber had the opportunity to prepare for the testimony of the witnesses, hear the examinations by both parties and ask its own questions.<sup>126</sup> Throughout this process, the Chamber was also able to observe the witnesses and draw conclusions from their demeanor regarding the credibility of their

<sup>119</sup> *Prosecutor v. Tadic*, IT-94-1-A, ‘Judgment’, 15 July 1999, para. 48, citing *Dombo Beheer v. B.V. v. The Netherlands*, ECtHR, Application No. 14448/88, ‘Judgment’, 27 October 1993, para. 40.

<sup>120</sup> See Document No. **E-212**, ‘Request for a Public Oral Hearing Regarding the Calling of Defence Witnesses’, ERN 00818577-00818588, para. 7 (citing relevant sources).

<sup>121</sup> See para. 11, *supra*.

<sup>122</sup> See Rules 50, 53, 55.

<sup>123</sup> Document No. **E-96/8.3**, ‘Annex 2 – Case 001 Trial Transcripts’, 27 July 2012, ERN 00829187-00829190.

<sup>124</sup> Document No. **E-55/4**, ‘Decision on Ieng Thirith, Nuon Chea and Ieng Sary’s Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony’, 23 March 2011, ERN 00655691-00655700 (‘Disqualification Decision’), paras 15-19.

<sup>125</sup> Disqualification Decision, paras 16, 18.

<sup>126</sup> See e.g., Document No. **D-288/4.21.1**, ‘Transcript of Trial Proceedings’, 19 May 2009; Document No. **D-288/4.22.1**, ‘Transcript of Trial Proceedings’, 20 May 2009, pp. 7-27.



testimony. The Chamber then considered and relied on this evidence in the Case 001 judgment.<sup>127</sup>

50. This crucial exposure and access to the witness, granted to both the Chamber and the Co-Prosecutors in Case 001, is unavailable to the Nuon Chea defence in Case 002. The Nuon Chea defence in Case 002 will only have the opportunity to make incidental reference to that testimony during final submissions as part of its analysis of the vast body of material before the Chamber. Under these conditions, the Defence will have no realistic opportunity to dislodge the conclusions already made by the Chamber in Case 001. Such a disadvantage places the Defence in an unequal and unfair position in relation to both the Chamber and the Co-Prosecutors.
51. For similar reasons, admission of the transcripts would entail a violation of the equality of arms. The Co-Prosecutors have already made extensive submissions to this same Chamber, in the form of their examinations during Case 001, to which the Defence will have no opportunity to respond. Nor was Duch's cross-examination a substitute for Nuon Chea's right of confrontation. Duch chose not to contest many of the allegations against him. His interests were directly antagonistic to Nuon Chea with regard to the authority of the party centre. Much of the testimony tendered by the Co-Prosecutors concerns exactly that subject.<sup>128</sup>
52. In the alternative, the admission of transcripts into evidence is subject to the same high standards applicable to witness statements.<sup>129</sup> Since the Statements Decision was issued, the Chamber has expressly reaffirmed that the principles set out therein apply to transcripts.<sup>130</sup> As the Co-Prosecutors indicate, there is furthermore no distinction in the law of the *ad hoc* tribunals between witness statements and transcripts.<sup>131</sup>

#### IV. CONCLUSION AND RELIEF REQUESTED

53. The Defence respectfully requests that the Chamber:
- i. Admit the present Objections;
  - ii. Exclude evidence of administrative, military and communication structures;

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<sup>127</sup> Case No. 001/18-07-2007/ECCC/TC, Document No. E-188, 'Judgement', 26 July 2010 ('Duch Judgment'), fns 116, 118-125, 129, 133, etc.

<sup>128</sup> Document No. E-96/8.3, 'Annex 2 – Case 001 Trial Transcripts', 27 July 2012, ERN 00829187-00829190, points 5-9.

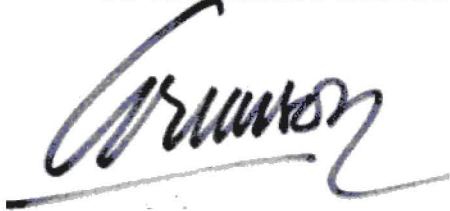
<sup>129</sup> OCP Final Request, para. 22.

<sup>130</sup> Document No. E-185/1, '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, ERN 00860704-00860713, para. 17 & fn 43.

<sup>131</sup> OCP Final Request, para. 21.

- iii. Exclude evidence beyond the scope of Case 002/01; and
- iv. Exclude all evidence tendered other than complaints and statements taken by the Office of the Co-Investigating Judges.

CO-LAWYERS FOR NUON CHEA

A handwritten signature in blue ink, appearing to read 'Arun', with a horizontal line underneath.

SON Arun

A handwritten signature in blue ink, appearing to read 'KOPPE', with a horizontal line underneath.

Victor KOPPE