

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: 27 May 2012



CLASSIFICATION

Classification of the document suggested by the filing party: PUBLIC with CONFIDENTIAL Annexes A & B

Classification by Trial Chamber: សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

**CO-PROSECUTORS' COMBINED RESPONSE TO
DEFENCE OBJECTIONS TO THE ADMISSION OF WITNESS STATEMENTS,
COMPLAINTS AND TRANSCRIPTS**

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 Om
Anta GUISSÉ
Arthur VERCKEN
Jacques VERGÈS

I – INTRODUCTION AND PROCEDURAL HISTORY

1. The Co-Prosecutors hereby respond to the objections posed by the Khieu Samphan¹ and Nuon Chea² Defence to the admission of witness statements and complaints listed in the Co-Prosecutors' Revised Annexes 12 and 13, as well as Case 001 transcripts set out in Annex 11. For brevity, the Co-Prosecutors incorporate by reference the procedural history set out in their submission of 9 April 2013,³ which contained Revised Annexes 12 and 13.
2. The thrust of the Defence's legal submissions is that the Trial Chamber has erred in its interpretation of principles governing the admission of written testimonial evidence in its decision of 20 June 2012⁴ ("Statements Decision"). The Defence effectively seek a reconsideration of the Statements Decision. They advocate an extremely expansive interpretation of the "acts and conduct" test applicable under Rule 92 *bis*(A) of the *ad hoc* tribunals. They also urge the application and significant expansion of the 92 *bis*(C) criteria, which require a separate consideration of whether authors of all written statements should be summoned for cross-examination. The Defence also assert that the admission of Case 001 transcripts would breach their clients' fair trial rights. Finally, they put forward a number of additional objections, including those based on the scope of trial and alleged unreliability of certain statements. All of these objections should be rejected. The Co-Prosecutors maintain that the Trial Chamber has acted correctly in adapting principles derived from international sources to the context of the ECCC. The Statements Decision correctly interprets the "acts and conduct" test and adequately accommodates the requirements of fair trial within the ECCC procedural model. The Co-Prosecutors invite the Chamber to reject the Defence objections and admit all the proffered statements, complaints and Case 001 transcripts.

II – GENERAL ISSUES RAISED IN DEFENCE OBJECTIONS

1. Whether the Trial Chamber's approach meets the requirements of a fair trial

3. The Nuon Chea Defence asserts that, by seeking guidance in the rules applicable at the international level, the Trial Chamber has "implanted a foreign regime based entirely on the

¹ E277 Submission Regarding Legal Standards for Admission of Written Statements in Lieu of Oral Testimonies Pursuant to Rule 92, 9 April 2013 ('E277 Khieu Samphan Submissions on Applicable Law'); E208/5 Mr. Khieu Samphan's Objections to Admitting Certain Written Statements Proposed by the Co-Prosecutors and the Civil Parties in Lieu of Oral Testimony, 26 April 2013 ('E208/5 Khieu Samphan Objections').

² E96/8/1 Preliminary Response to Co-Prosecutors' Further Request to Put Before the Chamber Written Statements and Transcripts, 8 November 2012 ('E96/8/1 Nuon Chea Preliminary Objections'); E223/2/8 Objections to Requests to Put Before the Chamber Written Statements and Transcripts, 26 April 2013 ('E223/2/8 Nuon Chea Objections 26 April 2013'); E223/2/8/1 Supplementary Annexes in Connection with Objections to Statements and Transcripts, 29 April 2013.

³ E278 Co-Prosecutors' Submission of Revised Annexes 12 and 13 of their Rule 80(3) Trial Document List (Witness Statements and Complaints), 9 April 2013 ('E278 OCP Submission of Revised Annexes 12 and 13').

⁴ 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 ('E96/7 Statements Decision').

law of the *ad hoc* tribunals” and that, in these circumstances, it “must be careful to apply the regime in its entirety.”⁵ According to the Defence, this requires the strict application of all provisions of rule 92 *bis*, including: a) an attestation requirement; and b) a consideration, with respect to each statement, of whether its author should be subjected to cross examination.⁶ As for the latter requirement, they submit that a statement “must be subject to cross examination (or otherwise excluded) if it is of sufficient importance in the context of the case against the Accused.”⁷ The Nuon Chea Defence further allege that the Statements Decision does not accord with procedural rules at the international level and is inconsistent with the requirements of a fair trial prescribed in the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR).⁸ The Khieu Samphan Defence supports these submissions, and further argues that a statement is inadmissible in the absence of cross examination if: a) it relates, *directly or indirectly*, to modes of liability alleged against the Accused; or b) it relates to “issues in dispute between the parties at trial,” including legal issues.⁹

4. As a preliminary matter, the Co-Prosecutors note that the Defence submissions amount to a request for reconsideration of the Statements Decision as to how to best implement procedural modalities derived from international courts within the unique circumstances of the ECCC. The Defence submissions do not address the legal pre-conditions applicable to such requests, such as the presentation of new arguments, or the demonstration of a clear error.¹⁰ The Co-Prosecutors note that the power to reconsider a decision is only exercised in exceptional circumstances, which have not been demonstrated by the Defence.¹¹
5. The Co-Prosecutors’ Rule 92 Submission on the Admission of Witness Statements provided a detailed overview of the applicable rules and case law at the international level.¹² The Co-Prosecutors invited the Chamber to take guidance from these rules and to adapt them to the system applicable before the ECCC, including this Court’s civil law procedure in which

⁵ E96/8/1 Nuon Chea Preliminary Objections, para. 5.

⁶ E96/8/1 Nuon Chea Preliminary Objections, paras. 6, 9, 10, 14.

⁷ According to the Nuon Chea Defence, this includes statements which describe criminal conduct that is “‘highly proximate’ to the accused” and statements which go to “any ‘live issue’ between the parties”. E96/8/1 Nuon Chea Preliminary Objections, para. 12; see also para. 13.

⁸ E223/2/8 Nuon Chea Objections 26 April 2013, paras. 10-11.

⁹ E277 Khieu Samphan Submissions on Applicable Law, paras. 12, 14 - 17; see also E208/5 Khieu Samphan Objections, paras. 20 - 21.

¹⁰ See, e.g., D250/3/2/1/8 Decision on the Reconsideration of the Admissibility of Civil Party Applications, 1 July 2011, at para. 6.

¹¹ Ibid.

¹² E96 Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber, 15 June 2011 (‘E96 Co-Prosecutors Rule 92 Submission’), at paras. 12 – 20.

- statements and other evidence are not gathered by the parties but by an independent and impartial judicial investigating body.¹³
6. The Co-Prosecutors submit that the Chamber has proceeded correctly in its approach to the admissibility of evidence in the form of witness statements. Contrary to Defence submissions, there is no requirement to apply the rules of international tribunals *in toto*. Article 33 new of the ECCC Law empowers the Chamber to seek “*guidance* in procedural rules established at the international level”¹⁴ (emphasis added). Rather than implanting a foreign set of rules into the ECCC procedure, the Chamber has appropriately based its ruling on a consideration of: a) ECCC Law, Internal Rules and the Code of Criminal Procedure; and b) the relevant international principles, which include the rules and jurisprudence of the *ad hoc* tribunals, and the principles emerging from the ICCPR and ECHR. As the Chamber noted, none of these sources provide for an absolute right to call witnesses at trial.¹⁵
 7. The Trial Chamber has a broad discretion pursuant to Rule 87 to consider admissible all evidence that is relevant and probative, “subject to the requirements of a fair and expeditious trial.”¹⁶ It noted that this principle is qualified by the criteria in Rule 87(3), holding that it would apply these criteria to decide whether written statements or transcripts may be admitted without in-court examination. It indicated that it would also use these criteria to assess what probative value should be attached to individual statements.¹⁷
 8. In considering the application of the international principles to the ECCC framework, the Trial Chamber noted with approval a Declaration of Judge O-Gon Kwon in *Milošević*, which, in the Trial Chamber’s words, observed that “a more flexible approach to the admission of witness statements enhances a Trial Chamber’s ability to manage trials of a vast scale more efficiently, that it is common practice to admit written witness statements in civil law legal systems, and that professional judges have the ability to determine the appropriate weight to be given to this evidence.”¹⁸
 9. The Trial Chamber found that, in regards to the admission of statements in lieu of oral testimony, the rules and jurisprudence of the *ad hoc* tribunals “strike an appropriate balance

¹³ Ibid, at paras. 31- 36, 41(c).

¹⁴ Law on the Establishment of the Extraordinary Chambers, Article 33 new; see also E138/1/7 Decision on Immediate Appeal Against the Trial Chamber’s Order to Release the Accused Ieng Thirith, 13 December 2011, para. 17 (noting that the Article allows the use of international sources for “guidance” and “analogy”).

¹⁵ E96/7 Statements Decision, paras. 18, 19.

¹⁶ E96/7 Statements Decision, para. 17.

¹⁷ E96/7 Statements Decision, para. 17.

¹⁸ E96/7 Statements Decision, fn. 36, citing *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution’s Request to Have Written Statements Admitted Under Rule 92 *bis*, Declaration of Judge O-Gon Kwon, 21 March 2002, para. 3.

between the Accused's fair trial rights and the efficiency of the proceedings."¹⁹ Taking this into consideration, the Chamber held that, within the ECCC legal framework, it would exclude evidence which goes to "proof of the acts and conduct of the accused as charged in the indictment" as being inconsistent with Rule 87(3)(d) of the ECCC Rules,²⁰ unless allowance is made for examination by the non-moving party.²¹

10. In further utilising the guidance derived from international sources, the Trial Chamber approved of a number of considerations that may favour "affording some probative value and thus weight to evidence in the form of a written statement or transcript."²² It indicated that factors disfavouring probative value and weight may include "the absence of oral testimony and an opportunity for confrontation,"²³ as well as the factors applied by the *ad hoc* tribunals in favour of allowing cross-examination.²⁴ The Trial Chamber appropriately noted that evidence submitted through written statements must be considered in the context of other evidence ultimately relied upon, and that "a conviction based solely or to a significant extent on statements which the Defence has not been given an adequate and proper opportunity to challenge may violate the Accused's fair trial rights."²⁵
11. In the present context, utilising guidance from international sources and adapting them to the context of the ECCC is not only entirely proper, but rational given the significant procedural and contextual differences between the *ad hoc* tribunals and the ECCC. Whereas at the tribunals most witness statements are collected by parties, all statements before the ECCC were either taken by the Office of the Co-Investigating Judges (OCIJ) or reviewed by them and assessed as relevant and reliable.²⁶ The civil law procedure applicable before the ECCC, unlike the *ad hoc* tribunals, places significant emphasis on written records which have been collected and reviewed by an impartial, judicial investigating body.²⁷ To apply the rules of the *ad hoc* tribunals *verbatim* at the ECCC would render meaningless the concept of judicial investigation, a key feature of the civil law procedure which affords extensive protections to the Defence (which protections are not available at the ICTY/ICTR).

¹⁹ E96/7 Statements Decision para. 20.

²⁰ E96/7 Statements Decision, para. 22.

²¹ E96/7 Statements Decision, para. 21, 22 & fn. 40.

²² E96/7 Statements Decision, para. 24.

²³ E96/7 Statements Decision, para. 25.

²⁴ E96/7 Statements Decision, fn. 40, (referencing factors listed under ICTY Rule 92 *bis*(A)(ii) disfavouring admission and jurisprudence describing factors favouring providing for cross-examination).

²⁵ E96/7 Statements Decision, para. 21.

²⁶ More than 63% of the statements included in the Revised Annexes 12 and 13 were taken by the OCIJ.

²⁷ The Co-Prosecutors incorporate by reference paras. 31-32 of E96 Co-Prosecutors' Rule 92 Submission.

12. Therefore, the additional procedural requirements imposed at the *ad hoc* tribunals to ensure fairness and reliability²⁸ of statements (such as the attestation requirement in Rule 92 *bis*(B) and the consideration, under Rule 92 *bis* (C), whether cross-examination is necessary) are of minimal importance to the issue of admission at the ECCC. Nevertheless, the Chamber has determined that the underlying logic of some of those factors may be helpful in determining probative value and weight to the evidence contained in witness statements - a perfectly legitimate way of ensuring that the rights of the Accused are in no way undermined.
13. As the Trial Chamber has noted, there is no absolute right to confrontation of witnesses before the ECCC and a “limitation of the right to hear all proposed witnesses, Civil Parties and experts is necessary in order to safeguard the right of the accused to an expeditious trial.”²⁹ The approach adopted by the Chamber under Rule 87(3) strikes an appropriate balance between the fair trial rights of the Accused and the goal of expediency that is the *raison d’être* of procedures allowing the admission of written evidence.

2. Application of the Acts and Conduct Test

14. The language of ICTY / ICTR Rule 92 *bis*(A) excludes from admission evidence of “acts and conduct of the accused as charged in the indictment.” As noted above, the Chamber has adopted this test within the ECCC legal framework,³⁰ ruling that statements that contain evidence of the acts and conduct of the Accused shall be regarded as “not allowed under the law” pursuant to Internal Rule 87(3)(d).³¹
15. The Khieu Samphan and Nuon Chea Defence urge the Trial Chamber to adopt a sweeping interpretation of the phrase “acts and conduct of the accused as charged in the indictment” to include evidence that does not mention the Accused, but refers to groups which the Accused were members of, as well as any evidence relating to communication and administrative structures.³² As will be demonstrated below, this is an invitation for the Chamber to depart from its prior ruling which is entirely consistent with settled case law under Rule 92 *bis*(A).
16. The jurisprudence of the *ad hoc* tribunals prescribes an interpretation of the phrase “acts and conduct of the accused” that is based on the plain wording of the provision. Under this jurisprudence, rather than encompassing the acts of individuals and bodies alleged to be associated with the Accused, the phrase is personal to the accused and limited to his / her

²⁸ See *Prosecution v. Galić*, Case No. IT-98-29-AR73.2 Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002, para. 30.

²⁹ E96/7 Statements Decision, para. 18

³⁰ E96/7 Statements Decision, para. 22.

³¹ E96/7 Statements Decision, para. 22. In addition to this requirement, statements are assessed by the Chamber against the other admissibility criteria in Internal Rule 87(3): para. 23.

³² See E277 Khieu Submission on Applicable Law paras. 19, 26; E208/5 Khieu Samphan Objections, paras. 17-19; E96/8/1 Nuon Chea Preliminary Objections, para. 27.

acts and conduct.³³ The Trial Chamber has endorsed this approach, citing with approval the decision of the ICTY Trial Chamber in *Haradinaj et al.*, where the latter held: “‘Acts and conduct of the accused’ is understood as a plain expression that should be given its ordinary meaning: deeds and behaviour of the accused, including in appropriate cases omissions.”³⁴ The Trial Chamber has also referenced the following ruling by the ICTY Trial Chamber in *Milošević*: “The phrase ‘acts and conduct of the accused’... should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or, indeed, of anybody else. Had the rule been intended to extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so.”³⁵ Several other ICTY and ICTR decisions confirm that the phrase does not include evidence of the acts and conduct of an accused’s co-perpetrators or his / her subordinates.³⁶ Indeed, as the ICTR held in *Ngirabatware*, it makes good sense to reject a “fanciful interpretation” of the acts and conduct test because “an overly broad interpretation of Rule 92 *bis* would render it inutile.”³⁷

17. Having endorsed this jurisprudence, the Chamber has also ruled that not included in the phrase “acts and conduct of the accused” is evidence which concern(s) matters “such as general policies, communication structures and the existence of a common criminal plan.”³⁸

³³ *Prosecutor v. Tolimir*, Case No. IT-05-88-T/2-T Decision on Prosecution’s Motion for Admission of Written Evidence Pursuant to Rules 92 *Bis* and 94 *Bis*, 7 July 2010, para. 30; see also *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T Decision on the Prosecutor’s Motion for Admission of Testimony of Expert Witness (Rule 92 *bis* of the Rules), 24 March 2005, para. 16.

³⁴ **E96/7** Statements Decision, fn. 39, citing *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-PT, Decision on Prosecution’s Motion for Admission of Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to 92 *bis*, 22 July 2011, para. 20.

³⁵ **E96/7** Statements Decision, fn. 39, citing *Prosecutor v. Milošević*, Case No. IT-02-54-T Decision on Prosecution’s Request to Have Written Statements Admitted Under Rule 92 *bis*, 21 March 2002, para. 22.

³⁶ *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, para. 15; *Prosecutor v. Goran Hadžić*, Decision on Prosecution Motion to Admit GH-164’s Evidence Pursuant to Rule 92 *bis*, 22 April 2013, para. 6; *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.’”).

³⁷ *Prosecutor v. Ngirabatware*, ICTR-99-54-T, Decision on Defence Motion for Admission of Written Statements, 14 May 2012, para. 15.

³⁸ **E96/7** Statements Decision, para. 21.

18. The Chamber has referenced with approval³⁹ the clear-cut elucidation of the parameters of the “acts and conduct” test established by the ICTY Appeals Chamber in *Galić*, which holds that Rule 92 *bis* excludes written statements which go to prove any act or conduct of the accused upon which the prosecution seeks to establish his liability through one of the recognised direct modes of liability.⁴⁰
19. Where an accused is alleged to have participated in a Joint Criminal Enterprise (JCE), Rule 92 *bis*(A) precludes the admission of evidence of his / her acts and conduct upon which the prosecution would rely to prove that the Accused had participated in that JCE, or “that he[*she*] shared with the person who actually did commit the crimes charged the requisite intent for those crimes.”⁴¹ Thus, where a party has claimed that evidence of actions of members of a JCE other than the accused amounted to “acts and conduct of the accused” because the accused were charged on the basis of a JCE, the ICTY rejected such a broad interpretation as “load[ing] the term ‘acts and conduct’ with legal content that is inconsistent with the Appeals Chamber’s interpretation of the term.”⁴²
20. Also as referenced by this Chamber,⁴³ where an accused is alleged to be criminally responsible based on the acts of others, evidence of “the acts and conduct of those others who commit the crimes for which the accused is alleged to be responsible” is admissible, while evidence of the acts and conduct of the accused “which establish[es] his responsibility for the acts and conduct of those others” is not admissible.⁴⁴ Further, evidence regarding the

³⁹ E96/7 Statements Decision, fn. 39, citing *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2 Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002, para. 10.

⁴⁰ See *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2 Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002, para. 10; *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Decision on Prosecution Motion to Admit GH-164’s Evidence Pursuant to Rule 92 *bis*, 22 April 2013, para. 6; *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, para. 15.

⁴¹ See E96/7 Statements Decision, fn. 39; *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2 Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002, para. 10; *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, para. 16; *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Decision on Prosecution Motion to Admit GH-164’s Evidence Pursuant to Rule 92 *bis*, 22 April 2013, para. 7.

⁴² *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Prosecution’s Motion for Admission of Written Evidence 7 October 2010, para. 42.

⁴³ See E96/7 Statements Decision, fn. 39, citing *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Prosecution’s Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 *bis* (Witnesses for Sarajevo Municipality), 15 October 2009, para. 5.

⁴⁴ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Prosecution’s Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 *bis* (Witnesses for Sarajevo Municipality), 15 October 2009, para. 5; *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, para. 15; *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T Decision on Prosecution Motion to Admit GH-164’s Evidence Pursuant to Rule 92 *bis*., 22 April 2013, para. 6.

acts and conduct of others adduced to establish the accused's state of mind (*e.g.*, knowledge that his/her acts fit into a widespread or systematic attack) is admissible.⁴⁵ In addition to these clearly delineated categories, evidence of omission (as noted above), and possibly exonerative evidence, is also encompassed by the phrase.⁴⁶

21. As indicated in the Submission of Revised Annexes 12 and 13, acting in accordance with the Statements Decision, the Co-Prosecutors have identified a total of 220 statements which contain evidence of the acts and conduct of the accused, and whose authors had not testified before the Chamber as at the time of that filing.⁴⁷ The relevant passages in these statements have been highlighted and amended copies of the statements have been made available to the Chamber and the parties. Subject to the Chamber's approval of the redactions, this approach safeguards the rights of the Accused by ensuring that evidence of their acts and conduct is excluded from the admitted statements (unless the witnesses are deceased or unavailable, in which case the evidence is admissible⁴⁸).
22. The Khieu Samphan Defence submit that "the Chamber must not adopt a restrictive approach whereby it excludes only the statements relating to the conduct – in the narrow sense of the term – of an accused,"⁴⁹ arguing that the term should be read to include "any statements relating to: 1) the administrative structures, 2) the communication structures and 3) to what is referred to in the Closing Order as the "Center" (term designating all the decision-making organs of the Democratic Kampuchea government)."⁵⁰ Tellingly, however, the Khieu Samphan Defence's sole citation for the "established case law" on acts and conduct of the accused⁵¹ is the *Milošević* decision, which is quoted above, and which cautions against an extension of Rule 92 *bis* beyond its "ordinary meaning".⁵²
23. The Nuon Chea Defence similarly argue for a broad interpretation, submitting that acts and conduct of the accused encompass any references to the "Standing, Central or Military Committee" and to "Angkar, 870, the Party Center, Senior Leaders, K-1, K-3 or any similar

⁴⁵ *Prosecutor v. Galić*, Case No. IT-98-29AR73.2 Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002, para. 11; *Prosecutor v. Galić*, Case No. IT-98-29-T Decision on the Prosecution's Request for Admission of Rule 92 *bis* Statements, 26 July 2002, para. 13.

⁴⁶ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44-D-T Decision on Nzabonimana's Motion for the Admission of Written Witness Statements, 10 May 2011, paras. 34, 37 ("the Tribunal's jurisprudence does not draw a distinction between whether the material sought to be admitted goes to prove or disprove acts and conduct of the accused"); *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2 Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002, para. 11.

⁴⁷ E278 OCP Submission of Revised Annexes 12 and 13, paras. 4, 32.

⁴⁸ E96/7 Statements Decision, para. 32.

⁴⁹ E277 Khieu Samphan Submissions on Applicable Law, para. 19.

⁵⁰ E277 Khieu Samphan Submissions on Applicable Law, para. 26.

⁵¹ E277 Khieu Samphan Submissions on Applicable Law, para. 19 & fn. 25, citing *Prosecutor v. Milošević*, Case No. IT-02-54-T Decision on Prosecution's Request to have written Statements admitted under rule 92 *bis*, 21 March 2002, para. 15.

⁵² *Milošević*, *Ibid*, at para. 22.

appellation, as well as any information received or knowledge held by Pol Pot.”⁵³ This is clearly inconsistent with settled jurisprudence and seeks to extend the phrase beyond both its logical meaning and its legal definition.

24. The Co-Prosecutors agree that sufficiently specific references to the Accused in person may be encompassed within the phrase “acts and conduct of the accused.” Thus, the example given by the Nuon Chea Defence of a statement concerning the Chairman of the People’s Representative Assembly would be subject to exclusion since there is no evidence that any person other than Nuon Chea held that role during the DK period.⁵⁴ This principle has been followed by the Co-Prosecutors in highlighting passages that relate to the acts and conduct of the Accused within the proffered witness statements and complaints.
25. This does not justify, however, the further expansion beyond the specific positions which would be in contravention of the approach adopted by the ICTY and ICTR,⁵⁵ and, most importantly, the ruling of this Chamber. Indeed, contrary to the assertion of the Nuon Chea Defence that in the *Bagasora* case the ICTR excluded the evidence of “conduct of unnamed military personnel as acts and conduct of subordinates of defendant Minister of Defence,”⁵⁶ the ICTR Trial Chamber held that the relevant statement does not go to proof of the accused’s acts and conduct as charged and is therefore admissible under Rule 92 *bis*.⁵⁷ The Nuon Chea Defence similarly misconstrue the *Brđanin* decision, which they claim excludes “evidence of unnamed ‘soldiers’ against defendant General.”⁵⁸ In fact, statements of two of the witnesses in the cited paragraphs were considered moot because they were withdrawn⁵⁹, while with respect to the second set of witnesses the Chamber noted that “the Rule does not absolutely prohibit the admission of statements that contain proof on alleged subordinates” and admitted the statements pursuant to Rule 92 *bis*.⁶⁰

⁵³ E96/8/1 Nuon Chea Preliminary Objections, para. 27 (internal quotations omitted).

⁵⁴ E96/8/1 Nuon Chea Preliminary Objections, para. 27; see *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T Decision on Prosecution’s Motion to Amend Witness List and Admit Evidence Under Rule 92 *bis*, 25 September 2003, para. 17.

⁵⁵ See *Prosecutor v. Galić*, Case No. IT-98-29AR73.2 Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002, para. 9-13; *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.

⁵⁶ E96/8/1 Nuon Chea Preliminary Objections, fn. 54.

⁵⁷ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor’s Motion for the Admission of Written Witness Statements Under Rule 92 *bis*, 9 March 2004, para. 25.

⁵⁸ E96/8/1 Nuon Chea Preliminary Objections, fn. 54.

⁵⁹ *Prosecutor v. Brđanin*, Case No. 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. 16.

⁶⁰ *Prosecutor v. Brđanin*, Case No. 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, paras. 24-26. The Nuon Chea Defence cite two other authorities for their broad interpretation of “acts and conduct.” The first, *Prosecutor v. Popović et al.*, is readily distinguishable from the statements submitted by the Co-Prosecutors. In *Popović*, the Trial Chamber held that evidence concerned a particular meeting which the Accused was alleged to have attended, and thus that “without

26. To adopt the language of the ICTY Appeals Chamber, the interpretation suggested by the Defence would “denude [Rule 92 *bis*(A)] of any real utility” and would be “inconsistent with both the purpose and the terms of the Rule.”⁶¹ The Co-Prosecutors submit that the Trial Chamber should affirm its endorsement of the correct legal test and reject the Defence submissions and the objections based on them.

3. Whether the Evidence goes to Pivotal Issues or Acts of Subordinates

27. As noted in Part II.1. above, the Defence have argued that the Chamber must apply strictly all the requirements of ICTY / ICTR Rule 92 *bis*, including the obligation to consider, in relation to each statement, whether its author should be summoned for cross examination (even if the statement does not go to the acts and conduct of the Accused). As demonstrated in Parts II.1. and II.2., the Chamber’s approach in not importing this part of the Rule appropriately reflects the differences between the procedures of the *ad hoc* tribunals and the civil law procedure of the ECCC, and is consistent with the requirements of a fair trial. The Defence’s submissions should therefore be rejected.

28. For completeness, the Co-Prosecutors note that the Defence have in any event misconstrued the scope of the considerations which would militate in favour of cross examination under Rule 92 *bis*(C). In the seminal *Galić* decision, the ICTY Appeals Chamber held that the proximity to the accused of the individual whose acts the statement describes (whether that be a subordinate, or another person in respect of whose acts the accused is charged with responsibility) is a relevant consideration in the exercise of the discretion to order cross examination. Where the evidence is so pivotal to the prosecution case, and where the individual is so proximate to the accused, the *ad hoc* tribunals may decide that the maker of the statement should be summoned to testify in person.⁶² Thus, under the ICTY / ICTR rules, a significant burden rests on the objecting party to show, in respect of each statement, why

naming him, the witness describes an event in which Popović participated.” In regards to the second decision, *Prosecutor v. Karemera*, the Co-Prosecutors submit the decision is not in keeping with the governing Appeals Chamber decision in *Galić*, and is in any case not applicable to the approach adopted by this Chamber. In *Karemera*, the court found that references to generic bodies such as “certain personalities of the government and the MRND party” went to the acts and conduct of the accused. Such an interpretation, which, again, runs counter to the interpretation of the phrase “acts and conduct of the accused” adopted by the *ad hoc* chambers cited by this Chamber, would render the 92 *bis* procedure virtually ineffectual. *Prosecutor v. 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, para. 57; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecutor’s Motion to Admit Witness Statement from Joseph Serugendo, 15 December 2006, para. 9.

⁶¹ *Prosecutor v. Galić*, Case No. IT-98-29AR73.2 Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002, para. 9.

⁶² *Ibid*, at para. 13.

the evidence is proximate to the accused or of pivotal importance to the case, and why the Trial Chamber should exercise its discretion to call the witness to testify.

29. Both the Khieu Samphan and Nuon Chea Defence submit that evidence relevant to broad topics such as CPK administrative, military and communication structures or issues in dispute should not be admitted absent cross-examination.⁶³ The argument that *any* evidence regarding such broad matters necessarily amounts to evidence of the acts of the Accused's proximate subordinates or issues so pivotal that an opportunity for in-court examination must be afforded goes beyond the requirements of Rule 92 *bis*. As the Trial Chamber correctly notes, the legal framework and jurisprudence of the *ad hoc* tribunals have not tended to exclude evidence which concerns matters such as "general policies, communication structures and the existence of a common criminal plan."⁶⁴ Therefore, even if Rule 92 *bis* (C) was applicable before the ECCC (which, in consequence of the Trial Chamber's ruling, it is not), the Defence would have failed to meet their burden by: a) framing their objections in extremely broad terms; and b) failing to demonstrate in relation to each statement why the Chamber should exercise its discretion to call the witness.
30. The Co-Prosecutors submit that all of the statements that have been proffered go to permissible issues such as crime base events, historical / military / political background, general structures and communications, the impact of crimes on victims and *chapeau* elements for Crimes Against Humanity. To the extent that a limited number of statements may contain passages which would meet the strict criteria in Rule 92 *bis* (C), their admission without examination is not precluded at the ECCC due to: a) the reliability of the statements; b) the fact that the vast majority of them were collected completely independently of the Co-Prosecutors; and c) the protections inherent in the Chamber's qualifications as to reduced probative value that may be afforded to statements admitted without cross examination.

4. General Objections as to Scope of Trial

31. The Khieu Samphan Defence submit that statements relating to crime sites outside the scope of Case 002/01 are inadmissible in this trial. They make the curious claim that, having decided to sever the case, the Trial Chamber has *de facto* determined that it "lacks jurisdiction" to consider evidence from crime sites not included in this trial.⁶⁵ They further submit that this is the first time that the Co-Prosecutors have sought to invoke the five JCE policies alleged in the Closing Order in connection with proof of a widespread or systematic

⁶³ E277 Khieu Samphan Submissions on Applicable Law, at para. 26; E208/5 Khieu Samphan Objections, at para. 19; E223/2/8 Nuon Chea Objections 26 April 2013, at paras. 34-39.

⁶⁴ E96/7 Statements Decision, at para. 21.

⁶⁵ E208/5 Khieu Samphan Objections, paras. 34-35.

attack against Cambodia's civilian population.⁶⁶ Nuon Chea also submit that statements relating to crime sites outside the scope of Case 002/01 are inadmissible, and further assert that the Chamber has excluded from the current trial consideration of any policies not concerned with the specific crime sites covered in Case 002/01.⁶⁷

32. First, the Co-Prosecutors note that the Nuon Chea Defence have previously adopted the exact opposite submission with respect to statements concerning crime sites outside Case 002/01. In their Preliminary Objections, which are incorporated by reference into their most recent filing,⁶⁸ the Nuon Chea Defence accept that statements relating to crime sites outside the scope of Case 002/01 are “likely admissible absent cross-examination...[for the purpose of proving] the existence of a widespread and (sic) systematic attack.”⁶⁹
33. Second, Nuon Chea Defence's assertion as to the exclusion of certain policies from this trial is simply false. As the Khieu Samphan Defence acknowledges, the Trial Chamber has indeed included in this trial an examination of all five CPK policies described in the Closing Order.⁷⁰ The limitation with respect to the policies which do not directly touch upon the Case 002/01 crime sites is that the Chamber will consider the development and existence of those policies, but will not enter a detailed consideration of their implementation.⁷¹ As the Chamber stated when clarifying the scope of Case 002/01, it will “give consideration to the roles and responsibilities of the Accused in relation to all policies relevant to the entire Indictment,” while restricting its “detailed factual consideration” to the policies that specifically relate to the crime sites included in Case 002/01⁷² (emphasis added). Thirdly, Khieu Samphan Defence's claim that the Chamber has divested itself of jurisdiction in relation to crime sites outside Case 002/01 is clearly without merit. While the Chamber has ruled that it will not render judgment on these additional crime sites in this trial, throughout this trial, it has admitted evidence of crimes committed throughout Cambodia as part of its consideration of CPK policies, authority structures and communications at various levels.

⁶⁶ E208/5 Khieu Samphan Objections, para. 39. It should be noted that the passage quoted by the Khieu Samphan Defence does not support their assertion. It contains the Co-Prosecutors' observation that, following the severance of the case, the criminal acts arising from the five policies will be excluded from the trial, not the existence of the policies themselves.

⁶⁷ E223/2/8 Nuon Chea Objections 26 April 2013, paras. 21-23.

⁶⁸ E223/2/8 Nuon Chea Objections 26 April 2013, para. 6.

⁶⁹ E96/8/1 Nuon Chea Preliminary Objections, para. 38.

⁷⁰ E208/5 Khieu Samphan Objections, para. 31; 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), ('E124/7.3 List of Relevant Paragraphs') para. 1(vi).

⁷¹ E141 Response to issues raised by parties in advance of trial and scheduling of informal meeting with Senior Legal Officer on 18 November 2011, 17 November 2011, at p. 2.

⁷² E124/7 Decision On Co-Prosecutors' Request For Reconsideration of the Terms of the Trial Chamber's Severance Order (E124/2) and Related Motions and Annexes, 18 October 2011, para. 11.

34. Fourthly, contrary to Khieu Samphan Defence's claim, the Co-Prosecutors have stressed their burden of proof in relation to both the five policies in the Closing Order, and the existence of a widespread or systematic attack against Cambodia's entire civilian population from the very early stages of the trial.⁷³ Furthermore, the Closing Order paragraphs which are included in this trial make the obvious connection between evidence establishing the existence of the five policies, and the finding of a widespread or systematic attack.⁷⁴
35. The admission of a small, manageable number of statements for Case 002 crime sites beyond the scope of Case 002/01 is both appropriate and necessary. Statements of individuals who witnessed the commission of crimes in furtherance of the policies described in the Closing Order are an element of proof of the *existence* of those policies. They corroborate other evidence on the Case File (such as witness and expert testimonies, contemporaneous CPK documents and Accused statements), and help the ascertainment of the truth. Furthermore, they assist the Co-Prosecutors in meeting their burden with respect to the threshold requirements of Crimes Against Humanity, a factor which the Chamber has considered as mitigating in favour of admission, and a use which Nuon Chea has previously accepted.⁷⁵
36. As the Co-Prosecutors explained in their Submission accompanying Revised Annexes 12 and 13, the statements submitted for these sites are merely a representative sample of the witness statement evidence available for each site.⁷⁶ The Defence have had access to the vast majority of these statements since the moment they were placed on the Case File - a period of well over three years.⁷⁷ In these circumstances, the admission of the statements will not represent an unreasonable burden on the Defence or the Accused.

5. General Objections as to Non-Cumulative Nature of the Evidence

37. The Nuon Chea Defence asserts that several categories of statements relating to Case 002 crime sites are inadmissible as they are not cumulative of the testimonial evidence the

⁷³ See, e.g., the submissions made by Senior Assistant Prosecutor Tarik Abdulhak on 13 March 2012: **E1/47.1** Transcript, at pp. 54-55: "An additional matter that relates to the issue of relevance is, of course, proof of contextual elements of the crimes. So putting aside Your Honours' approach in -- including in this trial elements relating to the regime, we, of course, bear the onus of proving for the purposes of crimes against humanity that there was a widespread and systematic attack as part of which these crimes were committed. Now, that is an element which we must prove. and at paragraph 1352, the Closing Order alleges that that widespread and systematic attack was directed against the entire population of Cambodia. Recalling Ieng Sary's submissions that I quoted from earlier, of course, you can't dissect this joint criminal enterprise. It is alleged to have been directed at the entire civilian population of Cambodia, and it is alleged to have lasted throughout the period covered by the indictment." (emphasis added).

⁷⁴ **D427** Closing Order, 15 September 2010, at paras. 1350 – 1361.

⁷⁵ **E96/7** Statements Decision, para. 24 (b); **E96/8/1** Nuon Chea Preliminary Objections, para. 38.

⁷⁶ **E278** OCP Submission of Revised Annexes 12 and 13, paras. 27(b), 28 and 29.

⁷⁷ The only exception to this are the 17 statements placed on the Case File during the trial, two of which have already been admitted by the Chamber in the context of live testimonies, and 15 of which were taken by the Co-Investigating Judges in Cases 003 and 004: see **E278** OCP Submission of Revised Annexes 12 and 13, para. 2.

Chamber has heard in this trial. As a preliminary observation, the Co-Prosecutors submit that the cumulative nature of witness statements should be assessed against both testimonial evidence and documentary evidence before the Court.⁷⁸ The subsections below address the categories of statements referred to in Nuon Chea's objections⁷⁹ and demonstrate that the proffered statements are cumulative of evidence before the Chamber.

38. **Targeting of Buddhists** - The Chamber has heard extensive testimonial evidence regarding the persecution of Buddhists. This evidence confirms CPK's prohibition of the Buddhist religion,⁸⁰ and includes descriptions of the forced disrobing⁸¹ and killing of monks.⁸² Witnesses have also described the destruction of pagodas,⁸³ and their conversion to non-religious uses, such as kilns,⁸⁴ pigsties,⁸⁵ and places for detention⁸⁶ or meetings.⁸⁷ Witnesses have testified that the absence of monks and religious uses of pagodas meant an end to Buddhism in Cambodia.⁸⁸ The existence of the CPK policy to suppress the Buddhist religion was confirmed by expert witness Professor David Chandler.⁸⁹
39. These testimonies are consistent with documentary evidence before the Chamber, including: CPK directives, publications and statements of leaders discussing the abandonment of Buddhism, identifying former monks as part of the "petty bourgeoisie" most likely to become CPK's enemies, and indicating that Buddhism was incompatible with the revolution.⁹⁰ This evidence is further corroborated by scholarly research which describes CPK's ill-treatment of monks, including CPK leaders' decision to defrock all of them.⁹¹

⁷⁸ The list of criteria in Rule 92 bis(A)(i) is not exhaustive.

⁷⁹ E223/2/8 Nuon Chea Objections 26 April 2013, at paras. 24 - 30.

⁸⁰ E1/88.1 Transcript, YUN Kim, 19 June 2012, at p.50; E1/90.1 Transcript, KHIEV Neou, 21 June 2012, at ERN pp.11-12.

⁸¹ E1/89.1 Transcript, YUN Kim, 20 June 2012, at p.77; E1/90.1 Transcript, KHIEV Neou, 21 June 2012, at p.9; E1/182.1 Transcript, CHHOUK Rin, 23 April 2013, at pp. 14-15; E1/185.1 Transcript, SAR Sarin, 29 April 2013, at p.10; see also E1/115.1, Transcript, EM Oeun, 27 August 2012, at p.8.

⁸² E1/51.1 Transcript, KAING Guek Eav, alias DUCH, 20 March 2012, at ERN pp.38, 42-43.

⁸³ E1/113.1 Transcript, EM Oeun, 23 August 2012, at p.72.

⁸⁴ E1/88.1 Transcript, YUN Kim, 19 June 2012, at p.52.

⁸⁵ E1/105.1 Transcript, ONG Thong Hoeung, 9 August 2012, at p.26.

⁸⁶ E1/185.1 Transcript, SAR Sarin, 29 April 2013, at p.10.

⁸⁷ E1/88.1 Transcript, YUN Kim, 19 June 2012, at p.52; E1/148.1 Transcript, PECH Srey Phal, 5 December 2012, at p.28; E1/152.1 Transcript, Denise AFFONÇO, 12 December 2012, at 78, 82, 85, 105-6.

⁸⁸ E1/88.1 Transcript, YUN Kim, 19 June 2012, at p.51-52; E1/90.1 Transcript, KHIEV Neou, 21 June 2012, at p.11-12.

⁸⁹ E1/93.1 Transcript, David Chandler, 20 July 2012, at pp.15, 123-124.

⁹⁰ E3/99 *Follow-up of implementation of the political line in mobilizing the National Democratic Front Forces of the Party (Document No. 6)*, 22 September 1975, at ERN 00244275; E3/135 *Revolutionary Flag*, Issue 6, June 1977, at ERN 00142907; E3/2306 Slavko Stanic, International Media Report entitled "A Yugoslav Journalist's Impressions on his Visit," 29 April 1978, at ERN 00010086.

⁹¹ E3/1593 Ben Kiernan, *The Pol Pot Regime*, 1996, at ERN 00678522; E3/2818 Ian Harris, *Buddhism Under Pol Pot*, 20 January 2008, especially, e.g., at ERN 00703985-90, for the defrocking of monks; ERN 00703990-2, for forced marriages of monks; and ERN 00703994, for killings of monks; see also ERN 00704021-5, for non-religious purposes to which pagodas were put.

40. **Targeting of Chams** - The evidence contained in the witness statements proffered by the Co-Prosecutors also corroborates testimonies which describe the CPK policy of targeting the Cham people as “enemies” of the regime.⁹² Expert witness, Professor David Chandler, testified that this policy was deemed necessary as “autonomous systematic communities” threatened CPK’s vision of Cambodia.⁹³ In his expert opinion, Chams were “killed without a covering statement.”⁹⁴ Witnesses have also described the mistreatment of Chams, including instances where Chams were moved forcibly,⁹⁵ and forced to abandon their religion,⁹⁶ eat pork contrary to their religion,⁹⁷ and perform labour.⁹⁸ CPK telegrams confirm that Chams were considered to be enemies of the regime,⁹⁹ and forcibly moved to the North Zone.¹⁰⁰ A May 1977 weekly report by Sector 5 indicates that, following protest by Chams against communal eating, “special measures” were taken to identify and “sweep clean” the head of their “movement.”¹⁰¹ Scholarly research also confirms this evidence of the deliberate persecution of Chams.¹⁰²
41. **Targeting of Vietnamese** - The proffered witness statements are also cumulative of testimonial evidence of CPK’s systematic targeting of the Vietnamese ethnic group. Professor David Chandler testified that the CPK developed a policy of eliminating all Vietnamese.¹⁰³ Fact witnesses have confirmed the derogatory labeling of the Vietnamese as “Yuon,”¹⁰⁴ and testified that the decisions to arrest the Vietnamese came from the Party Centre.¹⁰⁵ The CPK policy of targeting the Vietnamese is also evidenced in CPK directives that speak of the need to “whip up” the Vietnamese to “make things permanently clean,”¹⁰⁶

⁹² E1/155.1 Transcript, Suon Kanil, 17 December 2012, at pp.16-17; E1/93.1 Transcript, David Chandler, 20 July 2012, at p.122.

⁹³ E1/93.1 Transcript, David Chandler, 20 July 2012, at p.140.

⁹⁴ E1/93.1 Transcript, David Chandler, 20 July 2012, at p.151.

⁹⁵ E1/88.1 Transcript, YUN Kim, 19 June 2012, at pp.39-40.

⁹⁶ E1/58.1 Transcript, KAING Guek Eav alias Duch, 3 April 2012, at p.19.

⁹⁷ E1/144.1 Transcript, PECHUY Chipse, 14 November 2012, at p.9-10.

⁹⁸ E1/144.1 Transcript, PECHUY Chipse, 14 November 2012, at p.10.

⁹⁹ E3/952 DK Telegram from Pauk to Pol Pot, Nuon Chea, Khieu Samphan, 2 April 1976, at ERN 00182658.

¹⁰⁰ E3/154 DK Telegram 15 from Chhon to Brother Pol, 30 November 1975, at ERN 00008495.

¹⁰¹ E3/178 DK Government, Weekly Report of the Sector 5 Committee, 21 May 1977, at ERN 00342709.

¹⁰² E3/2653 Ysa Osman, *The Cham Rebellion*, at ERN 00219075; E3/1822 Ysa Osman, *Oukoubah*, at ERN 00078451.

¹⁰³ E1/93.1 Transcript, David CHANDLER, 20 July 2012, at p.146.

¹⁰⁴ E1/25.1 Transcript, KLAN Fit, 11 January 2012, at pp.54-55, 61-62.

¹⁰⁵ E1/152.1 Transcript, PHAN Van, 12 December 2012, at pp.12-13.

¹⁰⁶ E3/742 *Revolutionary Flag*, April 1977, at ERN 00478502; see also D243/2.1.16 *Revolutionary Flag*, April 1978, at ERN 00519836; E3/722 CPK Directive from Office 870 entitled “Announcement of Steady and Absolute Combat Against the Yuon Enemy Aggressors and Expansionist Land-Grabbers,” 1 January 1979, at ERN 00183666.

and reports of mass killings of Vietnamese civilians.¹⁰⁷ The Revised S-21 Prisoner Lists confirms that hundreds of Vietnamese were arrested and killed at that Security Centre.¹⁰⁸ Contemporaneous newspaper reports describe massacres of Vietnamese civilians carried out by Democratic Kampuchea forces during incursions into Vietnam.¹⁰⁹

42. **Forced Marriage** - The proffered witness statements are cumulative of testimonial evidence heard at trial of people being forced to marry individuals against their will.¹¹⁰ Expert witness Philip Short described the Party's disapproval of "romantic attachments" between couples, and the policy of marrying Khmer Rouge soldiers to young women to increase the population.¹¹¹ Furthermore, the Court has heard testimonial evidence regarding authorisation for forced marriages by CPK authorities,¹¹² and severe punishments for those who refused.¹¹³ This evidence is corroborated by CPK directives, which demonstrate that the authority to make decisions regarding matters of family building rested with the Party.¹¹⁴ Evidence in the form of scholarly research confirms that forced marriage was intended to increase the population,¹¹⁵ that marriages were often between people who had never met,¹¹⁶ and that objectors were threatened with, or were actually, tortured, raped or murdered.¹¹⁷
43. **Worksites and Security Centres** - The Nuon Chea Defence claims that, due to alleged differences between worksites, co-operatives and security centres, the Chamber should reject the premise that the proffered statements corroborate the testimonies heard thus far.¹¹⁸ This submission ignores the very nature of this case and the evidence before the Chamber. One of the issues included in this case is the existence of a CPK policy of confining the country's

¹⁰⁷ **E3/1094** DK Report from M-401 to Angkar, 4 August 1978, at ERN 00315374; see also **E3/871**, Telegram 21 from Chhon to POL Pot, 21 March 1976; **E3/243** Telegram 15 from Chhon to Brother Pol, 19 January 1978; **E3/1075** Telegram 18 from 47 to Brother, 8 April 1978.

¹⁰⁸ **E3/342** Revised S-21 Prisoner List.

¹⁰⁹ **E3/2298** Los Angeles Times, "Cambodians Counterattack into Vietnam", 16 January 1978, at ERN 00166155; **D108/28.255** New York Times, "A Vietnamese Diplomat Accuses Cambodian Troops of Atrocities," 28 April 1978, at ERN 00165998.

¹¹⁰ **E1/113.1** Transcript, EM Oeun, 23 August 2012 at p. 104; **E1/126.1** Transcript NOEM Sem, 25 September 2012 at p.28; **E1/90.1** Transcript, KHIEV Neov, 21 June 2012 at p. 67.

¹¹¹ **E1/190.1** Transcript, Philip Short, 7 May 2013 at p. 10.

¹¹² **E1/90.1** Transcript, KHIEV Neov, 21 June 2012 at p. 66; **E1/126.1** Transcript, NOEM Sem, 25 September 2012 at p. 32; **E1/110.1** Transcript, SA Siek, 20 August 2012 at p. 95; **E1/82.1** Transcript, SAO Sarun, 6 June 2012 at p. 67.

¹¹³ **E1/113.1** Transcript, EM Oeun, 23 August 2012 at p. 104.

¹¹⁴ **E3/775** *Revolutionary and Non-Revolutionary World Views Regarding the Matters of Family Building*, 2 June 1975, at ERN 00417943; **E3/765** *Revolutionary Youth* Issue 10, October 1978, at ERN 00539994.

¹¹⁵ **E3/3416** Bridgette Toy-Cronin, *I Want to Tell You*, at ERN 00449489-91; **E3/20** Elizabeth Becker, *When the War Was Over*, at ERN 00237929; **E3/2812** Henri Locard, *Pol Pot's Little Red Book*, at ERN 00394900-01.

¹¹⁶ **E3/3416** Bridgette Toy-Cronin, *I Want to Tell You*, at ERN 00449488;

¹¹⁷ **E3/2959** Nakagawa Kasumi, *Gender-Based Violence During the Khmer Rouge Regime*, at ERN 00421892-94, 919-20; **E3/3416** Bridgette Toy-Cronin, *I Want to Tell You*, at ERN 00449488 - 93; **E3/2634** Khamboly Dy, *A History of Democratic Kampuchea (1975-1979)*, at ERN 00284191; **E3/2818** Ian Harris, *Buddhism Under Pol Pot*, at ERN 00176786.

¹¹⁸ **E223/2/8** Nuon Chea Objections, 26 April 2013, at para. 30.

population within worksites and cooperatives and subjecting them to forced labour and other mistreatment.¹¹⁹ Similarly, this case concerns a policy of re-educating bad elements and smashing enemies, which was implemented in security centres throughout Cambodia.¹²⁰ The Chamber has heard testimonial evidence of the centrally devised nature of these policies.

44. Professor Chandler testified that forced labour was implemented in cooperatives and worksites throughout Cambodia pursuant to a common policy.¹²¹ Nuon Chea himself testified that one of the reasons for the evacuation of Phnom Penh was to organise people into cooperatives.¹²² Expert witness Philip Short labeled DK a “slave state” in which each cooperative and worksite was part of a policy of depriving the population of all rights and freedoms.¹²³ He further testified that, despite a degree of variation, the same CPK policies were implemented in all parts of the country.¹²⁴ He described S-21 and its associated institutions in the districts as being part of a network of centres charged with enforcing the policy of re-educating and smashing enemies.¹²⁵ Extensive documentary evidence confirms the existence of these policies and their dissemination.¹²⁶ The statements being proffered by the Co-Prosecutors help demonstrate the existence and effect of these centrally devised policies. The fact that the sites operated at different levels of the CPK authority structure merely demonstrates the widespread nature and systematicity of the JCE.

¹¹⁹ **E124/7.3** List of Relevant Paragraphs, at para. 1(vi); **D427** Closing Order, 15 September 2010, at paras. 170 - 177; **E3/748** *Revolutionary Flag*, October-November 1975, at ERN 00495813; **E3/215** *Revolutionary Flag*, September 1978, at ERN 00488636; **E3/794** DK Government Meeting Minutes entitled “Minutes of Council of Ministers, 2nd Meeting, 31 May 1976” at ERN 00182676 - 00182677.

¹²⁰ **E124/7.3** List of Relevant Paragraphs, at para. 1(vi); **D427** Closing Order, 15 September 2010, at paras. 180, 182.

¹²¹ **E1/93.1**, Transcript, David Chandler, 20 July 2012, at p.105.

¹²² **E1/21.1**, Transcript, Nuon Chea, 13 December 2011, at p.30.

¹²³ **E1/190.1** Transcript, Philip Short, 7 May 2013, at pp. 96-97; **E1/189.1** Transcript, Philip Short, 6 May 2013, at pp.58-59.

¹²⁴ **E1/190.1** Transcript, Philip Short, 7 May 2013, at pp. 83, 86, 88, and at 97: “It did emanate from the top. It could only have emanated from the top because the -- the underlying principles were the same everywhere. Everyone -- well, the overwhelming majority because there was always a tiny group who were exceptions for one reason or another; the leaders, those high up in the Party, certain very privileged workers had a greater degree of freedom and so on, but the -- really 99 percent of the population, the overwhelming mass, were all slaves in the sense that they had no choice over any aspect of their -- of their lives.”

¹²⁵ **E1/191.1** Transcript, 8 May 2013, Philip Short, at p.10.

¹²⁶ As to worksites, see, e.g., **E3/201** Phnom Penh Domestic Service broadcast entitled “Khieu Samphan's Speech at Anniversary Meeting,” 15 April 1977, at ERN 00419514; **E3/759** *Revolutionary Flag* Issue 4, April 1976, at ERN 00517870; **E3/748** *Revolutionary Flag* Special Issue, October - November 1975, at ERN 00495827; **E3/734** *Revolutionary Youth* Issue 7, July 1976, at ERN 00360779, 00360798-00360800. As to policy on enemies, see, e.g., **E3/196** Statement of NUON Chea entitled “Statement of the Communist Party of Kampuchea to the Communist Workers’ Party of Denmark,” 30 July 1978 at ERN 00762402; **E3/201** Phnom Penh Domestic Service broadcast entitled “Khieu Samphan's Speech at Anniversary Meeting,” 15 April 1977, at ERN 009419512-00419513; **E3/748** *Revolutionary Flag* Special Issue, October - November 1975, at ERN 00495802; **E3/4** *Revolutionary Flag* Issue 7, July 1976, at ERN 00268921; **E3/135** *Revolutionary Flag* Issue 6, June 1977, at ERN 00446876.

III – FURTHER AND SPECIFIC DEFENCE OBJECTIONS

1. Khieu Samphan’s Document - Specific Objections

Overview

45. The Khieu Samphan Defence has submitted five annexes containing objections to a number of statements submitted by the Co-Prosecutors prior to the revision of Annexes 12 and 13 - namely, Co-Prosecutors’ filings E208 of 15 June 2012, E208/2 of 5 July 2012 and E96/8 of 27 July 2012.¹²⁷ The objections therefore relate to tables which have been superseded by Revised Annexes 12 and 13. The Khieu Samphan Defence states that it has also not presented specific objections regarding many written statements because: a) some of the statements fall outside the scope of Case 002/01;¹²⁸ b) the Co-Prosecutors have failed to identify passages relating to the acts and conduct of the Accused;¹²⁹ and c) certain categories of statements relate to essential elements of the prosecution’s case or acts and conduct of the Accused, and as such cannot be admitted without cross examination of their authors.¹³⁰
46. Khieu Samphan Defence’s use of the superseded annexes renders many of their objections moot (*e.g.* as to statements which are not included in the Revised Annexes), or invalid (*e.g.* because the Defence fails to take into account the proposed redactions which the Co-Prosecutors have made to remove evidence of the acts and conduct of the Accused). The remaining objections should be rejected because they are vague and lacking specificity, and / or because they propose an approach which is inconsistent with the Statements Decision.
47. The Defence claims that it has been forced to formulate its objections on the basis of the now superseded tables because the Co-Prosecutors failed to meet the “deadline” for the filing of their Revised Annexes.¹³¹ The Co-Prosecutors note that no deadline was set for the revision of Annexes 12 and 13. Rather, responding to a request from the Trial Chamber to consider proposing representative samples¹³² where evidence is voluminous, the Co-Prosecutors undertook an exercise which resulted in a reduction of over 40 percent in the number of

¹²⁷ These Khieu Samphan objections are contained in the following Annexes are: a) Annex **E208/5.2** - objections to written statements listed in the Co-Prosecutors’ Annex E208/1, which related to the first phase population movement; b) Annex **208/5.6** - objections to written statements listed in the Co-Prosecutors’ Annex 208/2, which related to the population movements which took place prior or simultaneously with the first forced movement; c) Annex **208/5.3** - objections to written statements listed in the Co-Prosecutors’ Annex **E208/2.1**, which related to the second phase population movement; d) Annex **208/5.4** - objections to statements listed in the Co-Prosecutors’ Annex E96/8.10, which related to the CPK policy on the movements of population; and e) Annex **208/5.5** - objections to statements listed in the Co-Prosecutors’ Annex E96/8.13, which related to the CPK policy of targeting specific groups.

¹²⁸ **E208/5** Khieu Samphan Objections, para. 35 – in relation to Annexes 8, 10-11 and 13-16 of E96/8.

¹²⁹ **E208/5** Khieu Samphan Objections, para. 23 – in relation to Annex 3 of E96/8.

¹³⁰ **E208/5** Khieu Samphan Objections, paras. 24 – 26 – in relation to Annexes 4 to 7 of E96/8.

¹³¹ **E208/5** Khieu Samphan Objections, paras. 9, 10 and 12.

¹³² **E223/2** Trial Chamber Memorandum entitled “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. 7.

statements and complaints being put forward. This exercise also involved the highlighting, in the statements, of all passages containing evidence of the acts and conduct of the Accused.¹³³ Starting from 16 November 2012, the Co-Prosecutors provided regular updates on this project, keeping the Chamber and the parties informed about its progress, the extent of the likely reductions, and the indicative date of completion.¹³⁴

48. The Co-Prosecutors submit that the Defence has had ample opportunity to transfer any objections already prepared to the Revised Annexes. It was also open to the Khieu Samphan Defence to seek a modest extension of time to update its annexes. It elected not to do so. The Nuon Chea Defence has submitted its objections to Revised Annexes 12 and 13 without even a request for an extension of time.
49. It should be noted that Annexes 12 and 13 were first filed by the Co-Prosecutors as part of their Rule 80 Document List on 19 April 2011. On 19 October 2012 the Trial Chamber set the deadline of 26 April 2013 for the filing of Defence objections to the statements in these annexes. The Khieu Samphan Defence have therefore been on notice of the Co-Prosecutors' proposed statements for two years, have been aware of the deadline for their objections for over six months, and have also been aware, since November 2012, of the planned reductions to the Co-Prosecutors' Annexes. Despite this, they appear to have made no attempt whatsoever to submit relevant objections, filing instead a set of annexes in which as many as 65% of the objections are either entirely invalid or moot, while applying an erroneous legal test in their remaining objections. Khieu Samphan Defence's actions expose a lack of diligence and good faith which should be not be tolerated by the Chamber.
50. Various categories of objections made by the Khieu Samphan Defence are dealt with briefly in individual subsections below.

Objections to statements not included in the Revised Annexes

51. A total of 82 objections in the Khieu Samphan Defence's filing relate to 79 statements which are not listed in Revised Annexes 12 and 13. All of these objections are moot. For convenience, they are listed in Section I of Annex A.

Unstated objections

52. The Defence has failed to specify any objection with respect to nine statements with which it apparently takes issue. Since the Trial Chamber cannot speculate as to the basis for the

¹³³ E278 OCP Submission of Revised Annexes 12 and 13, paras. 4 and 32.

¹³⁴ See Deputy Prosecutor William Smith's emails to Susan Lamb and the parties sent on 16 November 2012, 22 November 2012, 24 January 2013 (indicating that "due to the recent changes in the trial schedule, the Co-Prosecutors have had to postpone some of the work on this project in order to prepare urgently for document presentations (and alternative witnesses)"), 14 February 2013.

Defence's challenge to those statements, the objections should be deemed invalid. These documents are listed in Section II of Annex A.

Objections to documents already admitted

53. Ten written statements objected to by the Defence were made by individuals who have testified before the Trial Chamber in this trial. Those statements will therefore have already been admitted.¹³⁵ They are listed in Section III of Annex A.
54. Khieu Samphan Defence's Annex E208/5.3 contains six objections to statements in excerpts from the book *The Cham Rebellion*,¹³⁶ which passages have been authenticated by their authors. This objection is invalid since the book in question has already been admitted by the Trial Chamber as relevant and reliable.¹³⁷ The excerpts are listed in Section IV of Annex A.

Deceased Witnesses

55. Section D of the Co-Prosecutors' Revised Annex 12 lists a number of persons who are deceased or no longer available to testify. From this list, the Defence objects to statements of four individuals, including Pol Pot. These are listed in Section V of Annex A.
56. As noted in the Co-Prosecutors' Submission of Revised Annexes 12 and 13, the Trial Chamber has endorsed the international rules pursuant to which a statement or transcript of testimony of a deceased or unavailable witness is admissible, including where it contains evidence of the acts and conduct of the Accused.¹³⁸
57. The Co-Prosecutors agree that Pol Pot's statements could be placed into a category other than witness statements. They are not statements in the form of a witness interview by a court investigator or external researcher. Nevertheless, they are relevant and contain probative evidence as they emanate from a senior CPK leader and deal with matters such as CPK policies and history. The Co-Prosecutors invite the Chamber to admit them pursuant to the ordinary application of Rule 87(3), or as statements of an individual who is deceased.
58. The Co-Prosecutors submit that it is in the interests of justice for the Chamber to admit all statements of witnesses who are deceased or unavailable. Given the passage of time since the events which are the subject of this trial, it is to be expected that many witnesses, including those who gave statements during the judicial investigation, are no longer available. To exclude their statements would deprive the Chamber of relevant material and undermine the ascertainment of the truth. The Chamber has ruled that the fact that the author of a statement has not been subjected to in-court examination may affect the weight attributed to such a

¹³⁵ See **E1/57.1** Transcript, 2 April 2012, at pp. 89-90; **E96/7** Statements Decision, para. 2; see also para. 26.

¹³⁶ **E3/2653, D196.2** YSA Osman, *The Cham Rebellion: Survivors' Stories from the Villages*, 2006.

¹³⁷ **E185/1**, Trial Chamber 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; **E185/1.3**, Annex C: Documents Proposed by the Co-Prosecutors, at ERN 00884514.

¹³⁸ **E96/7** Statements Decision, para. 32.

statement. It is submitted that this sufficiently safeguards the rights of the Accused with respect to the statements of witnesses who are deceased / unavailable.

Objections in Annexes E208/5.4 and E208/5.5 are vague and lack specificity

59. While Khieu Samphan's Annexes E208/5.2, E208/5.3 and E208/5.6 contain objections to specific passages within witness statements and complaints, Annexes E208/5.4 and E208/5.5 make no reference to specific passages and contain broad objections which are formulated on the basis of incomplete witness summaries and / or incorrect legal criteria.
60. By way of example, in Annex 208/5.4 the Defence summarises a complainant's statement as follows: "Complaint - Four or five days after the liberation, on National Road Nr 1, the Khmer Rouge, using loudspeakers, made announcements requesting singers and troops holding the ranks of Second Lieutenant to Colonel to gather at Chbar Ampov under the pretext to take them to work to Phnom Penh. All of them died."¹³⁹ The Defence objects to the complaint on the following grounds: "The statement goes beyond the scope of the trial as defined by the Chamber in E124/7 and E124/7.3 (paras. 28-41)."¹⁴⁰ First, the objection is apparently based on the erroneous implication that the evacuation of Phnom Penh and arrests / killings of Khmer Republic soldiers are outside the scope of Case 002/01. Second, the objection lacks specificity – it fails to explain which specific facts the Defence takes issues with. And third, the objection fails to take into account relevant evidence contained in the complaint, including inhumane conditions to which Phnom Penh evacuees were subjected.
61. A second example illustrates this lack of specificity with respect to statements alleged to contain evidence of the acts and conduct of the Accused. In Annex E208/5.5, the Defence objects to statement D25/29 (the substance of the testimony being in D125/123).¹⁴¹ The witness was detained at the Kraing Ta Chan Security Centre and describes the conditions in which prisoners were detained, the torture and rape inflicted on them, as well as executions following receipt of letters from the local district. The witness states that Ta Mok, Secretary of the Southwest Zone, visited the Security Centre. The Defence objects to this statement on the basis that evidence of the acts and conduct of the Accused cannot be admitted unless the Defence has the opportunity to cross examine the author of the statement.¹⁴² However, no details are provided as to which part of the statement supposedly contains this type of information. The statement in fact does not refer to the Accused at all.
62. The Chamber should therefore reject the objections contained in Annexes E208/5.4 and E208/5.5 as vague and lacking specificity and / or being based on the wrong legal criteria.

¹³⁹ Unofficial translation from French. Annex **208/5.4**, objection to D230/2/3.1.643a, b at ERN 00898610.

¹⁴⁰ Unofficial translation from French. Annex **E208/5.4**, objection to D230/2/3.1.643a, b, at ERN 00898610.

¹⁴¹ Annex **E208/5.5**, objection to D25/29, at ERN 00898611-12.

¹⁴² Unofficial translation from French original.

Objections based on the wrong legal test and misinterpretation of the scope of trial

63. A total of 115 objections remain once those in the sections immediately above are dispensed with. Within this group, 24 objections relate to statements which the Defence alleges contain evidence of the acts and conduct of the Accused. As discussed in Part II.2. above, the Khieu Samphan Defence has argued for an unduly expansive definition of this phrase. Essentially, the Defence asserts that all passages containing terms such as “Angkar,” “upper level,” and “upper echelon,” or describing orders issued by lower level CPK cadres amount to evidence of the acts and conduct of the Accused. Such objections are contrary to the legal definition of the term “acts and conduct of the accused as charged in the indictment” as enunciated by the *ad hoc* tribunals and endorsed by the Trial Chamber.
64. Out of the 24 statements referred to above, 15 do not contain any evidence of the acts and conduct of the Accused as understood under the correct legal test.¹⁴³ The remaining nine objections relate to statements that do contain evidence of the acts and conduct of the Accused, which evidence has been identified and proposed for redaction by the Co-Prosecutors. The Defence objects to passages other than those already redacted because it has applied the wrong legal test.¹⁴⁴
65. Two examples illustrate Khieu Samphan Defence’s application of the wrong legal test:
- a. In Annex E208/5.2, the Defence objects to an extract from statement D40/8 on the basis that it contains evidence of the acts of conduct of the Accused. The extract describes the evacuation by the Khmer Rouge of a pagoda in April 1975, and makes references to “Angkar.” As demonstrated in Part II.2., references to bodies, organisations or groups of which the Accused are alleged to have been members do not qualify as evidence of the acts and conduct of the Accused themselves.
 - b. In Annex E208/5.6, the Defence argues that an extract from statement E3/428, which describes evacuation orders issued at regimental level in Kampot, is inadmissible absent cross examination of the author. Again, no mention is made of the acts and conduct of the Accused and the objection is therefore invalid.¹⁴⁵
66. Most of the remaining objections relate to extracts of statements which describe the discriminatory treatment of the “17 April People,” “New People” or officials of the Khmer

¹⁴³ In Annex E208/5.2: objections to D232/40, at ERN 00898437; D125/93, at ERN 00898439; D40/8, at ERN 00898441; D232/89, at ERN 00898443; D277/2, at ERN 00898448; D166/110, at ERN 00898450; D246/7, at ERN 00898471; D232/70, at ERN 00898477; D125/177, at ERN 00898484; D232/64, at ERN 00898517; D296/2, at ERN 0089851; in Annex E208/5.3: D232/79, at ERN 00898526-29; D232/74, at ERN 00898547; in Annex E208/5.6: LOEUNG Bunny D246/11, at ERN 00898656; TUON Lorn D232/19, at ERN 00898676.

¹⁴⁴ In E208/5.2: D232/54, at ERN 00898446; D166/125, at ERN 00898456; D166/117, at ERN 00898458; D166/73, E3/509, at ERN 00898459; D232/48, at ERN 00898487; D232/12, at ERN 00898512; in Annex E208/5.3: D125/104, at ERN 00898538; in Annex E208/5.6: D234/9 and E3/428, at ERN 00898673.

¹⁴⁵ D234/9, E3/428, in Annex E208/5.6 at ERN 00898673.

Republic regime.¹⁴⁶ The Defence submits that the issue of discriminatory treatment of these groups has not been debated.

67. First, the Defence here again applies the wrong legal test. The question of whether a matter has been “debated” has no bearing on the admissibility of witness statements - unless the defence alleges that the proffered statements are not *cumulative* of the existing evidence. Even if the objection is based on the latter ground, it must fail. The discriminatory treatment of the groups referred to above has been the subject of extensive testimonial evidence and is dealt with in numerous CPK documents which have been admitted by the Trial Chamber.¹⁴⁷ The evidence contained in the written statements listed in the Revised Annexes 12 and 13 is corroborative and cumulative of that evidence.
68. Second, the Co-Prosecutors note that the Defence appears to be using its invalid “debate” objection (on the issue of discriminatory treatment) in order to exclude evidence of the April 1975 evacuations themselves.¹⁴⁸ To state the obvious, the crime base evidence relating to the evacuations often, if not always, also relates to the issue of the discriminatory treatment of the urban populations and officials of the Khmer Republic. Both are issues within the scope of this trial, both have been the subject of testimonial evidence, and both belong to the categories of facts in respect of which the Trial Chamber has declared admissible evidence in the form of written statements.¹⁴⁹ The same position applies to the Defence attempts to exclude probative evidence relating to the Tuol Po Chrey crime site.¹⁵⁰
69. Finally, the Defence also objects to statements containing evidence relevant to worksites and cooperatives,¹⁵¹ the treatment of Chams,¹⁵² Buddhists¹⁵³ or Vietnamese,¹⁵⁴ or to events

¹⁴⁶ For example, in Annex **E208/5.2**: D166/35, at ERN 00898426, D125/171, at ERN 00898427-28; D125/71, at ERN 00898431; D166/123, at ERN 00898432; D166/41, at ERN 00898443; D296/9, at ERN 00898444; D232/44, at ERN 00898449; D277/3, at ERN 00898451; D125/86, at ERN 00898456; D125/68, at ERN 00898468; D125/92, at ERN 00898476; D40/15, at ERN 00898481; D232/42, at ERN 00898488; D125/91, at ERN 00898494; D246/16, at ERN 00898498; D166/82, at ERN 00898515; in Annex **E208/5.3**: D125/154, at ERN 00898533; in Annex **E208/5.6**: D166/100, at ERN 00898650; D25/28, at ERN 00898652; D125/170, at ERN 00898655.

¹⁴⁷ For example, the following civil parties, witnesses and experts have testified on the discriminatory intent against 17 April people and / or former Khmer Republic officials: Denise AFFONÇO, CHUM Sokha, LAY Bony, PECH Srey Phal, François PONCHAUD, Philip SHORT, KHOEM Ngorn, SOKH Chhin, UNG Chhat and SUM Chea.

¹⁴⁸ See, e.g., in Annex **E208/5.6**: D125/170, at ERN 00898655 for passages that concern the evacuation and the reasons given to the population to justify the evacuation. Among others, the same applies to extracts from D166/100 (**E208/5.6**, at ERN 00898650), and to D125/71, (**E208/5.2** at ERN 00898431).

¹⁴⁹ **E96/7** Statements Decision, at para. 24.

¹⁵⁰ For example, see Annex **E208/5.2**, objections to D125/174, at ERN 00898428-30.

¹⁵¹ For example, see Annex **E208/5.3**: objections to D125/169, at ERN 00898524, D166/181, at ERN 00898529; and Annex **E208/5.6**: objection to D246/14, at ERN 00898650.

¹⁵² Annex **E208/5.2**: objections to D166/42, at ERN 00898509; D166/79, at ERN 00898514; Annex **E208/5.3**: objections to D125/102, at ERN 00898531 and D125/129, at ERN 00898539.

¹⁵³ Annex **E208/5.2**: objections to D40/3, at ERN 00898460, D232/77, at ERN 00898475 and D277/10, at ERN 00898502 (This Civil Party is scheduled to testify on his suffering).

occurring prior to 1975,¹⁵⁵ which they say fall outside the scope of the trial. For the reasons discussed in detail in Part II.5., these objections must fail.

70. As discussed in Part II.5., the Co-Prosecutors have submitted a representative sample of evidence relevant to CPK policies by selecting a small number of statements for each crime site included in Case 002 (sites not included within Case 002/01). These statements are relevant to a range of issues included in this trial, such as historical background, existence and further development of policies during the DK period, CPK authority and communications structures, and the existence of a widespread or systematic attack on the civilian population. The Khieu Samphan Defence's claims that some of the statements fall outside the *temporal* scope of the trial ignore the fact that evidence of development of CPK policies prior to April 1975 is directly relevant to the existence and enforcement of those policies on 17 April 1975 and in the months and years that followed.¹⁵⁶
71. The Co-Prosecutors respectfully request the Chamber to reject all of the objections by the Khieu Samphan Defence, and admit the statements in the Revised Annexes 12 and 13. The statements should be admitted with redactions as proposed by the Co-Prosecutors, thus removing evidence of the acts and conduct of the Accused, unless the witnesses are deceased or unavailable, in which case the statements should be admitted in full.¹⁵⁷

2. Nuon Chea's Objections to Statements and Complaints

72. As a threshold matter, the Co-Prosecutors submit that none of the Nuon Chea Defence's document-specific objections are sufficiently detailed to meet their burden in demonstrating why the documents should not be admitted. In its annexes, the Defence uses short-form notations describing the general category of information in the document they allege to be objectionable, leaving it to the Chamber to determine what particular portions of the document are relevant to the objection and how. Therefore, the form and content of the objections are insufficient.

¹⁵⁴ Annex **E208/5.2**: objection to D125/57, at ERN 00898482.

¹⁵⁵ Annex **E208/5.6**: objections to D125/76, at ERN 00898646, D232/7, at ERN 00898647, D232/87, at ERN 00898653 and D125/69, at ERN 00898654.

¹⁵⁶ See, e.g., the objection to D232/87 in Annex **E208/5.6**, at ERN 00898653: The Defence objects to a large extract of the statement which relates to the historical background, including the evacuation of the liberated District 20 villages in 1973 as well as the evacuation of Kampong Chhnang city on 17 April 1975. Similarly the Defence seeks to exclude extracts from statement D125/69 (Annex **E208/5.6**, at ERN 00898654) which contains evidence of a forced evacuation of Prey Nob as well as evacuations in 1974.

¹⁵⁷ Statements in Khieu Samphan's annexes which have been redacted for acts and conduct of the Accused are: Annex **E208/5.4**: D368/2, listed at ERN 00898552, D108/27.19, listed at ERN 00898553; D313/1.2.406 and D313/1.2.406.1, listed at ERN 00898554-56; D313/1.2.405, listed at ERN 00898557; IS 19.216, listed at ERN 00898567; IS 19.219, listed at ERN 00898567; D166/116, listed at ERN 00898569; D94/4, listed at ERN 00898585; IS 19.41, listed at ERN 00898586; Annex **E208/5.5**: D108/27.19, listed at ERN 00898614; D223.15, listed at ERN 00898616; IS 19.24, listed at ERN 00898617; IS 19.108, listed at ERN 00898619; D269/9/1.15.1 & D210/5 or D248/2.2, listed at ERN 00898620; IS 19.160, listed at ERN 00898622; IS 19.182, listed at ERN 00898623; IS 19.196, listed at ERN 00898624.

Scope

73. Pursuant to the legal submissions laid out in Part II.4., the Co-Prosecutors submit that Nuon Chea Defence's objections that some of the proffered statements are inadmissible because they contain evidence of matters outside of the scope of Case 002/01 are meritless.¹⁵⁸ For example, the Nuon Chea Defence state that document D125/68 is "almost entirely about Prey Damrei Srot prison,"¹⁵⁹ and that document D232/18 "concerns Kraing Ta Chan security center."¹⁶⁰ As demonstrated in Parts II.4. and II.5., statements relating to crimes committed within individual security centres help demonstrate the existence of the CPK policy regarding suspected enemies and will also assist the Chamber in considering the requirement of widespread or systematic attack for the purposes of Crimes Against Humanity.

Acts and Conduct

74. Pursuant to the legal submissions made in Part II.4., the Co-Prosecutors submit that Nuon Chea Defence's objections that some of the proffered statements are inadmissible because they contain evidence of the acts and conduct of the Accused are unfounded, and should be dismissed.¹⁶¹ For example, the Nuon Chea Defence allege that "directions of Angkar"¹⁶² and references to "upper echelons," "Office 87" and "Office 870"¹⁶³ amount to acts and conduct of the Accused. Contrary to these submissions, the phrase "acts and conduct of the Accused as charged in the indictment" refers only to the Accused and not to other persons or bodies.

Proximity

75. Pursuant to the legal submissions made in Parts II.1 - 3, the Co-Prosecutors submit that Nuon Chea Defence's objections that some of the proffered statements are inadmissible because they contain evidence of matters proximate to the Accused are invalid.¹⁶⁴ For example, the Nuon Chea Defence argue that statements are not admissible because they contain evidence regarding: a) the acts and conduct of individuals such as Pol Pot, Ieng Sary, Van Rith, Duch, Ta Mok, Ieng Thirith, Vorn Vet, Ruos Nhim, Moul Sambat, Son Sen, Sao Phim, Pang, Ke Pauk, Yun Yat, Hu Youn, Hou Nim, Koy Thuon, and Ta Nhem;¹⁶⁵ b) groups such as "senior military officials,"¹⁶⁶ and "numerous senior CPK members [*sic*] proximate to Nuon Chea,"¹⁶⁷ and c) S-21.¹⁶⁸ While some of the named individuals were proximate

¹⁵⁸ See Annex B, part I.

¹⁵⁹ See, e.g., E223/2/8/1.2 Annex 1 - NC Objections to OCP Revised Annex 12 - Witness Statements number 181.

¹⁶⁰ Ibid, number 190.

¹⁶¹ See Annex B, part II.

¹⁶² See, e.g., E223/2/8/1.2 Annex 1 - NC Objections to OCP Revised Annex 12 - Witness Statements number 188.

¹⁶³ Ibid, numbers 223, 423.

¹⁶⁴ See Annex B, part III.

¹⁶⁵ See, e.g., E223/2/8/1.2 Annex 1 - NC Objections to OCP Revised Annex 12 - Witness Statements number 189, 201, 226, 242, 258, 290, 297, 333, 338, 347, 398, 729, 737, 794 .

¹⁶⁶ See, e.g., E223/2/8/1.2 Annex 1 - NC Objections to OCP Revised Annex 12 - Witness Statements, number 227.

¹⁶⁷ See, e.g., Ibid, number 265.

¹⁶⁸ See, e.g., Ibid, number 201.

subordinates or co-perpetrators of the Accused, the objections are invalid because: a) this Chamber has not held the “proximity” factor to be applicable to admission of statements at the ECCC; and b) even if the proximity test was applicable, the objections are too vague and unsubstantiated. The objections lack reasoning as to which particular fact or event being described is sufficiently important to warrant the calling of the witness.

Structure

76. Pursuant to the legal submissions made in Parts II.1. and 3., the Co-Prosecutors submit that Nuon Chea Defence’s objections that some of the proffered statements are inadmissible because they contain evidence of administrative, communication or military structures are invalid.¹⁶⁹ For example, the Nuon Chea Defence argue that documents that describe “authority structures,”¹⁷⁰ “organization of sector and zone level[s],”¹⁷¹ and “linkages of the center to the Zone and to rubber plantations and salt fields”¹⁷² are inadmissible because they relate to “structural” evidence. The Trial Chamber has not considered “structural evidence” to be a factor favouring the exclusion of written statements. To the contrary, the Chamber has recognised that the jurisprudence of *ad hoc* tribunals has not tended to prevent the admission of statements containing evidence of communication structures, policies and the existence of common criminal plans.¹⁷³

Objections as to the DC-Cam Bias

77. The Nuon Chea Defence alleges that authors of all statements collected by DC-Cam must be cross examined because DC-Cam’s mission is not merely to create a historical record but to compile evidence against the Accused, and because DC-Cam interviewers have failed to “credibly investigate the responsibility of lower-level officials.”¹⁷⁴ They further accuse DC-Cam of an “institutional belief in Nuon Chea’s guilt.”¹⁷⁵ This is merely the latest in a long string of baseless Defence attacks on an organisation whose work in collecting and preserving the history of the Democratic Kampuchea regime, and recording the memories of both its victims and perpetrators, is nothing short of historic.

78. The Co-Prosecutors note that the Chamber has already ruled that statements collected by DC-Cam and other researchers external to the ECCC are admissible and may be put before the Chamber, although they are not entitled to the presumption of reliability afforded OCIJ

¹⁶⁹ See Annex B, part IV.

¹⁷⁰ See, e.g., E223/2/8/1.2 Annex 1 - NC Objections to OCP Revised Annex 12 - Witness Statements, number 181.

¹⁷¹ See, e.g., *Ibid*, number 188.

¹⁷² See, e.g., *Ibid*, number 189.

¹⁷³ E96/7 Statements Decision, at para. 21.

¹⁷⁴ E223/2/8 Nuon Chea Objections, 26 April 2013, paras. 40-41.

¹⁷⁵ *Ibid*, para. 40.

witness statements.¹⁷⁶ The Chamber indicated that indicia of reliability may assist it “in its assessment of whether the evidence in question satisfies the criteria contained in Internal Rule 87(3), and the probative value and weight that may be accorded to it.”¹⁷⁷ There are numerous indicia of reliability which attach to statements taken by DC-Cam researchers, including: DC-Cam’s independence and its mission; the fact that DC-Cam statements are verbatim transcripts of tape-recorded interviews; and the contents of the statements themselves, which contain no indicia of manipulation or bias, and are extremely detailed and comprehensive. The Co-Prosecutors note that the Chamber has previously ruled that documents collected from DC-Cam’s archives are entitled to a presumption of relevance and reliability, including authenticity.¹⁷⁸

79. Turning to the Defence allegations of bias, the Co-Prosecutors note that, in the course of their testimonies before the Chamber, both the Director¹⁷⁹ and Deputy Director¹⁸⁰ of DC-Cam gave compelling evidence of DC-Cam’s independence and its focus on collecting accurate and reliable historical information on the DK period, without fear or favour.
80. During his cross- examination by the Defence, Mr Chhang Youk rejected any suggestion of bias and testified that in fact DC-Cam had voluntarily provided all of its Nuon Chea-related

¹⁷⁶ E96/7 Statements Decision, para. 29.

¹⁷⁷ Ibid.

¹⁷⁸ 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, at para. 28.

¹⁷⁹ E1/37.1 Transcript, CHHANG Youk, 1 February 2012, at p.14 (stating “We compile documents in order to study the historical backgrounds and as well as to reconcile people in the country, and we have three strategies in order to achieve this objective. When I talk about ‘we’ in this context, we are talking about staff members working in DC-Cam. We actually wanted a court, an independent court to ascertain the truth of what happened in the past. That was the first objective. The second objective, we want students in Cambodia to remember the history and to learn accurate history. And the third objective is to have a centre that compile all historical information about that for the future uses.”), at p.116 (stating “Our decision in - in our attempt to prevent serious human-rights violation is unaltered. We believe it will help the memory, the prevention, and the national reconciliation. It does not have any impact on the documents.”)

¹⁸⁰ E1/31.1 Transcript, VANTHAN Dara Peou, 23 January 2012, at p. 6 (stating “DC-Cam is an organization -- an independent, non-profit organization which has a clear mission. Our mission is to collect, compile Khmer Rouge related documents and also to provide these documents to those who would like to find justice for those survivors of the Khmer Rouge, indeed, through these documents.”), at p. 25 (“I would like to reiterate that DC-Cam has two main objectives. First, to collect -- gather information with regard to the Democratic Kampuchea regime to serve the purpose of recollection of history of the genocide regime, and secondly, is to make these documents available to those who like to search for the truth, for justice for the survivors of the regime, and for those who would like to trace their lost loved ones.”), at pp. 65-66 (stating “Generally, a funding provided by donors cannot come with any conditions imposed on DC-Cam. It is DC-Cam who decide how to work and to work independently...DC-Cam does not receive any financial assistant (sic) from the Cambodian Government; rather, it receives such support as permission for the centres to conduct its research across the country...We never received any instructions from the government beside the permission it provides us for the centres to conduct its research everywhere across the country as well as other places outside the country.”), p.69 (stating “I am of the view that, first of all, we have precise documents. Secondly, we express our purpose on our behalf of the AA (sic) Centre who compiles documents in order to collect memories of the history of the Democratic Kampuchea.”), p.97 (stating “The important point for the DC-Cam is that we do not analyze the documents that we have collected. We keep the documents as they are, and it is up to those who would use the documents to analyse and to evaluate the documents.”).

documents to the Defence, and then forwarded additional DK-era documents to the Defence in response to a request from the Head of the Defence Support Section.¹⁸¹ He also testified that, throughout the life of the ECCC, DC-Cam's services and archives have been made available to the Defence just as they have been available to other participants in the proceedings.¹⁸² None of this evidence was challenged by the Defence. When asked by Nuon Chea's counsel whether DC-Cam had ever focused on collecting evidence that would implicate particular individuals, Mr Chhang responded: "[W]e are not using the word 'evidence'. For us, we are seeking for the truth. I don't know whether you prefer to call it evidence. For us, we want to know the truth."¹⁸³ When asked whether DC-Cam would collect evidence that may mitigate the guilt of the CPK for any of the atrocities which took place in Cambodia during the 1970s, he answered unequivocally in the affirmative and confirmed that such evidence has indeed been collected by DC-Cam.¹⁸⁴ Again, this was not challenged by the Defence.

81. Against this record, the Defence's repeated groundless allegations against DC-Cam should be rejected explicitly by this Court. The Defence has had ample opportunity to examine DC-Cam's most senior staff and challenge documents gathered by the organisation. It has not pointed to a single instance in which statements or other evidence collected by DC-Cam have been rendered unreliable through bias or any other form of impropriety.
82. The Co-Prosecutors submit that all of the DC-Cam statements included in the Revised Annex 12 should be admitted as they are relevant to Case 002/01 and possess a high degree of reliability.

3. Nuon Chea Objections to Case 001 Transcripts

83. Nuon Chea Defence have objected to the admission of Case 001 transcripts on several grounds. First, they assert that several of the transcripts were not included in the Co-Prosecutors' request E96/8.3 and that they should be excluded due to inadequate notice.¹⁸⁵ This objection should be rejected because the transcripts were included in the original Annex 11 in April 2011.¹⁸⁶ Secondly, Nuon Chea Defence assert that the admission of Case 001 transcripts in this case would violate the Accused's right to an independent and impartial tribunal or the equality of arms. This objection is unfounded. The Co-Prosecutors note that, in the decision refusing a Defence application for the disqualification of Trial Chamber

¹⁸¹ E1/38.1 Transcript, CHHANG Youk, 2 February 2012, at p. 82.

¹⁸² E1/37.1 Transcript, CHHANG Youk, 1 February 2012, at p. 73.

¹⁸³ E1/38.1 Transcript, CHHANG Youk, 2 February 2012, at p. 84.

¹⁸⁴ E1/38.1 Transcript, CHHANG Youk, 2 February 2012, at pp. 68-69.

¹⁸⁵ E.g., E223/2/8/1.1 Annex 3: NC Objections to OCP Annex 11 - Case 001 Trial Transcripts, entries 1, 2, 7 – 12.

¹⁸⁶ E9/31 Co-Prosecutors' Rule 80 (3) Trial Document List, 19 April 2011, Annex 11 – CF1 Trial Transcripts.

judges, a separately constituted chamber held that the fact that the Trial Chamber presided over the trial in Case 001 is not a valid basis for alleging its bias. As pointed out in that decision, the majority of cases at international criminal tribunals are tried before benches that have presided over cases dealing with substantially the same facts.¹⁸⁷ In response to the assertion that the Trial Chamber judges would find it difficult or embarrassing to reach conclusions inconsistent with their findings in Case 001, the decision held: “Judges at the ECCC are highly qualified and experienced jurists with expertise in the substantive law at issue. The reasonable observer apprised of all the relevant circumstances would not lightly assume that the Judges would be ‘embarrassed’ by a faithful exercise of their judicial functions.”¹⁸⁸ Similarly here, a reasonable observer would not doubt the ability of the Trial Chamber judges to bring their judicial expertise and a fresh mind to their examination of the Case 001 transcripts in the context of Case 002.

84. The argument that allowing Case 001 transcripts to be used in Case 002 would violate the right to equality of arms is logically inconsistent with the very existence of the procedures providing for the admission of transcripts. It is a common feature of criminal tribunals that the prosecutor’s office is a party to all trials. If, as the Nuon Chea Defence contends, admission of transcripts from previous proceedings would violate the equality of arms because the defence did not participate in prior proceedings, courts could *never* admit such transcripts. This would, in turn, nullify the purpose of rule 92 *bis*.
85. The Chamber has already admitted a number of Case 001 transcripts.¹⁸⁹ It has also held that the fact that transcripts from prior trials are admitted without the attendance of their authors will influence the probative value and weight given to these documents.¹⁹⁰ Thus, the admission of Case 001 transcripts in Case 002 will not violate the principle of equality of arms, but the fact that they are admitted without cross-examination of witnesses may affect the probative value and weight given to them by the Trial Chamber.
86. Thirdly, as to short hand objections set out in Nuon Chea Defence’s Annex 3,¹⁹¹ (*e.g.* “Scope,” “A&C (Nuon Chea, Central Committee, Standing Committee; others)”, “Structure (Role of the Center)”), the Co-Prosecutors refer to their submissions as to the relevant legal test and scope of trial in Parts II.2.- II.4. above. The Co-Prosecutors also submit that the

¹⁸⁷ E55/4 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 (“Decision on Disqualification”), at para. 20.

¹⁸⁸ E55/4 Decision on Disqualification, at para. 17 (internal citations omitted).

¹⁸⁹ 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.

¹⁹⁰ E96/7 Statements Decision, at para. 25.



¹⁹¹ E223/2/8/1.1 Annex 3: NC Objections to OCP Annex 11 - Case 001 Trial Transcripts.

objections should be dismissed as vague and lacking specificity. Finally, as stated in the Submission of Revised Annexes 12 and 13, the Co-Prosecutors are at the Chamber's disposal should it determine that references to the acts and conduct of the Accused in the transcripts should be redacted.¹⁹²

IV – CONCLUSION

87. For all of the reasons stated above, the Co-Prosecutors respectfully request the Chamber to:
- a. Reject the Defence submission that the Chamber must apply strictly ICTY / ICTR Rule 92 *bis* despite differences in the procedures between the ECCC and the *ad hoc* tribunals;
 - b. Confirm its ruling that, within the ECCC procedural framework, all relevant and probative witness statements are admissible except to the extent that they contain evidence of the acts and conduct of the Accused as charged in the indictment;
 - c. Confirm that statements of witnesses who are deceased or no longer available to testify will be admitted without redactions;
 - d. Confirm that statements containing evidence relating to Accused's subordinates, as well as CPK structures, communications and policies are admissible;
 - e. Rule that it is appropriate to admit a representative sample of statements relating to Case 002 crime sites not included in Case 002/01, for the purposes of establishing elements such as communications, policies and widespread or systematic attack; and
 - f. Admit all statements, complaints and transcripts listed in Annex 11 and Revised Annexes 12 and 13.

Respectfully submitted,

Date	Name	Place	Signature
27 May 2013	YET Chakriya Deputy Co-Prosecutor	Phnom Penh	
	Andrew Cayley Co-Prosecutor		

¹⁹² E278 OCP Submission of Revised Annexes 12 and 13, paras. 21 - 23.