

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

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**RESPONSE TO OCP SUBMISSION REGARDING THE
ADMISSION OF WRITTEN WITNESS STATEMENTS**

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I. INTRODUCTION

1. Pursuant to this Chamber's direction,¹ counsel for the Accused Nuon Chea (the 'Defence') hereby submits its response to the 'Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber'² (the 'Witness Submission') by the Office of the Co-Prosecutors (the 'OCP'). For the reasons stated below, the Defence submits that: (a) the testimony of all available adverse witnesses who have not been confronted by Nuon Chea *must be* heard orally at the substantive hearing, without exception; (b) written witness statements *may be* admissible in lieu of oral testimony in certain cases, subject to conditions; and (c) Nuon Chea *may be* willing, upon consultation with the OCP, to waive his right to confront certain crime-base witnesses.

II. RESPONSE

A. Cambodian Law Mandates *Viva Voce* Testimony at Trial of All Adverse Witnesses Who Have Not Been Confronted by the Accused

2. The OCP has argued that accused persons at the ECCC 'do not have an absolute right to summon and examine witnesses at trial' and suggested that the Chamber may 'exercise its discretion' in a variety of ways when dealing with certain adverse witness testimony.³ In this regard, the OCP urges the adoption of a number of procedural mechanisms in place at various international tribunals.⁴ However, the Witness Submission ignores the fact that existing Cambodian law explicitly and sufficiently addresses the issue of adverse witness testimony, and the OCP fails to justify the suggested departures from such established procedure.⁵

¹ See Document No E-107, Public 'Decision on Extension of Time', 7 July 2011, ERN 00711953–00711954.

² Document No E-96, Public, 15 June 2011, ERN 00706071–00706086.

³ See Witness Submission, para 2.

⁴ *Ibid.*, paras 12–29.

⁵ *N.B.* Acknowledging the need to ensure that ECCC proceedings adhere to universally accepted legal standards, the ECCC Law and Agreement allow for the adoption of additional procedural rules in three limited cases, namely where: (i) existing Cambodian law or procedure does 'not deal with a particular matter'; (ii) 'there is uncertainty regarding' the 'interpretation or application' of an existing provision; or (iii) 'there is a question regarding' a provision's 'consistency with international standards'. ECCC Agreement, Article 12(1); Law, Articles 20 new, 23 new, 33 new; *see also* Case No 001, Document No E-188, Public 'Judgment', 26 July 2010, ERN 00572517–00572797 (the 'Duch Judgment'), para 35. In such cases—and *only in such cases*—'guidance' may be sought 'in procedural rules established at the international level'. *Ibid.* The recognition of new procedures or any departure from 'existing procedures in force' must therefore be justified by reference to one of these specific statutory exceptions. Any other approach—for example, the creation of new rules for the sake of convenience or more efficiency—is in

***1. Existing Cambodian Law Deals with
the Matter of Adverse Witness Testimony***

3. Article 297 of the Cambodian Code of Criminal Procedure (the ‘CCP’) is clear: ‘Inculpatory witnesses who have never been confronted by the accused shall be summoned to testify at the trial hearing.’ (Indeed, the Khmer phrasing of the operative verb—*must be summoned*—is even more emphatic.) Rule 84(1) is consistent with this position: ‘The Accused shall have the absolute right to summon witnesses against him or her whom the Accused had no opportunity to examine during the trial stage.’ Neither provision contains any limiting language or sets out any exception to the stated general rule. And no such exception is found elsewhere in the CCP or the Rules. In short, the matter of adverse witness testimony is dealt with clearly, concisely, and comprehensively by existing Cambodian law. Simply, all adverse witnesses who have not been previously confronted by the Accused and upon whose testimony the Chamber intends to rely in reaching any judgment against Nuon Chea must appear in court and provide *viva voce* testimony.

***2. There is No Uncertainty Regarding the Interpretation or
Application of Article 297 of the CCP or Rule 84(1) of the Rules***

4. The established rule expressed above is, on its face and by its clear terms, an absolute one; the Chamber has no discretion to admit the statements of adverse witnesses in lieu of their oral testimony—that is, without summoning those available witness to appear in open court; and there are no *lacunae* in the CCP or the Rules on the question of adverse witness testimony necessitating recourse to external procedures. Nevertheless, the OCP has attempted to create confusion where none exists:
- a. The fact that only the English version of Rule 84(1) refers to an ‘absolute’ right does not give rise to a state of uncertainty.⁶ When read in conjunction with Article 297 of the CCP (as it must be), the guarantee expressed in Rule 84(1) cannot be understood as anything but an unqualified one. In fact, the imperative phrasing of the former text—‘shall be summoned’—suggests something even more than the right of an accused person to request confrontation with adverse

direct violation of the terms of Article 12(1) of the ECCC Agreement. *See* Document No E-51/3, Public ‘Consolidated Preliminary Objections’, 25 February 2011, ERN 00648279–00648310, paras 66–72.

⁶ *See* Witness Submission, paras 3–4.

witnesses; the CCP goes so far as to impose an affirmative duty on the Chamber to summon those individuals, should it intend to rely on their testimony. The fact that no exceptions are specifically provided bolsters this position.⁷

- b. The meaning of the phrase ‘against him or her’ is hardly vague.⁸ It stretches credibility to suggest that the import of such plain language is anything but clear. The common English preposition *against* is defined simply as: ‘in opposition to; contrary to; adverse or hostile to’.⁹ Guido Acquaviva’s views notwithstanding,¹⁰ any individual whose testimony tends to prove any aspect of the prosecution case would fall within the broad contours of that definition¹¹ and must therefore be considered a witness *against* an accused person. The dichotomy proposed by the OCP—‘acts and conduct of the accused’ as opposed to ‘evidence [that] supports the prosecution case more broadly’¹²—has no resonance in the Cambodian legal system, where the established procedure with respect to adverse testimony makes no such distinction. And no ‘further guidance’—beyond, perhaps, a refreshing glance at the dictionary—is needed for jurists to comprehend ‘the adjective inculpatory’.¹³ Such testimony would include that which goes to: ‘acts and conduct of the accused as charged in the indictment’, ‘acts and conduct of an accused’s immediately proximate subordinate’, ‘a pivotal issue in the case’, and anything else tending to incriminate an accused person—either specifically or in a broader sense.

⁷ *N.B.* To the extent that any doubt arises regarding the interpretation of the applicable Cambodian procedure, such discrepancy *must* be resolved in favor of Nuon Chea pursuant to the general principle of *favor rei* (which encompasses the more specific evidentiary principle of *in dubio pro reo*). See Antonio Cassese (Ed), THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE (Oxford 2009), pp 440–441 (*Favor rei* ‘is the principle [...] requiring, in the case of conflicting interpretations of a rule, the construction that favors the accused. It [...] has also been conceived of as a standard governing the appraisal of evidence: in this case the principle is known as *in dubio pro reo*.’) (citing international jurisprudence). A strict version of the principle is enshrined in the Cambodian Constitution. See Article 38 (*‘Any case of doubt [...] shall be resolved in favor of the accused’*) (emphasis added). Equally, the Rules ‘shall be interpreted so as to always safeguard the interests of [...] [the] Accused’. Rule 21(1); see also Duch Judgment, ‘Separate and Dissenting Opinion of Judge Jean-Marc Lavergne on Sentence’, para 8 (stating ‘where the law is unclear or silent, the most favorable solution must be applied to the accused in the event of uncertainty as to the application of a given rule’; noting ‘the widely-accepted principle that doubt must be resolved in favor of the accused’; and citing international criminal jurisprudence for the following proposition: ‘The principle that doubt must be resolved in favor of the accused does not apply only to the assessment of the evidence pertaining to the guilt of the accused; its application is broader and includes interpretation of ambiguous or uncertain applicable legal standards.’)

⁸ See Witness Submission, para 4.

⁹ Dictionary.com (unabridged), based on the Random House English Dictionary (Random House 2011).

¹⁰ See Witness Submission, n 8.

¹¹ *N.B.* In the absence of any agreed facts—as in the instant case—the ‘prosecution case’ is, by definition, in opposition, contrary, adverse, and hostile to the position of an accused person.

¹² Witness Submission, para 4.

¹³ *Ibid.*

- c. There is nothing ‘inconsistent’ between respecting the established rights of an accused person and the ‘fundamental principles’ enshrined in Rule 21.¹⁴ Indeed, one of the primary aims of that Rule is to ‘safeguard the interests of [the] Accused’.¹⁵ It is wholly unclear how honoring Nuon Chea’s absolute right to confront untested adverse witnesses would upset the ‘balance between the rights of the parties’.¹⁶ If what the OCP is attempting to express here is its frustration with the size and scope of this case—and the inordinate amount of time required to (properly) prove it beyond a reasonable doubt—such considerations are misplaced. The moment for such debate has passed. Had expedition of trial proceedings indeed been one of the OCP’s prominent concerns at the outset of this case, one would have expected such anxiety to be reflected in a manageable Introductory Submission. Rather, the vast breadth and depth of the document actually submitted four years ago have been mirrored—predictably—by the gargantuan Indictment filed by the Office of the Co-Investigating Judges (the ‘OCIJ’). It would be disingenuous (to say the least) to now suggest that Nuon Chea’s right to confront the witnesses against him must somehow be curtailed because the effective exercise of that crucial guarantee would simply take too long. Like Victor Frankenstein before them, the Co-Prosecutors cannot avoid the consequences of their own creation.
- d. The mere fact that the procedural regimes of certain international criminal tribunals contain highly specific rules with respect to the admission of witness statements does not, in and of itself, create ‘*lacunae* in the procedure before the ECCC’.¹⁷ By the OCP’s logic, in every case where the rules of the ICTY (for example) deal with a matter to a greater degree of specificity than the analogous provisions of Cambodian procedure, the latter would be considered a *lacuna* to be filled by the former. Such overzealous ‘hole-filling’—clearly not the process envisaged by the drafters of the ECCC Agreement and Law—would displace perfectly serviceable domestic provisions on the basis that they lack the purported sophistication of their international analogues. While, indeed, Cambodian law does not contain a *specific* provision ‘on the admission of written statements or

¹⁴ Witness Submission, para 4.

¹⁵ Rule 21(1).

¹⁶ Witness Submission, para 4.

¹⁷ *Ibid*, para 5.

transcripts from other trials’,¹⁸ the ‘general principle applicable to the admission of evidence’¹⁹ articulated in Rule 87(1) and Article 321 of the CCP is sufficiently flexible to deal with the issue.²⁰ Yet what the OCP position in this regard glosses over is that Cambodian law *does contain* specific and clear provisions on adverse witness testimony, namely: Article 297 of the CCP and Rule 84(1).

- e. Finally, ‘the relationship between [Rules] 87(1) and 84(1)’²¹ is clear: the former is a general rule regarding the admissibility of evidence and the latter is the *lex specialis* with respect to adverse witness testimony. According to Rule 87(1), ‘[u]nless provided otherwise [...], all evidence is admissible’. Rule 84(1) and Article 297 of the CCP, providing otherwise (to a certain degree), require available adverse witness testimony to be heard orally—as a condition of its admissibility—before the Chamber.
5. In sum, the OCP has taken one of the most unambiguous tenets of Cambodian law (expressed clearly and comprehensively in Article 297 of the CCP and Rule 84(1)) and attempted to muddle its plain meaning beyond recognition. Any lack of specificity with regard to the admissibility of certain written witness statements²² does not alter the clear requirement that all available adverse witnesses who have not been previously confronted by the Accused must testify orally before the Chamber.

3. There is No Question Regarding Cambodian Law’s Consistency with International Standards

6. Article 297 of the CCP and Rule 84(1) are in no way inconsistent with established international standards. In fact, Cambodia’s approach to adverse witness testimony—which provides an unqualified right to confront all available adverse witnesses at trial (assuming the Accused has not previously had the opportunity to do so)—goes well beyond any *minimum* protections afforded by international human rights law.²³

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *N.B.* In fact, the Chamber has already proven this—with reference to international principles where necessary on a case by case basis. *See* n 28, *infra*.

²¹ Witness Submission, para 5.

²² *See* para 9, *infra*.

²³ *See* Witness Submission, paras 7–11.

7. The International Covenant on Civil and Political Rights (the ‘ICCPR’) (applicable to these proceedings by virtue of the current Cambodian Constitution²⁴) ‘preserves the sanctity of any laws that provide a higher level of protection for civil and political rights than those set out in the ICCPR’.²⁵ Therefore, in the context of international criminal litigation within a domestic court system, the notion of ‘international standards’ must be understood as providing baseline fair-trial guarantees from which the municipal jurisdiction is free to depart in favor of more stringent—that is to say, *more protective*—due-process safeguards. In any event, it would be a perverse logic indeed (as well as a breach of Cambodian sovereignty) which would suggest that a democratic legislature is somehow barred from adopting laws and procedures that *exceed* any minimum criteria provided by international law.
8. Accordingly, given the high standard set by existing Cambodian procedure, the OCP’s reliance on the less protective approaches endorsed by the European Court of Human Rights and other international criminal tribunals is misplaced.²⁶ Again, at the ECCC—as in all domestic courts in this country—where an adverse witness (broadly defined, as discussed above²⁷) who has not been previously confronted *is available to testify*, he or she must do so orally at trial in order for the Chamber to consider his or her testimony ‘against’ the Accused. No amount of discourse on international jurisprudence can (or should) alter this established domestic position.

B. The Admission of Written Witness Statements in Lieu of Oral Testimony May Be Permissible in Certain Cases Subject to Conditions

9. The Defence concedes that existing Cambodian procedure does not explicitly address the admission of adverse witness statements in situations *where the deponent is unavailable (stricto sensu) to testify orally in court*. In this regard, the OCP has identified the proper international principles that should be brought to bear by the

²⁴ See Constitution, Article 31 (‘Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of human Rights, the covenants and conventions related to human rights [...]’).

²⁵ Document No **D-427/1/6**, Public ‘Ieng Sary’s Appeal Against the Closing Order’, 25 October 2010, ERN 00617486–00617631, n 210 (citing Manfred Nowak, UN Covenant on Civil and Political Rights: ICCPR Commentary 118 (NP Engel 2005)). See ICCPR, Article 5(2) (‘There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations, or custom on the pretext that the present Covenant does not recognize such rights *or that it recognizes them to a lesser extent.*’) (emphasis added).

²⁶ See Witness Submission, paras 7–29.

²⁷ See para 4(b), *supra*.

Chamber if and when it is necessary to consider such a scenario. As noted by the OCP, the Chamber has done so previously in Case No 001.²⁸

10. In determining whether or not a particular adverse witness is in fact unavailable to testify orally, the Chamber should apply a strict test in keeping with the object and purpose of Rule 84(1) and Article 297 of the CCP—that is, the production of evidence ‘at a public hearing, in the presence of an Accused, with a view to adversarial argument’.²⁹ In particular, an adverse witness should only be deemed unavailable if he or she is deceased, physically or mentally incapable of testifying, or protected by a recognized legal privilege. An adverse witness who simply refuses to appear should not be considered unavailable; otherwise, political (or other non-judicial) motivations on the part of individual witnesses—or the larger forces that control them—could be employed to prevent the presentation of important live testimony. The Chamber should use all available means at its disposal³⁰ to ensure the attendance at trial of all available adverse witnesses.
11. Once it has been judicially determined that an adverse witness is in fact unavailable, the Chamber should then turn to the question of the permissible scope of his or her untested written testimony. Again, the OCP has identified several relevant (non-exhaustive) factors for consideration: whether the testimony goes to the acts and conduct of the accused; the extent to which the evidence is of a corroborative nature, as opposed to being the only testimony on a particular point; the ability of testing the reliability and probative value of the evidence by means other than cross-examination; and the circumstances surrounding the taking of the original statement.³¹ Given the number of factors to be considered and the potential variety of testimonial topics, the Defence

²⁸ See Case No 001, Document No E-43/4, Public ‘Decision on Admissibility of Material on the Case File as Evidence’, 26 May 2009, ERN 00332849–00332857 (the ‘Admissibility Decision’), para 15 (‘Where the evidence goes to proof of acts and conduct of an accused as charged, this is a factor against the admission of such evidence, or that part of it.’) (citing a decision in the Charles Taylor case). *N.B.* In the Duch case, statements of deceased individuals whom Duch had not had the opportunity to confront and whose statements referred ‘to the Accused’s alleged criminal acts and conduct’ were excluded by the Chamber ‘in accordance with Rule 87(3)’. *Ibid.*, para 16. While the Chamber acknowledged ‘exceptions to [the] general principle,’ it held that ‘as a general rule an Accused must be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage’. *Ibid.*, para 14 (citing ECtHR jurisprudence). The ‘general principle’ was articulated as follows: ‘part of the right to a fair trial normally presupposes that the evidence be produced at a public hearing, in the presence of an Accused, with a view to adversarial argument’. *Ibid.*

²⁹ Admissibility Decision, para 14.

³⁰ See Rule 5 (regarding the possibility of international judicial cooperation) and Rules 41, 84, and 88 (regarding this Chamber’s authority to summon witnesses).

³¹ See Witness Submission, para 33.

submits that the inquiry must be conducted on a case-by-case basis with the input of the affected parties.

12. In this regard, it must be emphasized—in contrast to the position taken by the OCP—that the judicial investigation conducted by the OCIJ was not, in fact, ‘governed by the objective of ascertaining the truth regarding the allegations in the Introductory Submission, rather than collecting inculpatory evidence against the accused’.³² For the various reasons expressed previously,³³ the OCIJ’s investigation cannot benefit from any presumption of impartiality that may normally attach to civil-law pre-trial inquiries.³⁴ Nor—also for reasons expressed previously³⁵—can it be said that ‘many statements collected prior to the commencement of the proceedings before the ECCC also have strong indicia of reliability (such as statements taken by the Documentation Center of Cambodia or academic researchers [...])’.³⁶ Although required by law to conduct its investigation ‘impartially, whether the evidence is inculpatory or exculpatory’,³⁷ the OCIJ inquiry was objectively unfair; and any curative power attributed to the Closing Order³⁸ is nothing more than a legal fiction.
13. In any event, the Chamber must be guided by its obligations to: ensure the fairness of the proceedings; respect fundamental fair-trial rights; apply relevant principles of construction (*favor rei*) and evidence evaluation (*in dubio pro reo*), and avoid a paper trial which merely rubber-stamps the conclusions of the OCIJ’s investigation—a process in which the Defence was actively prevented from playing a meaningful role.

**C. Nuon Chea May Be Willing to Waive His Right to Examine
Certain Adverse Witnesses Despite Their Availability at Trial**

14. Subject to review of any concrete OCP proposals and approval by the Chamber, the Defence *may be* in a position to advise Nuon Chea to waive his right to confront certain adverse witnesses (for example, those whose testimony relates strictly to alleged

³² Witness Submission, para 32.

³³ See Consolidated Preliminary Objections, paras 4–19, 57–65.

³⁴ See Witness Submission, para 31.

³⁵ See, e.g., Consolidated Preliminary Objections, para 15.

³⁶ Witness Submission, para 39.

³⁷ Rule 55(5).

³⁸ See, e.g., Rule 76(7) (‘Subject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation.’)

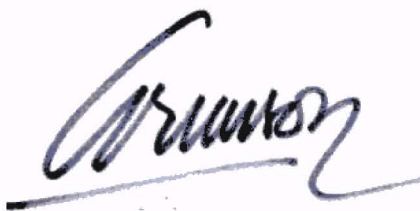
offences committed at the various crime bases) irrespective of their availability to appear at trial. The Defence would welcome any OCP initiatives in this regard.

III. CONCLUSION

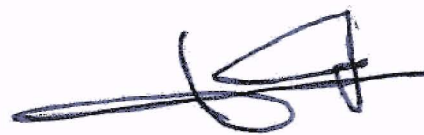
15. Accordingly, for the reasons stated herein, the Defence submits that:
- a. there is an absolute right under Cambodian law to examine at trial all available adverse witnesses who have not been previously confronted by the Accused;
 - b. the admission at trial of written witness statements in lieu of oral testimony may be permissible in certain cases, subject to conditions designed to protect the rights and interests of the Accused;
 - c. Nuon Chea may be willing to waive his right to confront certain adverse witnesses despite their availability to testify at trial.

As these matters relate intimately to ‘the lists of potential witnesses and experts submitted by the parties’,³⁹ further oral argument at a continued Initial Hearing⁴⁰ would be appropriate and is hereby requested.

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³⁹ Rule 80*bis*(2).

⁴⁰ See Document No E-93/9, Confidential ‘Request for Additional Witnesses & Continuation of Initial Hearing’, 5 July 2011, ERN 00711970–00711975.