

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

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC

Party Filing: Defence for Ieng Thirith

Filed to: Trial Chamber

Original language: English

Date of Document: 22 July 2011

CLASSIFICATION

**Classification of the document
suggested by the filing party:** Public with Confidential Annex A

Classification by Chamber: សាធារណៈ / Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

**IENG THIRITH DEFENCE RESPONSE TO 'CO-PROSECUTORS' RULE 92 SUBMISSION
REGARDING THE ADMISSION OF WRITTEN WITNESS STATEMENTS BEFORE THE
TRIAL CHAMBER'**

Defence for Ieng Thirith:

PHAT Pouv Seang
Diana ELLIS, QC

Trial Chamber Judges:

NIL Nonn, President
Silvia CARTWRIGHT
THOU Mony
Jean-Marc LAVERGNE
Ya SOKHAN

Civil Party Co-Lead Lawyers:

PICH Ang
Elisabeth SIMONNEAU FORT

Co-Prosecutors:

CHEA Leang
Andrew CAYLEY

ឯកសារដើម	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception): 22 / 07 / 2011	
ម៉ោង (Time/Heure) :..... 10:45	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier:..... Ratanak	

I INTRODUCTION

1. On 15 June 2011 the Co-Prosecutors filed their 'Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements before the Trial Chamber' (**OCP Request**),¹ requesting the Trial Chamber (a) to declare that there is no absolute right to summon all witnesses whose statements are being proposed into evidence; (b) to decide on the need for witnesses to appear for examination at the start of the relevant phases of the proceedings; and (c) to take general guidance from the International Criminal Tribunal for former Yugoslavia (**ICTY**)'s Rule 92*bis* and jurisprudence.² On 20 June 2011, the defence was informed by the Trial Chamber that the deadline for response to the OCP Request was extended to 22 July 2011.³ The defence herewith files its response to the OCP Request.
2. Rule 84(1) provides the Accused with a mandatory right to examine, at the very least, witnesses who give evidence against her in the forthcoming proceedings. Furthermore, the OCIJ written records placed on the case file, do not provide an accurate and reliable representation of the contents of the interviews recorded with witnesses and should not be ruled admissible in evidence in the absence of live testimony from the witnesses. All evidence relied upon to support a conviction of the Accused should be subject to examination by the defence on behalf of the Accused.

II LEGAL PROVISIONS

3. The following provisions are relevant:

Rule 84 Appearance of Witnesses and Experts

1. The Accused shall have the absolute right to summon witnesses against him or her whom the Accused had no opportunity to examine during the pre-trial stage

Article 35^{new} of the ECCC Establishment Law

The accused shall be presumed innocent as long as the court has not given its definitive judgment.

In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights. [...]

¹ OCP, Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements before the Trial Chamber, 15 June 2011, Document No. E96. The defence was notified of this document on 17 June 2011.

² OCP Request, para. 41.

³ Confirmed in TC, Decision on Extension of Time, 7 July 2011, Document No. E107.

e. to examine evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them; [...].

Article 13 of the Agreement between the UN and Cambodia

1. The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process. Such rights shall, in particular, include the right: to a fair and public hearing; to be presumed innocent until proved guilty; to engage a counsel of his or her choice; to have adequate time and facilities for the preparation of his or her defence; to have counsel provided if he or she does not have sufficient means to pay for it; and to examine or have examined the witnesses against him or her.

2. The United Nations and the Royal Government of Cambodia agree that the provisions on the right to defence counsel in the Law on the Establishment of Extraordinary Chambers mean that the accused has the right to engage counsel of his or her own choosing as guaranteed by the International Covenant on Civil and Political Rights.

Article 14 of the International Covenant on Civil and Political Rights (ICCPR)⁴

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law [...].

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; [...].

Article 297 of the Code of Criminal Procedure of the Kingdom of Cambodia

Inculpatory witnesses who have never been confronted by the accused must be summon(s)ed to join the trial hearing

III LEGAL SUBMISSIONS

3.1 The Right to Examine Witnesses against the Accused

4. Rule 84, as illustrated by its heading, deals with the appearance of witnesses at trial. The wording of the three versions of Internal Rule 84(1) is different and this is clearly the result of an unintentional error in translation. However, the essence of Rule 84(1) in all its versions is the same; it provides a mandatory right to the Accused to examine witnesses whose attendance she can demand. This clear meaning can be understood by the use of the word 'shall' which appears in all three versions. The OCP wrongly asserts that insertion of the adjective 'absolute' detracts from the 'right' accorded to an Accused. The use of the word 'absolute' serves merely to emphasize the right. There is no ambiguity in the words used. The words are unequivocal and they should be accorded their natural and clear meaning. Where the drafters have chosen to place limitations on the right to require the attendance of witnesses these are clearly set out. Most importantly,

⁴ This same right is reflected in Article 6(1) and (3)(d) of the European Convention on Human Rights.

the 'right' can only be enforced in respect of witnesses whom the Accused has not had an opportunity to examine during the pre-trial stage. There is a further qualification in the English and Khmer versions that the right relates to witnesses who give evidence against the Accused. In the application of Rule 84(1), no further qualifications should be placed upon the right of the Accused.

5. The recognition of the right of the Accused to examine a witness, as set out in Rule 84(1), gives expression to the right contained in numerous human rights instruments⁵, as set out above. Significantly, Rule 84(1) closely follows Article 297 of the Code of Criminal Procedure of the Kingdom of Cambodia which states that inculpatory witnesses who have not been confronted by the Accused must be summonsed.
6. The OCP wrongly asserts that the Trial Chamber has a discretion to admit the written statements of witnesses. This is not borne out by the wording of Rule 84. Once the necessary conditions set out in Rule 84(1) have been satisfied there is no discretion to deny the Accused the right to require the attendance of the witness. The rationale is obvious. It is unfair for an Accused to be denied the opportunity to question a witness who gives evidence on matters pertinent to the Accused's case.
7. The burden is on the OCP to prove the case against the Accused to the necessary criminal standard. The OCP has the task of i) establishing the crime base and ii) proving the criminal responsibility of the Accused, if the crime base is made out. It is, therefore, wrong to contemplate depriving the Accused of the right to examine any witness called to give evidence relevant to either of these issues.
8. The OCP seems to implicitly accept that the Accused does have the right to examine witnesses who give evidence as to her acts and conduct, but contends that the right does not extend to examining the crime base witnesses.
9. The OCP has not clarified its position on whether, if permitted, it intends to call few or no witnesses to testify as to the crime base and whether it will seek to admit into evidence

⁵ Article 35 *new* of the ECCC Establishment Law; Articles 13 and 14 of the International Covenant on Civil and Political Rights (ICCPR); Article 6 of the European Convention on Human Rights (ECHR).

the OCIJ Written Records of witnesses to provide crime base evidence or to provide further support for witnesses who have been called to testify.

10. The admissibility of evidence is governed by the provisions of Rule 87 of the Internal Rules which states that all evidence is admissible subject to the test of relevance, which is a fundamental principle applicable to all criminal trials. The OCP wrongly seeks to import into the trial process at the ECCC the provisions set out in the Statutes emanating from Tribunals within other jurisdictions which are very different in nature and whose procedures are based more closely on the common law adversarial system.
11. Rule 84(1) quite clearly provides that the Accused can examine a witness whom she has not had an opportunity to question pre-trial. In the present case, the defence was precluded from interviewing any witness at the investigative stage, because the OCIJ took a calculated decision to conduct the interviews in the absence of the parties. In taking this course, the OCIJ must have had in mind the right accorded to the Accused at the trial stage pursuant to Rule 84(1) which would prevent her being prejudiced by an inability to pose questions at the pre-trial stage. As a consequence of the procedure adopted, the statements obtained from the OCIJ witnesses have not derived from the participation of the defence who have had no chance to influence their content on matters of relevance to the Accused.

3.2 Co-Prosecutors Are Estopped from Raising This Argument

12. During the investigative stage, this issue was raised by the defence for co-accused Nuon Chea, but the Co-Investigating Judges informed the defence that at trial the defence would be in a position to examine the witnesses.⁶ At that stage of the proceedings, when they were alerted to the defence's grave concern that they were not in a position to examine important evidence against the accused, the Co-Prosecutors did not mention that it was their intention to submit the OCIJ Written Records into evidence thereby denying the defence the opportunity to examine the witnesses. Thus, the Co-Investigating Judges decided on this issue in ignorance of the Co-Prosecutors' intention to admit into evidence their Written Records without according the right to the defence to examine the witnesses

⁶ OCIJ Letter to Nuon Chea defence, 10 January 2008, Document No. A110/I, p. 2.

in court. By not speaking out at that stage, the Co-Prosecutors have withheld crucial information from the Co-Investigating Judges. Thus, the Co-Prosecutors should be estopped from requesting admission of OCIJ Written Records into evidence now. It is not unreasonable to conclude that, had the Co-Prosecutors disclosed their intention, the Co-Investigating Judges would have decided to allow questioning of witnesses pre-trial.

3.3 OCIJ Written Records Cannot Be Equated with 'Witness Statements'

13. Further the, defence contends that the Co-Prosecutors are wrongly seeking to accord the OCIJ Written Records the same status as 'witness statements' which may on occasion be admitted in evidence without the maker being called to testify in other jurisdictions.
14. The documents referred to as OCIJ Written Records, and which the Co-Prosecutors refer to as 'statements', were written down in the *procès-verbal*.⁷ It is submitted that the quality and characteristics of the documents is very different from a 'witness statement'. The defence submits it would be unfair to the Accused, and a breach of Article 14 of the ICCPR (and Article 6 ECHR) to admit into evidence the OCIJ Written Records in the absence of full transcripts and then to deny the Accused the right to examine those witnesses on the all relevant aspects of their recorded accounts .
15. The OCIJ investigators adopted the practice of interviewing witnesses, and audio-recording the original language interviews. Instead of transcribing these in full, the investigators frequently made summaries based on their own interpretation of the material discussed with the witness and its relevance. These OCIJ Written Records were subsequently added to the case file, and the Co-Prosecutors now refer to them as 'witness statements'. The defence submits that this term does not accurately represent the document described as the OCIJ Written Records in that it does not contain 'the statement' of the witness.
16. The Co-Prosecutors confidently claim that the 'statements' (OCIJ Written Records) '*have probative value and strong indicia of reliability*'⁸. The defence has examined the accuracy of this assertion to ascertain whether the summaries are fair. It is impossible for

⁷ Because the OCIJ Witness Statements themselves use the term 'Written Record of Interview of Witness'.

⁸ OCP Request, para 38.



the defence to check all the audio-recordings, due to the vast number of interviews that have been conducted by the OCIJ and their length, in the light of the limitations of time and resources. However, the defence has selected a sample of the OCIJ Written Records which are on the case file and compared them with the original audio-recordings of interviews to see whether the Written Records contain a fair representation of the content of the interviews. This comparison reveals that the OCIJ Written Records are generally inaccurate, tend to exclude exculpatory evidence, and frequently fail to identify the original source of pieces of information.

17. If the defence is not permitted the opportunity to examine the witness during the trial process, the defence cannot rectify any errors or omissions which have occurred, including failures to include exculpatory material. The Accused would thus be denied a fair trial. Whether or not these 'statements' relate to crime base evidence or purport to contain evidence of the acts and conduct of the Accused the point is the same. The fact that crime base evidence may have less direct applicability to the Accused, does not diminish its significance to her case. If crime base OCIJ Written Records are admitted into evidence without the defence being permitted to examine the author, this adversely impacts on the defence fair trial rights.

3.4 Factual Analysis of OCIJ Interviews

18. The defence attaches hereto **Annex A**, which sets out examples of inconsistencies which have been noted between the 'OCIJ Written Records' and the actual accounts given by the witnesses on the audio-recordings.⁹
19. Due to constraints of time and resources, the defence has only been able to compare those parts of the audio-recorded interviews which have particular relevance to the Accused's case. In a number of instances the chronology of the 'OCIJ Written Record' is entirely different from the chronology of the actual interview, which makes it practically impossible to verify the accuracy and reliability of the OCIJ Written Record.

⁹ The translation of audiotapes from Khmer to English and from French to English was made by the defence team.

20. The defence submits that the comparison of the contents of the original audio-recordings with the Written Records, as demonstrated in **Annex A**, shows that the OCIJ Written Records are not a fair and accurate, or adequate representation of the information provided by the witnesses. Furthermore, on occasion exculpatory information is omitted. There is no reason to conclude that the sample selected does not reflect the state of those Written Records not subjected to comparison with the full recording of the interviews.
21. The examples provided in **Annex A**, also show that often the information provided in the summary comes from either the investigator or the translator, and is merely confirmed by the witness and thus derives from a leading question. This is not the proper method by which to obtain the account of the witness. By employing this methodology to obtain the statement it becomes impossible to identify by reference to the transcript or audiotape from whom a piece of information originates; nor can it be ascertained whether the witness has actually understood what he or she is confirming, and thus to what extent the witness actually agreed with such information. As a consequence the statements provided by the OCP cannot be relied upon as accurate representations of the evidence that the witnesses have provided.

3.5 Admissibility of Evidence

22. In considering the admissibility of evidence, the European Court of Human Rights (ECtHR) has held that 'the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy.'¹⁰ It is in this regard, that the defence submits full transcripts become essential in order to ascertain the reliability and accuracy of the information contained in the 'OCIJ Written Records'. With respect to the recording of a witness interview, the ECtHR further held that:¹¹

The recording also allowed [the accused] to observe the manner in which the interview was conducted and to assess for themselves, at least to some degree, the credibility of A.'s account. [...] While the Court acknowledges the significance of such a recording as evidence [...], it cannot alone be regarded as sufficiently safeguarding the rights of the defence where no real opportunity to put questions to a person giving the account has been afforded by the authorities [...].

¹⁰ *A.S. v Finland*, ECtHR, Authority 29 to OCP Request, para. 52.

¹¹ *A.S. v Finland*, ECtHR, Authority 29 to OCP Request, para. 66.

3.5.1 European Court of Human Rights Jurisprudence

23. The ECtHR jurisprudence cited by the Co-Prosecutors in their Request relates to situations in which the issue is whether actual 'statements' can properly be admitted into evidence, and not *procès-verbal*, as in the instant case. The defence will briefly review the authorities the Co-Prosecutors cite.¹²
24. The case of *Unterpertinger v Austria*¹³ concerned a man who had allegedly assaulted his stepdaughter. His ex-wife and stepdaughter made statements to the police. However, under Austrian law, as family of the accused, they could not be compelled to testify in court. The accused contested the reliability of the statements. The ECtHR stated:
- As such, the provision [in Austrian law that allows the victims not to testify in court] manifestly is not incompatible with Article 6 §§ 1 and 3 (d) (art. 6-1, art. 6-3-d) of the Convention: it makes allowance for the special problems that may be entailed by a confrontation between someone "charged with a criminal offence" and a witness from his own family and is calculated to protect such a witness by avoiding his being put in a moral dilemma [...].¹⁴
25. More importantly, the Court ruled that, since the evidence in question formed the main evidence upon which the conviction was based, there was in fact a breach of Article 6(1) of the European Convention on Human Rights.¹⁵
26. The Co-Prosecutors also refer in their submission to the case of *Windisch v Austria*.¹⁶ Again, the ECtHR found a violation of the fair trial principle embedded in Article 6(1) and 6(3)(d) of the ECHR. Two anonymous witnesses were not required to testify in court, and the only way in which the accused could test the evidence was by interviewing the police officers who had interviewed those two witnesses prior to trial.¹⁷
27. Another case relied on by the Co-Prosecutors is *Delta v France*, where the European Court sets out the following principle:¹⁸

¹² OCP Request, footnote 11.

¹³ See Authority 33 to OCP Request.

¹⁴ *Unterpertinger v Austria*, ECtHR, Authority 33 to OCP Request, para. 30.

¹⁵ *Unterpertinger v Austria*, ECtHR, Authority 33 to OCP Request, para. 33.

¹⁶ *Windisch v Austria*, ECtHR, Authority 35 to OCP Request.

¹⁷ *Windisch v Austria*, ECtHR, Authority 35 to OCP Request, para. 28.

¹⁸ *Delta v France*, ECtHR, Authority 30 to OCP Request, para. 36. This same argument is reflected in *Asch v Austria*, ECtHR, Authority 28 to OCP Request, para. 27; *Saidi v France*, ECtHR, Authority 32 to OCP Request, para. 43; *Van Mechelen and Others v the Netherlands*, ECtHR, Authority 34 to OCP Request, para. 51.

36. In principle, the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3(d) and 1 of Article 6 (art. 6-3-d, art. 6-1), provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness makes his statement or at some later stage of the proceedings [...].

28. In this case, and contrary to *Unterpertinger v Austria*¹⁹, the Court held that the witnesses could in fact have been compelled to testify in court.²⁰ Again, the European Court concluded that the accused's fair trial rights had been breached, and stated:²¹

Accordingly, neither the applicant nor his counsel ever had an adequate opportunity to examine witnesses whose evidence, which had been taken in their absence and later reported by a policeman who had not witnessed the attack in the underground, was taken into account by the courts responsible for trying the facts – decisively at first instance and on appeal, as the file contained no other evidence. They were therefore unable to test the witnesses' reliability or cast doubt on their credibility.

29. In the case of *Asch v Austria*,²² the ECtHR held that, whilst the local court had not been able to hear the main victim, this did not lead to a breach of the defendant's right because the officer who had interviewed her in the pre-trial stage had in fact been called at trial, and secondly, because there was more evidence that supported the allegations against the accused. The defence notes that this was a case of domestic violence, where the woman, the victim, had been assaulted in her home by her partner, Mr Asch. The morning following the assault, the victim went to the police and doctor and had a record made of her injuries suffered the previous night. Cases of domestic violence are very particular with respect to the weight of evidence, and cannot be compared to the instant case, even if all other elements of that particular case are not taken into account. It was also expressly held that these factors distinguish the facts of the *Asch* case from the *Unterpertinger* and *Delta* cases mentioned above.²³

30. Further, in the case of *Saïdi v France*, the European Court held that there was a breach of Article 6 of the ECHR where the testimony that had not been subject to scrutiny at trial was the sole basis for the applicant's conviction. The Court further held that '[t]he lack of

¹⁹ See Authority 33 to OCP Request.

²⁰ *Delta v France*, ECtHR, Authority 30 to OCP Request, para. 37.

²¹ *Delta v France*, ECtHR, Authority 30 to OCP Request, para. 37.

²² *Asch v Austria*, ECtHR, Authority 28 to OCP Request.

²³ *Asch v Austria*, ECtHR, Authority 28 to OCP Request, para. 30.

any confrontation deprived him in certain respects of a fair trial', and held that even if there are difficulties in the fight against drug-trafficking in particular with regard to obtaining and producing such evidence, 'such considerations cannot justify restricting to this extent the rights of the defence'.²⁴

31. The case of *Van Mechelen and Others v the Netherlands*, also cited in the OCP Request to support their argument, concerns the use of anonymous witnesses, and the Court there held that anonymous witnesses cannot be the sole basis for a conviction.²⁵ Anonymous witnesses cannot be equated with witnesses that testify to crime base. In the *Van Mechelen* case, the issue was not so much that the defence had not had the right to examine the witness in question, because they had, but that the task was made meaningless by the fact that they did not know the identity of that particular witness.²⁶ The Court held that the Dutch courts' decision to allow the anonymous evidence had not been sufficiently justified, and concluded that there had been a breach of Article 6 of the ECHR, and the Court again stressed the importance for the defence to examine the witness in court, thus being able to judge the witness's reliability and demeanour.²⁷
32. In the case of *Lucà v Italy*, the European Court considered a complaint of an accused who was deprived of the chance to examine the main witness upon whose evidence the conviction was based; in that case the Court decided Article 6 had been violated.²⁸
33. The case of *A.S. v Finland* concerned the testimony of a five-year-old child against an alleged sexual perpetrator. Given the impact the questioning had on the child, it had been decided by a child psychiatrist that he should not be subject to further questioning.²⁹ More specifically, this case concerned the question whether a video of the interview with the child should be admitted into evidence, when the applicant had not himself been in a position to interview the child himself. Domestic Finnish law provides that a video of an interview of a witness under fifteen years old cannot be allowed in court unless the

²⁴ *Saïdi v. France*, ECtHR, Authority 32 to OCP Request, para. 44.

²⁵ *Van Mechelen and Others v the Netherlands*, ECtHR, Authority 34 to OCP Request, para. 55.

²⁶ *Van Mechelen and Others v the Netherlands*, ECtHR, Authority 34 to OCP Request, para. 59.

²⁷ *Van Mechelen and Others v the Netherlands*, ECtHR, Authority 34 to OCP Request, para. 62.

²⁸ *Lucà v Italy*, ECtHR, Authority 31 to OCP Request, para. 43-45.

²⁹ *A.S. v Finland*, ECtHR, Authority 29 to OCP Request, para. 13.

accused has had the opportunity to interview the witness. However, the applicant had initially agreed to the showing of the video in court.³⁰

34. The European Court in *A.S. v Finland* held:³¹

In any event, paragraph 1 of Article 6 taken together with paragraph 3 requires the Contracting States to take positive steps, in particular to enable the accused to examine or have examined witnesses against him. Such measures form part of the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner [...].

35. Even in the case of *A.S. v Finland*, concerning the sensitive issue of child sex abuse, the European Court held that certain specific measures should have been put in place, the failure of which led to a violation of the Convention:³²

In acknowledging the need to strike a balance between the rights of the defendant and those of the alleged child victim, the Court finds that the following minimum guarantees must be in place: the suspected person shall be informed of the hearing of the child, he or she shall be given an opportunity to observe that hearing, either as it is being conducted or later from an audiovisual recording, and to have questions put to the child, either directly or indirectly, in the course of the first hearing or on a later occasion.

36. In that case, the Court concluded that the applicant should have had the right, at the very least, to put written questions to the child. The defence for the Accused has not been given the opportunity to put such written questions. The effect of the OCP Request is to seek to put in evidence witness statements that have not been tested by the defence *at all*. This procedure is in breach of the ECtHR decisions as to the minimum threshold for respect of an accused's fair trial rights.

37. The cases mentioned by the OCP serve to underline the importance for the Accused to examine the witnesses who give evidence against her.

3.5.2 *International Tribunals' Jurisprudence*

38. At the international tribunals, prior to the commencement of the trial, full witness statements are provided to the defence, and thus the defence has a complete overview of what the witness has said to the investigators.³³ This allows the defence to ascertain the origin of the information contained in the statement in contrast to the procedure

³⁰ *A.S. v Finland*, ECtHR, Authority 29 to OCP Request, para. 49.

³¹ *A.S. v Finland*, ECtHR, Authority 29 to OCP Request, para. 53.

³² *A.S. v Finland*, ECtHR, Authority 29 to OCP Request, para. 56.

³³ Though the statements may be redacted at first instance, but this does not prevent the defence of being fully informed of the (exculpatory) information relating to the accused person contained in the statement.

employed at the ECCC for the reasons set out above. Further, as partial analysis of the interview recordings has shown, exculpatory evidence has been left out of the OCIJ Written Records. The admission of evidence of this nature which cannot be tested must lead to a breach of the Accused's fair trial rights.

39. Any comparison with the practice of admission of witness statements at the ICTY, the ICTR and the Special Court for Sierra Leone is therefore, unhelpful in determining the issue.
40. Further, whilst in principle, comparison with other Tribunals may be instructive, reference to the ICTY and SCSL Rules of Procedure and Evidence (RPE) is not helpful in this instance, since they do not have any rule equivalent to Internal Rule 84(1), which in itself underlines the importance of this provision. Also, as acknowledged by the Co-Prosecutors, the other tribunals have explicit provisions for the admission of witness statements.³⁴ The absence of such provision in the ECCC legal instruments is indicative of the different system prevalent here. In view of the rules contained in the Statutes of other Tribunals and their inevitable familiarity to the drafters of the Internal Rules of the ECCC, the omission of explicit provisions to allow for the admissibility of written statements must have been intentional. It is wrongly characterized by the Co-Prosecutors as a *lacuna* in the Rules.
41. The jurisprudence cited of the International Criminal Court (ICC) is of limited relevance as the ICC, like the other tribunals, makes use of 'witness statements', rather than mere summaries. However, it is notable that the ICC does not permit the use of the witness statements unless the defence and prosecution has been allowed the opportunity to examine the maker of the statement at the time it is taken.
42. The Co-Prosecutors refer to 'the civil law system' in paragraph 31 of the OCP Request. The defence submits there is a need for caution in using that term, since there are many different civil law systems, and as far as the defence is aware, in most if not all of those systems, the defence is allowed to test the witness's evidence, either at the pre-trial phase,

³⁴ See OCP Request, para. 5. Whilst the OCP calls this '*lacunae*', the defence submits omitting such provision in the Rules was not an oversight, but a deliberate decision.

or in court. Whilst in no system, civil or common law, does counsel have 'unrestricted freedom to cross-examine witnesses',³⁵ restrictions are imposed such as those described in the cases before the ECtHR mentioned above. Further, the case cited by the Co-Prosecutors dates from 1969,³⁶ and the 'civil law system' has developed greatly since. The defence submits that in the civil law systems the accused or his or her counsel is generally actively involved at the pre-trial stage of the proceedings, even if the charged person relies on his or her right to remain silent.

43. Further, the OCP's emphasis on the objectivity of the procedures applied by the Co-Investigating Judges has been challenged by the defence throughout those proceedings. In respect of the defence's earlier comments on the quality of the OCIJ Written Records, it is irrelevant in this regard whether the errors and omissions noted in the OCIJ Written Records are the result of deliberate actions or mere mistakes and inaccuracies. What is relevant is that it has been shown that the OCIJ Written Records are not accurate reflections of the interviews conducted with these witnesses, and those cannot without admission of their full transcript into evidence, or cross-examination by the defence, be admissible.
44. In paragraph 34 of their Request, the Co-Prosecutors state that the defence wishes to examine hundreds of witnesses at trial. This number depends on the number of witnesses called by the Co-Prosecutors (which may number several hundred), and further on the number of OCIJ Written Records the Co-Prosecutors seek to rely on in the trial. The Co-Prosecutors choose which witnesses they want to place on their Witness List, and which OCIJ Written Records they seek to adduce in evidence. The defence is merely asserting its right to test the prosecution evidence. The Co-Prosecutors put a total of 6,969 documents on their Documents List, including 1,415 documents called 'witness statements'. The defence respectfully submits that, if the Co-Prosecutors, have concerns as to the expeditious conduct of the case, the remedy lies with them but not at the expense of the rights of the Accused.

³⁵ OCP Request, para. 31.

³⁶ Authority 38 to OCP Request.



45. The Co-Prosecutors cite Rule 21. The defence submits this provision has no relevance to the issue to be determined. The Co-Prosecutors can request the attendance of all those witnesses whose evidence they seek to rely upon to try and prove their case.
46. The defence further submits that the Case 001 should not guide the Chamber in its determination of this matter in Case 002. The case was wholly different and many of the facts were not in issue in Case 001. The Trial Chamber was concerned with the admission into evidence of some 14 documents.³⁷

3.6 Statements from Outside Organizations and Persons

47. The Co-Prosecutors further contend that 'witness statements' from organizations other than the OCIJ should similarly be admitted into evidence,³⁸ such as statements taken by the Documentation Center for Cambodia (**DC-Cam**). As shown by previous filings of other defence teams, information deriving from this organization cannot be treated as objective, and thus lacks reliability. The organization was created to instigate the prosecution of Khmer Rouge leaders. In this respect, the defence refers to the filing of the co-accused, Ieng Sary's, defence, asking the Trial Chamber not to rely on any material deriving from DC-Cam.³⁹ The arguments contained therein apply to other organizations and persons who have conducted interviews in preparation for the trials; these cannot be said to be objective. Further, frequently the provenance of the material is not clear.

3.7 Admission of Statements from Deceased Witnesses

48. The OCP Request makes reference to the Trial Chamber's decision in Case 001 relating to the admission of statements made by witnesses who are now deceased.⁴⁰ In that case the Chamber denied the Co-Prosecutors' request to admit into evidence statements made by witnesses who had died since providing a statement, and whom the defence had not had the opportunity to examine, either at the investigative or at the trial stage. It is respectfully submitted that the Trial Chamber had proper regard for Rule 84(1) and was

³⁷ OCP Request, para. 30.

³⁸ OCP Request, para. 39.

³⁹ Ieng Sary's Motion against the Use of All Material Collected by the Documentation Center for Cambodia, 24 February 2011, Document No. E59.

⁴⁰ Case 001, TC, Decision on Admissibility of Material on the Case File as Evidence, 26 May 2009, Document No. E43/4, paras. 13-16.

Eg6/2

not persuaded to embrace the provisions of the Rules applicable to the ICTY. The Trial Chamber's ruling is correct and unambiguous. As a general principle, the defence has the right to examine evidence from witnesses against the Accused, and if the witness has died the evidence may not be used against the Accused, in accordance with international fair trial standards.

3.8 Admission of Transcripts

49. The defence objects to the admission of transcripts into evidence on the basis of Rule 92 which is not intended to be used for the admission of evidence. The defence strategy in the case of Duch was not to challenge most of the evidence adduced by the Co-Prosecutors; consequently, the witnesses in that trial were not subjected to cross-examination and the reliability and veracity of the witnesses was not tested.

V CONCLUSION

For the reasons set out herein, the defence respectfully requests the Trial Chamber:

- To reject the OCP Request in its entirety;
- To allow the defence the right to examine in court each witness who testifies against the Accused;
- To allow the defence in principle the right to examine witnesses who have provided inculpatory information about the Accused;
- To exclude any incomplete OCIJ Written Record;
- To reject all 'witness statements' or other witness documents emanating from DC-Cam and / or comparable organisations or persons;
- To affirm that statements of deceased witnesses are inadmissible;
- To rule that transcripts of evidence from other trials are not admissible.

Party	Date	Name Lawyers	Place	Signature
Co-Lawyers for Ieng Thirith	22 July 2011	PHAT Pouv Seang Diana ELLIS, QC	Phnom Penh	

