BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' REPLY TO THE RESPONSES REGARDING THE ADMISSION OF WRITTEN WITNESS STATEMENTS BEFORE THE TRIAL CHAMBER

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I. INTRODUCTION

1. In accordance with the Trial Chamber's decision on requests for extension of time,[1] the Co-Prosecutors hereby file this joint reply to the responses[2] by Nuon Chea, Ieng Thirith, Ieng Sary and Khieu Samphan (the 'Responses'), as well as the Civil Party Lead Co-Lawyers,[3] to the Co-Prosecutors' Submission Regarding the Admission of Written Statements Before the Trial Chamber (the 'OCP Submission').[4]

2. Given the space restrictions, it is not possible to respond individually to all the arguments raised in the Responses. The Co-Prosecutors, nevertheless, maintain their position as set out in the OCP Submission, and additionally respond to these principal issues addressed in the Responses: 1) The challenge to the use of international principles given the supposedly unambiguous nature of domestic provisions; 2) The relevant civil law principles; 3) The argument that the European Court of Human Rights jurisprudence supports an unqualified right to call witnesses at trial; and 4) The arguments regarding the lack of reliability or accuracy of various categories of statements.

II. REPLY TO DEFENCE SUBMISSIONS

A. The use of international principles under Article 33 new of ECCC Law

3. Common to all the Responses is the argument that there is no uncertainty in the existing procedures, which, according to the Defence, effectively provide an unqualified, absolute or "mandatory" right for the Accused to examine all witnesses whose statements are proposed as evidence and whom they did not have an opportunity to examine during the judicial investigation.[5] It has also been submitted that there is no inconsistency between these procedures and international standards, and that any differences between the two were intentional. In these circumstances, the Defence argue, there is no need to apply the rules established at the international level. Ieng Sary further submits that, in any event, the Co-Prosecutors have failed to establish that the Chamber should prefer the approach

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1 Decision on Co-Prosecutors' Requests for Extension of Time, E107/3, 2 August 2011.

2 Response to OCP Submission Regarding the Admission of Written Statements, 21 July 2011, E96/1 ('**Nuon Chea Response**'); Ieng Thirith Defence Response to 'Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Statements Before the Trial Chamber,' E96/2, 22 July 2011, ('**Ieng Thirith Response**'); Ieng Sary's Response to the Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Statements Before the Trial Chamber & Request for a Public Hearing, E96/3, 22 July 2011 ('**Ieng Sary Response**'); Observations in Response to Co-Prosecutors' Submission Regarding the Admission of Written Statements, E96/4, 22 July 2011 ('**Khieu Samphan Response**').

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

4 Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Statements Before the Trial Chamber, 15 June 2011, E96 ('**OCP Submission**').

5 The Co-Prosecutors note that Khieu Samphan acknowledges that the Trial Chamber has the discretion to admit written statements in lieu of oral testimony, albeit in very limited and exceptional circumstances.

of the *ad hoc* tribunals over the more restrictive approach of the International Criminal Court (ICC). Finally, Ieng Thirith claims that the Co-Prosecutors are estopped from seeking the admission of written statements in lieu of oral testimony at this stage of the proceedings. These arguments are addressed below.

A(1) Unresolved Issues of Interpretation in the Existing Procedures

4. The Co-Prosecutors submit that questions of interpretation arise out of: 1) The differences in the wording of the three language versions of Subrule 84(1), namely the omission of the word "absolute" in the Khmer and French texts, and of the words "against him or her" in the French text; and 2) The need to resolve the potential conflict between the right to examine witnesses, and the Trial Chamber's obligations to ensure that the trial is conducted expeditiously and that a balance is preserved between the parties.

A(1)(i) – Wording of the Provisions

5. The omission of the word "absolute" in the Khmer and French versions of Subrule 84(1) is material. The core submission put forward by the Accused is that this provision essentially does provide an absolute right.[6] Nuon Chea argues that Article 297 of the Cambodian Code of Criminal Procedure (CCPC) resolves any ambiguity in Subrule 84(1) as it provides that witnesses "must appear in court [to] provide *viva voce* testimony."[7] However, it is far from clear that the existing domestic procedures embrace an unqualified right to examine witnesses at trial. A recent trial monitoring project run by the Cambodian Center for Human Rights found that "witnesses appeared in 82 of the 532 trials monitored."[8] The report notes that, while the accused has the right to summon and examine witnesses in support of his case and those against him, "[t]he right should not be read as an unqualified right to force witnesses' attendance or as a right to call an indeterminate number of witnesses."[9]

6. The above conclusion is consistent with the practice of the Trial Chamber in Case 001, where, as indicated in the OCP Submission, the Chamber admitted 14 witness statements without requiring the witnesses to appear for examination. Contrary to Ieng Sary's submission, in refusing to admit the statements of two deceased witnesses, the Chamber did not rely solely on the fact that the Accused had not been able to examine them. It adopted an approach consistent with the international rules cited in the OCP Submission,

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6 OCP Submission, para 3-4.
7 Nuon Chea Response, para 3.
8 Cambodian Center for Human Rights, "Fair Trial Rights in Cambodia," p.29.
9 Ibid. p.28.

pursuant to which the fact that an accused was unable to examine a witness is a consideration against the admission of the statements (as opposed to a bar to admission).[10] Further, the provisions of the Internal Rules (IRs) cited by Ieng Sary in support of an unqualified right to call witnesses relate to the modalities of examination of witnesses who are summoned to give oral evidence, and not to the right to examine witnesses.[11]

7. Equally, the words "against him or her" in Subrule 84(1) are material as they are a limitation on the Accused's right to examine witnesses at trial. When interpreted in accordance with the international principles described in the OCP Submission, these words mean that an accused has the right to examine witnesses testifying to his/her acts and conduct, or another pivotal aspect of the case. For the remaining witnesses, the Chamber has the discretion to admit statements in lieu of oral testimony. If the Defence submissions (that an accused has an absolute right to examine all witnesses) are accepted, the words "against him or her" in the English and Khmer versions of Subrule 84(1) would effectively have no meaning.

8. In seeking to illustrate the supposed clarity of the phrase "against him or her," Nuon Chea offers a purely linguistic solution: he argues that the definition should follow the plain meaning of the word "against." But he then offers a wide-sweeping definition: "any individual whose testimony tends to prove any aspect of the prosecution case"[12] (emphasis added). No legal authority is cited in support of this definition, which raises more questions than it answers.[13] The fact that the single "authority" on which Nuon Chea relies in support of his statutory interpretation argument is a lay *English language* dictionary is itself indicative of the dearth of domestic legal authorities on this topic, and of the need to look to international principles for guidance.

9. If Defence submissions are accepted, the Chamber would be obliged to summon *any* witness whose statement is tendered in support of *any* allegation in the indictment. For example, the fact that a witness's statement does not relate to the acts and conduct of one of the Accused, and is corroborated by other evidence, would be of no relevance. With

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[10] Decision on Admissibility of Material on the Case File as Evidence, E43/4, 26 May 2009, para 13-16.
[11] Ieng Sary Response, para 7-9.
[12] Nuon Chea Response, para 4(b).
[13] For example: what is the "**prosecution case**" in an inquisitorial proceeding led by the judges? Nuon Chea offers an unworkable definition: according to him, in the absence of agreed facts, the "prosecution case" is "by definition, in opposition, contrary, adverse, and hostile to the position of the accused person." And yet, he fails to explain how the "position of the accused person" is to be established in a multi-accused trial where each of the accused exercises his/her right to remain silent. His definition in effect invites the Chamber to guess what the position of the accused may be, and to then deduce, from that, its opposite – the "prosecution case." This proposal is without basis in domestic or international jurisprudence.

this approach, the Trial Chamber would lose any ability to control the length of the trial. As illustrated in Section A(1)(ii) below, this would result in a breach of the Trial Chamber's positive duty to ensure the trial is conducted in an expeditious manner.

10. Ieng Sary has submitted that the IRs represent a consolidation between domestic procedures and international standards, and that, therefore, further recourse to international rules is unwarranted.[14] In response, it is sufficient to note that the Court has, on numerous occasions, sought international guidance to elaborate principles which are contained in the Rules in varying degrees of detail.[15] Clearly, while the Rules do set out the procedure applicable before the Court, they do not and simply cannot, address comprehensively every conceivable procedural issue which may arise in practice. Finally, the Co-Prosecutors note that Ieng Sary himself turns to international sources to support his interpretation of the phrase "witnesses against him."[16]

A(1)(ii) – The need to reconcile the right to call witnesses with other provisions

11. The existing Cambodian procedures require a balancing of the right to call witnesses with the obligation to conclude the proceedings within a reasonable period. However, as the Civil Party Lead Co-Lawyers (CPLC) point out, it is with respect to this balancing exercise that the domestic procedures do not provide sufficient guidance.[17]

12. The obligation to act expeditiously is a positive duty reflected in several provisions which are applicable before the Court, including Article 33 new of the ECCC Law (which states that the trials must be both fair *and* expeditious), Article 14(3)(c) of the ICCPR and Article 29 of the ECCC Agreement. This duty has been recognised by the Pre-Trial Chamber (PTC) in this case,[18] and by the Trial Chamber in Case 001.[19]

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[14] Ieng Sary Response, para 14.

[15] See, for example: Decision on Ieng Thirith's Appeal against Order on Extension of Provisional Detention, C20/5/17, 11 May 2009, para 55-60; Decision on Appeal against Provisional Detention Order of Nuon Chea, C11/54, 20 March 2008, para 18-32; Decision on Nuon Chea's Appeal regarding Appointment of Expert, D54/V/5, 22 October 2008, para 18-27; Pre-Trial Chamber Decision on Admissibility on "Appeal against the CO-Investigating Judges' Order on Breach of Confidentiality of the Judicial Investigation", D138/1/8, 13 July 2009, para 13-26; and Decision on Request to Reconsider the Decision on Request for an Oral Hearing On the Appeals PTC24 and 25, D164/3/5, 20 October 2009, para 15-24.

[16] Ieng Sary Response, para 6.

[17] CPLC Response, para 16-18.

[18] See, for example: Public Decision on the Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, C11/29, 4 February 2008, para 8; Decision on Application to Postpone the Hearing of the Appeal Against the Provisional Detention Order, C 20/I/13, 1 April 2008, para 5; Decision on Appeal of Ieng Sary Against OCIJ's Order on Extension of Provisional Detention, C22/5/38, 26 June 2009, para 43; Decision to Determine the Appeal on Written Submissions, D 361/2/2, 12 May 2010, para 5; Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summon Witnesses, D314/1/8, 8 June 2010,

13. As the CPLC have indicated, Article 297 of the CCCP is limited by Article 318, which gives the Presiding Judge the discretion to exclude from the hearing everything he/she deems to unnecessarily delay the hearing without being conducive to ascertaining the truth.[20] Similarly, IRs 85 and 87 appear to qualify Subrule 84(1). Subrule 85(1) provides that "the President may exclude any proceedings that unnecessarily delay the trial and are not conducive to ascertaining the truth." Subrule 87(3) gives the Chamber the discretion to reject any request for evidence where it finds that it is, *inter alia*, repetitious or intended to prolong the proceedings.

14. The approach proposed by the Accused effectively invites the Chamber to ignore its obligation to manage the trial efficiently. They assert that, if the Co-Prosecutors insist on an expeditious trial, they should not have initiated a large criminal case. Nuon Chea's comparison of this case to "Frankenstein" is as offensive to the victims as it is misplaced.[21] What he describes as the Co-Prosecutors' "creation" is a modest representative sample of one of the largest series of mass crimes alleged to have been perpetrated against any single nation in modern history. By way of concrete example, the Co-Investigating Judges ('CIJs') found that the Communist Party of Kampuchea established "approximately 200 security centres and countless execution sites…throughout Cambodia" during the period covered by the Indictment.[22] The Indictment covers 11 security centres, representing some five per cent of the number of prisons which formed part of the alleged joint criminal enterprise.

15. Finally, the Defence take issue with the Co-Prosecutors' argument that a rigid application of Subrule 84(1) would be inconsistent with the fundamental requirement to maintain a balance between the rights of the parties which is found in Subrule 21(1)(a). The Co-Prosecutors submit that, to interpret Subrule 84(1) as giving each Accused an unqualified right to examine witnesses whose statements are proposed as evidence, would result in an imbalance between the rights of the parties because: 1) the Co-Prosecutors bear the onus of proving the guilt of the Accused beyond a reasonable doubt; and 2) at the same time, they are subject to the Trial Chamber's obligation to manage the trial efficiently which means that, inevitably, the number of witnesses they are able to summon will be limited

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para 70; Decision on Appeals by Nuon Chea and Ieng Thirth Against the Closing Order, D427/2/15, 15 February 2011, para 82.

19 Trial Chamber, Judgment, E188, 26 July 2010, para 665.

20 CPLC Response, para 13-15.

21 Nuon Chea Response, para 4(c).

22 Closing Order, D427, 15 September 2010, para 178.

by the Chamber.[23] In these circumstances, allowing the Accused an unconditional right to call hundreds of witnesses whose testimonies largely relate to the crime-base and are corroborative of other evidence (including oral evidence which *will* be subject to in-court examination by the parties), would be inconsistent with Subrule 21(1)(a).

A(2) Gaps and Inconsistencies with International Standards

16. Nuon Chea has argued that the fact that "highly specific" international rules exist on an issue on which the Cambodian law is less specific is not, of itself, a reason to seek guidance in those international rules.[24] This submission ignores the fact that existing Cambodian procedures are silent on several key issues, including: the admission of witness statements; the meaning of the phrase "witnesses against him or her;" and, as indicated above, the way in which the Trial Chamber should strike a balance between the Accused's right to call witnesses and its obligation to conclude the trial within a reasonable time. More broadly, it ignores the obvious fact that domestic Cambodian criminal procedure was not developed for cases such as this one: alleging mass crimes and relying very heavily on international law.

17. It is also plainly incorrect to assert that Cambodian standards are more stringent than those under international law, and therefore provide a higher level of protection.[25] As illustrated in Section A(1) above, Cambodian courts have an overriding discretion to exclude evidence which delays the proceedings; and practice witnesses are heard far less often than Nuon Chea is suggesting.

18. There is significant potential for inconsistencies between Subrule 84(1) (if interpreted in the manner suggested by the Accused) and international standards. Those standards do not recognise a right to cross-examine all witnesses in a criminal trial,[26] but do place an obligation on the Chamber to conduct the trial in an expeditious manner. Contrary to Ieng Sary's submissions, this obligation is a core principle of international law. Article 14(3)(c) of the International Covenant on Civil and Political Rights (ICCPR) states, in the relevant part: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees…(c) To be tried without undue delay." The Human Rights Committee's commentary on this provision stresses the importance of

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[23] This is already apparent from the Chamber's tentative witness list distributed at the recent Initial Hearing.
[24] Nuon Chea Response, para 4(d).
[25] Nuon Chea Response, para 6.
[26] Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, Doc No. CCPR/C/GC/32, para 39.

ensuring accused are tried "as expeditiously as possible," especially where they are held in custody.[27] In commenting on a provision framed in terms similar to Article 33 new of the ECCC Law, the ICC Appeals Chamber has affirmed the importance of the right to be tried without undue delay, and the corresponding duty of a court to conduct the trial expeditiously: "Not only is trial without undue delay assured as a right of the accused, but the Statute goes a step further. Article 64 (2) of the Statute binds the Court to hold, not only a fair, but an expeditious trial too."[28]

19. International standards provide useful guidance on the issue of expeditious proceedings. The International Criminal Tribunal for the Former Yugoslavia (ICTY), the first international court with jurisdiction over genocide, war crimes and crimes against humanity since Nuremberg-era tribunals, initially preferred live oral testimonies at trial. As a result, "trials develop[ed] into endless contests between the parties, whose main aim [was] to win these battles, not to promote the expeditiousness of the proceedings and judicial economy."[29] This process was altered by Rule 92*bis*, which allows the admission of written witness statements and transcripts in lieu of oral testimony so long as they do not go to proof of acts and conduct of the accused.[30] The primary reason for this shift towards admission of written witness statements was to "focus on shorter and less costly trials entailing less delay for the accused in detention and more credibility for the Tribunal's ability to get its work done."[31] It is also relevant to note that the use of written witness statements in lieu of oral testimony is widely permitted in international dispute resolution.[32]

20. The need to manage trials expeditiously also led to other reforms at the ICTY, such as the practice of imposing time limits on parties' presentation of evidence. The ICTY Manual on Developed Practices states:

> In light of the voluminous materials presented, the period of alleged criminal acts spanned in the indictments, and the inherent case management issues arising during the litigating of international criminal matters, particularly in multi-accused cases, the presentation of evidence could conceivably continue indefinitely. Consequently, the imposition of global time limits is viewed as a necessary and useful measure.[33]

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[27] Ibid, para 35 (footnotes omitted).
[28] Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I Entitled "Decision on the Release of Thomas Lubanga Dyilo," Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06 OA 12, 21 October 2008, para 15.
[29] Jermone de Hemptinne, The Creation of Investigating Chambers at the International Criminal Court, p.405.
[30] Patricia Wald, Dealing With Witnesses in War Crime Trials: Lessons From The Yugoslav Tribunal, p.227.
[31] Ibid, pp.229-230.
[32] John Wolf & Kelly Preteroti, Written Witness Statements—A Practical Bridge of the Cultural Divide, p.85.
[33] International Criminal Tribunal for the Former Yugoslavia Manual on Developed Practices, 2009, p.78.

21. A variation of this practice was adopted by the Trial Chamber in Case 001, where specific time limits were imposed for each party's examination of witnesses.[34]

22. Nuon Chea's argument that the reference in Article 33 new of the ECCC Law to "international standards" is limited to a very narrow scope of fair trial principles must also fail.[35] While fair trial guarantees are clearly essential, the Court must also consider other relevant international principles, including Cambodia's obligation to ensure that victims of violations of the rights recognised in the ICCPR have an effective remedy.[36] For example, in considering the interests underpinning the rule *ne bis in idem* in international law, the PTC held: "[T]hese interests have to be balanced with the interest of the international community and victims in insuring that those responsible for the commission of international crimes are properly prosecuted. [footnote omitted]"[37] In considering the international standards relevant to the rights of Civil Parties to participate in detention appeal hearings, the PTC considered numerous instruments, including the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[38]

23. Finally, Ieng Thirith asserts that the practice of admission of witness statements at the *ad hoc* tribunals should be distinguished. This is because, at these tribunals, the defence are in a better position, as they are provided "full witness statements" prior to the commencement of trial.[39] This argument does not withstand scrutiny. In fact, defence at the ECCC are in a significantly better position. At the *ad hoc* tribunals, the defence receive summary witness statements taken by investigators who work under the supervision of the Prosecutor. In most cases, these statements are not accompanied by audio recordings of the witness interviews. ICTY prosecutors need only disclose the statements following the confirmation of indictment and initial appearance of the accused.[40] At the ECCC, the statements are taken by staff of the Office of the Co-Investigating Judges (OCIJ), who work under the direction of the CIJs. Defence have access to these statements, and to full audio recordings of the interviews, during the investigation. The CIJs are required by Subrule 55(5) to "conduct their investigation

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[34] Transcript, E1/46.1, 9 July 2009, p.62.
[35] Nuon Chea Response, para 7-8.
[36] Article 2(3), ICCPR.
[37] Decision on Ieng Sary's Appeal against the Closing Order, D427/1/30, 11 April 2011, para 143.
[38] Decision on Civil Party Participation in Provisional Detention Appeals, C11/53, 20 March 2008, para 30-34.
[39] Ieng Thirith Response, para 38.
[40] Subrule 66A(ii), Rules of Procedure and Evidence of the ICTY.

impartially, whether the evidence is inculpatory or exculpatory," an obligation which does not apply to the ICTY Prosecutor.[41]

A(3) Whether ICC Rules Should be Preferred

24. In response to Ieng Sary's submissions,[42] while it is not possible to provide an exhaustive analysis of the differences between the relevant procedural frameworks of the *ad hoc* tribunals and the ICC in this reply, the Co-Prosecutors maintain that the former should be preferred. Like the IRs, the ICC Statute recognises an Accused's right to examine witnesses against him or her.[43] However, the drafters of the ICC Rules of Procedure and Evidence (RoPE) took the additional step of restricting, in Rule 68, the admission of witness statements in lieu of oral testimony to cases where prosecution and the accused were able to examine the witness during the taking of the statement. This approach was not taken at the ECCC or the *ad hoc* tribunals.

25. Furthermore, while the ICC case law is limited (the Court is yet to render its first judgment), even at this stage it is far from apparent that the Court will read Rule 68 as constituting the only avenue for the introduction of witness statements. Although the decision cited by the CPLC[44] did not deal directly with witness statements, it appears to leave open the possibility for a more purposive approach, focusing on, *inter alia*, the principle of free evaluation of evidence.[45] In a more recent decision, another Trial Chamber of the ICC admitted *prima facie* all witness statements, while noting that the Accused will be afforded the opportunity to examine witnesses against him. The majority of the Chamber noted that "the [ICC] Statute only envisages a presumption in favour of oral testimony, but no prevalence of *orality* of the procedures as a whole."[46] A recent article suggests that the ICC "solution will likely tend to be similar to that adopted by the ad hoc tribunals, which…tend to accept written statements, allowing the cross-

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[41] Article 16, Statute of the International Criminal Tribunal for the Former Yugoslavia. Although the OTP is obliged to disclose exculpatory material to the defence after the confirmation of an indictment, there is no requirement to pursue impartiality during the investigations: Rule 68(i), Rules of Procedure and Evidence.

[42] Ieng Sary Response, para 17-18.

[43] Article 67(1)(e) of the ICC Statute.

[44] CPLC Response, para 22-24.

[45] Decision on the Admissibility of Four Documents, Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06 OA, 13 June 2008, para 24.

[46] Decision on the Admission into Evidence of Materials Contained in the Prosecution's List of Evidence, Situation in the Central African Republic in the Case of The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 19 November 2010, para 14 and 20 (Footnote omitted). In recognising the right of the Accused to examine witnesses against him, the Chamber refers to ECtHR jurisprudence, which, as Section C demonstrates, does not recognise an unqualified right to confront witnesses at trial: para 20.

examination by the counterpart only when the evidence seems crucial.[47] The author argues that the ICC should adopt the approach taken by the ICTY under its Rule 92*bis*, and permit admission of written statements in lieu of oral testimony where the evidence does not relate to the acts and conduct of the accused, or a crucial element of the case.[48]

26. Khieu Samphan's submissions[49] regarding the applicability of the Rules of the Special Tribunal for Lebanon (STL) do not undermine the international jurisprudence cited in the OCP Submission; in fact they support it. Rule 155 of the STL RoPE adopts the *ad hoc* tribunals' distinction between evidence going to the acts and conduct of the accused and other evidence. Where the parties had the opportunity to examine a witness at the time his/her statement was taken, this is simply a factor in favour of admitting the statement in lieu of oral testimony.

A(4) The Co-Prosecutors are not Estopped From Seeking Admission of Written Statements

27. Ieng Thirith claims that the Co-Prosecutors are estopped from seeking the admission of written statements because, during the judicial investigation, they did not give notice of their intention to make such a request at trial.[50] The Co-Prosecutors note that the concept of estoppel is unknown in Cambodian law, or the civil law tradition more broadly.[51] However, even if considered on the basis of considerations of conscionability which underpin the concept of equitable estoppel in common law,[52] Ieng Thirith's argument must fail. It invites the Chamber to accept the fiction that the parties were unaware that witness statements given to the CIJs may be proposed as evidence at trial in lieu of oral testimony. As noted in Section B, use of written evidence at trial is a well-established procedure in countries which employ judicial investigations. A basic review of the civil law procedure, and of the Trial Chamber's practice in Case 001, would have informed Ieng Thirith's Defence of this position.[53] The estoppel argument therefore has no merit.

B. Civil Law Principles

28. In the OCP Submission the Co-Prosecutors argued that, in exercising its discretion regarding the summoning of witnesses, the Chamber should take into account the nature

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[47] Michelle Caianiello, First Decisions on the Admission of Evidence at ICC Trials – A Blending of Accusatorial and Inquisitorial Models?, p.400.
[48] Ibid, Conclusions.
[49] Khieu Samphan Response, para 26-28.
[50] Ieng Thirith Response, para 12.
[51] Ieng Thirith fails to cite a single provision of the Cambodian law or the Internal Rules, or any case-law, that would support the application of estoppel before this Court.
[52] Adam Kramer, The many doctrines of estoppel, p.17.
[53] For example, Subrule 87(1) provides that all evidence is admissible and Subrule 87(3) states that the Chamber "bases its decision on evidence from the case file."

of the civil law procedure and the specific checks and balances provided therein. The Co-Prosecutors submit that, when tested against those considerations, the Accused's submissions that the Cambodian procedure allows an absolute right to examine all witnesses does not stand. An impartial judicial investigation constitutes one of the essential tenets of the civil law procedure and a key distinction between civil and common law procedural models. In civil law systems, such as that applicable in Cambodia, less emphasis is placed upon the testing of evidence at trial because "[i]nquisitorial trials are more deeply embedded within the investigative process."[54]

29. The independence and impartiality of the judicial investigator offer important protections for the rights of a person under investigation. Evidence is reviewed and placed on a case file by a judge who is searching for the truth, and not a party who may have an interest in the outcome of the proceedings.[55] As a result, witness statements placed on the case file may be admitted without the necessity for the witnesses to be called to give evidence at trial. In a detailed study of five criminal trials in France, one author observed the following significant feature: "The evidence against the defendant was to be found in the dossier, not in testimony and exhibits at the hearing. In this sample of cases the statements of 17 people, apart from defendants, were included in the dossiers but only one of those appeared at a hearing, and that because he was a civil party claiming damages."[56]

30. The civil law system has developed procedural safeguards to provide the guarantees of a fair trial. They include granting access to the suspect and his/her counsel to the investigation dossier.[57] However, as noted in the OCP Submission, counsel do not have unrestricted freedom to cross-examine witnesses.[58] Further, insofar as judicial authorities oversee both the investigating and the adjudicating phases of proceedings, the need to discount the information gathered prior to trial is significantly reduced.[59] These factors should inform the Chamber's consideration of the need to summon witnesses at trial.

C. European Court of Human Rights Jurisprudence

31. The OCP Submission cited several cases in which the European Court of Human Rights (ECtHR) interpreted Article 6 of the European Convention on Human Rights not to give an accused an unqualified right to summon and examine witnesses. Ieng Thirith has

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[54] Francis Pakes, Comparative Criminal Justice, p.74.
[55] Jermone de Hemptinne, The Creation of Investigating Chambers at the International Criminal Court, p.407.
[56] Bron McKillop, Readings and Hearings in French Criminal Justice: Five Cases in the Tribunal Correctionel; French Criminal Justice, p.774.
[57] James G. Apple & Robert P. Deyling, A Primer on the Civil-Law System, pp.28.
[58] Merryman, Chapter XVII Criminal Procedure, The Civil Law Tradition, p.129.
[59] Francis Pakes, Comparative Criminal Justice, p.81.

referred to the outcomes of those cases as illustration that the admission of written statements in lieu of oral testimony is not consistent with the Accused's fair trial rights.[60]

32. The inference drawn by the Ieng Thirith does not follow from the ECtHR cases. The judgments illustrate that the ECtHR has applied a test which allows the admission of written statements in lieu of oral evidence, subject to conditions. In essence, the ECtHR test allows the use of statements without oral testimony provided that: i) the Accused has had an adequate opportunity to challenge the evidence against him/her; and ii) the statements are not relied upon "solely or to a decisive degree" as evidence for the conviction.[61] Despite the emphasis which Ieng Thirith has sought to place on the outcomes of the ECtHR cases, as opposed to the legal principles discussed therein, the cases simply illustrate the application of the above test.

33. In *Unterpinger v. Austria*, *Saidi v. France*, *Luca v. Italy*, *Delta v. France*, and *Van Mechelen and Others v. the Netherlands*, the ECtHR found violations of Article 6 because the trial courts had relied on written statements solely or to a decisive degree as evidence for the convictions.[62] For example, in *Delta v. France*, the witness statement relied upon by the trial court constituted the only evidence in the case file. Similarly, as Ieng Thirith correctly points out, the ECtHR found a violation in *Unterpinger v. Austria* because witness statements formed the main evidence upon which the conviction was based. In stark contrast to the facts of these cases, the Co-Prosecutors are not proposing that the Trial Chamber rely on written witness statements solely or to a decisive degree in reaching its factual findings. In this respect, contrary to Ieng Thirith's assertion,[63] the Co-Prosecutors have indicated, in their witness lists, which witnesses they propose to give oral evidence with respect to each part of the case, including the crime base.

D. Allegations as to the Unreliability of Witness Statements

OCIJ Statements

34. Ieng Sary asserts that witness statements obtained by OCIJ investigators are not reliable and should not be admitted into evidence without affording the Accused the right of

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[60] Ieng Thirith Response, para 24-37; see also Ieng Sary Response, para 16.

[61] Unterpertinger v. Austria, 24 November 1986, Application no. 9120/80 ('**Unterpertinger**'), para 31; Windisch v. Austria, 27 September 1990, Application no. 1249/86, para 26 and 31; Delta v. France, 19 December 1990, Application no. 11444/85 ('**Delta**'), para 36-37; Asch v. Austria, 26 April 1991, Application no. 12398/86, para 25, 27 and 30; Saidi v. France, 20 September 1993, Application no. 14647/89 ('**Saidi**'), para 43; Van Mechelen and Others v. the Netherlands, 18 March 1997, Case no. 55/1996/674/861-864 ('**Van Mechelen**'), para 49, 51, 55 and 76; Luca v. Italy, 27 February 2001, Application no. 33354/96 ('**Luca**'), para 37, 39-40; and A.S. v. Finland, 28 September 2010, Application no. 40156107, para 53-54.

[62] Unterpertinger, para 33, Saidi, para 44; Luca, para 40-43; Delta, para 36-37; Van Mechelen, para 55, 63.

[63] Ieng Thirith Response, para 9.

confrontation.[64] The Co-Prosecutors submit that these generalised arguments which rely on submissions already rejected by the Court[65] do not warrant further consideration. The Accused cannot simply recycle prior attacks on the OCIJ *ad infinitum* and expect this Court to entertain them. By way of illustration, Ieng Sary refers to, and effectively misrepresents, Judge Lemonde's alleged statement that he "would prefer that [the OCIJ] find more inculpatory evidence than exculpatory evidence" as an instruction to his staff.[66] The PTC has in fact determined that, even if made, this alleged statement did not amount to an instruction.[67] It also found that the alleged facts relating to this statement were insufficient to prove a biased approach to the investigation.[68]

35. However, the transcripts of OCIJ witness interview recordings prepared by the Ieng Thirith Defence do point to legitimate, albeit limited, concerns in relation to the completeness or accuracy of some of the OCIJ witness statements.[69] While Ieng Thirith does not specify which passages are, in her view, incomplete or exclusive of exculpatory evidence, at least the following instances appear to contain omissions or inaccuracies:

    a) The Seng Mon statement indicates that the witness said "I saw Ieng Thirith occasionally." The Defence's transcript of this interview reads: "Ieng Thirith, she rarely came;" and "For Ieng Thirith was very very rare, maybe one, that I saw."[70]

    b) According to the Phan Sovannhan statement, the Witness said that Ieng Thirith was of the "upper rank," whereas according to the Defence's transcript, the Witness stated that she did not know who the upper rank was, and that Ieng Thirith operated at the middle level and received instructions from the upper rank.[71]

36. Although the summaries are largely accurate, omissions such as those above do give rise to legitimate concerns. In noting these concerns, the Co-Prosecutors emphasise their submission that witnesses who gave evidence regarding the acts and conduct of the Accused, or other pivotal parts of the case, should be summoned to testify at trial. However, given their largely cumulative nature, witness statements relating to the crime

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64 Ieng Sary Response, para 26.
65 Decision on Ieng Sary's Application to Disqualify Co-Investigating Judge Marcel Lemonde, 002/009-10-2009-ECCC/PTC(01), 9 Dec 2009 ('First Disqualification Decision'); Decision on Nuon Chea's Application for Disqualification of Judge Marcel Lemonde, 002/29-10-2009-ECCC/PTC(04), 23 March 2010 ('Second Disqualification Decision').
66 Ieng Sary Response, para 26.
67 First Disqualification Decision, para 25; Second Disqualification Decision, para 20.
68 First Disqualification Decision, para 18-26.
69 Ieng Thirith Response, para 14-16.
70 Ieng Thirith Response, Annex A, E96/2.2, pp.1, 7.
71 Ibid, pp.8-10.

base can be sufficiently probed through a combination of means, including examination of a limited number of witnesses, and comparisons with other evidence. As the Ieng Thirith Defence has demonstrated, audio recordings enable the counsel to check the accuracy of any statement taken by the OCIJ. Further, it should be recalled that these interviews were conducted by impartial investigators and there is nothing to suggest that any errors or omissions were the result of a bias against the Accused.

37. It is reasonable, and consistent with fair trial standards, to require all parties to exercise due diligence by reviewing these materials, comparing them to other evidence, and making appropriate submissions to the Trial Chamber in the relevant phases of the evidentiary proceedings. Once such submissions are made, the Trial Chamber can exercise its discretion to admit a transcript and note any corrections to a statement. The Co-Prosecutors propose the following approach:

    a) Where available, audio recordings of interviews of witnesses who will be called to testify should be transcribed by the Court in advance of each witness's testimony (this will enable more focused examinations by the judges and counsel and easy clarification of any potential errors in statements);

    b) For the remaining witnesses, where material omissions or errors which prejudice a party have been identified, the Chamber can order the production of a transcript of either the full recording or of its relevant parts.

38. In conclusion, Ieng Thirith has not established that OCIJ witness statements are, as a whole, inaccurate, unreliable or exclusive of exculpatory evidence. Indeed, the written records and transcripts submitted by Ieng Thirith yielded largely consistent parallels, with some inconsistencies. Reasonable requests relating to any inaccuracies or omissions should be accommodated, but this does not automatically lead to the requirement that each and every witness must be called to testify at trial.

Statements taken by other organisations

39. The Chamber should reject all wholesale objections against admitting into evidence written statements collected by external organisations, such as the Documentation Center of Cambodia. These objections are framed in generalised terms, and cannot be properly assessed.[72] Pursuant to Subrule 87(1), all evidence is admissible, and as illustrated in the OCP Submission, international jurisprudence permits the admission of witness statements

[72] See, for example: Ieng Sary Response, para 23; and Ieng Thirith Response, para 47.

collected by individuals other than court officials.[73] If the Defence wish to challenge any individual statement, they should be expected to make their objections specific and focused on the precise grounds for exclusion, such as Subrule 87(3) and the relevant international principles. Furthermore, any concerns as to the fact that statements are unsworn can be addressed by considering their probative value and reliability, and adopting the procedures proposed in the OCP Submission, including the possibility of seeking subsequent certification.

III. CONCLUSION

40. In summary, while the Chamber must balance the Accused's right to examine witnesses with the obligations to preserve a balance between the parties and ensure the efficient and expeditious management of the trial, the existing procedures do not provide an adequate mechanism to achieve this objective. If interpreted in the manner proposed by the Accused, those procedures would lead to a contravention of domestic rules and international standards, and would render this trial unmanageable. It is therefore appropriate to seek guidance in international rules, as provided in Article 33 new of the ECCC Law. The Co-Prosecutors submit that the Chamber should:

a) Adopt the approach proposed in the OCP Submission.

b) In order to address concerns arising from the Ieng Thirith Response, 1) order the transcription of available audio recordings of interviews of those witnesses who are called to testify, and 2) order full or partial transcription of available recordings where a party demonstrates that the relevant witness statement contains material errors or omissions which prejudice a party.

c) Otherwise dismiss the arguments raised in the Responses.

Respectfully submitted,

Date	Name	Place	Signature
10 August 2011	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		

[73] OCP Submission, para 22(d).