

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

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**CO-PROSECUTORS' RULE 92 SUBMISSION REGARDING THE ADMISSION OF  
WRITTEN WITNESS STATEMENTS BEFORE THE TRIAL CHAMBER**

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## I. INTRODUCTION

1. On 17 January 2011, the Trial Chamber instructed the parties to file their lists of proposed witnesses and evidence in preparation for the trial.<sup>1</sup> In response, Ieng Sary informed the Chamber that he intends to invoke his “right” to confront all witnesses against him, and to challenge the introduction into evidence of any statement made by a witness who is not called to testify.<sup>2</sup> Similarly, Ieng Thirith requests the Trial Chamber to allow her to cross-examine all witnesses whom she was not able to confront at the pre-trial stage, if their statements are proposed for admission into evidence.<sup>3</sup> Khieu Samphan has also asserted a right to summon any witnesses “against him whom he had no opportunity to examine during the pre-trial stage.”<sup>4</sup> Finally, Nuon Chea has indicated that he “reserves [his] right to call as witnesses each and every individual named in any ... statements subsequently offered by the OCP (or other parties) and admitted by the Chamber.”<sup>5</sup>
2. In summary, the Co-Prosecutors submit that:
  - (a) The Accused do not have an absolute right to summon and examine witnesses at trial. The Trial Chamber has the discretion to admit witness statements, including those which do not go to proof of the acts and conduct of the Accused as charged in the indictment, without summoning the witnesses to testify at trial.
  - (b) The Trial Chamber may exercise its discretion to admit a witness’s statement and to require the witness to appear for examination at trial if the statement relates to: i) the acts and conduct of an accused’s immediately proximate subordinate; or ii) a pivotal issue in the case.
  - (c) In exercising its discretion, the Chamber should be guided by: i) the Court’s overriding duty to ensure a fair trial; ii) other principles governing the proceedings, such as the Chamber’s obligation to safeguard the interests of victims; iii) the civil law procedure applicable before the ECCC, which places significant emphasis on the use of written records gathered by investigating judges; iv) international principles calling for a flexible approach to the admission of evidence in cases of mass crime; and v) the scope of the case and the nature of the allegations against the Accused.

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<sup>1</sup> Order to File Material in Preparation for Trial, 17 January 2011, E9.

<sup>2</sup> Ieng Sary’s Response to the Co-Prosecutors’ Motion Which Accompanied Their Rule 80 Expert, Witness and Civil Party Lists, 8 February 2011, E9/4/1, paragraph 2.

<sup>3</sup> Ieng Thirith Indication of Intention to Object to Witnesses and Experts on the Co-Prosecutors, Civil Parties and Nuon Chea’s Witness Lists, 28 February 2011, E9/4/11, paragraphs 4, 6 and 26; and Ieng Thirith Motion to Submit Its List of Documents, 19 April 2011, E9/27, paragraph 6.

<sup>4</sup> Proposed List of Witnesses and Experts, 21 February 2011, E9/4/6, paragraphs 11 and 13.

<sup>5</sup> List of Proposed Witnesses, Experts, and Civil Parties, 15 February 2011, E9/4/4, paragraph 8.

- (d) The Trial Chamber should assess the statements in phases as the evidentiary proceedings progress, and rule upon the need for witnesses to be called prior to each phase of the case.

## II. THE LAW

### *Rules and Legislation Applicable before the ECCC*

3. There are a number of inconsistencies between the three versions of Subrule 84(1).<sup>6</sup> The English version provides:

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.

The Khmer version, translated into English, is as follows:

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

The French version of the rule, translated into English, is in the following terms:

The Accused shall have the right to summon any witness in respect of whom the Accused has not had the opportunity of a confrontation at the pre-trial stage/during the judicial investigation.<sup>7</sup>

4. Only the English text describes the right of an accused to summon witnesses as an “absolute” one; this adjective is absent in the French and Khmer language versions of the rule. The French version also does not contain the words “against him or her.” The meaning of this phrase itself is vague. It is not clear whether it: i) refers only to witnesses who testify to the acts and conduct of the accused; or ii) also encompasses witnesses whose evidence supports the prosecution case more broadly (e.g. crime base witnesses).<sup>8</sup> Similarly, Article 297 of the Cambodian Code of Criminal Procedure (the ‘CCP’) uses the adjective “inculpatory” but does not offer further guidance.<sup>9</sup> If interpreted to provide an “absolute right,” Subrule 84(1) would be inconsistent with Subrule 21(1)(a), which requires the Court to preserve a balance between the rights of the parties. It would also be inconsistent with the approach taken at the international level, which is discussed below.
5. There are also a number of *lacunae* in the procedure before the ECCC: unlike the Rules of the international *ad hoc* tribunals, the Internal Rules do not contain provisions on the admission of written statements, or transcripts from other trials. The general principle applicable to the admission of evidence is found in Subrule 87(1), which provides that

<sup>6</sup> The three language versions of the Internal Rules are of equal authority: see ECCC Law, Article 45 new.

<sup>7</sup> The translations from Khmer and French were provided by the ECCC Interpretation and Translation Pool on 19 May 2011.

<sup>8</sup> Guido Acquaviva: *New Paths in International Criminal Justice – The Internal Rules of the Cambodian Extraordinary Chambers*, *Journal of International Criminal Justice*, 6 1 (129) 2008, page 9.

<sup>9</sup> The Article states: “Inculpatory witnesses who have never been confronted by the accused shall be summoned to testify at the trial hearing.”

“[u]nless provided otherwise...all evidence is admissible.” The Rules do not provide guidance on how the Court should approach the relationship between Subrules 87(1) and 84(1). They also do not specifically deal with the admission of pre-trial statements of witnesses who are deceased, cannot be located or are otherwise unable to attend.

6. Given that the existing procedures do not deal comprehensively with the issue of admission of witness statements, that there is uncertainty regarding the interpretation or application of these procedures, and that a question arises as to the consistency of these procedures with international standards, the Trial Chamber should seek guidance in procedural rules established at the international level.<sup>10</sup>

### *Human Rights Jurisprudence*

7. Article 6(3)(d) of the European Convention on Human Rights, which is framed in similar terms to Subrule 84(1), states:

3. Everyone charged with a criminal offence has the following minimum rights:

- d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

8. Article 14(3)(e) of the International Covenant on Civil and Political Rights provides:

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.

9. The European Court of Human Rights (the ‘ECtHR’) has held that the right of an accused to examine witnesses whose statements are admitted into evidence is not an unlimited one. While in principle a fair trial is best achieved by having all the evidence produced during the trial, “the use as evidence of statements obtained at the stage of the judicial investigation is not in itself inconsistent with Article 6(1) and 6(3)(d),” provided that: i) the Accused has had “an adequate and proper opportunity” to challenge the evidence against him / her; and ii) the written statement is not relied upon “solely or to a decisive degree” as evidence for the conviction.<sup>11</sup>

<sup>10</sup> Article 33 new of the ECCC Law.

<sup>11</sup> Examples include *Unterpertinger v. Austria*, 24 November 1986, Application no. 9120/80, paragraph 31; *Windisch v. Austria*, 27 September 1990, Application no. 1249/86, paragraphs 26 and 31; *Delta v. France*, 19 December 1990, Application no. 11444/85, paragraphs 36-37; *Asch v. Austria*, 26 April 1991, Application no. 12398/86 (“Asch Judgment”), paragraphs 25, 27 and 30; *Saidi v. France*, 20 September 1993, Application no. 14647/89 (“Saidi Judgment”), paragraph 43; *Van Mechelen and Others v. the Netherlands*, 18 March 1997, Case no. 55/1996/674/861-864, paragraphs 49, 51, 55 and 76, *Luca v. Italy*,

10. The above test was applied in the cases of *Asch v. Austria* and *Artner v. Austria* where the ECtHR dealt with appeals by accused who had been convicted on the basis of witness statements corroborated by other evidence. In *Asch*, the ECtHR held that, since the appellant had been afforded an opportunity to challenge the victim's version of the events, and since the statement did not constitute the only evidence before the trial court, it was open to the court to admit it into evidence. The fact that the victim was not examined at trial did not violate the rights of the defence.<sup>12</sup> In *Artner*, the ECtHR similarly held that it was open to the national court to rely on written statements, subject to the rights of the defence being respected, "in particular in view of the fact that it could consider those statements to be corroborated by other evidence before it."<sup>13</sup> In *Saidi v. France* the ECtHR held that the accused's conviction on the basis of witness statements amounted to a breach of his fair trial rights because the statements constituted the sole basis for the conviction.<sup>14</sup>
11. It is relevant to note that the Appeals Chamber of the International Tribunal for the Former Yugoslavia (ICTY) has upheld the principle that there is no absolute right to cross-examine all witnesses at trial, and found that reliance on ECtHR jurisprudence in this regard is appropriate.<sup>15</sup>

#### *International Criminal Tribunals*

12. The Rules of Procedure and Evidence (RoPE) of the ICTY contain a general provision on the admission of evidence similar to Subrule 87(1) of the ECCC Internal Rules. Rule 89(C) of the RoPE states that "[a] Chamber may admit any relevant evidence which it deems to have probative value."<sup>16</sup>
13. However, the RoPE also deal specifically with the admission of witness statements. Rule 92*bis* states, in the relevant part:

(A) A Trial Chamber may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral

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27 February 2001, Application no. 33354/96, paragraphs 37 and 39-40; and *A.S. v. Finland*, 28 September 2010, Application no. 40156/07, paragraphs 53-54.

<sup>12</sup> *Asch* Judgment, paragraphs 27-30.

<sup>13</sup> *Artner v. Austria*, 25 June 1992, Case no. 39/1991/291/362, ("Artner Judgment") paragraphs 21-24.

<sup>14</sup> *Saidi* Judgment, paragraphs 43-44.

<sup>15</sup> *Prosecutor v. Martić*, IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babic, 14 September 2006, paragraphs 12-14 and 18-19. See also *Prosecutor v. Lukic*, IT-98-32/1-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92*bis*, 22 Aug 2008, paragraph 24.

<sup>16</sup> Evidence may be excluded if its probative value is substantially outweighed by the need to ensure a fair trial (Subrule 89(D)).

testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.

(i) Factors in favour of admitting evidence in the form of a written statement or transcript include but are not limited to circumstances in which the evidence in question:

- (a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
- (b) relates to relevant historical, political or military background;
- (c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;
- (d) concerns the impact of crimes upon victims;
- (e) relates to issues of the character of the accused; or
- (f) relates to factors to be taken into account in determining sentence.

(ii) Factors against admitting evidence in the form of a written statement or transcript include but are not limited to whether:

- (a) there is an overriding public interest in the evidence in question being presented orally;
- (b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or
- (c) there are any other factors which make it appropriate for the witness to attend for cross-examination.

...

(C) The Trial Chamber shall decide, after hearing the parties, whether to require the witness to appear for cross examination; if it does so decide, the provisions of Rule 92 *ter* shall apply.

14. Rule 92*bis* essentially vests in a trial chamber the discretion to admit written testimony containing crime base evidence without requiring the witness to appear for examination.<sup>17</sup>

The exercise of this discretion requires a three step assessment:

- (a) First, the evidence must have probative value which is not outweighed by prejudice to the accused or his / her right to a fair trial.
- (b) Second, the evidence must not go to proof of the acts and conduct of the accused as charged in the indictment, and the Chamber should consider the factors militating in favour and against admitting the statement.
- (c) Third, if it decides to admit the written evidence, the Chamber must consider whether it will require the witness to appear for cross-examination.<sup>18</sup>

15. The **first** part of the test simply gives effect to the principle that all evidence must meet the general requirements for admission.<sup>19</sup> Turning to the **second** issue, the ICTY has

<sup>17</sup> Prosecutor v. Galic, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002, paragraph 16 ('Galic Appeal Decision').

<sup>18</sup> For a similar formulation of this approach, see Prosecutor v. Popovic & Ors, IT-05-88-T, Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92*bis*, 12 September 2006, paragraphs 8-9.

interpreted the phrase “acts and conduct of the accused” in accordance with its ordinary meaning. The *Milosevic* Trial Chamber held:

“The phrase ‘acts and conduct of the accused’ under Rule 92bis is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused. It should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or, indeed, of anybody else. Had the rule been intended to extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so.”<sup>20</sup> (emphasis added)

16. In further elaborating the meaning of this phrase, the ICTY Appeals Chamber has held that Rule 92bis excludes written statements which go to prove any act or conduct of the accused upon which the prosecution seeks to establish:

- (a) “that the accused committed (that is that he personally physically perpetrated) any of the crimes charged himself, or
- (b) that he planned, instigated or ordered the crimes charged, or
- (c) that he otherwise aided and abetted those who actually did commit the crimes in their planning, preparation or execution of those crimes, or
- (d) that he was a superior to those who actually did commit the crimes, or
- (e) that he knew or had reason to know that those crimes were about to be or had been committed by his subordinates, or
- (f) that he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.”<sup>21</sup>

17. Where an accused is alleged to have participated in a joint criminal enterprise (JCE), Subrule 92bis(A) prevents the admission of written statements which go to prove any act or conduct of the accused which the prosecution would rely upon to establish:

- (a) “that he had participated in that joint criminal enterprise,” or
- (b) “that he shared with the person who actually did commit the crimes charged the requisite intent for those crimes.”<sup>22</sup>

18. Further, where an accused is alleged to be criminally responsible based on the acts of others, a distinction is to be drawn between statements tending to prove: “(i) the acts and conduct of those others who commit the crimes for which the accused is alleged to be responsible” [admissible]; and “(ii) the acts and conduct of the accused as charged in the indictment, which establish his responsibility for the acts and conduct of those others” [inadmissible].<sup>23</sup> Similarly, written testimonial evidence regarding the acts and conduct of

<sup>19</sup> Prosecutor v. Sikirica & Ors, IT-95-08-T, Decision on Prosecution’s Application to Admit Transcripts Under Rule 92Bis, 23 May 2001, paragraph 3; Prosecutor v. Lukic, IT-98-32/1-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92bis, 22 Aug 2008, paragraph 15.

<sup>20</sup> Prosecutor v. Milosevic, IT-02-54-T, Decision on Prosecution’s Request to Have Written Statements Admitted Under Rule 92bis, 21 March 2002, paragraph 22.

<sup>21</sup> Galic Appeal Decision paragraph 10.

<sup>22</sup> Galic Appeal Decision, paragraph 10 (footnotes omitted).

<sup>23</sup> Prosecutor v. Karadzic, IT-95-5/18-PT, Decision on Prosecution’s Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92bis (Witnesses for Sarajevo Municipality), 15 October 2009, paragraph 5.

others, adduced to establish the accused's state of mind (e.g. knowledge that his/her acts fit into the pattern of a widespread or systematic attack), is admissible.<sup>24</sup>

19. Rule 92*bis*(B) requires a statement to be accompanied by a declaration signed by the witness, verifying that the contents of the statement are true and correct. The declaration must be witnessed by an authorised officer in a state, or a presiding officer appointed by the Registrar of the ICTY.<sup>25</sup>
20. On the **third** issue, the ICTY case-law suggests that a trial chamber should be guided by its overriding obligation to ensure a fair trial,<sup>26</sup> and require a witness to appear for cross-examination if: (i) his/her evidence is pivotal to the prosecution's case;<sup>27</sup> (ii) there is close proximity between the person whose acts and conduct the witness describes and the accused (for example, evidence relates to the conduct of an immediate subordinate of the accused);<sup>28</sup> or (iii) the witness's evidence relates to a "live and important issue between the parties, as opposed to a peripheral or marginally relevant issue."<sup>29</sup>
21. Rule 92*quater* of the RoPE allows the admission of statements of witnesses who are deceased, cannot be traced or are otherwise unable to testify. This evidence may relate to proof of acts and conduct of an accused.<sup>30</sup>

*Application of these Principles by International Tribunals*

22. Applying Rule 92*bis*, ICTY trial chambers have admitted witness statements and transcripts from other trials on numerous occasions, without requiring witnesses to appear for cross-examination. They have usually done so where they found that the written records did not relate to the acts and conduct of the accused, but contained crime base

<sup>24</sup> Galic Appeal Decision, paragraph 11.

<sup>25</sup> ICTY Rule 92*bis*(B).

<sup>26</sup> Prosecutor v. Sikirica & Ors, IT-95-8-T, Decision on Prosecution's Application to Admit Transcripts Under Rule 92*bis*, 23 May 2001, paragraph 4.

<sup>27</sup> Prosecutor v. Blagojevic and Jokic, IT-02-60-T, First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92*bis*, 12 June 2003, paragraph 28; Prosecutor v. Perisic, IT-04-81-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92*bis*, 2 October 2008, paragraph 14.

<sup>28</sup> Galic Appeal Decision, paragraph 16; Prosecutor v. Blagojevic and Jokic, IT-02-60-T, First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92*bis*, 12 June 2003, paragraphs 12, 19 ; Prosecutor v. Brdanin and Talic, IT-99-36-T, 23 May 2002, Public Version of the Confidential Decision on the Admission of Rule 92*bis* Statements Dated 1 May 2002, paragraph 14; Prosecutor v. Popovic & Ors, IT-05-88-T, Decision on Prosecution's *Confidential* Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92*bis*, 12 September 2006, paragraph 13.

<sup>29</sup> Prosecutor v. Milosevic, IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92*bis*, 21 March 2002, paragraph 24.

<sup>30</sup> If the statement does relate to the acts and conduct of the accused as charged in the indictment, this may be a factor against admission: Rule 92*quater* (B).



evidence of a cumulative nature, dealt with the impact of crimes upon victims, or contained relevant background information.

- (a) In *Prosecutor v. Karadzic* the Trial Chamber admitted pre-trial witness statements and a transcript, which discussed, amongst other matters: municipality takeovers, expulsion and mistreatment of Bosnian Muslim populations; personal accounts of imprisonment; the use of human shields; and the destruction of villages. Although the evidence contained the names of potential members of a JCE, it did not go to proof of any acts or conduct which established that the Accused participated in the JCE. None of the names were sufficiently linked to the Accused to warrant their attendance for cross-examination.<sup>31</sup>
- (b) In *Prosecutor v. Blagojevic and Jokic*, the Trial Chamber admitted the written statements of 16 witnesses. These statements contained crime base evidence, and did not mention the accused or their participation in a JCE. The evidence also did not concern perpetrators so proximate to the accused, nor was it otherwise so pivotal, as to require *viva voce* testimony. The evidence was also cumulative insofar as other witnesses were to testify at trial about similar facts.<sup>32</sup>
- (c) In *Prosecutor v. Milosevic*, the Trial Chamber admitted witness statements pertaining to a shelling attack carried out by forces under the accused's command. It ordered the redaction of parts of the statements which contained opinion evidence and evidence on the presence of military forces in the targeted area, a critical issue in the case.<sup>33</sup>
- (d) In *Prosecutor v. Perisic*, the Chamber admitted written statements (and attached exhibits) containing evidence regarding shelling attacks and medical records at a hospital which treated the victims of those attacks. While the defence did not object to the admission of these statements, the Chamber assessed their compliance with the Rules. Importantly, two of the statements were not given to ICTY investigators but to other authorities in Bosnia Herzegovina.<sup>34</sup>

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<sup>31</sup> Prosecutor v. Karadzic, IT-95-5/18-PT, Decision on Prosecution's Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92bis (Witnesses for Sarajevo Municipality), 15 Oct 2009, paragraphs 13-27.

<sup>32</sup> Prosecutor v. Blagojevic and Jokic, IT-02-60-T, First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 bis, 12 June 2003, paragraphs 17 – 20, 22, 28.

<sup>33</sup> Prosecutor v. Milosevic, IT-98-29/1-T, Decision on Prosecution Motion for Admission of Witness Statements Pursuant to Rule 92bis, 3 April 2007.

<sup>34</sup> Prosecutor v. Perisic, IT-04-81-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92bis, 2 October 2008, paragraphs 20- 33.

- (e) In *Prosecutor v Naletilic* the Trial Chamber admitted transcripts and exhibits from an earlier trial, holding that this evidence went to the proof of *chapeau* elements such as the existence of an international armed conflict and the widespread or systematic nature of an attack.<sup>35</sup>
- (f) In *Prosecutor v. Brdanin and Talic* the Trial Chamber admitted written statements containing evidence which was of a cumulative nature because *viva voce* witnesses were to testify to the same facts. The Chamber otherwise allowed cross-examination of those witnesses whose statements contained evidence regarding the conduct of soldiers under the accused's command or locations under his authority.<sup>36</sup>
- (g) In *Prosecutor v. Sikirica* the Chamber admitted transcripts of testimony of two witnesses whose evidence was useful background or did not relate to a central issue in the case. On the other hand, the Chamber required cross-examination of witnesses whose evidence related to important issues in the case, such as proof of genocide against the accused.<sup>37</sup>
23. The Co-Prosecutors note that, in *Prosecutor v Prlic*, Ieng Sary's international counsel successfully applied for the admission into evidence of four written statements. Refusing the prosecution's objection, the Trial Chamber held that the statements should be admitted without cross-examination. The statements did not relate to the acts and conduct of the accused as charged in the indictment, and their admission was conducive to ensuring that the proceedings were efficient and expeditious.<sup>38</sup> In addition, Ieng Sary's international counsel has agreed before this Trial Chamber that written witness statements are admissible and effectively endorsed the principles set out in this submission.<sup>39</sup>

<sup>35</sup> *Prosecutor v. Naletilic*, IT-98-34-PT, Decision Regarding Prosecutor's Notice of Intent to Offer Transcripts Under Rule 92bis(D), 9 July 2001, paragraphs 7-12.

<sup>36</sup> *Prosecutor v. Brdanin and Talic*, IT-99-36-T, Public Version of the Confidential Decision on the Admission of Rule 92bis Statements Dated 1 May 2002, 23 May 2002, paragraphs 20, 23-25 and 30.

<sup>37</sup> *Prosecutor v. Sikirica & Ors*, IT-95-8-T, Decision on Prosecution's Application to Admit Transcripts Under Rule 92bis, 23 May 2001.

<sup>38</sup> *Prosecutor v. Prlic*, IT-04-74-T, Decision on Prlic Defence Motion for Admission of Written Statements Pursuant to Rule 92bis, 25 November 2008, paragraphs 12, 13 and 16.

<sup>39</sup> Statement of Michael Karnavas, Trial Management Meeting, 4 May 2011, E1/2.1, pages 89-90. "I do agree with Mr. Smith with respect to statements. The practice is that some statements, witness statements can come in under certain circumstances where they don't go to the acts and conduct of the accused, the onus being on the parties who is trying to introduce the statement to show that that is not the case, and the party, the opposing party, is given an opportunity to object. If, for instance, since you're charging -- there's the charge of joint criminal enterprise, it is very likely that some statements may touch upon the joint criminal aspect of the case, which may or may not require the witness to appear..."

24. The RoPE of the Special Court for Sierra Leone contain a similar provision to ICTY Rule 92bis,<sup>40</sup> and the Court has noted ICTY's relevant jurisprudence with approval.<sup>41</sup> Applying these rules, the Special Court has admitted witness statements of unavailable witnesses while excluding portions of the statements which contained opinions or which related to the acts and conduct of the Accused as charged in the indictment.<sup>42</sup>
25. The admission of written evidence in lieu of oral testimony is consistent with the adoption by the international tribunals of flexible rules relating to the admission of evidence. In international jurisprudence, decisions on admissibility fall within a wide discretion of a trial chamber.<sup>43</sup> Evidence is admissible if it is relevant and has probative value; the weight to be given to it is determined when assessing the probative value of the totality of the evidence.<sup>44</sup>
26. An additional important consideration supporting the admission of evidence in the form of written statements is the need to conduct trials with reasonable expediency. As Judge Kwon, an experienced civil law practitioner, indicated in his declaration in Milosevic:

“[B]y having a more flexible approach to the admission of witness statements, a Trial Chamber's ability to manage trials of a vast scale...more efficiently would be improved...[A] Trial Chamber would be assisted by being able to find the truth more easily: a witness at trial may not give his or her evidence fully due to time constraints, embarrassment or for some other reason...While the risk will always exist that a statement may not provide a truthful account of events, or only a partially true one, this should not preclude the general admission of witness statements into evidence. Professional judges will be alert to such dangers, and have the ability to note discrepancies between written witness statements and actual testimony, and determine what weight should be granted to the evidence...[I]t is common practice to admit written witness statements in civil law legal systems.”<sup>45</sup>

<sup>40</sup> Subrule 92bis(A) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone states: “In addition to the provisions of Rule 92ter, a Chamber may, in lieu of oral testimony, admit as evidence in whole or in part, information including written statements and transcripts, that do not go to proof of the acts and conduct of the accused.”

<sup>41</sup> Prosecutor v. Norman & Ors, SCSL-04-14-T, Decision on Prosecution's Request to Admit into Evidence Certain Documents Pursuant to Rules 92bis and 89(C), 14 July 2005, at page 4.

<sup>42</sup> Prosecutor v. Norman & Ors, SCSL-04-14-T, Decision on Fofana Request to Admit Evidence Pursuant to Rule 92bis, 9 October 2006, paragraphs 22-27.

<sup>43</sup> See, for example, Prosecutor v. Arsene Shalom Ntahobali and Pauline Nyiramasuhuko, ICTR -97-21-AR73, Appeals Chamber's Decision on Appeal of Accused Arsene Shalom Ntahobali Against the Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997, 27 October 2006, paragraph 10.

<sup>44</sup> Rule 89(C) of the ICTY Rules of Procedure and Evidence; Prosecutor v. Norman and Ors, SCSL-04-14-AR65, Decision on Fofana – Appeal Against Decision Refusing Bail, 11 March 2005, paragraphs 22 – 24; Prosecutor v. Norman and Ors, SCSL-04-14-T, Decision on Norman Request to Admit Documents in Lieu of the Testimony of Abdul-one Mohammed Pursuant to Rules 89(C) and 92bis, 15 September 2006, at page 4; Prosecutor v. Issa Hassan Sesay and Ors, SCSL-04-15-T, Decision on the Joint Defence Motion Requesting Conformity of Procedural Practice for Taking Witness Statements, 26 October 2005, paragraph 38.

<sup>45</sup> Prosecutor v. Milosevic, IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92bis, 21 March 2002, Declaration of Judge O-Gon Kwon paragraph 3.

27. Finally, it is relevant to note that, even prior to the adoption of Rule 92*bis*, ICTY Trial Chambers exercised their discretion to admit written statements into evidence. On an appeal against a decision to admit written statements, the Appeals Chamber held:

“The purpose of the rules is to promote a fair and expeditious trial, and Trial Chambers must have the flexibility to achieve this goal...In these circumstances, the Trial Chamber was entitled to take into account the stage of the trial, the length of time the accused had been in custody and its finding that the witness was not immediately available in exercising its discretion to admit the evidence.”<sup>46</sup>

*International Criminal Court*

28. A different approach was taken in the RoPE of the International Criminal Court (ICC). A pre-trial statement of a witness is only admissible without the witness’s attendance at trial if both the prosecution and the defence had the opportunity to examine the witness during the recording of the statement.<sup>47</sup> In *Lubanga* the Trial Chamber noted this rule but also recognised that Article 68(2) of the Rome Statute allows the Court to “conduct any part of the proceedings in camera or allow the presentation of evidence by electronic **or other special means.**” Article 68(2) therefore “enables the Court, when it is necessary to provide protection to victims, witnesses or the accused, to use appropriate ‘special means’, which will include reading part, or all, of a witness’s statement in open Court or in private, so long as those steps do not detract from the fairness of the proceedings.”<sup>48</sup>

29. The ICC rules are less relevant in the present context given that they contain an express limitation on the admission of written statements, an approach that was not taken at the ECCC. Such a limitation would run contrary to the spirit of the civil law procedure applicable at the ECCC, in which evidence is collected by impartial judicial officers and then transferred to the Trial Chamber. As noted below, the ECCC Trial Chamber has not followed the ICC approach.

### III. APPLICATION OF THE ABOVE PRINCIPLES BEFORE THE ECCC

30. In Case 001, the Trial Chamber noted the principles enunciated by the ECtHR and the ICTY. While it refused to admit unsworn statements of two individuals containing

<sup>46</sup> Prosecutor v. Aleksovski, IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, paragraph 19.

<sup>47</sup> Rule 68(a) of the Rules of Procedure and Evidence of the International Criminal Court.

<sup>48</sup> Prosecutor v. Lubanga, ICC-01/04-01/06, Decision on the prosecution’s application for the admission of the prior recorded statements of two witnesses, 15 January 2009, paragraph 17.

evidence relating to the accused's acts and conduct,<sup>49</sup> it admitted the statements of 14 witnesses and allowed the parties the opportunity to comment on them.<sup>50</sup>

31. The Co-Prosecutors submit that there are compelling reasons which militate in favour of the admission of witness statements in this case, without requiring all witnesses to appear for examination. Admission of statements in accordance with the international principles discussed above is fully consistent with the Accused's fair trial rights, and it is also appropriate in light of the civil law procedure applicable before the ECCC.<sup>51</sup> This procedure places significant emphasis on the use of written evidence gathered in the judicial investigation.<sup>52</sup> The investigation is expected to be thorough, so that when it is concluded, all relevant evidence has been placed on the record.<sup>53</sup> A key feature of this system is that, while suspects have the right to legal representation, this "does not mean that counsel has unrestricted freedom to cross-examine witnesses."<sup>54</sup>
32. Evidence in this case was collected and reviewed by the Co-Investigating Judges (CIJ), who were required to conduct their investigation "impartially, whether the evidence is inculpatory or exculpatory."<sup>55</sup> The investigation was governed by the objective of ascertaining the truth regarding the allegations in the Introductory Submission, rather than collecting inculpatory evidence against the Accused.<sup>56</sup> The CIJ were not bound by the Co-Prosecutors' submissions either in relation to the persons to be charged or in relation to their conclusions at the end of the investigation.<sup>57</sup>
33. In light of the international principles discussed in Section II, and the procedure applicable before the ECCC, in assessing defence requests for examination of witnesses, the Trial Chamber should take into account the following considerations:

<sup>49</sup> Case 001: Decision on Admissibility of Material on the Case File as Evidence, 26 May 2009, E43/4, paragraphs 13-16.

<sup>50</sup> Judgement, 26 July 2010, E188, paragraph 19.

<sup>51</sup> As the ICTY Appeals Chamber has noted, Rule 92*bis* balances the interests of the parties, and provides stringent requirements for the admission of testimonial evidence in a written form: Prosecutor v. Milosevic, IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator's Evidence, 30 September 2002, paragraphs 18-19.

<sup>52</sup> See, for example, Jerome de Hemptinne, 'The Creation of Investigating Chambers at the International Criminal Court - An Option Worth Pursuing?,' *Journal of International Criminal Justice* 5 (2007), at 407.

<sup>53</sup> Merryman, J., *The Civil Law Tradition*, 1969, at page 129.

<sup>54</sup> *Ibid.*

<sup>55</sup> Subrule 55(5).

<sup>56</sup> Decision on the Appeal From the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, D164/3/6, paragraph 35. See also Francis Pakes, *Comparative Criminal Justice*, 2004, at page 80.

<sup>57</sup> Subrules 55(4) and 67(1).

- (a) The obligation to ensure the fairness of the proceedings as a whole, including by having regard to the checks and balances provided by the judicial investigation
  - (b) The obligations in Subrule 21(1) to maintain a balance between the parties and to safeguard the interests of victims
  - (c) The extent to which the evidence goes to proof of the acts and conduct of an accused, including their participation in the alleged joint criminal enterprise
  - (d) The extent to which the evidence is of a cumulative nature and merely corroborates oral evidence which will be subjected to examination before the Chamber
  - (e) The reliability and probative value of the statements; and
  - (f) The availability of witnesses to appear before the Court and the impact on the overall length of the trial.
34. The witness statements whose admission the Co-Prosecutors have proposed were placed on the case file over a period of three years during which both the prosecution and the defence had full access to the file. The parties were able to see each piece of evidence as it was added to the case file and participate in the investigation by filing investigative requests and exercising their right of appeal to the Pre-Trial Chamber. They should therefore be expected to exercise a high degree of diligence in selecting the witnesses whom they wish to examine at trial. To allow an accused to insist on examining several hundred individuals whose statements are on the case file, regardless of whether the statements relate to the acts of the accused or other parts of the case, regardless of whether they are corroborated by *viva voce* and/or written evidence, and regardless of the impact on the length of the trial, would be tantamount to allowing him/her to frustrate the proceedings and abuse the Court's processes. It would also undermine the right of the other Accused to a trial within a reasonable period and the victims' interests in the efficient conduct of the proceedings.
35. The Chamber should take guidance from the rules established at the international level, and tailor them to the procedure applicable before the ECCC. For example, the requirement for a certification of statements would be inappropriate in the case of written records of interview produced during the judicial investigation.
36. As is apparent from the Co-Prosecutors' Rule 80 witness and document summaries, the majority of witnesses whose statements have been put forward did not testify to the acts and conduct of the Accused or their immediate subordinates, but to crime base events,

impact of crimes on victims and other relevant matters such as policies, communication structures and the existence of a common criminal plan. Applying the case law of the ICTY, these statements should be admitted without a requirement that the witnesses appear for examination. In producing their proposed trial witness lists the Co-Prosecutors took care to identify all witnesses who they believed were able to give probative evidence relating to the acts and conduct of the Accused. It is certainly not the position of the Co-Prosecutors that key testimonial evidence relating to the acts and participation of the Accused in the crimes should be admitted in written form if the witnesses are available. The Co-Prosecutors' primary concern is to facilitate a trial that is both fair and completed within a reasonable time.

#### IV. PROCEDURAL ISSUES

37. Considering the size and complexity of this case, the Co-Prosecutors submit that it is not practicable to rule on all witness statements at this early stage. The Co-Prosecutors invite the Chamber to deal with this evidence in stages, by issuing rulings regarding witness statements (and on whether witnesses are to appear for examination) prior to the start of each relevant phase of the proceedings.<sup>58</sup> This will enable the parties to provide assistance to the Chamber by providing additional information that may be necessary.
38. The Co-Prosecutors recognise that the Chamber may need to adopt different procedures depending on the form and origin of the written statements. For example, written records of interviews produced by investigators working under the supervision of the CIJ clearly have probative value and strong indicia of reliability in that they were given under oath, recorded by Court officials, signed by the witnesses and accompanied by audio recordings. The same considerations would apply to Case 001 transcripts or earlier statements which were read to witnesses during the judicial investigation, and which the witnesses confirmed on oath as being true.
39. While 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 Centre of Cambodia or academic researchers, which were often transcribed from audio recordings), the Chamber could consider: i) whether certification such as that provided in Subrule 92*bis*(B) of the ICTY RoPE would be appropriate; or ii)

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<sup>58</sup> Prosecutor v. Brdanin and Talic, IT-99-36-T, Public Version of the Confidential Decision on the Admission of Rule 92*bis* Statements Dated 1 May 2002, 23 May 2002, paragraphs 3 – 7.

whether statements may be admitted if the witnesses are deceased or cannot be located with reasonable diligence, as provided in Rule 92*quater* of the ICTY RoPE.

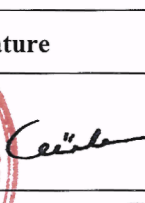

40. To simplify these procedures, the Trial Chamber could also exercise its discretion to provisionally admit statements subject to certification, a procedure that has been frequently employed by the ICTY.<sup>59</sup> A similar approach could be taken where the Chamber deems it appropriate to seek clarification from researchers as to the circumstances in which the statements were taken, or to require the filing of additional proof of reliability, such as contemporaneous notes or audio recordings.

## V. CONCLUSION

41. For the above reasons, the Co-Prosecutors respectfully request the Trial Chamber to:

- (a) Declare that:
  - i. there is no absolute right to summon all witnesses whose statements are being proposed into evidence; and
  - ii. all witness statements are admissible provided they are relevant and have probative value.
- (b) Decide on the need for witnesses to appear for examination at the start of the relevant phases of the proceedings.
- (c) Take general guidance from ICTY's Rule 92*bis* and jurisprudence, adapting them to the specific circumstances of the ECCC, including the fact that evidence on Case File 002 has been collected in an impartial judicial investigation.

Respectfully submitted,

Date	Name	Place	Signature
15 June 2011	YET Chakriya Deputy Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		

<sup>59</sup> Prosecutor v. Karadzic, IT-95-5/18-PT, Decision on Prosecution's Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92*bis* (Witnesses for Sarajevo Municipality), 15 October 2009, paragraph 9; Prosecutor v. Popovic et al., Case No. IT-05-88-T, Decision on Prosecution's *Confidential* Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92*bis*, 12 September 2006, paragraphs 19-21; Prosecutor v. Martić, Case No. IT-95-11-T, Decision on Prosecution's Motion for the Admission of Written Evidence Pursuant to Rule 92*bis* of the Rules, 16 January 2006, paragraphs 11, 37.