BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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PRELIMINARY RESPONSE TO CO-PROSECUTORS' FURTHER REQUEST TO PUT BEFORE THE CHAMBER WRITTEN STATEMENTS AND TRANSCRIPTS

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I. Introduction

1. On 15 June 2011, the Office of the Co-Prosecutors (OCP) submitted a request seeking a declaration from the Trial Chamber that all witness statements are admissible into evidence provided they are relevant and probative ('OCP Original Request').[1] The Nuon Chea Defence responded that, pursuant to Cambodian criminal procedure and the plain language of the Internal Rules, and subject to certain minor exceptions, the right to confront witnesses is absolute.[2] Hence the statements of witnesses who will not be called to trial are inadmissible. Other defendants filed similar responses.[3]

2. On 20 June 2012, the Trial Chamber held that procedural rules established at the international level pertaining to the admissibility of witness statements applied to proceedings at the ECCC ('TC Decision').[4] In so doing, the Chamber adopted without stated qualification the legal regime in place at the *ad hoc* tribunals ('Rule 92*bis*'). The Co-Prosecutors thereafter submitted a request pursuant to that ruling for the admission of no fewer than *one thousand three hundred and ninety four documents* – 1,354 witness statements and a further 40 days of testimony from the trial in Case 001 – into evidence in Case 002 ('OCP Further Request').[5]

3. The sheer volume of that request – nearly 1,400 statements as against 90 live witnesses[6] – should by itself concern the Chamber. As far as the Defence is aware, written testimony has never been admitted into evidence at an international criminal trial on anything approaching the scale now proposed by the OCP. Following review of dozens of Rule 92*bis* motions at the ICTY and ICTR the Defence has never encountered an instance in

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[1] Document No. **E-96**, 'Co-Prosecutors Rule 92 Submission Regarding the Admission of Written Statements before the Trial Chamber', 15 June 2011, ERN 00706071-00706086 ('OCP Original Request').
[2] Document No. **E-96/1**, 'Response to OCP Submission Regarding the Admission of Written Witness Statements', 21 July 2011, ERN 00716969-00716978, paras. 3-5.
[3] Document No. **E-96/2**, 'IENG Thirith Defence Response to 'Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber'', 22 July 2011, ERN 00715984-00715999; *See* Document No. **E-96/3**, 'IENG Sary's Response to the Co-Prosecutor's request regarding the Admission of Written Statements Before the Trial Chamber and Request for a Public Hearing', 22 July 2011, ERN 00718446-00718461; Document No. **E-96/4,** 'Observations in Response to Co-Prosecutor's Request regarding the Admission of Written Witness Statements', 22 July 2011, ERN 00721872-00721882.
[4] Document No. **E-96/7**, 'Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber', 20 June 2012, ERN 00812146-00812163 ('TC Decision').
[5] Document No. **E-96/8**, 'Co-Prosecutors' Further Request to Put Before the Chamber Written Statements and Transcripts with Confidential Annexes 1 to 16', 27 July 2012, ERN 00828859-00828873 ('OCP Further Request').
[6] Document No. **E-131/1.1**, 'Confidential Annex A: Partial List of Witnesses, Experts and Civil Parties for First Trial in Case 002', ERN 00747687-00747694; Document No. **E-236/1**, Memorandum re 'Preliminary indication of individuals to be heard during population movement trial segments in Case 002/01', 2 October 2012, ERN 00850147-00850148.

which a party has sought to introduce more than 130 such statements in one motion (of which 51 were admitted without cross-examination).[7] During the entire two and one half years of the prosecution case in the *Karadzic* trial, 239 statements were submitted into evidence, of which 128 were accepted without cross-examination.[8] The OCP Request would shatter – by orders of magnitude – standing practice at international courts.

4. These previous international criminal proceedings cannot be glibly accused of lacking the size or complexity of Case 002. Indeed, the experience of the *ad hoc* tribunals in that respect was the principal reason why the Chamber deemed the use of Rule 92*bis* justified in the first place.[9] The Chamber should therefore view with skepticism the Co-Prosecutors' apparent position that Case 002, more than any other trial in two decades of proceedings at the ICTY and ICTR, demands so extraordinary an exception to the right of the accused to confront the witnesses against him.[10]

5. The *ad hoc* tribunals limit the number of written statements admitted without cross-examination because that procedure is subject to highly restrictive conditions under Rule 92*bis*. Those restrictions are integral to the regime, which was intended to function as a coherent whole. In holding that Rule 92*bis* applies to the present proceedings, the Chamber implanted a foreign regime based entirely on the law of the *ad hoc* tribunals

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[7] *Prosecutor v. Tolimir*, IT-05-88/2-T, 'Decision on Prosecution's Motion for Admission of Written Evidence Pursuant to Rules 92 *bis* and 94 *bis*', 7 July 2010, Disposition para 2(a).

[8] *Prosecutor v. Karadzic*, IT-95-5/18-T: 'Decision On Prosecution's First Motion For Admission Of Statements And Transcripts Of Evidenc In Lieu Of *Viva Voce* Testimony Pursuant To Rule 92 *Bis* (Witnesses For Eleven Municipalities)', 10 November 2009; 'Further Decision On Prosecution's First Rule 92 *Bis* Motion (Witnesses For Eleven Municipalities)', 9 February 2010; 'Decision On Prosecution's Second Motion For Admission Of Statements And Transcripts Of Evidence In Lieu Of *Viva Voce* Testimony Pursuant To Rule 92 *Bis* (Witnesses Ark Municipalities)', 18 March 2010; 'Decision On Prosecution's Second Motion For Admission Of Slobodan Stojkovic's Evidence In Lieu Of *Viva Voce* Testimony Pursuant To Rule 92 *Bis*', 22 March 2012; '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; 'Decision On Prosecution's Fourth Motion For Admission Of Statements And Transcripts Of Evidence In Lieu Of *Viva Voce* Testimony Pursuant To Rule 92 *Bis* - Sarajevo Siege Witnesses', 5 March 2010; 'Public Redacted Version Of "Decision On Prosecution's Fifth Motion For Admission Of Statements In Lieu Of *Viva Voce* Testimony Pursuant To Rule 92 *Bis* (Srebrenica Witnesses)" Issued On 21 December 2009', 6 March 2012; 'Decision To Call Dražen Erdemović For Cross-Examination', 13 February 2012; 'Decision On Prosecution's Sixth Motion For Admission Of Statements In Lieu Of *Viva Voce* Testimony Pursuant To Rule 92 *Bis:* Hostage Witnesses', 2 November 2009; 'Decision On Prosecution's Seventh Motion For Admission Of Statements', 21 December 2009; 'Decision On Prosecution Motion For Admission O Milan Tupajić's Evidence In Lieu Of *Viva Voce* Testimony Pursuant To Rule 92 *Bis*', 24 May 2012; 'Decision On Prosecution's Motion For Admission Of Evidence Of Eight Experts Pursuant To Rules 92 *Bis* And 94 *Bis*', 9 November 2009.

[9] TC Decision, para. 19.

[10] The Chamber should not be distracted by the civil law nature of these proceedings. Cambodian procedures were available to the Chamber and all of the Defence teams urged the Chamber to follow them. The Chamber held instead that the rules and jurisprudence of the *ad hoc* tribunals were applicable. In any event, the Co-Prosecutors submit that the admission of these statements is appropriate for the conduct of an expeditious mass crimes trial, a proposition contradicted by the experience of the ICTY/R. *See* OCP Original Request, para. 26.

within the procedure of the ECCC. Under these circumstances, the Chamber must be careful to apply that regime in its entirety – not pick and choose its most liberal rules for admission. For the reasons that follow, the application of the full Rule 92*bis* legal regime leads to the exclusion of a substantial majority of the Co-Prosecutors' statements. A less rigorous approach would involve applying a legal regime bearing little resemblance to Rule 92*bis*, and would therefore infringe the original premise of the TC Decision: that the Chamber is employing 'procedures established at the international level.' It would also constitute a massive violation of the right to confrontation, and thus to a fair trial.

II. Relevant Law

A. Standards for Admission Under Rule 92*bis*

i – Relationship between Rules 92*bis*(A) and (C)

6. Under Rule 92*bis* the admission of prior statements into evidence in lieu of examination in chief and admission in lieu of cross-examination are separated in two distinct and successive analyses.[11] Chambers are required first to determine bare admissibility pursuant to Rule 92*bis*(A) and then to consider whether such admission ought to be subject to the appearance of the witness for cross-examination under Rule 92*bis*(C). The two analyses involve an examination of an overlapping, but distinct set of considerations.

7. This motion is concerned with the statements of fourteen hundred witnesses, the vast majority of which will never be examined *at all*. With respect to these witnesses, the relevant standards are those applicable to admission without cross-examination under Rule 92*bis* (C) – not the much lower standard applicable to the admission of statements without 'the attendance of the witness' under Rule 92*bis*(A). Case law from the *ad hoc* tribunals which merely concerns the admission of a statement under Rule 92*bis*(A)

[11] *Prosecutor v. Milutinovic*, IT-05-87-T, 'Decision on Prosecution's Rule 92 *Bis* Motion', 4 July 2006 ('Milutinovic Decision July 06'), paras 15-19 (considering the factors stated in Rule 92*bis*(A) *and then* cross-examination); *Prosecutor v. Milosevic*, IT-02-54-T, 'Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to 92bis(D) – Foca Transcripts', 30 June 2003 ('Milosevic Decision June 03'), para. 10 ('there are three steps in any decision under Rule 92 *bis*: (i) Whether the transcript *is capable of admission* under Rule 92 *bis* (if it goes to proof of acts and conduct of the accused, as charged in the indictment, it is inadmissible); (ii) If capable of admission, whether there are any other reasons why, in the exercise of the Trial Chamber's discretion, the transcript ought not to be admitted; and (iii) If the transcript is admissible, whether the witness whose evidence is contained in the transcript should be required to appear for cross-examination.'); *Prosecution 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 ('Karadzic Decision Oct 09'), paras 5-10 (analysis under (A)), para. 10 (followed by analysis under (C)).

without clearly indicating that the defendant is not entitled to cross-examination is of no relevance whatsoever to this analysis.[12]

8. Although the distinction between these two stages of the analysis was recognized in the OCP Original Request,[13] it did not explicitly figure in the decision issued by the Chamber. The TC Decision indicates that the admissibility of statements which do not go to the acts and conduct of the accused will be considered pursuant to a five-factored test which is taken, very nearly verbatim, from Rule 92*bis*(A)(i). Once admissibility is determined – in effect, under Rule 92*bis*(A) – 'the absence of oral testimony and an opportunity for confrontation is a relevant consideration...and it follows that the probative value and weight to be accorded to such evidence may in some circumstances be limited.'[14] It is not clear whether the Chamber intended to hold that diminished weight is the only relevant consequence of the absence of any opportunity for cross-examination.[15]

9. There is, however, not a shadow of a doubt that at the *ad hoc* tribunals, the failure to permit an opportunity for cross-examination impacts the admissibility of the evidence. Under Rule 92*bis*, *after* deciding that a statement satisfies the test stated in (A), the Court is *then* obligated to consider whether the witness should be required to appear for cross-examination under (C).[16] In any such case, the statement will only be *admitted* if the witness is present in court and available for cross-examination.[17] That conclusion derives

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[12] The Defence recognizes that different considerations apply to a witness who is deceased or otherwise unavailable. Admission on that basis would require a showing of unavailability. *See* TC Decision, paras 32-33.
[13] OCP Original Request para. 13.
[14] TC Decision, para. 25.
[15] In describing the circumstances under which written statements may be admissible, the Chamber cited to case law summarizing the factors relevant to Rule 92*bis*(C) but did not explain the role those factors would play in the Chamber's analysis. *See* TC Decision, para. 31 & fn 50.
[16] *See* fn 11, *supra*.
[17] Rule 92*ter*(A)(i)-(iii); Milutinovic Decision July 06, para. 19 (with respect to statements for which cross-examination is required under Rule 92*bis*(C), it 'would be appropriate to admit the evidence, *provided that* each witness...is made available for cross-examination.'); *Prosecutor v. Karemera*, ICTR-98-44-T, 'Decision Following Joseph Nzirorera's Submission of Rule 92 *bis* Certified Statements', 10 September 2009 ('Karemera Decision Sept 09'), para. 4 ('mindful of the consequences that might arise should the witnesses not attend for cross-examination', statements not formally admitted into evidence until witnesses actually appear before the Chamber); *Prosecutor v. Karadzic*, IT-95-5/18-T, 'Decision on Prosecution's Second Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *Bis* (Witnesses Ark Municipalities)', 18 March 2010 ('Karadzic Decision March 10'), para. 49 (determination of admissibility delayed until actual appearance in court); *Prosecutor v. Milosevic*, IT-02-54-T, 'Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92*Bis*', 21 March 2002 ('Milosevic Decision March 02'), para. 27 ('in the event that a witness fails to appear for cross-examination, his or her written statement will not be admitted into evidence'); *Prosecutor v. Lukic*, IT-98-32/1-T, 'Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *Bis*', 22 August 2008 ('Lukic Decision'), para. 30 (admitting transcripts *upon fulfillment* of requirements in 92*ter*); *Prosecution v. Galic*, IT-98-29-AR73.2 'Decision on Interlocutory Appeal Concerning Rule 92*bis*(C)', 7 June 2002 ('Galic Decision'), para.15 (if Rule 92*bis*(C) is satisfied, the two choices available to the court are to exclude the statement altogether or determine that the 'absence of the opportunity to cross-examine the maker of the statement would in fairness preclude the use of

from the explicit language of Rule 92*bis*(C): 'the Trial Chamber *shall* decide...whether to require the witness to appear for cross-examination; if it does so decide, the provisions or Rule 92ter *shall* apply.' Pursuant to Rule 92*ter*, 'a Trial Chamber may *admit*...the evidence of a witness in the form of a written statement...*under the following conditions*: (i) the witness is present in court; (ii) the witness is available for cross-examination and any questioning by the Judges.' That procedure is universally followed by Chambers of the *ad hoc* tribunals.[18]

10. The decision to require a Rule 92*bis* witness to appear for cross-examination is understood as an exercise of the Chamber's discretion. However, that discretion must be exercised in a manner consistent with the well-established standards arising from the case law. A failure to recognize or consider relevant discretionary factors in connection with Rule *92bis* constitutes reversible error.[19]

ii – Standards for Admission *in lieu* of Direct Examination Pursuant to Rule 92*bis*(A)

11. Following the *ad hoc* tribunals, the TC Decision holds that statements 'which go to the acts and conduct of an accused as charged in the indictment' are inadmissible.[20] Such statements are *automatically* inadmissible, as a threshold matter, prior to the evaluation of any other considerations.[21] Evidence which does not go to the acts and conduct of the Accused must then be considered in light of a variety of factors, derived from Rule

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the statement'); *Prosecutor v. Martic*, IT-95-11-T, 'Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 *Bis* (D) and of Expert Reports Pursuant to Rule 94 *Bis*', 13 January 2006 ('Martic Decision'), para. 20 (where the prejudice of admitting a statement cannot be remedied by cross-examination, the statement must be excluded); *Prosecutor v. Taylor*, SCSL-03-1-T, 'Decision on Prosecution Notice Under Rule 92 *Bis* for the Admission of Evidence Related to *Inter Alia* Kenema District and On Prosecution Notice Under Rule 92 *Bis* for the Admission of the Prior Testimony of TF1-036 Into Evidence', 15 July 2008 ('Taylor Decision'), p. 6 (admission of statement requiring cross-examination is conditional on the actual opportunity to cross-examine).

[18] *See* fn 16, *supra*. Although the Rule 92*bis* scheme envisages determining 'admissibility' under (A) *and then* the right to cross examine under (C), that construction assumes that witnesses whose statements are admitted under (A) would actually be subject to cross-examination if so required based on the analysis carried out under (C). In this case, the witnesses can never be summoned for cross-examination no matter what the outcome of the (C) analysis. That circumstance is a consequence of the unprecedented volume of material included on the Co-Prosecutors' annexes. The structure of the rule demonstrates that the drafters did not anticipate requests for admission so large that the witnesses could never conceivably be called to testify.

[19] Galic Decision, paras 18-20.

[20] TC Decision, para. 14(b).

[21] TC Decision, para. 21; *Prosecutor v. Nsabimana*, ICTR-97-29-T, 'Decision on Nsabimana's Motion to Admit the Written Statement of Witness Jami in Lieu of Oral Testimony Pursuant to Rule 92*bis*', 15 September 2009, para. 33 (describing acts and conduct as a 'threshold'). Pursuant to Rule 92*ter*(B) and para. 31 of the TC Decision, such evidence may be admissible where cross-examination is permitted.

92*bis*(A) and discussed at paragraph 24 of the TC Decision, prior to determining admissibility in lieu of examination in chief.[22]

iii – Standards for Admission *in lieu* of Cross-Examination Pursuant to Rule 92*bis*(C)

12. A statement which is admissible *in lieu* of direct examination must be subject to cross examination (or otherwise excluded) if it is of sufficient importance in the context of the case against the Accused. Such evidence includes, more specifically, that which goes to: (i) criminal conduct which is 'highly proximate' to the accused;[23] and (ii) any 'live issue' between the parties, as distinct from those which are merely 'marginal' or 'peripheral'.[24]

13. These standards are context-specific in that they depend on the allegations against the accused and the defence he intends to advance. As a consequence, bright line rules are not readily found. However, the following principles which arise from the case law are especially relevant to this case.[25]

    a. Where superior or command responsibility is charged, testimony that concerns the conduct of subordinates requires cross examination if those subordinates are sufficiently 'proximate' to the Accused. Where the evidence concerns a *direct* subordinate it is almost universally excluded. In none of the seven cases identified by the Co-Prosecutors as representative of *ad hoc* tribunal jurisprudence was such evidence admitted – twice, the court explicitly concluded that none of the evidence

[22] Milosevic Decision June 03, paras 10-14.

[23] Martic Decision, para. 20 (proximity of the Accused to the evidence provided in the statement is at the core of both the admission and cross-examination analysis); *Prosecutor v. Karemera*, ICTR-98-44-T, 'Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 *Bis* of the Rules; and Order for Reduction of Prosecution Witness List', 11 December 2006 ('Karemera Decision 11 Dec 06'), para. 15 (proximity of acts and conduct described in statement to the Accused relevant to exercise of discretion with respect to cross-examination); Karadzic Decision Oct 09, para. 10 (same); *Prosecutor v. Blagojevic*, 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 ('Blagojevic Decision'), para. 12 (same); Taylor Decision, p. 5 (requiring cross-examination of acts sufficiently proximate to Accused).

[24] *Prosecutor v. Haradinaj*, IT-04-84bis-PT, 'Decision on Prosecution's Motion for Admission of Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to 92Bis', 22 July 2011 ('Haradinaj Decision'), para. 22 (evidence of a 'live and important issue between the parties, as opposed to a peripheral or marginally relevant issue' requires cross-examination); Karadzic Decision Oct 09, para. 10 (same); Blagojevic Decision, para. 12 (evidence that is 'pivotal to the Prosecution case' requires cross-examination); *Prosecutor v. Brdanin,* 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 ('Brdanin Decision'), para. 11 (evidence of a 'critical element of the Prosecution case' requires cross-examination); Karemera Decision 11 Dec 06, para.16 (same).

[25] Because there is some overlap in the analysis of Rules 92bis(A) and (C), in the case law cited these factors are occasionally relied upon to exclude the testimony for any purpose pursuant to Rule 92*bis*(A) rather than (C). That distinction is of no consequence here, since a statement which is inadmissible under (A) is of course also inadmissible without cross-examination under (C).

concerned subordinates before deciding to admit it[26] and once, the court held that cross-examination was required for exactly that reason.[27] Those results are routinely replicated in the jurisprudence.[28]

b. Testimony concerning the acts and conduct of co-members of a joint criminal enterprise who are proximate to the accused is subject to cross-examination.[29]

c. Crime base evidence which is important under the circumstances may require cross-examination *even if* it does not concern persons legally proximate to the accused. Such was the case in one of the seven cases described by the Co-Prosecutors[30] and in numerous other cases to be found within the jurisprudence.[31]

d. Evidence of administrative and command structures requires cross-examination if important under the circumstances, for example, if it is highly relevant to determining the alleged criminal liability of the accused.[32]

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[26] OCP Original Request, paras 22(a) (citing Karadzic Decision Oct 09), 22(b) (citing Blagojevic Decision).
[27] OCP Original Request, para. 22(f) (citing Brdanin Decision).
[28] Galic Decision, paras 14-16; Milosevic Decision March 02, para. 8 (Chambers must exercise 'extreme caution' before admitting without cross-examination evidence of the acts and conduct of a proximate subordinate for whom the accused may be held criminal responsible); *Prosecutor v. Bagosora*, ICTR-98-41-T, 'Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92*bis*', 9 March 2004 ('Bagosora Decision March 04'), paras 20-22, 25, 28 (statements which do not go to acts and conduct of the accused admitted subject to cross-examination because statement describes acts and conduct of subordinates proximate to the Accused); Brdanin Decision, paras 12 (acts and conduct of subordinates and co-perpetrators relevant to cross-examination), 24-26 (right to cross-examine soldiers for whom Accused may be held responsible), 30 (requiring cross-examination of evidence concerning a 'place' under the control of the defendant); *Prosecutor v. Hadzihasanovic and Kubura*, IT-01-47-T, 'Decision on Prosecution Application Pursuant to Rule 92 bis(A) of the Rules', 4 February 2004 ('Hadzihasanovic Decision Feb 04'), pp. 4-5; Blagojevic Decision, para. 12 (proximity of acts and conduct described in statement relevant to exercise of discretion with respect to cross-examination).
[29] Galic Decision, para. 13 (fact that a written statement goes to acts and conduct of a subordinate 'or some other person for whose acts and conduct the accused is charged with responsibility' relevant to decision whether to permit cross-examination); Karadzic Decision March 10, paras 44-49 (requiring cross-examination of witness who testify to the acts and conduct of top level members of the JCE, but not middle and lower level members); *Prosecution v. Dordevic*, IT-05-87/1-T, 'Decision on Prosecution's Motion for Admission of Written Evidence of Witness K14 in Lieu of Oral Testimony Pursuant to Rule 92 *Bis*', 18 March 2009, paras 11-17 (low level evidence of crimes implicating only junior officers required cross because accused charged with widespread JCE and superior responsibility); *Prosecutor v. Stanisic and Zupljanin*, IT-08-91-T, 'Written Reasons for the Oral Decision Granting in Part Prosecution's Motion for Admission of Evidence of ST223 Pursuant to Rule 92*bis*', 1 December 2010 ('Stanisic Decision Dec 10'), paras 26-27.
[30] OCP Original Request, para. 22(g) (citing *Prosecutor v. Sikirica*, IT-95-8-T, 'Decision on Prosecution's Application to Admit Transcripts Under Rule 92 *Bis*', 23 May 2001).
[31] Haradinaj Decision, para. 60; Milosevic Decision March 02, paras 24-25; Milutinovic Decision July 06, para. 18 (crime base evidence which does not concerns acts and conduct of accused must be subject to cross-examination because it is contested by defence); Lukic Decision, para. 25 (subjecting testimony concerning an issue that does not bear directly on accused's criminal responsibility to cross-examination because it is of sufficient importance); Stanisic Decision Dec 10, paras 26-27.
[32] *Prosecutor v. Oric*, IT-03-68-T, 'Decision on Defence Motion for the Admission of the Witness Statement of Avdo Hesjnovic', 15 September 2005, pp. 3-4; Hadzihasanovic Decision Feb 04, pp. 4-5.

e. Evidence of chapeau elements is not automatically admissible without cross examination. The issue arose only once in the cases described by the Co-Prosecutors, and in that case the Court admitted evidence of a widespread and systematic attack *only* because that issue had been extensively litigated before the Tribunal *and* those particular witnesses had already been cross-examined in other trials.[33] Similar evidence has been excluded absent cross-examination in other cases.[34]

B. Conditions Precedent to the Admission of Evidence Pursuant to Rule 92*bis*

14. Statements submitted pursuant to Rule 92*bis* must meet the general requirements for the admissibility of evidence, including relevance and reliability.[35] The witness must furthermore attest to the veracity of the statement in the presence of 'a person authorised to witness such a declaration in accordance with the law and procedure of a State [or] a Presiding Officer appointed by the Registrar of the Tribunal for the purpose.'[36] A statement which is not verified by a person so authorized by is inadmissible.[37]

C. Statements Containing Admissible Evidence and Inadmissible Evidence

15. Where the statement of a witness who will not appear at trial is partially admissible, only the *admissible portions* may be put before the Chamber. The Chamber 'has no discretion…to admit inadmissible evidence subject to an 'understanding' that inadmissible portions will be ignored…Conditional admission would, in effect, destroy the preliminary threshold, leaving all parties in doubt as to which portions were properly before the Chamber as evidence and which portions were not.'[38] Accordingly, Chambers routinely redact those portions of a statement deemed inadmissible prior to admission.[39]

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[33] OCP Original Request, para. 22(e) (citing *Prosecutor v. Naletilic and Martinovic*, IT-98-34-PT, 'Decision Regarding Prosecutor's Notice of Intent to Offer Transcripts Under Rule 92*bis*(D)', 9 July 2001, para. 12).
[34] *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, 'Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92bis', 9 March 2004 ('Bagosora Decision March 04'), para. 38; Karemera Decision 11 Dec 06, para. 20.
[35] TC Decision, para. 23.
[36] ICTY Rule 92*bis*(B).
[37] *Prosecutor v. Bagosora*, ICTR-98-41-T, 'Decision on Bagosora Motion to Vary its Witness List and Tender a Witness Statement Under Rule 92 *bis*' 12 December 2006 ('Bagosora Decision Dec 06'), para. 5.
[38] *Prosecution v. Bagosora*, ICTR-98-41-T, 'Decision on Admission of Statements of Deceased Witnesses', 19 January 2005 ('Bagosora Decision Jan 05'), para. 17.
[39] *Prosecutor v. Prlic*, IT-04-74-T, 'Decision on Admission of Evidence Pursuant to Rule 92 *Bis* (A) of the Rules (Brix-Andersen)', 23 January 2008, para. 15 (Prosecution should have identified relevant excerpts), para. 16 (redacting inadmissible passages); *Prosecutor v. Popovic*, IT-05-88-T, 'Decision on Prosecutor's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92*bis*', 12 September 2006 ('Popovic Decision'), Disposition paras 4-6 (redacting inadmissible portions); Martic Decision, paras 26-27 (redacting inadmissible portions).

16. The obligation to identify those aspects of a statement which are admissible rests on *the party submitting the statement.*[40] That obligation derives first of all from the fact that the documents were tendered by the Co-Prosecutors; it is augmented by the presumption of innocence and the burden on the Co-Prosecutors to put admissible evidence before the Chamber establishing the guilt of the accused. In the absence of any specifics about which *parts* of a statement are admissible, the entirety of the statement must be rejected.[41]

III. Argument

A. This Response is Timely

17. The Defence responded to the OCP Original Request in July 2011 in compliance with the time limits established by the Internal Rules. In June 2012, the Chamber ruled on that request, rejecting the Defence argument concerning the inapplicability of the Rule 92*bis* regime at the ECCC and holding for the first time that the admissibility of the Co-Prosecutors' statements would be determined under that regime. On 27 July 2012, the Co-Prosecutors sought admission of the written testimony pursuant to the TC Decision. The Defence's arguments concerning the specifics of the Rule 92*bis* regime are presented here at the earliest possible opportunity and are therefore timely.[42]

B. Most of the Documents are Inadmissible Due to the Co-Prosecutors' Failure to Distinguish Between Admissible and Inadmissible Evidence

18. The Co-Prosecutors concede that hundreds[43] of the Documents include evidence concerning the acts and conduct of the Accused. For reasons that follow, the Defence submits that all of this evidence, in addition to evidence contained in numerous other statements, is inadmissible. Each one of these documents is inadmissible in part and must therefore be excluded in full.

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[40] Bagosora Decision Jan 05, para. 18.

[41] Bagosora Decision Jan 05, para. 18 ('In the absence of submissions, the Chamber is not in a position to distinguish the inadmissible from the admissible portions of the statements. Accordingly, the statements must be declared inadmissible *in toto*.').

[42] On 31 July 2012, the Senior Legal Officer confirmed the Chamber's indication in the TC Decision that the procedural modalities for rendering objections had not yet been established and that objections were not yet anticipated. *See* Email from Susan Lamb to Parties re 'OCP Request E96/7', 31 July 2012. The Chamber provided clarity in that respect only on 19 October 2012, at which time it set a deadline of 26 April 2013 for such objections. *See* Document **E-223/2**, Memo from President of the Trial Chamber to Parties, 19 October 2012, ERN 00852923-00852926, para. 14. At that time, the Defence's request for a page limit extension with respect to the present Response was still pending, and was resolved only on 6 November 2012.

[43] It is difficult to identify precisely the number of statements which the Co-Prosecutors concede include the acts and conduct of the accused, however, it is evident from a cursory review of their annexes that the number is substantial.

19. In addition to the uncontested case law to that effect,[44] the exclusion in full of any statement which is inadmissible in part is the only practical way forward. The Chamber has only four possible other choices: (i) introduce the entire statement on the understanding that inadmissible portions will be ignored; (ii) require the Co-Prosecutors to identify admissible portions; (iii) require the Defence to identify inadmissible portions; or (iv) make those determinations itself.

20. The first option is impossible for both legal and practical reasons. Legally, the internal rules are clear that inadmissible evidence may not be put before the Chamber.[45] If the Chamber agrees that some of the evidence listed on the Co-Prosecutors' annexes is inadmissible, it must conclude that such evidence may not be put before the Chamber. Practically, it would become impossible for parties to know which parts of the statements were admissible and therefore, for the accused persons, the substance of the evidence against them. Final trial submissions would be made by all parties in the dark as to the evidence they are entitled to rely on and required to rebut.

21. The third choice is obviously inequitable: the defendants did not choose to seek the admission of 1,400 statements and should not be held responsible for parsing them. It would in any case be a practical impossibility to undertake that review in light of the resources available and the demands of the ongoing trial.[46] The only real possibility is therefore that any statement which can be shown to include inadmissible evidence is excluded in full, unless the Chamber wishes to grant to the Co-Prosecutors the opportunity to separate the admissible portions from the inadmissible portions (or undertake that exercise itself).

22. At this stage, it is impossible to formulate comprehensively a list of statements which include inadmissible evidence. At least two categories of such statements can, however, be identified with reasonable ease based on the Co-Prosecutors' descriptions: those which concern the acts and conduct of the accused and, for the reasons that follow, S-21 or S-24. Any such statement should be deemed inadmissible in full. A fuller set of objections to

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[44] *See* paras 15-16, *supra*.
[45] Rule 87(3)(d) (that which is 'not allowed under the law' is not 'evidence' put before the Chamber).
[46] The Co-Prosecutors have continued to make the implausible claim that they have roughly equivalent resources to the defence teams. *See* Document No. **E-1/123.1**, 'Transcript of Trial Proceedings', 6 September 2012, ERN 00846635-00846745, p. 40:8-9. That proposition is almost brazen in its assumption: that the defendants are not three distinct individuals with distinct rights to present a defence. It is evident that *each* defence team would be required to perform *its own* analysis, thus performing three times the work of the Co-Prosecutors with a staff that, in the aggregate, is roughly the same size as that of the Co-Prosecutors.

statements containing inadmissible evidence will be formulated prior to the Chamber's April 2013 deadline.

C. Numerous Documents Tendered by the Co-Prosecutors Concern Acts and Conduct of the Accused and Are Therefore Inadmissible

i – Evidence of Acts and Conduct of the Accused is Inadmissible for Any Purpose

23. By their own admission, numerous statements tendered by the Co-Prosecutors include evidence of acts and conduct of the accused. In response to a recent defence submission, the Co-Prosecutors clarify that they do seek the admission of that evidence to establish 'general policies or structures' rather than the acts and conduct of the accused.[47]

24. The procedure proposed by the Co-Prosecutors does not appear to be in use at any of the *ad hoc* tribunals. Evidence of the acts and conduct of the Accused is routinely excluded as a threshold matter without any consideration of whether the evidence also goes to other facts relevant to the proceedings.[48] That remains true even though acts and conduct of the accused – particularly where they are senior leaders, which is frequently the case at the *ad hoc* tribunals – are almost certain to be probative of other facts at issue.

25. To use just one concrete example, where the accused is charged under a theory of joint criminal enterprise, evidence of the participation of the accused in the common purpose would inevitably corroborate the existence of the common purpose. It is, however, well established that evidence of the common purpose is admissible whereas the defendant's participation therein is considered 'acts and conduct' and is therefore inadmissible.[49] If the Co-Prosecutors' theory were correct – that evidence of acts and conduct of the accused could be used any relevant purpose – statements showing the participation of the accused would almost always be admitted to prove the existence of the common purpose.

ii - Evidence of Decisions or Conduct of Top-Level Entities, Including the Standing, Central or Military Committee is Inadmissible as Acts and Conduct of the Accused

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[47] Document No. **E-223/1**, 'Co-Prosecutors' Response to Khieu Samphan's Request to Revise Corroborative Evidence Lists', ERN 008454445-008454452, para. 12.
[48] *See e.g.*, Bagosora Decision Jan 05, para. 17 ('evidence which concerns the acts and conduct of the Accused is inadmissible, but...other parts of a statement which do not concern the acts and conduct of an accused may be admitted'); Brdanin Decision, para. 14 (any testimony concerning acts and conduct is 'automatically' excluded); *Prosecutor v. Karemera et al.*, ICTR-98-44-T, 'Decision on Prosecutor's Motion to Admit Witness Statement from Joseph Serugendo', 15 December 2006 ('Karemera Decision 15 Dec 06'), para. 10 (evidence excluded because it concerns acts and conduct of the accused).
[49] Galic Decision, para. 10; Haradinaj Decision, paras 51 (participation in common purpose excluded) 56 (existence of common purpose included).

26. According to the Closing Order, the CPK was 'lead by the system of collective leadership...Applied to the Committee system, this meant that individual members could not make decisions by themselves, but only in concert with other members.'[50] The Co-Prosecutors have similarly advanced a theory of 'collective decision-making' in the course of witness examinations.[51] Accordingly, the Closing Order frequently infers Nuon Chea's knowledge or conduct from his position on a variety of DK committees, including the Standing, Central and Military Committees.[52] The Closing Order also alleges that Nuon Chea *always* received copies of messages addressed to Pol Pot.[53]

27. Statements may concern the 'acts and conduct of the accused' without referring to the accused by name; rather, such statements include any reference to the acts and conduct of the person in a position he is alleged to hold.[54] For example, a statement concerning the Chairman of the People's Representative Assembly would clearly be excluded as a statement concerning the acts and conduct of Nuon Chea because Nuon Chea is alleged to have filled that role. In light of the theory of collective decision making on which the Co-Prosecutors' liability theory relies, any decision by the Standing, Central or Military Committee is liable to be attributed to Nuon Chea. Hence, any evidence of such conduct concerns the acts or conduct of the accused and is inadmissible without cross examination. The same is true of any allegation concerning 'Angkar', '870', the 'Party Center', 'Senior Leaders', 'K-1', 'K-3' or any similar appellation, as well as any information received or knowledge held by Pol Pot.

D. Evidence of Facts to Which Nuon Chea is Alleged to be Highly Proximate is Inadmissible Absent Cross-Examination

28. Any testimony pertaining to crimes to which Nuon Chea is alleged to be highly proximate is inadmissible absent cross-examination, including but not limited to any evidence describing the acts and conduct of Nuon Chea's proximate subordinates or anyone with

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[50] Document No. **D-427**, 'Closing Order', 15 September 2010, ERN 00604508-00605246 ('Closing Order'), para. 34.
[51] *See e.g.*, Document No. **E-1/91.1**, 'Transcript of Trial Proceedings', 18 July 2012, ERN 00825649-00825790, p. 42:11-25; Document No. **E-1/92.1**, 'Transcript of Trial Proceedings', 19 July 2012, ERN 00826714-00826865, pp. 88:23-89:15.
[52] *See* Closing Order, paras 870, 876, 901, 902, 905-906, 943, among many other references.
[53] Closing Order, para. 74.
[54] Bagosora Decision March 04, paras 25 (excluding evidence of conduct of unnamed military personnel as acts and conduct of subordinates of defendant Minister of Defence), 31 (excluding evidence of conduct of 'Minister of Defence' as 'oblique reference' to the Accused); Brdanin Decision, paras 16 (excluding evidence of unnamed 'soldiers' against defendant General), 24-26 (same); Karemera Decision 15 Dec 06, para. 9 (references to 'MRND Party', 'MRND Party leadership', 'MRND authorities', 'Senior Officials of the MRND Party' constitute inadmissible references to accused); Popovic Decision, para. 57 (reference to unnamed officers at a meeting which accused is alleged to have attended is inadmissible).

whom he is alleged to have participated in a joint criminal enterprise. The Defence has not yet been able to compile a comprehensive list of such statements, and reserves its rights pending further indications from the Chamber concerning the present submissions. The Defence has nevertheless identified the following preliminary categories of evidence which require exclusion.

i - Evidence Concerning Crimes at S-21

29. Both the Co-Investigating Judges and the Co-Prosecutors have repeatedly attempted to place Nuon Chea in a unique and privileged role with respect to the operations of and crimes committed at S-21. According to the Closing Order, Nuon Chea: was 'in overall charge' of S-21,[55] was Duch's direct superior,[56] made decisions to send specific individuals to S-21,[57] reviewed the confessions of individual prisoners,[58] knew of and gave instructions with regard to interrogation practice and executions,[59] and ordered the mass execution of prisoners at S-21 'on several occasions.'[60] The Co-Prosecutors have made similar allegations,[61] as did Duch in his testimony before the Chamber.[62]

30. In light of this alleged relationship, evidence of crimes committed and administrative structures at S-21 are clearly inadmissible. First, any evidence concerning S-21 implicates Duch directly or indirectly, and is thus excluded by the near-absolute rule concerning accused persons and their alleged direct subordinates.[63] That rule is of yet greater significance in this case because Duch is not a mere alleged subordinate of Nuon Chea's – he is (by several lengths) the singlemost important witness against him. Evidence that even touches on Duch's role or conduct in Democratic Kampuchea, and hence his credibility, is crucially important and in need of cross-examination. Second, Nuon Chea's alleged role in and management of S-21 is so direct and substantial that he must be considered highly proximate to anything alleged to have taken place there. The

[55] Closing Order, paras 123, 877, 943.
[56] Closing Order, paras 878-879, 925, 949-957.
[57] Closing Order, paras 434, 470, 958-962.
[58] Closing Order, paras 930, 933, 935-936, 940, 944, 963-967.
[59] Closing Order, paras 968-974,
[60] Closing Order, para. 467.
[61] *See e.g.*, Document No. **D-3**, 'Introductory Submission', 18 July 2007, ERN 00147244-00147399, fns 174, 181.
[62] *See e.g.,* Document No. **E-1/51.1**, 'Transcript of Trial Proceedings', 20 March 2012, ERN 00792960-00793045, p. 29:17-18; Document No. **E-1/52.1**, 'Transcript of Trial Proceedings', 21 March 2012, ERN 00793648-00793757, pp. 25:20-23, 27:3-8; Document No. **E-1/53.1**, 'Transcript of Trial Proceedings', 26 March 2012, ERN 00795037-00795152, p. 56:17-25; Document No. **E-1/54.1**, 'Transcript of Trial Proceedings', 27 March 2012, ERN 00795565-00795675, pp. 28:6-11, 31:3-16, 48:9-52:13.
[63] *See* para. 13(a), *supra*.

ad hoc tribunals have often excluded crime base evidence in less proximate circumstances.[64] These constitute distinct and independent grounds for exclusion; either one would be sufficient.

ii - Evidence Concerning Crimes at S-24

31. The Closing Order alleges that S-24 was 'part of' S-21, that it was within Duch's sphere of responsibility, and that Nuon Chea was 'in charge' of it and took specific decisions to send detainees there.[65] For the reasons already stated,[66] crimes allegedly committed at S-24 and administrative structures allegedly in place are highly proximate to Nuon Chea and must be subject to cross-examination as a requirement of admission.

iii – Administrative and Communication Structures

32. Case 002/01 presently concerns population movement phases I and II. Although the Closing Order presents some evidence concerning Nuon Chea's role in initiating the DK population movement policy, the crimes charged in Case 002/01 go far beyond forced transfer as such: Nuon Chea is charged with responsibility for a panoply of crimes allegedly committed during those movements, including, *inter alia*, murder, extermination, and attacks against human dignity. Nuon Chea's individual responsibility for those crimes is based in large part on having ordered, instigated and exercised control over[67] the lower level DK cadres who perpetrated them.

33. Those modes of responsibility presume the existence of lines of authority in Democratic Kampuchea which are heavily contested by the Defence. Several of the world's leading experts – including David Chandler, Stephen Heder and Michael Vickery, among others – agree that 'probably most [killings] were committed by regional and local authorities acting not as part of such a tight chain of command; but of a looser and more diffuse hierarchical structure of delegated and discretionary authority …these lower downs were *certainly were not "just following orders."* In practice, the most important level on both the chain of command and the hierarchy of delegated and discretionary authority appears

[64] *See e.g.* Bagosora Decision March 04, para. 25 (mere reference to acts of military personnel requires cross-examination by defendant senior military official); Brdanin Decision, para. 16 (similar).
[65] Closing Order, paras 402, 877, 959.
[66] *See* paras 29-30, *supra*.
[67] Closing Order, paras 1544-1545 (planning), 1547-1548 (instigating), 1557-1559 (superior responsibility which presumes effective control over subordinates).

generally to have been the district, making district Party Secretaries key figures in responsibility for killings nationwide.'[68]

34. The nature of the hierarchy which linked Nuon Chea to the individuals who personally committed the crimes charged is therefore of critical importance, and very much a 'live issue' in Case 002/01.[69] Evidence concerning that hierarchy must be subject to cross-examination. This is particularly so to the extent that evidence is derived from lower level cadres, who have a clear incentive to deflect responsibility to higher levels and describe themselves as unwilling but powerless pawns of the regime. Such testimony is inherently unreliable and cannot be accepted at face value.

35. Any evidence concerning administrative and communication structures involving the 'Centre' as it is generally described in the Closing Order – including 'Angkar', '870', 'Office 870', K-1, K-3 and any of the Central, Standing and Military Committees – as well as the Zones, which are alleged to have communicated directly with the Centre – is therefore inadmissible absent cross-examination.[70]

iv – Acts and Conduct of Alleged Members of the Joint Criminal Enterprise

36. Nuon Chea is alleged to have participated in a joint criminal enterprise with numerous members of the DK regime, including members of the Central and Standing Committee, 'heads of CPK ministries;…zone and autonomous sector secretaries; and heads of the Party Centre military divisions.'[71] Each of these individuals is alleged to have acted so closely with Nuon Chea that their statements are inadmissible absent cross-examination.

    a. In light of the theory of collective decision making advanced in the Closing Order, the acts and conduct of other alleged members of the Standing and Central Committees are of great proximity to the Accused.[72]

    b. Zone and autonomous sector secretaries are alleged to have received orders from and regularly reported information directly to the small group of leaders at the Party

[68] Document No. **E-190.1.398**, 'Reassessing the Role of Senior Leaders and Local Officials in Democratic Kampuchea Crimes: Cambodian Accountability in Comparative Perspective', ERN 00661455-00661491, p. 12; Document No. **E-1/94.1**, 'Transcript of Trial Proceedings', 23 July 2012, ERN 00829800-00829959, pp. 65:5-68:8; Document No. **D-222/1.17**, 'Cambodia: 1975-1982', ERN 00396894-00397284, pp. 73-74 (describing highly varied practices and conditions across districts and villages), 71-148 (more generally).
[69] *See* para. 12, *supra*.
[70] The Defence does not contend that *any* evidence concerning administrative and communication structures must be subject to cross-examination, particularly any such evidence concerning structures below the Zone level.
[71] Closing Order, para. 159.
[72] *See* para. 26, *supra*.

Centre, particularly Nuon Chea,[73] who is also alleged to have personally appointed several such individuals in his role as head of the Center's Organization Committee.[74] The nature of that hierarchy is, moreover, a critical element of the prosecution case and vigorously contested by the Defence.[75]

c. Nuon Chea is alleged to have been a member of the Military Committee and to have been 'responsible for' and 'actively participated in' security and military affairs.[76] He is alleged to have met and worked 'every day' with Son Sen, who was allegedly directly in charge of the Party Centre military divisions.[77]

d. Nuon Chea was allegedly 'in charge of' the Ministries of Propaganda, Education, Social Affairs and Culture.[78] The Closing Order thereby implies that the heads of each of those ministries reported directly to Nuon Chea, and gives specific examples of such a relationship.[79]

E. Crime Base Evidence Beyond the Scope of Case 002/01 which is Admissible May be Used Only for a Limited Purpose

37. Numerous statements on the Co-Prosecutors' annexes concern crime base evidence beyond the scope of Case 002/01. The Co-Prosecutors submit that these statements are relevant to 'the existence of JCE policies and the widespread and systematic attack against the civilian population as required for charges of crimes against humanity.'[80]

38. Although some of this evidence is likely admissible absent cross-examination, the purpose for which it can be used must be narrowly limited to proving the existence of a widespread and systematic attack. Such evidence could not be used in the aggregate to establish the knowledge or intent of the accused, which are subsumed within 'acts and conduct' and are therefore inadmissible under Rule 92*bis*.

39. According to the Co-Prosecutors, the ICTY Appeals Chamber in *Galic* held that written crime base evidence may be used to demonstrate a pattern of criminal conduct *and* that the accused '*must* have known that his own acts (proved by oral evidence) fitted into that

[73] Closing Order, paras 68, 71, 76-77, 81, 872, 886, 911, 930-931.
[74] Closing Order, para. 880.
[75] *See* paras 32-34, *supra*.
[76] Closing Order, paras 873-875.
[77] Closing Order, para. 875.
[78] Closing Order, paras 881, 945
[79] Closing Order, paras 1214, 1217.
[80] OCP Further Request, para. 12.

pattern.'[81] However, the *Galic* court made that statement as part of its analysis of Rule 92*bis*(A), on the assumption that witnesses would be available for cross-examination. Only two paragraphs later did the court consider the standards applicable to the admission without cross-examination, at which point it *specifically warned against* inferring the knowledge of the Accused from evidence of the widespread criminal conduct of subordinates.[82] Other courts have required cross-examination with respect to such evidence for exactly that reason.[83]

F. Much of the Written Testimony Tendered by the Co-Prosecutors Fails to Satisfy the Requirements of Rule 92*bis*(B)

i – DC-Cam interviews

40. To the knowledge of the Defence, none of the interviews conducted by DC-Cam was verified in any way by any authority under the power of the ECCC or the Cambodian state. Accordingly, they fail to satisfy the requirement of Rule 92*bis*(B) that statements tendered for admission be accompanied by a declaration by the witness, signed in the presence of one such authority. They are therefore inadmissible.[84]

41. Rule 92*bis*(B) should not be dismissed or denigrated as a mere requirement of form. The objective of Rule 92*bis*(B) is to ensure that there is some supervision of statements given to third parties over which no one associated at the Court exercises any control and which are tendered for admission *without even the opportunity to cross-examine*. The Deputy Director of DC-Cam has testified that DC-Cam is an independent non-governmental organization, a conclusion fatal to the admission of statements under Rule 92*bis*.[85]

42. Those concerns are augmented by DC-Cam's institutional objectives, which include among other things the compilation of evidence to be used in the prosecution of those allegedly responsible for crimes committed in Democratic Kampuchea. The questionnaire used by DC-Cam interviewers is divided into a series of specific

[81] OCP Further Request, para. 16.
[82] Galic Decision, para. 14.
[83] Bagosora Decision March 04, para. 38 ('the crimes charged here involve widespread criminal conduct by the Accused's subordinates, so that it may be argued that the Accused should have had knowledge of the same. In this case, the requirements of a fair trial necessitate the admission of the statement with cross-examination.'); Karemera Decision 11 Dec 06, para. 20 ('the evidence is to be relied upon to prove that rapes were committed on a widespread and systematic basis by the Accused's subordinates and/or co-perpetrators. These allegations are so pivotal to the Prosecution's case that it would be unfair to the Accused to permit the evidence to be given in written form without an opportunity to cross-examine the witnesses.').
[84] *See* para. 14, *supra*.
[85] Document No. **E-1/31.1**, 'Transcript of Trial Proceedings', 23 January 2012, ERN 00772575-00772677, pp. 6:20-8:7, 24:1-16.

international crimes, seeking evidence relevant to establishing the elements of each.[86] According to the Deputy Director of DC-Cam, the information gleaned through the questionnaire 'does not only serve the purpose of history, but also for those who wish to find justice for the survivors of the regime.'[87] Mr. Chhang agreed that the objective of the DC-Cam interviews 'is to gather historical information for the Court in order to find the culprits who committed crimes' during DK.[88]

43. The DC-Cam website explains that the project goes beyond identifying responsible individuals in general and is geared specifically toward Nuon Chea and his co-Accused, stating that 'the project is directly relevant to the cases against surviving Khmer Rouge leaders at the ECCC.'[89] Youk Chhang agreed that he had publicly contended for the prosecution of Nuon Chea.[90] The Deputy Director testified that DC-Cam maintains files concerning each defendant currently being tried in Case 002.[91]

44. Most troubling in this regard is Mr. Chhang's willing concession that in conducting interviews DC-Cam 'did not follow' the suggestion that substantial killing was committed by lower-ranking officials without instructions from the central leadership.[92] Indeed, Mr. Chhang noted that of the 'more than 1,000 people' interviewed *none* admitted to having been involved in any criminal acts, and implausibly concluded on that basis that 'none of them committed such crime or have ever killed anyone.'[93] In light of the extreme improbability, in the context of Democratic Kampuchea, that every one of *more than a thousand* interviewees is innocent of any form of wrongdoing, Mr. Chhang's testimony is tantamount to a concession that the method of the DC-Cam interviewers – and indeed, the interviews they produced – are systematically skewed in favour of a 'manichean'[94] narrative of total upper level responsibility. That bias strikes at the heart of the question in Case 002: at what level of the DK hierarchy does criminal responsibility lie?

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[86] Document No. **E-3/158**, 'Guide for Historical Interviews', 4 March 2001, ERN 00291445-00291464.
[87] Document No. **E-1/32.1**, 'Transcript of Trial Proceedings', 24 January 2012, ERN 00773146-00773267, p. 86:2-4
[88] Document No. **E-1/38.1**, 'Transcript of Trial Proceedings', 2 February 2012, ERN 00777033-00777149, p. 87:14-16.
[89] Document No. **E-1/32.1**, 'Transcript of Trial Proceedings', 24 January 2012, ERN 00773146-00773267, p. 80:19-25.
[90] Document No. **E-1/38.1**, 'Transcript of Trial Proceedings', 2 February 2012, ERN 00777033-00777149, p. 78:8-24.
[91] Document No. **E-1/33.1**, 'Transcript of Trial Proceedings', 25 January 2012, ERN 00774031-00774129, pp. 1:16-3:19.
[92] Document No. **E-1/39.1**, 'Transcript of Trial Proceedings', 6 February 2012, ERN 00778068-00778180, p. 77:5-13.
[93] Document No. **E-1/39.1**, 'Transcript of Trial Proceedings', 6 February 2012, ERN 00778068-00778180, p. 77:5-13.
[94] Document No. **E-3/1648**, 'Voices from S-21', ERN 00192667-00192932, p. 9.

45. The Defence does not wish to impugn Mr. Chhang or the value of the work performed at DC-Cam, whose role is obviously crucial to victim advocacy and the process of reconciliation. The question here is whether that role is consistent with the needs of a fair and impartial investigation. The answer is obviously no. Among the competing interests at the ECCC, it is clear that at DC-Cam, defence rights are secondary to justice for victims, conceived of as ensuring punishment for the defendants presently on trial. Admitting such statements without any supervision by the Court or live examination by anybody is an extreme violation of the right to a fair trial.

ii – Other Statements

46. Other statements on the OCP annexes are from a variety of sources. Aside from victim complaints and those taken by the CIJs and OCP, none are state-conducted interviews or otherwise meet the formal requirements for admission in the Rule 92*bis* regime. They are therefore all inadmissible. If the Chamber does not categorically exclude these statements, the Defence reserves its right to make more detailed submissions concerning the reliability of each.

G. Relief Requested

47. The Defence respectfully:

a. Seeks clarification from the Chamber concerning the legal standards applicable to the admission of written statements without the appearance of the witness before the ECCC in accordance with the submissions in the present Response;

b. Submits that the following categories of evidence are inadmissible absent cross-examination:

i. Evidence of the acts and conduct of the Accused, including any evidence of the acts and conduct of entities to which the Accused is alleged to belong, including but not limited to the Standing, Central and Military Committees;

ii. Evidence concerning crimes committed or administrative structures in place at S-21 or S-24;

iii. Evidence of administrative or communication structures, with particular emphasis on national and zone-level structures;

iv. Evidence of the acts and conduct of any person with whom the Accused is alleged in the Closing Order to have participated in a joint criminal enterprise;

c. Submits that statements taken by DC-Cam and any other entity not authorized by the ECCC or the Cambodian state are inadmissible;

d. Requests that the Chamber deem any statement which, on the face of the description provided in the Co-Prosecutors' annexes, includes evidence falling within paras b(i) or (ii), *supra*, inadmissible in full absent cross-examination; and

e. Reserves its right to:

i. Identify any further statements which include evidence described in paragraph (b), *supra*;

ii. Identify further statements or categories of statements which include evidence of crimes that are highly proximate to the Accused or of a live issue in the case against the Accused; and

iii. Identify unreliable statements or categories of unreliable statements.

CO-LAWYERS FOR NUON CHEA

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