

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN'S REQUEST TO
REVISE CORROBORATIVE EVIDENCE LISTS**

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RESPONSE

1. On 29 August 2012, Accused Khieu Samphan, through his Co-Lawyers (the “Defence”), made written submissions: (a) supporting the request of Accused Ieng Sary (“Ieng Sary Request”) that the Trial Chamber (“Chamber”) question the interpreter who assisted in the second interview of witness Phy Phuon before the Co-Investigating Judges;¹ and (b) requesting the Chamber to order the Co-Prosecutors to revise their list of written statements proposed to be put before the Chamber in lieu of oral testimony.² The Co-Prosecutors responded to the Ieng Sary Request on 4 September 2012, and hereby incorporate by reference those submissions in response to paras. 1-4 and 23 (bullet 1) of Khieu Samphan’s Request.³ The Co-Prosecutors now respond to paras. 5-22 and 23 (bullet 2) of the same Request.
2. The Co-Prosecutors observe, as a preliminary matter, that the Defence seeks to object to written submissions filed in the period from 15 June 2012 to 5 July 2012, well beyond the time afforded for responses under the relevant Practice Direction,⁴ and with little regard for the directions of the Chamber in its decision of 20 June 2012, whereby the Chamber indicates that it “will schedule a hearing or otherwise *provide an opportunity* to put any relevant objections to the proposed evidence”.⁵
3. In sum, the Defence objects to the admission of the written statements put forward by the Co-Prosecutors because these documents are too numerous, and would require an unacceptable amount of time to translate, to review and to

¹ **E223** Soutien à la requête de M. Ieng Sary E221 et demande à la Chambre de première instance d’ordonner aux co-procureurs de réviser les listes de déclarations écrites qu’ils souhaitent faire verser aux débats au lieu et place de témoignages oraux, 29 August 2012, paras. 1-4 (“Request”); referring to **E221** Ieng Sary’s request to hear evidence from the interpreter concerning witness Phy Phuon’s second OCIJ interview whereby irregularities occurred amounting to subterfuge, 23 August 2012.

² **E223**, *Ibid.*, paras. 5-23; referring to **E96/8** Co-Prosecutors’ further request to put before the Chamber written statements and transcripts with confidential annexes 1 to 16, 27 June 2012 (“Co-Prosecutors’ Further Request”); **E208**, Co-Prosecutor’s request to admit witness statements relevant to Phase 1 of the population movement, 15 June 2012; and **E208/2** Co-Prosecutors’ request to admit witness statements relevant to Phase 2 of the population movement and other evidentiary issues with confidential annexes I, II, III and public annex IV, 5 July 2012.

³ **E221/1** Co-Prosecutors’ response to Ieng Sary’s request to hear evidence from the interpreter concerning witness Phy Phuon’s second OCIJ interview, 4 September 2012.

⁴ Practice Direction ECCC/01/2007/Rev.8, Filing of documents before the ECCC, Article 8.3.

⁵ **E96/7** Decision on Co-Prosecutors’ Rule 92 submission regarding admission of witness statements and other documents before the Trial Chamber, 20 June 2012 at para. 36 (“Decision on admissibility”).

make objections, thereby unduly delaying the trial proceedings.⁶ In response, the Co-Prosecutors submit that these positions are both factually inaccurate and unjustified in law. In addition, the Defence maintains that it has not had the opportunity to review the written statements, but paradoxically finds itself entirely able to object to their relevance and reliability.⁷ In response, the Co-Prosecutors reaffirm that the written statements they seek to put before the Chamber meet the applicable requirements of relevance and reliability, and are directly relevant to the issues to be considered by the Chamber within the scope of Case 002/01, excluding – for reasons accepted by the Chamber⁸ – the acts and conduct of the Accused. The Defence submissions are considered in turn.

4. First, the Defence argues that too many documents remain to be translated, and that the need for translation will occasion delays at trial:

[...] *almost none of 420 victims' complaints the Co-Prosecutors wish to put before Chamber have been translated to French no more than an hundred from the statements collected by DC-Cam or the School of Oriental and African Studies (SOAS).*⁹

5. The Defence greatly overstates the scope of the translation burden occasioned by the Co-Prosecutors' requests to put written statements before the Chamber. As previously submitted,¹⁰ the time required to translate these complaints is minimal because, on average, only one page out of seven in a complaint form provides the actual description of the crime alleged and therefore requires translation. In addition, only a fraction of the other evidentiary material submitted by the Co-Prosecutors is not yet already available in all three working languages of the Chamber:

*Of the 40 transcripts of trial testimony requested for admission all are in the three working languages of the ECCC.*¹¹

*Of the 526 written records requested for admission all are available in all three working languages of the ECCC bar one translation in Khmer and four in French.*¹²

⁶ See esp. E223 Request, *supra* note 1 at paras. 6-7, 9, 11, 14 and 21.

⁷ See esp. E223 Request, *ibid.* at paras. 12, 16-21.

⁸ E96/7 Decision on admissibility, *supra* note 5 at para. 22.

⁹ E223 Request, *supra* note 1 at para. 20 [provisional translation from the original French].
¹⁰ 29 August 2012, at para 25.

¹¹ E96/8 Co-Prosecutors' Further Request, *supra* note 2 at para. 21.

¹² E96/8 *Ibid.* at para 22.

6. Second, the Defence claims that the volume of documents at issue leaves insufficient time to review each document specifically, so as to meet its due diligence obligations.¹³ The Co-Prosecutors submit that this argument is wholly without merit, particularly in the context of the system of criminal procedure applicable before the ECCC. Any insufficiency of time is solely and directly attributable to the Defence, who cannot now rely on its want of diligence to advance a need for due diligence.
7. Internal Rule 58(1) provides that a Charged Person can access the Case File, through his lawyer, at least five days prior to the first interview:

When a Charged Person has a lawyer, the Co-Investigating Judges shall summon the lawyer at least 5 (five) days before the interview takes place. During that period, the lawyer may consult the case file.

Accused Khieu Samphan was charged on 19 November 2007, and had access to the Case File through his lawyers from that point forward. Internal Rule 55(7) provides for such access throughout the judicial investigation phase:

The Greffier of the Co-Investigating Judges shall keep a case file, including a written record of the investigation. At all times, the Co-Prosecutors and the lawyers for the other parties shall have the right to examine and make copies of the case file under the supervision of the Greffier of the Co-Investigating Judges, during working days and subject to the requirements of the proper functioning of the ECCC.

Internal Rule 86 enshrines the Accused's right of access to the Case File throughout the trial proceedings:

At all times, the Co-Prosecutors and the lawyers for the other parties shall have the right to examine and obtain copies of the case file, under supervision of the Greffier of the Chamber, during working days and subject to the requirements of the proper functioning of the ECCC.

8. Thus, every protection and modality has been afforded to the Defence, since November 2007, to allow the proper exercise of its due diligence obligations in assessing all categories of documents that the Co-Prosecutors have now sought to put before the Chamber. In the Request, the Defence is particularly strident in

¹³ E223 Request, *supra* note 1 at paras. 7, 9.

its claim to lack sufficient time to scrutinise those witness statements provided to the Office of Co-Investigating Judges (“OCIJ”) that the Co-Prosecutors have sought to put before the Chamber¹⁴ (that is, those statements given by witnesses who are not anticipated to be called before the Chamber). A chart prepared by the Office of Co-Prosecutors (**Annex 1**) provides an overview of the staggered timing of the placement of these statements, and their official translations, on the Case File. This chart clearly demonstrates that all but 48 witness statements that the Defence now claims to need to review have, in fact, been readily accessible to the Defence *in both Khmer and French* for over *two and a half years*, well in advance of the Closing Order. The remaining statements have been available to the Defence for *over one and a half years*. Any failure to properly monitor the Case File, to conduct timely and ongoing review, or to ensure coordination among Co-Lawyers is solely and directly attributable to the Defence, and risks impeding the exercise of the Accused’s fair trial rights. Such conduct should not, in the Co-Prosecutors’ respectful submission, form the basis of a claim of insufficiency of time at this stage in the proceedings.

9. Third, the Defence argues that the Co-Prosecutors’ submission of documents to be put before the Chamber:

*[...] will require the Trial Chamber to spend precious time organising days of hearing so that the parties can make their objections.*¹⁵

The Defence contends that the volume of documents and available time would only allow for the formulation of general objections.¹⁶ The Co-Prosecutors submit that the Chamber’s directions in this regard clearly provide for a hearing *or* another means of making objections to evidentiary material. Objections submitted in writing can be well-organised and specific without unduly delaying the trial proceedings. Furthermore, submission of objections in writing would appear best-suited to complex cases involving significant documentary evidence to corroborate oral testimony on the many legal issues at trial that do not directly concern the acts and conduct of the Accused.

¹⁴ E223 Request, *supra* note 1 at paras. 7-9.

¹⁵ E223 Request, *ibid.* at para 9 [provisional translation from the original French].

¹⁶ E223 Request *ibid.* at para 14.

10. Fourth, while contesting the issue of available time to translate, review and object to the documents at issue, the Defence asserts that these very same documents lack both relevance and reliability. The logic of this argument cannot hold. Nonetheless, the Co-Prosecutors reaffirm that these documents fully meet the requirements of relevance and reliability in the criteria of admission adopted by the Chamber on 20 June 2012.¹⁷
11. Concerning relevance, the Co-Prosecutors submit that all documents at issue are relevant to factual issues to be decided in the current scope of this trial, as set forth by the Chamber,¹⁸ and illustrated in an annotated version of the Chamber's decision (**Annex 2**). These documents include materials directly relating to the first two phases of the population movement. Whilst certain witness statements may also concern crime sites beyond the scope of Case 002/01, these remain relevant to the current proceedings as either (a) cumulative of oral witness testimony, in the sense of the Chamber's 20 June 2012 Decision;¹⁹ or (b) corroborating other evidence before the Chamber concerning issues within the scope of trial, including: (i) the relevant historical, political or military background of the events during DK period; (ii) the contextual (i.e. "threshold"²⁰) element of crimes against humanity; and (iii) the legal requirements of the mode of liability of joint criminal enterprise ("JCE", particularly the existence of a common plan encompassing key policies). The Defence's objections to Annexes 10 to 16 of the Co-Prosecutors' submission of 27 June 2012 must, in particular, fail on this basis.²¹
12. For clarity, the Co-Prosecutors reiterate that some written statements and trial testimony at issue also contain evidence relating to the acts and conduct of the Accused, but this is not the purpose for which such documents are submitted to be put before the Chamber.²² Rather, these documents tend to establish the existence of general policies or structures that are within the scope of trial. The Chamber has already recognised the distinction between the acts and conduct of

¹⁷ E96/7 Decision on admissibility, *supra* note 5 at para. 35.

¹⁸ E124/7.2 Annex: List of paragraphs and portions of the Closing Order relevant to Trial One in Case 002, amended further to the Trial Chamber's Decision on Ieng Thirith's Fitness to Stand Trial

¹⁹ E96/7 Decision on admissibility, *supra* note 5 at para. 24(a).

²⁰ E96/7 *Ibid.* at para. 24(b).

²¹ E223 Request, *supra* note 1 at para. 12.

²² E96/8 Co-Prosecutors' Further Request, *supra* note 2 at para. 17.

the accused and general policies and structures in the evidentiary practice of the ICTY,²³ and applied this distinction to admissibility of documents at trial.

13. Concerning reliability, the Co-Prosecutors draw primarily on the established jurisprudence of the Chamber in its 20 June 2012 Decision, to which the Defence appears to defer, in its treatment of factors affecting reliability of the categories of evidentiary material put forward. The Chamber held that transcripts from Case 001 are inherently reliable and, in certain circumstances, would even permit their use to establish the acts and conduct of the Accused.²⁴ The Chamber confirmed that OCIJ written records carry a presumption of reliability and relevance.²⁵ As Judge Lavergne ruled, for the Chamber, on Trial Day 108:

The judicial investigation that preceded this trial lasted many years. During the course of the investigation there were investigative acts that were put on the case file. They were made accessible by the defence teams and by the accused. All of the questions [...] are based on the written records of witness statements. All of those indications were entirely accessible by you as well as by any other defence team representing any one of the accused [...] [E]ach defence team is comprised of Cambodian lawyers. Each Cambodian lawyer has the ability and power to listen to those audio recording if he or she wishes. What have the defence lawyers been doing over the course of the many years of the judicial investigation? This is my question. We are here to study and examine issues of substance. Issues relating to the judicial investigation must not be subject to redundant and repetitive questions.²⁶

Documents contained in Annex 1 of the Co-Prosecutors' 27 June 2012 submission, containing witness statements taken by entities external to ECCC do not generally carry a presumption of reliability. Nonetheless, the Chamber has allowed for their submission under Internal Rule 87(1).²⁷ The Co-Prosecutors submit that a sound legal basis exists in the practice and jurisprudence of existing *ad hoc* tribunals to admit statements in this category.²⁸ And this

²³ E96/7 Decision on admissibility, *supra* note 5 at para. 21.

²⁴ E96/7 *Ibid.* at paras. 30-31.

²⁵ E96/7 *Ibid.* at para. 26.

²⁶ Draft Transcript, 6 September 2012 at p.35 ln.3-25 [final transcript not available at the time of submission].

²⁷ E96/7 *Ibid.* at para. 29.



²⁸ See e.g. *Prosecutor v. Momčilo Perišić*, Case No.IT-04-81-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92bis (ICTY Trial Chamber I), 2 October 2008 at paras. 20-33.

Chamber has adopted a similar approach by recognising²⁹ that indicia of reliability – such as knowledge of the source of the document, consistency, level of detail and the degree to which it corroborates facts obtained elsewhere³⁰ – may assist in assessing probative value, weight, and compliance with the admissibility criteria in Internal Rule 87(3). Finally, victim complaints and Civil Party applications, though likely to be accorded “little, if any probative value”³¹ in isolation, may nonetheless be corroborative of other, more reliable evidence. Due consideration of the concrete evidentiary value of specific victim complaints and Civil Party applications is consonant with the Chamber’s finding that written statements “concern[ing] the impact of crimes upon victims” should be accorded “some probative value and thus weight”,³² and with the Chamber’s mandate to establish the truth.

14. For the reasons set out above, the Co-Prosecutors respectfully request the Chamber to:

- (a) dismiss the Request in full; and
- (b) having allowed for objections to be recorded in a manner the Chamber deems appropriate, to put before the Chamber the documents identified in the Co-Prosecutors’ submissions on 15 June 2012, 27 June 2012 and 15 July 2012.

Respectfully submitted,

Date	Name	Place	Signature
10 September 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		

²⁹ **E96/7** Decision on admissibility, *supra* note 5 at para 29.

³⁰ **E158** Co-Prosecutors’ Rule 92 Submission regarding Indicia of Reliability of the 978 Documents Listed in Connection with those Witness and Experts who may be Called during the First Three Weeks of Trial, 23 December 2011.

³¹ **E96/7** Decision on admissibility, *supra* note 5 at para. 29.

³² **E96/7** *Ibid.* at para. 24.