

BEFORE THE TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

**FILING DETAILS**

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**CO-PROSECUTORS' FURTHER REQUEST TO PUT BEFORE THE CHAMBER  
WRITTEN STATEMENTS AND TRANSCRIPTS with  
CONFIDENTIAL ANNEXES 1 TO 16**

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## I. INTRODUCTION

1. On 20 June 2012, the Trial Chamber (“Chamber”) issued its *Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents before the Trial Chamber* (“Decision”).<sup>1</sup> The Decision authorized the admission of “evidence in the form of written statements or transcripts....where [the evidence] satisfies the criteria contained in Sections 4.2 and 4.3 of [that] decision.”<sup>2</sup> The criteria included the degree to which the evidence was cumulative of oral testimony, relevant to issues at trial and was reliable.<sup>3</sup> As to evidence contained in these statements or transcripts that relate to the acts and conduct of the Accused the Chamber held they could not be admitted for that purpose as fundamental fair trial rights required that the defence be allowed to question witnesses on those issues.<sup>4</sup>
2. Pursuant to this Decision, the Co-Prosecutors file this request and accompanying **Annexes 1 to 16** which identify the written statements (including complaints) and trial transcripts relevant to factual issues to be decided in the current scope of this trial. Where this material contains evidence relating to the acts and conduct of the Accused it is not submitted for that purpose but for the purpose of proving the issues identified in the attached annexes.
3. The purpose of the request is to expedite the trial by putting before the Chamber relevant evidence of witnesses who would not otherwise have the opportunity to testify orally in court. The evidence will assist the Chamber in ascertaining the truth of the numerous allegations contained in the Indictment which are subject of this current trial. Such admission is essential for the effective management of a trial of this size, if the Chamber is to determine the truth of the allegations. As the former Appeals Chamber Judge at the International Criminal Tribunal for the Former Yugoslavia, Judge Patricia Wald stated with regards to cases of similar size, they are “more akin to documenting an episode or even an era of national . . . conflict rather than proving a single discrete incident” consequently “if they [the courts] are to perform their unique functions, such courts cannot be required to conform to a particular national code of criminal procedure.

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<sup>1</sup> E96/7 Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and other Documents before the Trial Chamber, 20 June 2012 (“Decision”).

<sup>2</sup> E96/7 Decision at para. 36.

<sup>3</sup> E96/7 Decision at paras. 20-33.

<sup>4</sup> E96/7 Decision at para. 22.

There must be due recognition that, to preserve respect, such courts must act not only fairly but expeditiously.”<sup>5</sup> By filing this request, the Co-Prosecutors seek to ensure that this trial is fair and also expeditious.

4. It is submitted that the documents identified in this request meet the criteria for admission established by the Chamber. Therefore, it is requested that these written statements and transcripts be admitted into evidence and assigned an E3 number (to the extent this has not already been done). It is further requested that the Chamber rely on this evidence, in conjunction with oral testimony heard and documentary evidence admitted at trial, in evaluating the charges against the Accused in this trial.

## II. BACKGROUND FACTS AND ANNEXES

### A. Background Facts

5. Prior to and immediately following the Chamber’s Decision to allow written statements and transcripts to be admitted at trial under certain conditions the Co-Prosecutors have filed two requests to admit witness statements for the purpose of corroborating testimony relating to Phases I<sup>6</sup> and II<sup>7</sup> of the forced transfer of the civilian population as alleged in the Indictment. On 19 July 2012 the Trial Chamber issued a response to these two requests<sup>8</sup> directing that the parties consolidate all written statements for admission concerning Phases I and II of the population movement. While the previous two requests by the Co-Prosecutors identify the statements “they propose to tender in relation to population movement Phases I and II”<sup>9</sup> this request also includes materials relating to these Phases. These statements corroborate evidence of other issues which are the subject of this current trial and necessary to prove the charges in the Indictment.<sup>10</sup>

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<sup>5</sup> See Patricia M. Wald, “‘To Establish Incredible Events by Credible Evidence’: Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings,” 42 Harv. Int’l L.J. 535 (2001) at p. 537.

<sup>6</sup> **E208** Co-Prosecutors’ Request to Admit Witness Statements Relevant to Phase I of the Population Movement, 15 June 2012 (“Co-Prosecutors’ Phase I Request”).

<sup>7</sup> **E208/2** Co-Prosecutors’ Request to Admit Witness Statements Relevant to Phase II of the Population Movement and Other Evidentiary Issues, 5 July 2012 (“Co-Prosecutors’ Phase II Request”).

<sup>8</sup> **E208/3** Trial Chamber’s Response to Co-Prosecutors’ Request to Admit Witness Statements Relevant to Population Movements Phases I and II (E208 and E208/2) and IENG Sary Response (E208/1), 19 July 2012 (“Trial Chamber’s Response”).

<sup>9</sup> **E208/3** Trial Chamber’s Response at para. 3.

<sup>10</sup> **E124** Severance Order Pursuant to Internal Rule 89ter, 22 September 2011 at para. 1.

## B. The Annexes

6. **Annexes 1 and 2** contain a full detailed list of the witness statements (including complaints) and witness trial transcripts respectively, that the Co-Prosecutors request to be put before the Chamber.<sup>11</sup> In accordance with the Decision, only documents that have not or will not be otherwise put before the Chamber are submitted in this request. Consequently, **Annexes 1 and 2** do not include witnesses who have testified in court<sup>12</sup> or are currently scheduled by the Chamber to testify.<sup>13</sup> To avoid repetition, they also do not include individuals whose statements have already been identified in the Co-Prosecutors' two previous requests to admit witness evidence relating to population movements Phase I<sup>14</sup> and II.<sup>15</sup> However, in the interest of consolidating the three submissions relating to the forced transfer of the civilian population, **Annex 9** refers to these two previous requests as directed by the Chamber.<sup>16</sup>
7. Both **Annexes 1 and 2** include the following details (1) the name of the witness who provided the statement or trial testimony; (2) the date of the statement or trial testimony; (3) the specific type of document; (4) the E3 number, if previously ascribed; (5) the case file document number; (6) the total number of pages of the original document; (7) the evidence reference number, "ERN," for the Khmer, English and French translations of the document (8) a brief description of the document and (9) a list of some of the relevant issues in the Indictment relevant to the first trial that the statement or trial testimony assists in proving.<sup>17</sup>
8. **Annexes 3 to 16** (14 in total) are simplified versions of **Annexes 1 and 2**. The purpose of these further 14 annexes is to make clearer the amount of corroborative evidence

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<sup>11</sup> This structure is intended to satisfy the Chamber's requirement of particularizing the purpose for the admission of each document. See **E96/7** Decision at para. 34.

<sup>12</sup> See **E1/57.1** Transcript, 2 April 2012 at p. 89-90. Wherein witnesses intend to provide testimony, the Chamber has held that all of their prior statements are deemed to have been put before the Chamber.

<sup>13</sup> **E131/1** Witness Lists for Early Trial Segments, Deadline for Filing of Admissibility Challenges to Documents and Exhibits, and Response to Motion E109/5, 25 October 2011; **E172** Next Group of Witnesses, Civil Parties and Experts to be Heard in Case 002/01, 17 February 2012. In accordance with the Trial Chamber's previous rulings, witness' prior statements will, in due course, be deemed to be put before the Chamber. However, where a witness or expert who is currently scheduled to testify is no longer required by the Chamber the Co-Prosecutors note that they may file a supplement to this motion in order to introduce written records and trial testimony that would not otherwise be admitted.

<sup>14</sup> **E208** Co-Prosecutors' Phase I Request.

<sup>15</sup> **E208/2** Co-Prosecutors' Phase II Request.

<sup>16</sup> **E208/3** Trial Chamber's Response.

<sup>17</sup> It is submitted that many facts contained in any written statement of transcript relate to multiple factual issues relevant to this trial. So as to not to create overly large lists the statements or transcripts have been related to the most obvious points in the indictment.

being proposed *per issue* as opposed to **Annexes 1 and 2** which identify the number of relevant issues *per statement or testimony*. Therefore, where a particular witness statement or testimony identified in **Annexes 1 and 2** relate to multiple issues the witness will be listed in all annexes relating to those multiple issues.

9. **Annexes 3 to 16** relate to the following key issues which are the subject of the current trial, listed in the order of the Annex ;
  - (1) historical background of Democratic Kampuchea (“DK”);
  - (2) administrative structure of DK at the central level;
  - (3) administrative structure of DK at the national level;
  - (4) communications structures of DK ;
  - (5) military structure of DK;
  - (6) armed conflict in which DK was engaged;
  - (7) joint criminal enterprise (“JCE”) policy of movement of the population;
  - (8) JCE policy of creation of worksites and cooperatives;
  - (9) JCE policy of the creation of security centres and execution sites;
  - (10) JCE policy to target certain groups of individuals;
  - (11) JCE policy relating to the treatment of Buddhists;
  - (12) JCE policy relating to the treatment of Cham;
  - (13) JCE policy relating to the treatment of Vietnamese; and
  - (14) JCE policy relating to the regulation of marriage.
10. At the commencement of each **Annex from 3 to 16** the Co-Prosecutors have identified witnesses who have provided testimony in this trial on the particular issue which is the subject of the Annex. Witness testimony scheduled but not yet heard has not been included. It is expected however that the remaining witnesses and experts scheduled for testimony by the Chamber will, cumulatively, cover all of the fourteen issues to which the identified written statements and trial testimony are relevant.
11. For ease of identifying the location of witnesses providing corroborative evidence on the issues contained in **Annexes 3 to 16**, each annex is sorted first by the type of witness

document, second, by their previous inclusion in the Co-Prosecutors' Witness List and then third, by alphabetical order.

12. Where appropriate, within the annexes, the witnesses are divided into sub-issues to which their evidentiary material assists in proving. Some of the sub-issues concern crime sites that are not themselves included in Case 002/01 however they are relevant as they assist in establishing the existence of JCE policies and the widespread and systematic attack against the civilian population as required for charges of crimes against humanity. It is also indicated in each annex where an individual in his or her written statement or trial testimony contain evidence relating to the acts and conduct of the accused. This is indicated by the following notation "[a&c]." As stated above, the witness statement or transcript is not being submitted for that purpose but to prove other issues in the Indictment that are the subject of the first trial.
13. **Annexes 3 to 16** therefore relate to the same written statements and trial testimony as identified in **Annexes 1 and 2** and are a sub-set of and complement the previous document lists filed by the Co-Prosecutors on 19 April 2011<sup>18</sup> and then on 22 July 2011.<sup>19</sup>

### III. CRITERIA FOR ADMISSION

14. In light of the nature of the written statements and testimony requested to be put before the Chamber and pursuant to the Chamber's Decision the admissibility criteria and factors in favour of admission will now be addressed. These criteria and factors include that the material (1) proves matters other than the acts and conduct of the accused, (2) is cumulative of oral testimony, (3) and/or relates to the impact of crimes on victims and (4) meets the requisite standard of reliability for admission.

#### **A. Documents Must be Cumulative of Oral Testimony and Prove Matters Other than the Acts and Conduct of the Accused**

15. In the Decision, the Chamber held that in accordance with the relevant jurisprudence and practice factors in favor of admitting and affording some probative value and thus weight to written statements or transcripts include whether the evidence "(a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts ; and (b) relates to relevant historical, political or military background,

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<sup>18</sup> **E9/31** Co-Prosecutors' Rule 80 Trial Document List, 19 April 2011.

<sup>19</sup> **E109/4** Co-Prosecutors' Response to the Trial Chamber's Request for Documents Relating to the First Phase of the Trial, 22 July 2012.

concerns crime-base evidence or goes to proof of threshold elements of international crimes (such as the existence of an international armed conflict or the widespread or systematic nature of an attack).”<sup>20</sup> Further, the Trial Chamber recognized the jurisprudence of the ICTY that admissible categories of evidence also included “general policies, communication structures and the existence of a common criminal plan.”<sup>21</sup>

16. However, the Chamber held that “written statements or transcripts proposed to be put before the Chamber which go to proof of the acts and conduct of an accused as charged in the indictment” shall subject to limited exceptions be “inadmissible for this purpose.”<sup>22</sup> In this context, the Chamber noted a distinction<sup>23</sup> between the “acts and conduct of the accused” and general policies and structure, including the factual background of crimes “not closely proximate to the accused”<sup>24</sup> in ICTY jurisprudence. Moreover, on the issue of the Accused’s knowledge of crimes, the ICTY Appeals Chamber in *Galić* held that evidence not directly addressing the acts and conduct of the accused may nevertheless prove the existence of a pattern of crime sufficient to establish that the accused “*must* have known that his own acts (proved by oral evidence) fitted into that pattern.”<sup>25</sup>
17. Therefore, in accordance with the Chamber’s Decision the Co-Prosecutors do not request to have written statements or testimony admitted without an oral examination of the witness for the purposes of proving the acts and conduct of the Accused. Where any written statement or testimony includes this evidence, the Co-Prosecutors only submit the material for the purpose of proving other matters authorized by the Chamber such as general criminal policies, administrative and communications structures, the DK historical, political and military context, the widespread and systematic attack against the civilian population and armed conflict as specifically identified in paragraph 9 of this Request. The documents sought for admission on this basis are identified in full in **Annex 1** and **2** and further identified in an analytical form in **Annexes 3** to **16**. To assist the Chamber written statements or testimony that include some evidence of the

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<sup>20</sup> E96/7 Decision at para. 24.

<sup>21</sup> E96/7 Decision at para. 21.

<sup>22</sup> E96/7 Decision at para. 22.

<sup>23</sup> See E96/7 Decision at para. 21.

<sup>24</sup> *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-PT, Decision on Prosecution’s Motion for Admission of Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92bis (ICTY Trial Chamber II), 22 July 2011 at paras. 19-21.

<sup>25</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C) (ICTY Appeals Chamber), 7 June 2002 at para. 11. Emphasis in original.

acts and conduct of the Accused amongst other matters is identified in long form in **Annexes 1 and 2** “Points of the Indictment” field and in **Annexes 3 to 16** in short form i.e. “[a&c]” meaning [acts and conduct].

### **B. Documents Relate to Impact of Crimes on the Victims**

18. The Chamber’s Decision specifically lists “the impact of crimes upon victims” as a factor in favor of admitting and assigning weight to evidence.<sup>26</sup> Such a commitment is set forth in the preamble to the Agreement between the United Nations and the Royal Government of Cambodia, which declares as its goals the “pursuit of justice and national reconciliation.”<sup>27</sup>
19. Most of the documents that show an impact of crimes on victims possess another factor in favour of admission corroborative evidence of the widespread and systematic attack on the civilian population and proof of the Communist Party of Kampuchea’s criminal policies during the DK period. However, given that victim participation is a vitally important aspect of the ECCC, acknowledging the impact of the crimes on individual victims is not only crucial for the process of reconciliation that this court has been designed to foster, but also to providing concrete examples of the harm caused.<sup>28</sup>

### **C. Documents Must be Reliable**

20. The Chamber has indicated in section 4.3 of the Decision that both admissibility and the weight of evidence in this submission depend upon the reliability of a document’s origins.<sup>29</sup> The relevant categories of documents are analysed below.

#### *i. Case 001 Transcripts*

21. The Chamber has held that transcripts from Case 001 contain inherent indicia of reliability because witnesses spoke under oath in a criminal court. The Chamber even permits, in certain circumstances, the use of transcripts from previous trials to prove the

<sup>26</sup> E96/7 Decision at para. 24(d).

<sup>27</sup> Agreement between the United Nations and the Royal Government of Cambodia concerning Prosecution under Cambodian Law of Crimes Committed during the period of Democratic Kampuchea, 6 June 2003 at p. 1.

<sup>28</sup> The victim complaints repeatedly mention achieving justice for lost family members and other victims throughout the country through the submission of a complaint to the ECCC (*see e.g.* complaint form of CHOU Kim Lan, D/230/2/4.2.138a, supplementary information form regarding change of status from Civil Party to complainant); it is also worth noting Article 68(3) of the Rome Statute of the International Criminal Court: “Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.”

<sup>29</sup> E96/7 Decision at paras. 26-33.



acts and conduct of the accused.<sup>30</sup> As the transcripts annexed to this motion are intended to corroborate matters not relating to the acts and conduct of the accused – they primarily establish criminal policies and general patterns of criminal behavior – they are admissible under the Chamber’s Decision.<sup>31</sup> Of the 40 transcripts of trial testimony requested for admission all are in the three working languages of the ECCC.

*ii. OCIJ Written Records*

22. The Chamber has held that “[s]tatements taken during the judicial investigation are entitled to a presumption of relevance and reliability.”<sup>32</sup> While the statements are not a verbatim record of the interview with the witness, the documents record that the statements were made under oath pursuant to ECCC Rule 24 and that the summarized form of the interview was read by or read back to the witness and approved and signed as a truthful account of the interview. To further ensure reliability the signed statements are accompanied by audio recordings.<sup>33</sup> The accuracy of these condensed written records has been confirmed further by numerous witnesses testifying to the truthfulness of their prior statements. No witness to date has claimed that their statements provided to OCIJ investigators were made under inducement or duress.<sup>34</sup> 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.<sup>35</sup>

*iii. Statements of Witnesses Taken by Entities External to OCIJ*

23. **Annex 1** contains statements obtained from sources other than the ECCC and also complaints written with the purpose of being submitted to the ECCC. The Chamber has held that statements of witnesses not called to give evidence at trial taken by entities external to the ECCC, unlike the written records of the Co-Investigating Judges and trial transcripts, do not carry a presumption of reliability. However, other tribunals have accepted into evidence statements made to authorities who were not judicial

<sup>30</sup> E96/7 Decision at paras. 30-31.

<sup>31</sup> E96/7 Decision at para. 30.

<sup>32</sup> E96/7 Decision at para. 26.

<sup>33</sup> E96 Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber, 15 June 2011 at para. 38 (“Co-Prosecutors’ Submission”).

<sup>34</sup> See E96 Co-Prosecutors’ Submission at para. 14.

<sup>35</sup> Many of the individuals listed in the annexes have been placed on the Co-Prosecutors’ Rule 80 witness list but have not been summoned by the Trial Chamber to testify. See E9/4.1 Annex to Co-Prosecutors’ Rule 80 Expert, Witness and Civil Party Lists, 28 January 2011.

investigators.<sup>36</sup> In *Perišić*, for example, the Trial Chamber admitted statements from multiple witnesses describing shelling of civilian areas as relevant to the crime base, even though these statements were made to the civil authorities of Bosnia and Herzegovina, as well as to prosecution investigations. This Chamber has also recognized that a document can carry with it 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 elsewhere.<sup>37</sup>

#### Victim Complaints

24. While victim complaints lack the judicial imprimatur of the OCIJ records,<sup>38</sup> the Trial Chamber can assess the probative value of such complaints on the basis of how they corroborate other, more reliable evidence. This tribunal has encouraged participation by victims in Rule 12*bis* (1)(a) through the submission of complaints, and aside from such submissions, there is no other way in which non-Civil Party victims may participate in the proceedings. As the tribunal is intended to be a court for all Cambodians, it is incumbent upon the tribunal to acknowledge and recognise complaints as contributions to the fact-finding function of the trial by admitting them as corroborative evidence under Rule 87(3). Of the 410 complaints (in Khmer) requested for admission, 27 require translation in English and 396 in French.<sup>39</sup>
25. It is submitted that the time and cost of the translation of these complaints is minimal. They are short. The average complaint form is 7 pages long, of which on average only 1 page constitutes the actual description of the crimes alleged – this part would only require translation. The benefit of taking into account the complaints of the Cambodian people at the ECCC warrants the acceptance of these documents.

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<sup>36</sup> *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92*bis* (ICTY Trial Chamber I), 2 October 2008 at paras. 20-33.

<sup>37</sup> See **E158** Co-Prosecutors' Rule 92 Submission regarding Indicia of Reliability of the 978 Documents Listed in Connection with those Witnesses and Experts who may be Called during the First Three Weeks of Trial, 23 December 2011.

<sup>38</sup> Individuals are assisted in writing and submitting complaints by the Victims Support Section of the ECCC, as well as approved Victims' Associations per Rule 23*quater*. Furthermore, the original complaints (in Khmer) submitted through the VSS Form, which contain information about the complainant as well as the description of the crimes alleged, are signed or thumb-printed on each page by the victim. The form also requires each complainant to sign or finger-print as an assurance that, to the best of his/her knowledge and belief, the information given in the form is correct, and that if it is not, s/he will be liable under the applicable law. Thus, it is clear that the complainants are aware of the nature of their statements as important, factual accounts, and of the purpose for which they will be used.

<sup>39</sup> The English translations are in a summary form. The translations summarize the actual description of the crime alleged in the complaint. It is submitted this is sufficient for the purposes of providing corroboration.

### Other Statements

26. Other statements contained in **Annex 1** have been taken by (1) the Documentation Centre of Cambodia (“DC-CAM”), (2) the Office of the Co-Prosecutors (“OCP”) and (3) the School for Oriental and African Studies (“SOAS”) amongst others. The reliability of these statements requires consideration of both the reliability of the source and of the content. The Chamber has suggested that documents held at DC-CAM may be considered reliable, as its archival practices have been subject to examination by the parties.<sup>40</sup> Certain statements were recorded by investigators working for the OCP, and although OCP does not claim the same investigative neutrality as the OCIJ, the statements that it recorded merit admission within the context of this submission.
27. When a given witness has made several statements, they should be read together to determine reliability, particularly when some of them have been given to a presumptively reliable body, such as the OCIJ. While these additional statements and complaints may not carry the same presumption of reliability as the OCIJ records, they relate to the same facts as contained therein and therefore improve the reliability of those records when read together. The Co-Prosecutors request that the Chamber weigh the reliability of these statements on an individualised basis by considering whether the content of the statements accord with established facts.
28. Of the 420 other statements (not including complaints) requested to be admitted, most translations are complete. Only 16 English translations, 42 Khmer translations and 123 French translations remain to be done. Consequently, as long as relevancy and reliability are established, the issue of the cost and time to translate these statements is minimal.

### **D. Other Considerations**

29. In requesting written statements and trial testimony to be admitted as corroborative evidence the Chamber directed the parties “to consider proposing to be put before [it] a representative sample of each type of evidence” where the evidence is “voluminous or essentially repetitive.”<sup>41</sup> This direction was made “in view of the need for the translation of large quantities of this material, as well as the potential for substantial in-court time to be allocated to the hearing of objections to it.”<sup>42</sup> The Co-Prosecutors have

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<sup>40</sup> E96/7 Decision at para. 29.

<sup>41</sup> E96/7 Decision at para. 35.

<sup>42</sup> E96/7 Decision at para. 34.

taken into account this consideration in light of the overarching requirement that the trial be “fair and expeditious”<sup>43</sup> and in light of the factors identified by the Trial Chamber.

### Fairness

30. To ensure that the trial is fair to the Accused, the Co-Prosecutors must establish beyond reasonable doubt, not only the specific charges in the Closing Order, but also the jurisdictional elements of the crimes. To meet this burden with respect to crimes against humanity, the Co-Prosecutors must prove that the crimes were part of a widespread and systematic attack on the civilian population. Equally, the Co-Prosecutors must establish the administrative, communication and military structures of Democratic Kampuchea, the policies underpinning the regime and the existence of a joint criminal enterprise. Given the limited number of oral testimonies that can feasibly be heard by the court and considering the need to fairly establish the existence of the crimes, cases involving a large scale joint criminal enterprise and the implementation of criminal policies frequently employ circumstantial evidence to enable judges to infer the existence of such policies, structures and attack.
31. The importance of the use of circumstantial evidence is evident in the jurisprudence of other international tribunals. In *Prosecutor v. Milutinović* the ICTY Trial Chamber held that the Prosecutor was not required to present “explicit evidence” regarding JCE, as a “Chamber may infer that a common plan or purpose existed by examining the totality of the circumstances surrounding the commission of a crime or underlying offence.”<sup>44</sup> The Trial Chamber explained that “the way in which the crime or underlying offense is committed may support an inference that it must have been pursuant to a common plan.”<sup>45</sup> Similarly, in *Prosecutor v. Galić*, the Trial Chamber specified that it was permissible to infer “ordering” based on factors such as “the number of illegal acts, the number, identity and type of troops involved, the effective command and control exerted over these troops, the logistics involved, the widespread occurrence of the illegal acts, the tactical tempo of the operations, the modus operandi of similar acts . . .”<sup>46</sup> Again in *Prosecutor v. Krstić*, the

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<sup>43</sup> Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, with inclusion of amendments as promulgated on 27 October 2004, art. 33 new.

<sup>44</sup> *Prosecutor v. Milan Milutinovic et al.*, Case No. IT-05-87-T, Judgment (ICTY Trial Chamber), 26 February 2009 at para. 102.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-T, Judgment (ICTY Trial Chamber), 5 December 2003 at para. 171.

Appeals Chamber, examining whether VRS (Bosnian Serb Army) forces had displaced Bosnian Muslim civilians pursuant to a genocidal objective, found that “genocidal intent” could be inferred “among other facts, from evidence of other culpable acts systematically directed against the same group.”<sup>47</sup>

32. In assessing the role of corroborative evidence, the ICTR has taken a similar path. In *Prosecutor v. Mpambara*, where direct evidence on the Accused’s participation in a joint criminal enterprise was lacking, the Trial Chamber allowed the Prosecutor to mount “a circumstantial case,” consisting “of evidence of a number of different circumstances, which, taken in combination, point to the guilt of the accused person.”<sup>48</sup> The court’s approach in *Mpambara* reflects the ICTR’s governing philosophy on the admission of evidence. As emphasized in *Prosecutor v. Gatete*, taking into account the “scale of events, in space and time” in the cases before the tribunal, the alleged crimes of Accused are not “isolated offences.”<sup>49</sup> Thereby authorizing witness testimony on events outside the temporal jurisdiction of the court, the Chamber stated that it would be “able to properly weigh the evidence” as a whole whilst remaining “mindful of its obligation to respect the rights of the Accused.”<sup>50</sup> The charges in Case 002 are similarly intertwined.
33. Considering the role of circumstantial evidence and the meaning of “beyond reasonable doubt,” the Appeals Chamber of the ICTY held:

*A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him... Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from the evidence. It must be the only reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.*<sup>51</sup>

34. Circumstantial, corroborative evidence drawn from victims and witnesses across Cambodia is not merely valuable but essential in order to prove the existence of

<sup>47</sup> *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Judgment (ICTY Appeals Chamber), 19 April 2004 at para. 33.

<sup>48</sup> *Prosecutor v. Jean Mpambara*, Case No. ICTR-01-65-T, Judgment (ICTR Trial Chamber), 11 September 2006 at para. 42.

<sup>49</sup> *Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-2000-61-T, Decision on Defence Motion on Admissibility of Allegations Outside the Temporal Jurisdiction of the Tribunal (ICTR Trial Chamber), 3 November 2009 at para. 18.

<sup>50</sup> *Gatete* at para. 19.

<sup>51</sup> *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgment (ICTY Appeals Chamber), 20 February 2001 at para. 458.

country-wide policies, country-wide administrative structures, country-wide communication structures, country-wide military structures and the existence of a widespread and systematic attack against the civilian population of Cambodia during the DK period. It is submitted therefore, that particularly in light of the Defence position to not stipulate to facts relating to the DK structure, policies and crimes alleged in the Indictment, it is appropriate that the Co-Prosecutors be provided with a reasonable opportunity to address these allegations through the admission of this corroborative evidence. By doing so the Chamber will “safeguard the interests of ... Accused *and* Victims so as to ensure legal certainty and transparency of proceedings” as required by Rule 21(1).<sup>52</sup>

#### Expedition

35. Whilst the Chamber has the responsibility to ensure that the trial is fair it must also ensure that the trial is expeditious. As indicated above, the majority of the material is already available in the three languages of the Court and the resources required to translate the remaining documents are consequently minimal. The trial transcripts and OCIJ written records of witnesses are fully translated bar one document, the complaints, while not translated in their entirety, have nearly all been summarized in English and the translation of the remaining statements would not be extensive.
36. It is submitted that the time required for parties to raise objections to documents requested for admission is unlikely to be lengthy. Parties will be able to submit written objections to the documents and experience shows that debates on documents have largely resulted in general objections that applied to all, rather than specific documents and often related to arguments of weight to be assigned to the documents rather than admissibility. Accordingly, the Co-Prosecutors respectfully submit that the court resources required to consider the admission of these documents are not likely to be significant, particularly where parties are required to file written objections in addition to a specified time to articulate those objections orally.
37. Furthermore, although the amount of oral testimony that can be heard by the Chamber is already limited for practical reasons, admitting this corroborative evidence would

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<sup>52</sup> Rule 21(1): “...ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of ... Accused *and* Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement” (emphasis added).

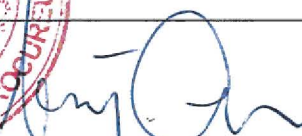
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significantly reduce the amount of testimony without depriving the Chamber of sufficient evidence to meet its duty to ascertain the truth of the allegations in the Indictment. In effect, the trial will be shorter. In reviewing the material to be submitted as corroborative evidence, the Co-Prosecutors have attempted to take into account the Court's duty to "strike an appropriate balance between the Accused's fair trial rights and the efficiency of the proceedings, notably in relation to the expeditiousness of the trial."<sup>53</sup>

#### IV. RELIEF SOUGHT

38. For the foregoing reasons, it is submitted that the documents identified in **Annexes 1** and **2** are admissible in accordance with the Chamber's Decision and are probative to proving the charges the subject of Case 002/01. Therefore, the Co-Prosecutors request that the Trial Chamber:
- (a) admit the witness statements and trial testimony identified in **Annexes 1** to **2** into evidence and assign each document an E3 number, to the extent that this has not already been done; and
  - (b) rely upon the witness statements and trial testimony identified in **Annexes 1** to **2** as cumulative evidence in corroboration of oral testimony heard at trial, in determining the charges against the Accused in Case 002/01.

Respectfully Submitted

| Date         | Name                           | Place      | Signature   |
|--------------|--------------------------------|------------|---|
| 27 July 2012 | CHEA Leang<br>Co-Prosecutor    | Phnom Penh |  |
|              | Andrew CAYLEY<br>Co-Prosecutor |            |  |

<sup>53</sup> E96/7 Decision at para. 20; *see also* ECCC Law, art. 33 new.