

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

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CIVIL PARTY LEAD CO-LAWYERS RESPONSE IN SUPPORT OF THE CO-PROSECUTORS' RULE 92 SUBMISSION REGARDING THE ADMISSION OF WRITTEN STATEMENTS BEFORE THE TRIAL CHAMBER

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Before:

The Trial Chamber
Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sakhan
Judge Jean-Marc LAVERGNE
Judge THOU Mony

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I – PROCEDURAL BACKGROUND

1. On 28 January 2011, Co-Prosecutors submitted to this Court a list of experts, witnesses and Civil Parties whom they expect to summon to appear at trial.¹ The submission stated that some witnesses were omitted from the list as the Co-Prosecutors would enter as evidence “witness statements and related documents” in lieu of appearance at trial.²
2. On 8 February 2011, Counsel for IENG Sary submitted a Response in which they asserted that IENG Sary would “invoke his right to confront *all witnesses* against him” by “challeng[ing] the introduction of any witness statement by a witness who will not be called to testify.”³
3. On 15 February 2011, Counsel for NUON Chea submitted a witness list in which they noted the Co-Prosecutors’ intent to enter as evidence written statements and “reserve[d] [their] right to call as witnesses each and every individual named in any such statements subsequently offered by the OCP (or the other parties) and admitted by the Chamber.”⁴
4. On 28 February 2011, Counsel for IENG Thirith submitted a response in which they asserted “the right to examine witnesses at trial who made statements at the investigative stage but with whom the Charged Person was not confronted at that stage.”⁵
5. On 15 June 2011, Co-Prosecutors filed a submission in which they supported the Court’s authority to admit written testimony without requiring the witnesses to be available for confrontation.⁶ The Co-Prosecutors argued that international criminal law permits the admission of statements without witness confrontation at the discretion of the Court, based on *inter alia* the content of the submission and the manner in which it was recorded. The Co-Prosecutors based their argument on ECCC organic law and on an analysis of practice at the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Court, and the Special Court for Sierra Leone.

¹ Co-Prosecutors’ Rule 80 Expert, Witness, and Civil Parties Lists, Including Confidential Annexes 1, 2, 3, 3A, 4 and 5, E9/4, 28 January 2011.

² Ibid, paragraph 10.

³ Ieng Sary’s Response to the Co-Prosecutors’ Motion which Accompanied their Rule 80 Expert, Witness and Civil Party Lists, E9/4/1, 8 February 2011, paragraph 2.

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

⁵ Ieng Thirith Indication of Intent to Object to Witnesses and Experts on the Co-Prosecutors, Civil Parties, and Nuon Chea’s Witness Lists, E9/4/11, 28 February 2011, paragraph 4.

⁶ Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Written Statements before the Trial Chamber, 15 June 2011, E96, (‘Co-Prosecutor’s Submission’).

6. Civil Party Lead Co-Lawyers and Lawyers for Civil Parties submit this Response in support of the Co-Prosecutor's Rule 92 Submission.

II – SUMMARY OF THE ARGUMENT

7. Civil Party Lead Co-Lawyers and Civil Parties Lawyers fully support the Co-Prosecutors' position, made in their 15 June 2011 Rule 92 submission to the Trial Chamber, that there is no absolute right of the Accused to summon and examine persons whose statements are offered into evidence.
8. Neither the ECCC nor Cambodian Criminal Procedure provides an absolute right to confrontation. Rather, the right to confrontation is qualified by such a request's value toward determining the truth and its cost in terms of trial efficiency. To the extent that these provisions are ambiguous or contradictory, the Chamber should look to international law and norms on the admissibility of written testimony. As with domestic Cambodian law, no international criminal tribunal, including the International Criminal Court, provides an absolute right to confront witnesses, as requested by the Defense. Such a request contradicts international criminal law and would frustrate this Chamber's responsibility to administer proceedings that are both fair and efficient.
9. In applying international principles to the instant proceedings, the Chamber should take into account the unique procedure of victim participation before the ECCC.

III – THE INTERNAL RULES OF THE ECCC AND CAMBODIAN LAW DO NOT ESTABLISH AN ABSOLUTE RIGHT TO CONFRONTATION

10. The Civil Party Lead Co-Lawyers and the Co-Lawyers for Civil Parties concur with the Co-Prosecutors' analysis of ECCC Internal Rules 87 and 84 and agree that these provisions leave some ambiguity on the type of evidence subject to confrontation.⁷ Moreover, an absolute right to confront witnesses does not fall within the procedural framework of this Court.
11. Internal Rule 87 on the Rules of Evidence spells out the principle features of the treatment of evidence in the civil law system, namely that "all evidence is admissible."⁸

⁷ Co-Prosecutors' Submission, paragraph 3-5.

⁸ IR 87(1).

12. Moreover, following the issuance of the Closing order and pursuant to Internal Rule 69, all documentation and evidence collected during the investigations phase is sealed and submitted to the Trial Chamber.⁹ In a civil law Court, such as the ECCC, the case file forms the factual and evidentiary basis upon which the trial phase of proceedings is built. Contrary to the arguments of the Accused, the start of the trial-phase does not signal an opportunity for the wholesale reappraisal of the admissibility of witness testimony before the Chamber.
13. The Civil Party Lead Co-Lawyers and the Co-Lawyers for Civil Parties supplement this analysis by observing that the right to witness confrontation provided for by the Cambodian Code of Criminal Procedure ('Code') is a qualified right, not an absolute right, that permits admissibility of certain non-oral testimony subject to the discretion of the Trial Chamber. Article 297 of the Code states that "[i]nculpatory witnesses who have never been confronted by the accused shall be summonsed to testify at the trial hearing."¹⁰ Even if this Court disagrees with the Co-Prosecutors' analysis that the meaning of "inculpatory" is ambiguous,¹¹ Article 318 of the Code limits the scope of this right.
14. Article 318 of the Code gives Trial Chambers the express discretion to deny any request for a submission before the court. "[T]he presiding judge may exclude from the hearing everything he deems to unnecessarily delay the trial hearing without being conducive to ascertaining the truth." The discretion to "exclude everything" certainly includes the authority to exclude oral confrontation and to take into account the content of the evidence when determining an appropriate standard of admissibility. This discretion must be exercised carefully, but there is no question that it exists. The assertion of the Defense that confrontation is mandatory, or that discretion exists only in the Accused's right to waive confrontation, ignores this clear provision of Cambodian Criminal Procedure.
15. It is the view of Civil Party Lead Co-Lawyers and the Co-Lawyers for Civil Parties that the judicial discretion provided in Article 318 of the Cambodian Criminal Procedure qualifies the rights of confrontation provided for in Article 297, such that Trial Chambers have discretion to admit written evidence without confrontation where doing so advances the pursuit of the

⁹ IR 69(1).

¹⁰ Code of Criminal Procedure of the Kingdom of Cambodia, Khmer-English Translation - First Edition, September 2008 ('Criminal Procedure').

¹¹ See Co-Prosecutor's Submission, paragraph 4.

truth and ensures an efficient trial without prejudicing the rights of either Party. The uncertainty is not whether such an authority exists, but what standard the Trial Court should apply in exercising its discretion in this case. Therefore Cambodian law, like the ECCC Internal Rules, leaves a question of interpretation unanswered by the content of the law itself.

IV – UNCERTAINTY ABOUT THE CONTENT OR STANDARD OF THE QUALIFIED RIGHT TO CONFRONTATION SHOULD BE RESOLVED BY REFERENCE TO INTERNATIONAL PRACTICE

16. The Internal Rules of the ECCC support the application of international standards for admission of written statements where such rules and procedures are incomplete.¹² For the reasons provided above, and in concurrence with the Co-Prosecutors' submission, Civil Party Co-Lawyers find that guidance from international standards is proper because there is uncertainty regarding (1) the interpretation or application of a relevant procedural rule of Cambodian law and (2) its consistency with international standards.¹³
17. Civil Party Lead Co-Lawyers and the Co-Lawyers for Civil Parties adopt the Co-Prosecutors' argument¹⁴ that there is a *lacunae* in the procedure before the ECCC on the admission of written testimony. Referring to Cambodian law does not resolve this conflict; if the Court finds that Article 297 of the Code of Criminal Procedure provides an absolute right to confrontation, then the Court will need to resolve the direct contradiction between this interpretation and the plain meaning of Article 318. Again, the ECCC constituting laws provide that international law should inform Court decisions when procedural requirements are inconsistent.¹⁵

¹² See Internal Rule 2 (“Where in the course of ECCC proceedings, a question arises which is not addressed by these IRs, the Co-Prosecutors, Co-Investigating Judges or the Chambers shall decide in accordance with Article 12(1) of the Agreement and Articles 20 new, 23 new, 33 new or 37 new of the ECCC Law as applicable, having particular attention to the fundamental principles set out in Rule 21 and the applicable criminal procedural laws. In such a case, a proposal for amendment of these IRs shall be submitted to the Rules and Procedure Committee as soon as possible.”).

¹³ Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Art 12 (“...where there is uncertainty regarding the interpretation or application of a relevant procedural rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level); see also Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Art. 33.

¹⁴ Co-Prosecutors' Submission, paragraph 5.

¹⁵ Ibid.

18. This Court has previously relied on international legal standards for decisions on admissibility of hearsay evidence.¹⁶ For instance, Ieng Sary cites to a decision in the case of Kaing Guek Eav “Duch”,¹⁷ where the Trial Chamber determined whether statements of two deceased witnesses taken by representatives of DC-Cam should be excluded under Internal Rule 87(3). Counsel for the Accused misinterpreted the Decision when stating that, “[t]he Trial Chamber rejected the admission of two witness statements taken by DC-Cam because the witness died prior to trial and Duch was unable to challenge the veracity of their statements.”¹⁸ Instead, in making its determination, the Chamber looked at a number of factors, not solely the Accused’s inability to cross-examine the witness, and relied heavily upon rulings from other international judicial bodies, in particular the ICTY.¹⁹ Ultimately, this Chamber rejected the evidence on a number of factors: including the fact that each statement referred to the criminal acts and conduct of the accused.²⁰

V - AN ABSOLUTE RIGHT TO WITNESS CONFRONTATION DOES NOT EXIST IN ANY INTERNATIONAL OR HYBRID CRIMINAL TRIBUNAL

19. Civil Party Lead Co Lawyers and Civil Parties Lawyers agree with the submission of the Co-Prosecutors that international standards do not provide the Accused an absolute right to summon and examine witnesses at trial²¹ and offer the following additional arguments in support.

¹⁶ The Chamber looked to the Convention Against Torture (CAT) in determining whether certain statements made while a witness was being tortured could be excluded as evidence. See Decision on Admissibility of the Appeal against Co-Investigating Judges’ Order On Use of Statements Which Were or May Have Been Obtained by Torture, 18 December 2009, D130/9/21, paragraphs 27-29 (citing Decision on the Parties Requests to Put Certain Materials before the Chamber Pursuant to Internal Rule 87(2), 28 Oct 2009, E176, paragraph 8); See also Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applicants, 24 June 2011, D404/2/4, paragraphs 58-60.

¹⁷ See Ieng Sary’s Response to the Co-Prosecutor’s Motion Which Accompanied Their Rule 80 Expert, Witness and Civil Party Lists, February 2011, E9/4/18 (citing Decision on Admissibility of Material on the Case File as Evidence, 26 May 2009, E43/3, paragraph 16).

¹⁸ Ibid at footnote 12.

¹⁹ Decision on Admissibility of Material on the Case File as Evidence, 26 May 2009, E43/3, paragraphs 15-16.

²⁰ Ibid, paragraph 16.

²¹ Co-Prosecutors’ Submission, paragraph 2.

a) International Ad Hoc Criminal Tribunals

20. The Civil Parties concur with the Co-Prosecutors discussion of the ICTY's qualified right to witness confrontation, which vests the Trial Chamber with discretion to admit written testimony and provides a non-comprehensive list of factors to consider in deciding the admissibility of such statements in lieu of oral testimony.²² The Civil Parties add that Rule 92bis of the ICTR Rules of Evidence and Procedure duplicates nearly verbatim the ICTY provision discussed in the Co-Prosecutor's submission.²³ That Rule has been applied in *Prosecutor v. Ndindabahizi*,²⁴ *Prosecutor v. Nzabonimana*,²⁵ and others, and the ICTR's interpretation of the Rule does not differ substantially from that of the ICTY.

b) Hybrid Ad Hoc Criminal Tribunals

21. The Civil Parties also agree with the Co-Prosecutors that the Sierra Leone Special Tribunal has likewise adopted a qualified right to confrontation.²⁶ The Civil Parties further add that

²² Co-Prosecutors' Submission, paragraphs 12-21.

²³ Rule 92bis, ICTR Rules of Procedure and Evidence as amended 1 October 2009 ("Proof of Facts Other Than by Oral Evidence (A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment. (i) Factors in favour of admitting evidence in the form of a written statement include, but are not limited to, circumstances in which the evidence in question: (a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts; (b) relates to relevant historical, political or military background; (c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates; (d) concerns the impact of crimes upon victims; (e) relates to issues of the character of the accused; or (f) relates to factors to be taken into account in determining sentence. (ii) Factors against admitting evidence in the form of a written statement include whether: (a) there is an overriding public interest in the evidence in question being presented orally; (b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or (c) there are any other factors which make it appropriate for the witness to attend for cross-examination.").

²⁴ Emmanuel Ndindabahizi (Appellant) v. The Prosecutor (Respondent), 16 January 2007, Case No. ICTR-01-71-A, paragraphs 96-98 (Holding that the Trial Chamber properly denied Defense's motion to submit written testimony without confrontation where some of the content "went to the matter of acts and conduct", and where the remainder of the testimony was "intertwined" with the inadmissible portions of the document.).

²⁵ *Prosecutor v. Nzabonimana*, Case No. ZCTR-98-44D-T, Decision on the Motion to Admit Transcripts from the *Bizimungu et al.* Case (Rules 92bis (D) and 89 (C) of the Rules of Procedure and Evidence), 30 June 2011 (Holding that written testimony was admissible without confrontation where the evidence did not mention or describe the Accused directly.)

²⁶ Co-prosecutors' Submission, paragraph 24, citing Sub-rule 92bis(A) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("In addition to the provisions of Rule 92ter, a Chamber may, in lieu of oral testimony, admit as evidence in whole or in part, information including written statements and transcripts, that do not go to proof of the acts and conduct of the accused.")

the Special Tribunal for Lebanon's Rules of Procedure and Evidence include a provision that duplicates almost verbatim the corresponding Rule from the ICTR and ICTY.²⁷

c) The International Criminal Court

22. The ICC provides parties a qualified, not absolute, right to confront witnesses. The Co-Prosecutors' Submission cited one ICC decision that applied Article 69(2) of the Rome Statute to admit prior recorded statements without witness confrontation.²⁸ Civil party lawyers submit that additional provisions of the Rome Statute also provide for discretionary admission of testimony without witness confrontation, and that the ICC has interpreted these Articles together to establish that Parties' right to confront witnesses is qualified. In a decision subsequent to the one cited in the Co-Prosecutors' submission, the Trial Chamber in *Prosecutor v. Lubanga* reviewed all provisions of the Rome Statute and the ICC's Rules of Procedure and Evidence, and concluded that "notwithstanding the express reference to oral evidence from witnesses at trial, there is a clear recognition that a variety of other means of introducing evidence may be appropriate."²⁹
23. The Trial Chamber in *Lubanga* identified five provisions of the Rome Statute that give it discretion to admit evidence without requiring that the witness be available for confrontation.³⁰ Article 69(3) provides the Court "the authority to request the submission of

²⁷ Rule 155, Special Tribunal for Lebanon Rules of Procedure and Evidence as amended on 10 November 2010 and corrected on 29 November 2010 ("Admission of Written Statements and Transcripts in lieu of Oral Testimony. (A) Subject to Rule 158, the Trial Chamber may admit in lieu of oral testimony the evidence of a witness in the form of a written statement, or a transcript of evidence which was given by a witness in proceedings before the Tribunal, which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment. (i) Factors in favour of admitting evidence in the form of a written statement include, but are not limited to circumstances in which the evidence in question: (a) is of a cumulative nature, in that other witnesses have given or will give oral testimony of similar facts; (b) relates to relevant historical, political or military background; (c) consists of a general or statistical analysis relating to the composition of the population in the places to which the indictment relates; (d) concerns the impact of crimes upon victims; (e) relates to issues of the character of the accused; (f) relates to factors to be taken into account in determining sentence; or (g) has been given by the witness in the presence of the Parties who have had the opportunity to examine or cross-examine him. (ii) Factors against admitting evidence in the form of a written statement include whether: (a) there is an overriding public interest in the evidence in question being presented orally; (b) a Party or a victim participating in the proceedings, who objects, can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or (c) there are any other factors that make it appropriate for the witness to appear for cross-examination.")

²⁸ Co-prosecutors' Submission paragraph 28, citing *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses, 15 January 2009 (citing Article 69(2) of the Rome Statute of the International Criminal Court).

²⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the admissibility of four documents, 13 June 2008 ('Lubanga Decision'), paragraph 22.

³⁰ *Ibid.*

all evidence that it considers necessary for the determination of the truth.”³¹ Article 69(4) states that “[t]he Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of witness, in accordance with the Rules of Procedure and Evidence.”³² Article 64(9) states that the court may “[r]ule on the admissibility or relevance of any evidence.”³³ Article 69(2) permits the Court to admit “documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence.”³⁴ Finally, Article 68(2), read together with Article 68(1), permits the Court to admit evidence “by electronic or other special means” where it is necessary to “protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.”³⁵

24. The Court synthesized these authorities in a three-part test for determining admissibility of evidence in forms other than live testimony: the evidence must be relevant; it must have probative value; and the probative value must be weighed against its prejudicial effect.³⁶ The ICC does not limit the analysis to a “finite list of possible criteria.”³⁷ Instead, the evaluation is a fact-specific determination that will turn on “the issues in the case, the context in which the material is to be introduced into the overall scheme of the evidence and a detailed examination of the circumstances of the disputed evidence.”³⁸ The Court has applied this test in subsequent decisions on evidence admissibility.³⁹
25. The ICC’s caselaw on this question, while limited, establishes that Courts may use their discretion to admit written testimony without witness confrontation. The facts at question in the *Lubanga* decision involved written evidence from witnesses who would not be called to testify, and the Court held that unavailability of witnesses for confrontation was “an important consideration” but that it was “not in itself determinative of admissibility.”⁴⁰ The

³¹ Ibid, paragraph 20.

³² Ibid, paragraph 23.

³³ Ibid.

³⁴ Ibid, paragraph 22.

³⁵ Ibid, paragraph 23.

³⁶ Ibid, paragraphs 27-31.

³⁷ Ibid, paragraph 29.

³⁸ *Lubanga* Decision, paragraph 29.

³⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the “Quatrième requête de la Défense aux fins de dépôt de documents”, 8 March 2011, paragraph 15 *et seq.*

⁴⁰ Ibid, paragraph 36.

decision quotes favorably ICTY caselaw according to which “the absence of the opportunity to cross-examine the person who made the statements [is] relevant,” but not dispositive.⁴¹

26. The test for admissibility of non-oral evidence in the *Lubanga* case is similar to that of the ICTY and ICTR. The first two prongs of the ICC test, relevance and probative value, are included in ICTY/ICTR Rule 89(C).⁴² The third prong of the ICC test, weighing probative value against prejudicial effect, addresses the same concern for fairness that is resolved through the ICTY/ICTR’s explicit requirement that the evidence address “proof of a matter other than the acts and conduct of the accused.”⁴³
27. For the purposes of this question it is sufficient to conclude that although the Rome Statute of the ICC establishes a preference for oral testimony, the standard as applied by the ICC does not provide parties with an absolute right to confront witnesses, and in fact the relevant test established by ICC case law is similar in form and content to the statutory test used in the ICTY and ICTR, vesting the Trial Chamber with discretion to determine the admissibility of written evidence.

VI - A QUALIFIED RIGHT TO WITNESS CONFRONTATION PROMOTES THIS CHAMBER’S EFFICIENCY REQUIREMENT

28. Civil party lawyers recognize that the rights of procedural fairness are fundamental before this Court, however the request of the Accused for an absolute right to question *any* witness mentioned in written statements before this Chamber contradicts this Court’s fundamental obligation to bring the proceeding to a conclusion within a reasonable time.⁴⁴
29. The ECCC has applied its efficiency requirement when deciding prior questions of Court procedure. For instance, the Pre-Trial Chamber in this Case reviewed whether the denial of a blanket investigative request covering *all* documents in the Shared Materials Database was

⁴¹ Ibid, paragraph 28, quoting Prosecutor v Aleksovski, IT-95-14/1, Decision on prosecutor’s appeal on admissibility of evidence, 16 February 1999, paragraph 15 [inner quotations omitted].

⁴² Rule 89(C), ICTR Rules of Procedure and Evidence, as amended 1 October 2009 (“A Chamber may admit any relevant evidence which it deems to have probative value.”).

⁴³ Rule 92bis(A), ICTY Rules of Procedure and Evidence.

⁴⁴ Internal Rule 21(4) (“Proceedings before the ECCC shall be brought to a conclusion within a reasonable time.”); See also Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Art 33 (“The Extraordinary Chambers of the trial court shall ensure that trials are fair and *expeditious* and are conducted in accordance with existing procedures in force.”).

proper.⁴⁵ The Chamber found that the Co-Investigating Judges' denial of the request was valid.⁴⁶ The Chamber noted that "...because of its lack of precision, granting the Request would have the concrete effect of delaying the proceedings unduly."⁴⁷ Further, the Chamber observed that, "[c]ontrarily to what is asserted by the Co-Lawyers, the Co-Investigating Judges did not invoke the Charged Person's right to a trial without undue delay as an excuse to deny a valid request for investigative action but rather referred to this *fundamental right* in order to explain the importance of the requirements for a request for investigative action to be specific and relevant to ascertaining the truth."⁴⁸

30. The blanket request by the Accused to confront all witnesses who have made statements on the Case File is equally burdensome, and its refusal to consider any balancing interests in favor of admitting evidence without confrontation lacks precision and specificity. Such requests would violate the fundamental right to a trial without undue delay and the Courts' overall goals of efficiency, as enshrined in Internal Rule 21(4).

VII – PROCEDURAL ISSUES AND EVIDENCE OBTAINED THROUGH CIVIL PARTY PARTICIPATION

31. Civil Party Lead Co Lawyers and Civil Party Lawyers support the Co-Prosecutors' discussion on the application of international principles before the ECCC and agree that the Chamber should take guidance from these principles and tailor them in light of ECCC procedure.⁴⁹ Upon tailoring these norms to the ECCC, the Trial Chamber should take into account the distinction of victim participation before the ECCC and acknowledge that Civil Parties are not treated the same as witnesses under the Internal Rules of this Court.⁵⁰
32. International courts recognize a variety of measures by which a document's reliability may be ascertained. While Rule 92*bis* of the Rules of Procedure and Evidence for the ICTY and ICTR list specific circumstances, such as certification by a Court Official or State process,⁵¹ which will establish the reliability of a written document for the purposes of admitting the

⁴⁵ Decision on the Appeal From the Order on the Request to Seek Exculpatory Evidence on the Shared Materials Drive, 12 November 2009, D164/3/6, paragraph 27.

⁴⁶ Ibid, paragraph 34.

⁴⁷ Ibid, paragraph 40.

⁴⁸ Ibid, paragraph 45.

⁴⁹ See Co-Prosecutors' Submission, paragraphs 30-40.

⁵⁰ See IR 23 [General Principles of Victims Participation as Civil Parties] and IR 24 [Witnesses].

⁵¹ See Rule 92*bis*(B) of the Rules of Procedure and Evidence of the ICTY.

document to trial without oral confrontation, these enumerated circumstances are non-exhaustive.⁵² Likewise, the ICC has noted that “the Chamber must be careful not to impose artificial limits on its ability to consider any piece of evidence freely, subject to the requirements of fairness.”⁵³ While official certification is available as a means of verifying the reliability of written testimony, other factors may also be used.

33. In the case of Victim Information Forms, Civil Party Lawyers note that the evidentiary standards as well as the procedures carried out by the Co-Investigating Judges for vetting Civil Party applications incorporate numerous indicia of reliability. For example, Civil Party Applicants must provide evidence of the facts of the crime, the harm experienced and the link between the two. Such evidence must meet the standard of “more likely than not to be true.”⁵⁴ Additional indicia of reliability in this process include the fact that civil party applications are signed and dated by the Civil Party Applicant as well as a witness; that the application includes a sworn declaration that the statements are, to the best of the applicant’s knowledge and belief, true and correct; and that the applicant understands that he/she may be subject to legal sanction if he/she is found to have provided false testimony.⁵⁵
34. It is worth noting that the Accused made no objection to the reliance of these documents during the Civil Party appeals for admissibility under Internal Rule 23*bis* (2), nor did they challenge or request confrontation of civil parties under Internal Rule 59 (4).⁵⁶ The Civil Party Lead Co-Lawyers and the Co-Lawyers for Civil Parties recognize that the evidentiary standards for admissibility decisions are different than those used at trial. However, for the specific question of whether the documents are prejudicial to the Accused, their failure to object to their usage earlier in the trial indicates that their content has little, if any, prejudicial effect.

⁵² Prosecutor v. Aleksovski, IT-95-14/1[ICTY], Decision on prosecutor’s appeal on admissibility of evidence, 16 February 1999, paragraph 15.

⁵³ Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Decision on the admissibility of four documents, 13 June 2008, paragraph 29.

⁵⁴ Rule 23 *bis* (1) of the ECCC IR.

⁵⁵ See ECCC Victim Information Form, available at <http://vss.eccc.gov.kh/en/documentation/form>.

⁵⁶ Vital to the procedural framework of the ECCC are the Internal Rules which afford the Accused ample opportunity to confront witnesses and challenge Victim Information Forms during the pre-trial phase. In spite of these opportunities, no such requests for confrontation or challenges were raised. In so far as it is the intention of the Accused to claim an absolute right of confrontation in the trial phase, the Civil Party Lawyers contend that it is disingenuous of the Defense, on the eve of the start of the trial-in-chief, to now claim that they have not had the opportunity to examine witnesses or test the evidence such witnesses might offer.


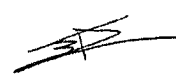

35. Where such measures of reliability are present, and where the evidence does not directly address the conduct of the Accused or where the evidence is cumulative in nature, the Court may find that the evidence is admissible without oral confrontation.
36. In consideration of the fact that the design of the ECCC envisages proceedings which are largely conducted through written submissions and which includes a lengthy investigation phase, it is critical to the dual imperatives of efficiency and good administration of justice to ensure that written documentation is not needlessly duplicated through an absolute right of confrontation that would lead to repetitive and time-consuming oral testimony on matters sufficiently established through the written record.

VIII – CONCLUSION

The Civil Party Lawyers request that :

- The Trial Chamber declare that there is no absolute right of the Accused to confront all witnesses whose statements are submitted as evidence; and
- Adopt international standards for admissibility of written testimony, taking into account the ECCC's mechanism of Civil Party participation.

Respectfully submitted,

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