

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

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**LEAD CO-LAWYERS' CONSOLIDATED RESPONSE TO DEFENSE OBJECTIONS  
ON THE ADMISSIBILITY OF  
WRITTEN STATEMENTS IN LIEU OF ORAL TESTIMONY**

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**Before:**

**Trial Chamber**

Judge NIL Nonn, President  
Judge Silvia CARTWRIGHT  
Judge YA Sakhan  
Judge Jean-Marc LAVERGNE  
Judge YOU Ottara

**Distribution to:**

**Office of the Co-Prosecutors**

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## I. INTRODUCTION

1. Herein, the Civil Parties respond to the objections posed by the Khieu Samphan and Nuon Chea Defense to the admission of written statements contained in the Civil Parties representative sample of written statements.<sup>1</sup>
2. As already noted by the Prosecution,<sup>2</sup> the arguments and objections put forward by the Defense largely attempt to reargue and substantially revise the decision of the Trial Chamber (“the Chamber”) which established the legal framework for the admission of witness statements in lieu of oral testimony.<sup>3</sup> Arguments in response to these efforts are thoroughly canvassed in the Prosecutions’ Response and, therefore, the Civil Parties incorporate the majority of these arguments into the present submission. In the interests of efficiency, the Civil Parties’ response is limited to a few particular points on the applicable law, and otherwise focuses on the nature and adequacy of the general objections put forward by the Defense, as well as the specific objections raised against individual written statements that the Civil Parties seek to admit into evidence.
3. In consideration of the fact that the Trial Chamber (“the Chamber”) determined it would not hold oral arguments on the admissibility of written statements, on 3 June 2013 it authorized the Civil Parties to file a single-language response to Defense objections on this point no later than 10 June 2013 with translation to follow.<sup>4</sup> Accordingly, the present Response is timely filed.

## II. PROCEDURAL HISTORY

4. On 20 June 2012, the Trial Chamber issued the Written Statements Decision wherein it directed the parties who had proposed to put written statements or transcripts before the Chamber to, *inter alia*, review the documents in their relevant lists in accordance with the criteria set forth in the decision, further specify the evidentiary purpose for each document or category of document and consider limiting the number of

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<sup>1</sup> Confidential Annex 1: Written Statements of Civil Parties Who Have Not Given Oral Evidence, **E223/2/7.2**, 4 March 2012 (hereinafter “4 March Table”).

<sup>2</sup> Co-Prosecutors’ Combined Response to Defence Objections to the Admission of Witness Statements, Complaints and Transcripts, **E277/1**, para.2, 27 May 2013 (hereinafter “Prosecution’s Response”).

<sup>3</sup> Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents before the Trial Chamber, **E96/7**, 20 June 2012 (hereinafter “Written Documents Decision”).

<sup>4</sup> E-mail from Susan Lamb, Senior Legal Officer, to Civil Party Lead Co-Lawyers, “Civil Party Lead Co-Lawyers Response on Written Statements and Closing Arguments (2008),” 3 June 2013.

documents sought to be put before the Chamber to a “representative sample” of documents.<sup>5</sup>

5. On 27 July 2012, the Civil Parties made their response to the Chamber’s Written Statements Decision and the Chamber’s subsequent directive to parties to indicate those written statements from their document lists filed in April 2011 that they propose to tender with relation to population movements phases 1 and 2.<sup>6</sup>
6. On 4 March 2013, the Civil Parties filed a submission and a table containing 566 documents a totaling 520 unique civil party written statements which they sought to tender into evidence in lieu of their oral testimony.<sup>7</sup> These documents form the representative sample of written statements the Trial Chamber required the parties to provide.<sup>8</sup> This sample comprises a vastly reduced total number of documents which are sought to be tendered into evidence as compared to Civil Parties’ previous requests.<sup>9</sup> In further response to the Chamber’s directives and for each of the documents contained in this sample, Civil Parties specified the relevant points of the indictment and evidentiary purpose on the basis of which the Civil Parties seek the admission of the documents in their sample.
7. On 9 April 2013, the Khieu Samphan Defense filed a Rule 92 submission on the legal standards applicable to the admission of written statements,<sup>10</sup> wherein it argues that the Trial Chamber committed “errors in law” in defining the legal framework on the admission of written statements and it reasserts many of the same legal arguments

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<sup>5</sup>Written Statements Decision, para. 35.

<sup>6</sup>See Civil Party Lead Co-Lawyers’ Response to the Decision on the Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Written Statements and Other Documents before the Trial Chamber (E96/7), and to Memorandum E208/3, Including Confidential Annexes 1 and 2, **E208/4**, 27 July 2012 (hereinafter, “Civil Parties’ Written Statements Response”).

<sup>7</sup>See Lead Co-Lawyers’ Response to Trial Chamber Directives on the Tendering into Evidence of Civil Party Written Statements & Other Documents (with Confidential & Strictly Confidential Annexes), **E223/2/7**, 4 March 2012 (hereinafter “4 March Submission”) and 4 March Table, respectively. The total number of documents is larger than the total number of civil party written statements, because Civil Parties submitted 46 statements which they understood to be French language translations of civil party statements on the list which existed under a distinct document number. See *infra*. at paras. 41-43 for further discussion of this issue.

<sup>8</sup>Written Statements Decision, para. 35.

<sup>9</sup>See Revised Annex 7(a)(iii): Civil Party Applications, **E109/2.2**, 22 July 2011; see also Civil Party Lead Co-Lawyers Revised List of Documents and Exhibit Relevant to the First Four Trial Segments, **E109/2**, 22 July 2011, para. 12 (explaining that the full contents of the Civil Party Application, included any annexed documents in extensions to the D22 number, are included in the list). Based on a conservative estimate that each of the civil party applications contained only three separate documents on the case file, the representative sample now before the Trial Chamber represents a 2,200% reduction in the number of documents sought.

<sup>10</sup>Submission Regarding Legal Standards for Admission of Written Statements in Lieu of Oral Testimonies Pursuant to Rule 92, **E277**, 9 April 2013 (hereinafter “Khieu Samphan Rule 92 Submission”).

made in its submissions prior to the issuance of the Trial Chamber's decision.<sup>11</sup> It also raises a number of general objections to the Civil Parties' statements.

8. On 26 April 2013, the Khieu Samphan Defense filed its objections to the admission of written statements in lieu of oral testimony. The submission reviews and expands on the objections in the Defense's earlier Rule 92 submission. In the annex to its submission, the Khieu Samphan Defense reviews 490 of the Civil Parties' 520 unique civil party statements, making document-specific objections to all but 4 of these 490 documents. Accordingly, the Khieu Samphan Defense has failed to raise individualized objections to 34 of the written statements proffered by Civil Parties. The Defense's document-specific objections fall into essentially four categories: scope, acts and conduct, discriminatory intent, and collection bias.
9. In November 2012 and April 2013, the Nuon Chea Defense filed objections to the admission of written statements in lieu of oral testimony.<sup>12</sup> On the latter date, the Defense reasserts a number of its original arguments concerning the legal framework for admission of written statements which had not been adopted by the Trial Chamber in its Written Statements Decision, but were argued prior to the Chamber's decision.<sup>13</sup> In the latter filing, the Defense also raises several generalized objections on relevance, reliability and authenticity,<sup>14</sup> but its primary objections fall into five main categories: scope, acts and conduct of the accused, and structures.<sup>15</sup>
10. On 29 April 2013, three days after the Chamber's filing deadline for defense objections to written statements,<sup>16</sup> the Nuon Chea Defense made further submissions on written statements,<sup>17</sup> wherein it significantly expanded its objections to the admissibility of written statements put forward by the Civil Parties, indicating that "[f]or lack of resources, the Defense did not review the statements filed by the civil

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<sup>11</sup> See Observations in Response to Co-Prosecutors' Submission Regarding the Admission of Written Witness Statements, **E96/4**, 22 July 2011 (hereinafter "Khieu Samphan's Preliminary Objections").

<sup>12</sup> Preliminary Response to Co-Prosecutor's Further Request to Put Before the Chamber Written Statements and Transcripts, **E96/8/1**, 8 November 2012 (hereinafter "NC Preliminary Objections") and Objections to Requests to Put Before the Chamber Written Statements and Transcripts, **E223/2/8**, 26 April 2013 (hereinafter "Nuon Chea Final Objections"), respectively.

<sup>13</sup> Nuon Chea Final Objections, paras. 6-15. See also Nuon Chea Preliminary Objections.

<sup>14</sup> Nuon Chea Final Objections, paras. 6-14.

<sup>15</sup> Supplementary Annexes in Connection with Objections to Statements and Transcripts, **E223/2/8/1**, para. 5, 29 April 2013 (hereinafter "Nuon Chea Supplementary Annexes").

<sup>16</sup> Trial Chamber Memorandum, Forthcoming document hearings and response to Lead Co-Lawyers' memorandum concerning the Trial Chamber's request to identify Civil Party applications for use at trial (E208/4) and KHIEU Samphan Defense request to revise corroborative evidence lists (E223), **E223/2**, para. 14, 19 October 2012 (granting the Defense until 26 April 2013 to make written objections to written statements).

<sup>17</sup> Nuon Chea Supplementary Annexes.

parties on 4 March 2013,” but nevertheless insists that “[t]he Objections are [...] equally applicable to those statements.”<sup>18</sup> The Nuon Chea Defense did not raise individualized objections to any of the written statements proffered by Civil Parties.

### III. DISCUSSION

#### *A. The Defense’s objections to Civil Parties’ written Statements proffered in lieu of oral testimony are untimely and lack specificity.*

11. In the whole of Nuon Chea’s Final Objections, reference to the Civil Parties or the written statements they seek to tender into evidence are referenced only twice, in the same paragraph, and both times in support of the Defense’s general assertion that the “civil parties’ request to admit statements extends beyond the limits of relevance delineated by the Chamber,”<sup>19</sup> or outside the scope of Case 002/01. It is only belatedly, in its submission introducing the Supplementary Annexes, filed 3 days *after* the Trial Chamber’s filing deadline, that the Nuon Chea Defense explicitly acknowledges that it did not actually make a review of the Civil Parties’ representative sample of written statements.<sup>20</sup> Nonetheless, the Nuon Chea defense insists that it should not be held to account for its lack of due diligence, instead indicating that its “[f]ailure to specify an objection does not reflect acquiescence to admission.”<sup>21</sup>
12. The Trial Chamber has ruled that “objections must be clearly identified and that absent sufficient particularity, only objections alleging that specific documents manifestly lack reliability or relevance will be entertained.”<sup>22</sup> Moreover, the Chamber has held that objections on relevance, reliability or authenticity “must be raised at the time it is proposed to put a document or other evidence before the Chamber. Any further submissions as to the documents reliability shall go instead to the weight to be accorded to it by the Chamber.”<sup>23</sup>
13. The Nuon Chea Defense has not met even this most basic requirement for raising valid objections to Civil Party written statements. Furthermore, its most far reaching

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<sup>18</sup>Nuon Chea Final Objections, para. 4 (referring to the objections the Defense raised in 26 April submissions, which almost exclusively directed at the Prosecution).

<sup>19</sup>*Ibid.*, para. 22.

<sup>20</sup>*Ibid.*, para. 4.

<sup>21</sup>*Ibid.* (italics omitted).

<sup>22</sup> Decision on Objections to Documents Proposed to be Put Before the Chamber on the Co-Prosecutors’ Annexes A1-A5 and to Documents Cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01, **E185**, para. 23, 9 April 2012 (hereinafter “Framework Documents Decision”).

<sup>23</sup> Trial Chamber Memorandum, Trial Chamber Response to portions of E114, E114/1, E131/1/9, E131/6, E136 and E158, **E162**, para. 2, 31 January 2012 (hereinafter “Memorandum on Admissibility”).

objections to civil party written statements first appear in the “Supplementary Annexes” the defense filed after the filing deadline and, therefore, are untimely. On this basis, all objections of the Nuon Chea Defense to the Civil Parties’ representative sample which have not been properly particularized must be rejected.

14. It should go without saying that valid objections, even those that cannot be particularized to a specific document, must actually be addressed to a party or its evidence. In many of its arguments,<sup>24</sup> the Defense fails to indicate that their objections are directed at the written statements proffered by Civil Parties. Accordingly, the Civil Parties focus their response on those objections which the Defense have directed to Civil Parties or specified apply to their list of documents.
15. The Khieu Samphan Defense has also failed to specify objections to 34 of the documents contained in the Civil Parties representative sample and, therefore, these documents should be admitted into evidence.<sup>25</sup>

***B. The Defense’s resurrected arguments on the law applicable to written statements are impermissible.***

16. The legal framework for the admission of written statements described by the Nuon Chea and Khieu Samphan Defense in their objections does not comport with that laid out in the Chamber’s Decision on Written Statements Decision. In spite of the binding nature of the Written Statements Decision, the Defense continue to insist that they are not bound by its rules or reasoning.<sup>26</sup> The Civil Parties note that the arguments of the Defense are so radical that they are tantamount to an almost wholesale rejection of the legal framework on written statements.
17. Civil Parties fully support of the position of the Co-Prosecutors’ that “the Defense submissions amount to a request for reconsideration of the Statements Decision” and that the Defense have not met the legal pre-conditions necessary to lodge such a request and incorporate by reference a number of the Prosecutions’ arguments in the remainder of this response.

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<sup>24</sup> See e.g. Nuon Chea Final Objections, paras. 24, 35, 43 (directing objections on the cumulative nature of testimony, evidence of administrative, command and communication structures and acts and conduct of the accused to only the Prosecution).

<sup>25</sup> See *supra* at para. 8.

<sup>26</sup> See e.g. Khieu Sampha Rule 92 Submission, para. 35 (describing the Trial Chamber’s acceptance of “threshold elements of international crimes” as a legitimate factor in assessing the relevance, reliability and authenticity of written statements as an “error of law”) and Nuon Chea Final Objections, paras. 6-13.

*C. The Civil Parties recall the Trial Chamber's key holdings and their own previous arguments on the relevance, reliability (and authenticity) of civil party written statements.*

18. The Trial Chamber has held that “Internal Rule 87(3), [...], requires documents intended to be put before the Chamber to satisfy *prima facie* standards of relevance, reliability, and authenticity”<sup>27</sup> and that “[w]here, for example, a document does not appear to be a forgery or unrepresentative of the original, the Chamber shall consider the document to have been put before it. [...] Any further submission as to the document’s reliability shall go, instead, to the weight to be accorded to it by the Chamber.”<sup>28</sup>
19. The Trial Chamber has repeatedly held that “the Co-Investigating Judges assessed all documents placed on the case file for relevance” and that “the Trial Chamber has accorded the documents cited in the Closing Order a presumption of relevance and reliability, including authenticity.”<sup>29</sup> Further, “where deficiencies in these statements are alleged, the Chamber has indicated that this will be entertained only where the alleged defects are identified with sufficient particularity and have clear relevance to the Trial.”<sup>30</sup>
20. Though the Defense does not specifically object to the reliability of the OCIJ written statements appearing in the Civil Parties representative sample, Civil Parties note that there are 54 such documents on the Civil Parties 4 March Table. Three of these documents have already been assigned an E3 number by the Trial Chamber and are, accordingly, already admitted into evidence.
21. Concerning written statements not taken by the OCIJ, the Nuon Chea defense asserts that “any [ ] statement not taken by representatives of the OCIJ, Co-Prosecutors or civil parties are inadmissible, because they were not witnessed by an officer of the Court as required by ICTY/R Rule 92bis(B).”<sup>31</sup> Similarly, the defense for Khieu Samphan argues that a number of the Civil Parties documents are inadmissible, on the basis that the entity taking the statement has an interest in the Accused being

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<sup>27</sup> Transcript, 26 January 2012, pp. 85-88. *See also* Framework Documents Decision, para. 20; and Memorandum on Admissibility, para. 2.

<sup>28</sup> Transcript, 26 January 2012, pp. 85-88.

<sup>29</sup> *Ibid.*

<sup>30</sup> Written Documents Decision, para. 26.

<sup>31</sup> Nuon Chea Final Objections, para. 42.

convinced of the crimes.<sup>32</sup> Neither the Khieu Samphan nor the Nuon Chea defense teams articulate any more specific reasoning to support their claims that the statements in question are not reliable.

22. The Trial Chamber intentionally omitted the Rule 92 certification requirement from the legal framework it established in the Written Statements Decision and instead created a system that permits such evidence to be proposed to be put before the Chamber in accordance with Rule 87(1).<sup>33</sup> To protect the rights of the Accused, the Chamber instead suggests that indicia of reliability can assist its determination of the admissibility and probative value of such evidence.<sup>34</sup>
23. Though civil party written statements are not afforded a presumption of reliability,<sup>35</sup> the legal framework established by the Trial Chamber in its Decision on Written Statements details the broad discretion the Chamber enjoys in admitting documents into evidence and affording them probative value.<sup>36</sup> Civil Parties relied upon these principles in substantiating the relevance of the statements contained in their representative sample, including detailing these factors in the column headed “evidentiary purpose” in their 4 March Table.
24. The Civil Parties have also made several submissions detailing further arguments in support of the relevance and reliability of civil party written statements.<sup>37</sup> On the reliability of civil party written statements not taken by the OCIJ, the Civil Parties incorporate by reference their earlier submission on this point.<sup>38</sup> Therein, Civil Parties describe the circumstances under which the components of the Civil Party Application have been collected and processed and the indicia of reliability favoring the admission and awarding of probative value to these documents: “[a]dditional indicia of reliability

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<sup>32</sup> See generally *Objections de M. KHIEU Samphan au versement aux débats de certaines déclarations écrites proposées par les co-Procureurs et les Parties civiles en lieu et place de témoignages oral*, E208/5.7, 26 April 2013 (« Khieu Samphan Individualized Objections »).

<sup>33</sup> Written Statements Decision, para. 29.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, para. 24 (naming factors in favor of admitting evidence to include: 1) of a cumulative nature to witness (and civil party) testimony on similar facts; 2) relating to relevant historical, political or military background, concerning crime-base evidence or goes to proof of threshold elements of international crimes; 3) consists of general or statistical analysis of the ethnic composition of the population in the places to which the indictment related; 4) concerns the impact of crimes upon victims; or 5) is impossible to subject to confrontation because its author has subsequently died, or can no longer be traced, or is medically unable to testify orally. (summarized for brevity).

<sup>37</sup> See Civil Parties’ Written Statements Response; and Lead Co-Lawyers’ Response in Support of the Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Written Statements before the Trial Chamber, **E96/5**, 22 July 2011 (hereinafter “Civil Parties First Written Statements Response”).

<sup>38</sup> Civil Parties Second Written Statements Response, para. 24-25.

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."<sup>39</sup>

25. In the absence of any particularized arguments by the Defense supporting their contention that the statements in question are unreliable and in consideration of the numerous indicia of reliability associated with these documents, the Civil Parties have met the Chamber's *prima facie* standard for establishing the reliability of these documents. Additional arguments regarding the relevance of civil party written statements follow.

***D. The evidence contained in the Civil Parties representative sample of written statements is within the scope of Case 002/01.***

26. Citing the Civil Parties' desire to admit evidence "of all five alleged policies of Democratic Kampuchea and crime-based evidence from nearly every crime site in the Closing Order," the Nuon Chea defense claims that "the civil parties' requests to admit statements extends well beyond the limits of relevance delineated by the Chamber."<sup>40</sup> Similarly, the Khieu Samphan Defense argues that the only evidence admissible on policies is that directly related to population movement phases 1 and 2 and Tuol Po Chrey.<sup>41</sup>
27. On this point, the Civil Parties support and incorporate by reference the Prosecution's arguments.<sup>42</sup> As set out by the Prosecution, evidence which goes toward the existence of the five policies that form the alleged joint criminal enterprise in Case 002/01, but not their implementation, falls within the scope of Case 002/01, as demonstrated through the Trial Chamber's admission of such evidence through oral testimony.<sup>43</sup> This is further substantiated by the fact that the Chamber's own list of the Closing Order

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<sup>39</sup> *Ibid.*, para. 2.

<sup>40</sup> Nuon Chea Final Objections, para. 22.

<sup>41</sup> Prosecutions' Response, paras. 28-29.

<sup>42</sup> *Ibid.*, paras. 31-36.

<sup>43</sup> *Ibid.*, para. 3.

paragraphs within the scope of Case 002/01 includes those introducing the alleged joint criminal enterprise.<sup>44</sup>

28. The evidence contained in the relevant written statements put forward by Civil Parties goes to proving the existence of the policies of the alleged joint criminal enterprise in Case 002/01, not their implementation, as noted in the evidentiary purpose portion of the 4 March Table.
29. The evidence available in the civil party written statements proffered is an important source of corroborating evidence of the existence of the alleged policies, as it comes from victims of the regime who were indoctrinated to and whose lives were directed by these policies on a daily basis, throughout the country. Moreover, in a setting where the accused deny the very existence of these policies and written documentation establishing the scope and elaborating the contours of these policies is limited, the accounts of those who lived under these policies are vitally important to proving their existence. Accordingly, the written statements put forth by Civil Parties on the joint criminal enterprise and policies are *prima facie* relevant.

***E. Civil party written statements are cumulative to oral testimony given in Case 002/01.***

30. The statements contained in the Civil Parties representative sample provide unique, important and entirely permissible evidence which is cumulative in nature to evidence given on similar facts through the oral testimony of witnesses, experts and civil parties in Case 002/01. Indications of this information are provided in the evidentiary purpose listed for each of the documents in the Civil Parties' 4 March Table. Concerning the requirement that that this evidence be cumulative to evidence (or similar facts to evidence) given through oral testimony, we refer to the examples of oral testimony provided in the Prosecution's Response.<sup>45</sup>

***F. The Defense's test for excluding evidence on the basis of "acts and conduct" is overbroad and its objections on the basis of document redaction are misapplied.***

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<sup>44</sup> List of paragraphs and portions of the Closing Order relevant to Case 002/01, amended further to the Trial Chamber's Decision on IENG Thirith's Fitness to Stand Trial (E138) and the Trial Chamber's Decision on Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163), **E124/7.3**, 18 October 2012 (including, in particular, paras. 156-159 on the Factual Findings JCE).

<sup>45</sup> Prosecution's Response, paras. 37-44.

31. In its submissions, the Nuon Chea Defense interprets the phrase “acts and conduct of the accused as charged in the indictment”<sup>46</sup> to include not only the acts of the Nuon Chea, but also any “of a group to which he allegedly belonged.”<sup>47</sup> In contradiction to its own previous submissions,<sup>48</sup> it also insists that Civil Parties bear the burden to redact all impermissible statements on acts and conduct from the written statements.<sup>49</sup>
32. The Khieu Samphan Defense argues an even more expansive concept of acts and conduct, including evidence which related to the accused hierarchical responsibility, decision-making structures of Democratic Kampuchea and local administrative structures,<sup>50</sup> and claims that any distinction between evidence going toward the existence of policies and acts and conduct of the accused is “entirely artificial.”<sup>51</sup> Khieu Samphan also claims that any inadmissible portions of the proposed witness statement parties intend to rely upon must be identified by the submitting party, or the whole statement “must be rejected in its entirety.”<sup>52</sup> This approach underlies the Defense’s arguments on objections to civil party written statements and, accordingly, it seeks the exclusion of statements on the basis that only a portion of the statements contents are impermissible.<sup>53</sup>
33. On the proper scope of the acts and conduct of the accused, the Civil Parties support and incorporate by reference the Prosecution’s arguments.<sup>54</sup> In addition, they emphasize that, if accepted by the Trial Chamber, the Defense’s overly broad view of acts and conduct would render the concept devoid of any useful meaning.
34. On the obligation of parties to redact impermissible evidence of acts and conduct from civil party written statements, the Civil Parties support Nuon Chea’s earlier assertion that under the jurisprudence of the *ad hoc* tribunals such redactions are properly made by the Chamber at the time of the document’s admission into evidence.<sup>55</sup> However, should the Chamber conclude that the documents proffered by the Civil Parties include

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<sup>46</sup> ICTY/ICTR Rule 92bis(A).

<sup>47</sup> Nuon Chea Supplementary Annexes, para. 5(b).

<sup>48</sup> Nuon Chea Preliminary Objections, para. 15 (noting that “Chambers routinely redact those portions of a statement deemed inadmissible prior to admission”).

<sup>49</sup> Nuon Chea Supplementary Annexes, para. 44-45.

<sup>50</sup> See Khieu Samphan Individualized Objections (for example, document numbers: D22/3850, d230/2/10 and E9/32.2.28 on hierarchical responsibility; d151/1, D2-1, and D22/140 on decision making structures; and d230/2/10 on local administrative structures).

<sup>51</sup> See Prosecution’s Response, para. 21.

<sup>52</sup> *Ibid.*, para. 44-5

<sup>53</sup> See Khieu Samphan Individualized Objections (for example, document numbers: D129/1, D145/2, D169/3, D217/3, D22/1140).

<sup>54</sup> Prosecution’s Response, paras. 14-26.

<sup>55</sup> Nuon Chea Preliminary Objections, para. 15.

impermissible evidence on the acts and conduct of the accused and order that Civil Parties themselves redact this evidence, they will do so.<sup>56</sup> In the interest of clarity, they would prefer to do so once the Chamber has ruled on the objections of the Defense.

35. Concerning Khieu Samphan's assertion that an entire written statement can be excluded from evidence on the basis that it contains an impermissible content that is "unidentified," the Civil Parties find this is an unnecessary, impracticable and entirely unsubstantiated position. Given the extremely limited view that the Khieu Samphan Defense takes of the admissible evidence in Case 002 and the fact that the Chamber has not yet ruled on its objections, it would have been impossible for Civil Parties to have identified impermissible content *a priori*. Moreover, in a court guided by the civil law principle of the free admission of evidence,<sup>57</sup> a trial overseen by professional judges<sup>58</sup> and a legal framework that allows these judges broad discretion in admitting evidence, it is a fallacy to insist that the mere appearance of evidence which may not be relevant to the current proceedings, can force the exclusion of other relevant evidence in the same document, especially when the evidence concerned is crime-based evidence or otherwise not prohibited on the basis of "acts and conduct."

***G. The Defense's assertions that matters of "proximity," "live issues," and "issues in dispute" require that the authors of written statements be heard or their written evidence be excluded are unfounded.***

36. The Defense argue an absolute right to cross-examination of the author of written statement exists in a broad array of circumstances, including when criminal conduct is "highly proximate to the accused" or concerns a "live issue" of "sufficient importance."<sup>59</sup> The Defense identifies issues as diverse as purported uncertainty in the chapeau elements of crimes against humanity and the factual grounds for forced transfer as "live issues" or "issues in dispute."<sup>60</sup>
37. Civil Parties fully agree with the Prosecution's analysis of these arguments as overbroad and their application unnecessary under this court's legal framework on the

<sup>56</sup> The Khieu Samphan Defense has identified fewer than 10 documents from the Civil Parties' representative sample that it seeks to exclude on this basis.

<sup>57</sup> Internal Rule 87(1).

<sup>58</sup> See Framework Documents Decision, para. 21(6) (citing as "unnecessary because professional judges have the ability to disregard unduly prejudicial evidence," the the Defense's argument that evidence should be excluded if its probative value is substantially outweighed by the need to ensure a fair trial).

<sup>59</sup> Nuon Chea Preliminary Objections, para. 12. See also, Prosecution's Response, para. 29.

<sup>60</sup> *Ibid.*, para. 37; and Khieu Samphan Rule 92 Submission, para. 35.

admission of written statements. In particular, they highlight that the Defense arguments are overbroad to the point of making distinctions between permissible and impermissible evidence impossible. Finally, they draw attention to the fact that the Defense arguments, especially those concerning the inadmissibility of evidence tending to prove chapeau elements of international crimes,<sup>61</sup> to be in direct conflict with the legal framework set out by in the Written Documents Decision.<sup>62</sup>

***H. The volume of material contained in the Civil Parties representative sample is reasonable in the context of a trial of the scope and complexity of Case 002/01.***

38. The Khieu Samphan Defense argues that the Trial Chamber must use its discretion to limit the number of written statements it admits to “reasonable proportions,”<sup>63</sup> while not providing any further specification of what might constitute a reasonable proportion for a trial of the scope and complexity of Case 002/01. The Nuon Chea Defense asserts that “unnecessarily cumulative statements are inadmissible” on the basis that they infringe on fair trial rights<sup>64</sup> and that a “lack of resources” prevented it from making a proper review of Civil Parties’ written statements.<sup>65</sup>
39. Though Civil Parties remain steadfast in their conviction that all civil party written statements on the Case File should be taken into account by the Trial Chamber in reaching a verdict in the present case because they are the basis upon which civil parties were admitted to Case 002, they note that in compliance with the Trial Chamber’s directives, they have drastically reduced the number (and total number of pages) of written statements they seek to admit into evidence.<sup>66</sup> As noted earlier, the Civil Parties’ 4 March Table includes 520 unique documents,<sup>67</sup> the length or relevant excerpt of which in most cases totals no more than 1-3 pages. Civil Parties have also provided detailed information on the points of indictment and evidentiary purpose of each document contained in their 4 March Table, thus offering the Defense and the Trial Chamber the necessary information to make an efficient assessment of these

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<sup>61</sup> Khieu Samphan Rule 92 Submission, para. 35.

<sup>62</sup> Written Documents Decision, para. 24(b) (indicating that a factor favorable to admitting and affording probative value to written statements is that it contains evidence that “goes to the proof of threshold elements of international crimes”).

<sup>63</sup> Prosecution’s Response, para. 49.

<sup>64</sup> Nuon Chea Final Objections, ERN 00902860 (heading to paragraph 15) and para. 33.

<sup>65</sup> *Supra* at para. 10.

<sup>66</sup> *Supra* at note 9.

<sup>67</sup> *Supra* at para. 6 and note 7.

documents possible. Furthermore, the total number of documents sought by the Civil Parties represents only 50% of those put forward by the Prosecution.<sup>68</sup> Accordingly, the Civil Parties number of written statements is reasonable relative to that of the Prosecution and in light of the scope and complexity of the proceedings.

***I. Civil Parties have properly identified and coordinated translation of the written statements they seek to admit into evidence.***

40. The Khieu Samphan Defense insists that the Civil Parties must “clearly identify [...] which portions of the proposed statements they intend to rely on.”<sup>69</sup> However, the defense does not cite a single supporting source to substantiate its position. As noted earlier, in response to directives from the Trial Chamber, the Civil Parties have provided extensive information to the defense teams to assist them in their assessment of civil party written statements, including detailed specification on the evidentiary purpose of the document (describing the relevant content) and citation to the related points of the indictment. In light of this and the fact that the Trial Chamber has never articulated any requirements beyond what the Civil Parties have already provided, the Civil Parties consider that they have properly identified the evidence they will rely upon in the civil party written statements they have proffered.
41. Additionally, the Khieu Samphan Defense makes the claim that “most of the ‘translations’ [of the Co-Prosecutors’ and Civil Parties’ written statements into English and French] consist of summaries whose reliability is even more questionable than that of the original documents.”<sup>70</sup>
42. Upon review of their table, the Civil Parties confirm that 46 documents, or 8%, of the 566 documents appearing on the Civil Parties 4 March list are indeed summary documents which were erroneously included on this list. Civil Parties highlight, however, that all the original Victim Information Forms (VIFs) for these 46 summary documents *were* included in the Civil Parties 4 March list. As expected, all the original VIFs are already or will be translated into each of the three official languages of the Court by the close of the substantive hearings in Case 002/01.<sup>71</sup>

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<sup>68</sup> Co-Prosecutors’ Submission of Revised Annexes 12 and 13 of Their Rule 80(3) Trial Document List (Witness Statements and Complains), **E278**, para. 2, 9 April 2013 (citing the total number of documents contained in the Prosecutors’ revised annexes 12 and 13 as 1,040).

<sup>69</sup> Prosecutor’s Response, para. 45.

<sup>70</sup> *Ibid.*, para. 54.

<sup>71</sup> 4 March Submission, para. 14.

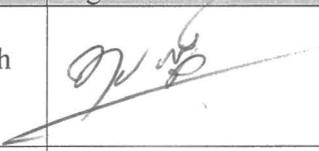
43. In order to ensure that the parties and Chamber can easily identify which of the written statements were erroneously listed, the Civil Parties annex to this submission a list of these documents.<sup>72</sup> In addition, Civil Parties will, posthaste, file a correction to their original 4 March Table which omits these statements.

#### IV. CONCLUSION

44. WHERETOFORE the Civil Parties respectfully request that the Trial Chamber:

- a. ADMIT the present Response;
- b. REJECT the objections of the Khieu Samphan and Nuon Chea Defense teams in whole; and
- c. ADMIT into evidence all written statements proffered in lieu of oral testimony and enumerated in the Civil Parties' 4 March Table (as corrected to omit the 46 erroneously listed summary documents).

Respectfully submitted,

Date	Name	Place	Signature
10 June 2013	PICH Ang Lead-Co-Lawyer	Phnom Penh	
	Elisabeth SIMONNEAU-FORT Lead Co-Lawyer	Phnom Penh	

<sup>72</sup>See Annex 1: List of Civil Party Written Statement Summaries Erroneously Included in Civil Parties' Representative Sample (E223/2/7.2) (attached).