BEFORE THE PRE-TRIAL CHAMBER

OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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OBSERVATIONS IN RESPONSE TO CO-PROSECUTORS' SUBMISSION REGARDING THE ADMISSION OF WRITTEN WITNESS STATEMENTS

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Before:

The Trial Chamber

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MAY IT PLEASE THE TRIAL CHAMBER

I- INTRODUCTION

1. In a submission dated 15 June 2011,[1] the Co-Prosecutors requested the Trial Chamber to declare that there is no absolute right to summon all witnesses whose statements are being proposed into evidence, and to decide on the need for witnesses to appear for examination at the start of the relevant phases of the proceedings, by taking guidance from Rule 92 *bis* of the ICTY's Rules of Procedure and Evidence ("Admission of Written Statements and Transcripts in Lieu of Oral Testimony") and the ICTY's jurisprudence.

2. Mr Khieu Samphan hereby submits observations in response to the Co-Prosecutors' Submission to remind the Chamber that the attendance of witnesses is the rule and admission of written statements in lieu of oral testimony must remain the exception, and strict guarantees must be respected.

II- APPLICABLE LAW

A. Rules and legislation applicable before the ECCC

3. According to the Co-Prosecutors, the procedure before the ECCC is imprecise and suffers from a number of *lacunae*.[2] They submit that "[t]he rules do not provide guidance on how the Court should approach the relationship between Subrules 87(1) and 84(1)."[3]

4. The differences in the wording of the different versions of Subrule 84(1) or the alleged inconsistencies in Article 297 of the Cambodian Code of Criminal Procedure

[1] Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber, 15 June 2011, E96 (Co-Prosecutors' Submission). The French version of this document was notified on 7 July 2011.
[2] Co-Prosecutors' Submission, paras. 3 to 6.
[3] Co-Prosecutors' Submission, para. 5.

("CCP") are of little import.[4] The meaning and purpose of the Rules is to uphold the principle of adversarial examination of witnesses at trial.

5. This is further demonstrated upon reading Internal Rule 87 in its entirety, notably sub-paragraph (2): "Any decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination."

6. The principle applicable before the ECCC is therefore that the witnesses must appear at trial for adversarial proceedings, a fundamental right of the Accused, according to international standards.

B. Human Rights Jurisprudence

7. The Co-Prosecutors rightly point out that Article 6(3)(d) of the European Convention of Human Rights is framed in similar terms as Subrule 84 (1) of the Internal Rules, and that, so is Article 14(3)(e) of the International Covenant on Civil and Political Rights.[5]

8. They cite many decisions of the European Court of Human Rights (ECtHR), highlighting the fact that the right of an accused to examine witnesses whose statements are admitted into evidence is not an unlimited one, where such witness statements are corroborated by other evidence.[6]

9. Mr KHIEU Samphan emphasises that in each of its decisions, the ECtHR recalls that:

> "evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use as evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 (art. 6-3-d, art. 6-1), provided that the rights of the defence have been respected. As a rule these rights require that the defendant be given an adequate and proper opportunity to

[4] Subrule 84(1): "The Accused shall have the absolute right to summon witnesses against him or her whom the Accused had no opportunity to examine during the pre-trial stage." Article 297 of the Cambodian CCP states, "Inculpatory witnesses who have never been confronted by the accused shall be summonsed to testify at the trial hearing."
[5] Co-Prosecutors' Submission, paras. 7 et 8.
[6] Co-Prosecutors' Submission, paras. 9 à 11.

> challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings."[7]

10. The ECtHR has clearly established that where a conviction is based solely *or to a decisive degree* on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6.[8]

11. The ECtHR held that "[TRANSLATION] where the lack of confrontation is due to the inability to locate the witness, it must be established that the competent authorities have actively sought to locate the witness in question to allow such confrontation."[9]

12. Although there are some exceptions to the principle that the witness must be examined by the accused or his/her counsel, such exceptions are precisely delineated and must be avoided. That is why the ECtHR sets the following principle as a positive obligation for States:

> "In any event, paragraph 1 of Article 6 taken together with paragraph 3 requires the Contracting States to take positive steps, in particular to enable the accused to examine or have examined witnesses against him. Such measures form part of the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner."[10]

13. Since the Co-Prosecutors lay emphasis on the scope of the case and the nature of the allegations against the accused,[11] it is worth noting that the ECtHR is particularly mindful of respect for the principle of adversarial examination of witnesses, and by implication, to defence rights and fair trial rights, including in particularly serious,

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[7] See for example: ECtHR, *Rachdad v. France*, No. 71846/01, 13 November 2003, para. 23 (emphasis added); *Saïdi v. France*, No. 14647/89, 20 September 1993, para. 43; *Isgro v. Italy*, No. 11339/85, 19 February 1991, para. 34.
[8] See for example: ECtHR, *Rachdad v. France*, No. 71846/01, 13 November 2003, para. 23; *Sadak et al v. Turkey*, No. 29900/96, 29901/96, 29902/96 and 29903/96, 17 July 2001, para. 65; *A.S. v. Finland*, No. 40156/07, 28 September 2010, para. 54.
[9] ECtHR, *Rachdad v. France*, No. 71846/01, 13 November 2003, para. 24.
[10] ECtHR, *Sadak et al v. Turkey*, No. 29900/96, 29901/96, 29902/96 and 29903/96, 17 July 2001, para. 67; *W.S. v. Poland*, No. 21508/02, 19 June 2007, para. 56; *A.S. v. Finland*, No. 40156/07, 28 September 2010, para. 53.
[11] Co-Prosecutors' Submission, para. 2

sensitive and complex cases, such as sexual violence against children[12] or drug-trafficking.[13]

C. International Criminal Tribunals: principles and application

14. The Co-Prosecutors' analysis of the rules and jurisprudence of the International Tribunal for the former Yugoslavia (ICTY) is aimed at persuading the Chamber to grant in a broad and flexible manner the admissibility of written statements in lieu of oral testimonies.[14]

15. Mr KHIEU Samphan notes that according to the ICTY's Rules and jurisprudence, the principle is still that witnesses must appear at trial, that the admissibility of written statements in lieu of oral testimonies is certainly not common practice, and is subject to very strict conditions.

16. In a bid to mislead the Chamber, the Co-Prosecutors conflate a certain degree of confusion in their analysis, between Rules 89(C) and 92 *bis* of the ICTY's Rules of Procedure and Evidence (RPE), which enables them to declare that "the admission of written evidence in lieu of oral testimony is consistent with the adoption by the international tribunals of flexible rules relating to the admission of evidence. In international jurisprudence, decisions on admissibility fall within a *wide* discretion of a trial chamber."[15]

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[12] See for example ECtHR, *A.S. v. Finland*, No. 40156/07, 28 September 2010, para. 56: "In acknowledging the need to strike a balance between the rights of the defendant and those of the alleged child victim, the Court finds that the following minimum guarantees must be in place: the suspected person shall be informed of the hearing of the child, he or she shall be given an opportunity to observe that hearing, either as it is being conducted or later from an audiovisual recording, **and to have questions put to the child, either directly or indirectly, in the course of the first hearing or on a later occasion**." (emphasis added).

[13] See for example ECtHR, *Saïdi v. France*, No. 14647/89, 20 September 1993, para. 44 : "The Court is fully aware of the undeniable difficulties of the fight against drug-trafficking – in particular with regard to obtaining and producing evidence – and of the ravages caused to society by the drug problem, but such considerations cannot justify restricting to this extent the rights of the defence of ´everyone charged with a criminal offence.'"

[14] Co-Prosecutors' Submission, paras. 12 to 27.

[15] Co-Prosecutors' Submission, para. 25 (emphasis added).

17. Not only is the reference in support of this last sentence not relevant[16] but also the assertion is false. The flexibility and wide discretion referred to by Co-Prosecutors only relate to the admissibility of written documents under Rule 89(C). As concerns written statements in lieu of oral testimonies under Rule 92 *bis*, the Trial Chamber must take into account strict considerations and conditions in the exercise of its discretionary power.

18. The distinction between the two rules is clearly explained in the ICTY Appeals Chamber decision in the *Galic case*,[17] which "is the leading Appeals Chamber authority on the interpretation of Rule 92*bis*".[18] According to the Appeals Chamber:

> "(…) a party cannot be permitted to tender a written statement given by a prospective witness to an investigator of the OTP under Rule 89(C) in order to avoid the stringency of Rule 92*bis*..The purpose of Rule 92*bis* is to restrict the admissibility of this special type of hearsay to that which falls within its terms. By analogy, **Rule 92*bis* is the *lex specialis* which takes the admissibility of written statements of prospective witnesses and transcripts of evidence out of the scope of the lex generalis of Rule 89(C)",** although th general propositions which are implicit in Rule 89(C) – that evidence is admissible only it is relevant and that it is relevant only if it has probative value – remain applicable to Rule 92*bis*."[19]

19. This distinction between the wide discretion provided in Rule 89(C) and the strict conditions set out in Rule 92 *bis* were still plain and relevant a few weeks ago.[20]

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[16] Footnote 43 of the Co-Prosecutors' Submission deals with the delimitation of the Trial Chamber's discretion in relation to that of the Appeals Chamber. The cited paragraph from the ICTY Appeals Chamber decision reads as follows: "Decisions relating to the admissibility of evidence and the general conduct of proceedings largely fall within the discretion of the Trial Chamber". In support of this assertion, the Appeals Chamber in footnote 30 cites a previous finding: "The decision to admit or to exclude evidence pursuant to Rule 89(C) of the Rules of Procedure and Evidence of the Tribunal ("Rules") as well as decisions related to the general conduct of the proceedings are matters within the discretion of the Trial Chamber", ICTR, *Muvunyi v. Prosecutor*, Case No. ICTR-00-55A-AR73(C), Decision on Interlocutory Appeal, 29 May 2006, para. 5.

[17] ICTY, *Prosecutor v. Galic*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002 (*Galic Decision*).

[18] ICTR, *Prosecutor v. Karemera et al*, Case No. ICTR-98-44-T, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules; and Order for Reduction of Prosecution Witness List", 11 December 2006 (*Karemera* Decision), para. 10.

[19] *Galic* Decision, para. 31 (emphasis added).

[20] See for example: ICTR, *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Motion to Admit Transcripts from the *Bizimungu et al.* Case, 30 June 2011 (*Nzabonimana* Decision), paras. 10-12; ICTR, *Prosecutor v. Karemera and Ngirumpatse*, Case No. ICTR-98-44-T, Decision on Edouard Karemera

20. Without going into details concerning the many relevant factors to be considered, as set out in Rule 92 *bis* and in the jurisprudence, it is worth noting that in exercising its discretion, the Trial Chamber must decide whether to require the witness to attend for cross-examination.[21]

21. In their Submission, the Co-Prosecutors contend that "[a]n additional important consideration supporting the admission of evidence in the form of written statements is the need to conduct trials with reasonable expediency" before citing a passage from Judge Kwon's Declaration in the *Milosevic* case.[22]

22. Yet, precisely in the above case, the Chamber decided to admit the statements tendered by the Prosecution under Rule 92 *bis*, on the condition that, *inter alia*, the witnesses be required to attend for cross-examination.[23] The Trial Chamber was mindful of the Prosecution's submissions about the length of the trial and of the obligation upon it to ensure that the trial is both fair and expeditious: "These ends can best be achieved by admitting the witness statements under Rule 92 *bis* (E), thereby saving the substantial time taken in examination-in-chief and requiring the witnesses to attend for cross-examination."[24]

23. In support of their submissions, the Co-Prosecutors cite a passage from Judge Kwon's Declaration in favour of the admission of written statements. However, when the passage is placed in the overall context of the Declaration, it emerges that Judge Kown was referring to the admission of prior statements of witnesses in addition to their court testimony, and not to written statements in lieu of oral testimony.[25]

Motion to Admit Transcripts of Testimony of Jean-Marie Vianney Mporanzi in the *Nzabonimana* Case and for Imposition of Sanctions for Breach of Rule 68, 30 May 2011, paras. 11 and 12.

[21] Article 92 *bis* (C) of the ICTR's RPE; Article 92 *bis* (E) of the ICTR's RPE; see for example: ICTR, *Karemera* Decisison, paras. 8, and 14-16; *Nzabonimana* Decision, para. 11.

[22] Co-Prosecutors' Submission, para. 26; ICTY, *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Prosecution motion to admit written statements, pursuant to Rule 92 *bis* of the Rules, 21 March 2002 (*Milosevic* Decision).

[23] *Milosevic* Decision, paras. 27 and 30.

[24] *Milosevic* Decision, para. 26.

[25] In fact, Judge Kwon is of the view that "if the defence consents (…) or [if] the maker of the statement comes to court to testify as a witness and testifies as to the veracity of the contents of the statement, and is cross-examined by the opposing party, then written witness statements should be admitted into the record

24. Lastly, the Co-Prosecutors note that at the ICTY, even prior to the adoption of Rule 92 *bis* of the RPE, the Trial Chambers exercised their discretion to admit written statements into evidence, and Co-Prosecutors cite a passage from a decision in the *Aleksovski* case.[26] However, a reading of that decision reveals that already prior to the adoption of Rule 92 *bis*, the Trial Chambers were extremely rigorous and cautious regarding the admissibility of out-of-court statements. Among other considerations, they especially took into account: "The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is "first-hand" or more removed, are also relevant to the probative value of the evidence".[27]

D. The International Criminal Court (ICC) and the Special Tribunal for Lebanon (STL)

25. The Co-Prosecutors submit that the approach taken by the ICC, whose rules contain an express limitation on the admission of written statements, cannot be taken by the ECCC, because it would be contrary to the spirit of the civil law procedure in which evidence is collected by impartial judicial officers and then transferred to the Chamber.[28]

26. Mr KHIEU Samphan observes that the Co-Prosecutors make no reference to the STL Rules, which permit a Pre-Trial Judge – whose powers are very similar to those of the civil law investigating judge – to gather evidence or question witnesses under certain circumstances.[29] Yet, Rule 155(C) of the RoPE of the STL, "Admission of Written statements and Transcripts in lieu of Oral Testimony", provides:

> "The Trial Chambers shall decide, after hearing the parties, whether to require the witness to appear for cross-examination. It may decide, providing reasons, that the interests of justice and the demands of a fair and expeditious trial exceptionally

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of evidence before the Trial Chamber," *Milosevic* Decision, Declaration of Judge O-Gon Kwon, para. 2.

[26] Co-Prosecutors' Submission, paras. 27 and footnote 46.

[27] *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecution Appeal Regarding Admissibility of Evidence, 16 February 1999, para. 15, referring to *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Decision on Defence Motion Objecting in Principle to Admissibility of Hearsay Evidence Without Any Conditions as to Justification and Reliability, 26 January 1998, para. 12; quoted in the *Galic* Decision, para. 27, and footnote 49.

[28] Co-Prosecutors' Submission, paras. 28 et 29.

[29] See, *inter alia*, Articles 7(a) and 18 of the Statute, and 92 and 93 of the RoPE of the TSL.

> warrant the admission of the statement or transcript, in whole or in part, without cross-examination. If the Chamber decides to require the witness to appear for cross-examination.(…)"[30]

27. Moreover, it is important to note that the wording of Rule 155 of the STL Rules is framed in almost identical terms as Rule 92 *bis* of the RPE of ICTY and ICTR. The only difference is that a factor justifying admission of a written statement into evidence has been added. That is where the evidence in question "has been given by the witness in the presence of the Parties who have had the opportunity to examine or cross-examine him".[31]

28. As such, for the STL, oral testimony is therefore always the rule, be it before or at trial, whereas admission of written statements in lieu of oral testimonies, in the absence of cross-examination, must remain the exception.

III – APPLICATION OF THE ABOVE PRINCIPLES AT THE ECCC

29. According to the Co-Prosecutors, the Chamber should admit the majority of the statements of witnesses proposed in their lists filed pursuant to Rule 80, without requiring that the witnesses appear for examination. However, the Chamber must take into account a large number of considerations when assessing requests for examination of witnesses proposed by the defence, to avoid "frustrating the proceedings". In summary, since the judicial investigation was conducted with a view to obtaining both inculpatory and exculpatory evidence, the Chamber should rely on the principle that written statements are admissible and decide whether or not to summon witnesses as the trial unfolds.[32]

30. Mr KHIEU Samphan submits that, on the contrary, according to the Rules applicable before the ECCC and to international norms, the Trial Chamber must follow the principle that witnesses must attend for examination and cross-examination. It is only in certain special instances that the Chamber is required to rule on the admissibility of

[30] Emphasis added.
[31] Article 155(A)(i)(g) of the RoPE of the STL. Rule 155(A) (i)(a) to (f) is identical to Rule 92 *bis* (A) (i) (a) to (f) of the RPE of ICTY and ICTR.
[32] Co-Prosecutors' Submission, paras. 30-36.

written statements in lieu of oral testimonies. In such instances, it must therefore always decide whether or not to summon a witness to attend for cross-examination after hearing the parties. The admission of such written statements without cross-examination must be granted only on an exceptional basis, and with respect for strict conditions.

31. Since such issues will arise on a case-by-case basis, Mr KHIEU Samphan will raise arguments regarding the specific criteria for admissibility or inadmissibility and the procedures to be followed in due course.

FOR THESE REASONS

32. The Trial Chamber is requested:

- TO DISMISS the Co-Prosecutors' Submission.

WITHOUT PREJUDICE

AND IT WILL BE JUSTICE

	SA Sovan **Jacques VERGÈS**	**Phnom Penh** **Paris**	
Date	**Name**	**Place**	**Signature**