

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**CO-PROSECUTORS' RESPONSE TO "IENG SARY'S OBJECTIONS TO THE
ADMISSIBILITY OF CERTAIN CATEGORIES OF DOCUMENTS"**

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I. INTRODUCTION

1. On 6 September 2011 the Ieng Sary defence (“Defence”) filed *Ieng Sary’s Objections to the Admissibility of Certain Categories of Documents (“Objections”)*.¹ They argue that “some documents within [certain] categories do not meet minimum thresholds of authenticity, reliability and relevance” and consequently that these categories of documents are “inadmissible”.² They request the Trial Chamber to “require the parties to demonstrate the authenticity, reliability and relevance” of documents they introduce for admission and to “reject documents which do not meet these minimum criteria”.³
2. The Co-Prosecutors submit that: (1) the Objections are superfluous, contradictory and unacceptably vague as to the evidence objected to and relief sought; (2) the legal test propounded by the Defence for the admissibility of evidence is incorrect in law in certain respects; and (3) the purported objections themselves are ill-founded and do not adequately demonstrate that the impugned categories of evidence are inadmissible. The Co-Prosecutors request the Trial Chamber to dismiss the Objections and direct the parties that any future objections to documents must be filed within a prescribed time and in a sufficiently specific manner to enable the Trial Chamber to assess those objections.

II. PROCEDURAL HISTORY

3. On 17 January 2011, the Trial Chamber issued an Order to File Material in Preparation for Trial (the “Initial Trial Preparation Order”) directing all parties to file “Lists of Documents and Exhibits” by 13 April 2011,⁴ the date being later extended to 19 April 2011.⁵ On 19 April 2011 the Co-Prosecutors filed the list of documents they intend to rely on at trial.⁶
4. On 1 April 2011, the Defence filed *Ieng Sary’s initial list of documents already on the case file and notice of his forthcoming initial list of new documents to be put before the Trial Chamber*.⁷ The filing attached a 1,389-page annex listing every document contained on the Case File for Case 002⁸ and expressly stated that it was “entitled to rely upon any

¹ E114 Objections, 6 September 2011.

² *Ibid.* at p. 1.

³ *Ibid.* at p.14.

⁴ E9 Initial Trial Preparation Order, 17 January 2011 at para. 12.

⁵ E68 Trial Chamber Memorandum, 28 March 2011.

⁶ E9/31 Co-Prosecutors’ Rule 80(3) Trial Document List, 19 April 2011, (“Co-Prosecutors first document list”).

⁷ E9/22 Ieng Sary’s initial list of documents already on the case file and notice of his forthcoming initial list of new documents to be put before the Trial Chamber, 1 April 2011 (“First Defence Document List”).

⁸ E9/22.2 Annex A: Case 002 Full Inventory 31 March 2011, 1 April 2011.

document on the Case File.”⁹ (emphasis in original) The Defence filed a second and third submission, in response to the Initial Trial Preparation Order, on 8 April 2011 and 19 April 2011 respectively.¹⁰ The second submission included a 560-page annex listing all documents available on the Shared Material Drive.¹¹ The third submission included an annex listing 1,037 new documents to be submitted to the Trial Chamber¹² and expressly reserved the Defence’s “right” to supplement its document lists at a later stage.¹³

5. On 27 June 2011, during the initial hearing for Case 002, the Trial Chamber directed the parties to identify by 22 July 2011 the documents and exhibits they considered to be relevant to the initial four trial segments.¹⁴ The Co-Prosecutors filed their supplementary list in response to the Trial Chamber’s direction on 22 July 2011.¹⁵
6. On 8 August 2011, the Defence filed *Ieng Sary’s document and exhibit list for the first four trial topics*.¹⁶ The filing annexed a list of eight documents the Defence intends to put before the Trial Chamber¹⁷ and reserved the Defence’s “right to supplement this list from its document lists for the entire trial and from other sources.”¹⁸ The filing also re-iterated objections raised previously by the Defence to the admission of three categories of documents which are again included in the present Objections, namely: material from the Documentation Center of Cambodia (“DC-Cam”); “torture-tainted evidence”; and statements and interviews of individuals who cannot be confronted during trial.

III. APPLICABLE LAW

7. The ECCC Internal Rules (“Rules”) are the starting point for an analysis of the issue of admissibility of evidence in ECCC proceedings.¹⁹ Rule 87(1) states that “all evidence is admissible.” This Rule is limited by 87(3) which sets out specific grounds upon which evidence can be excluded, namely where the evidence is: (a) irrelevant or repetitious; (b) impossible to obtain within a reasonable time; (c) unsuitable to prove the facts it purports

⁹ E9/22 First Defence Document List, *supra* note 7 at paras. 13, 38.

¹⁰ E9/24 Ieng Sary’s Second Initial List of Documents, 8 April 2011 (“Second Defence Document List”); E9/25 Ieng Sary’s Third Initial List of Documents, 19 April 2011 (“Third Defence Document List”).

¹¹ E9/24.2 Shared Material Drive Inventory, 8 April 2011.

¹² E9/25.2 Annex: Document and Exhibit Lists - IENG Sary, 19 April 2011.

¹³ E9/25 Third Defence Document List, *supra* note 10 at p. 2.

¹⁴ E1/4.1 Public Transcript of Initial Hearing, 27 June 2011 at p. 25.

¹⁵ E109/4 Co-Prosecutors’ Response to the Trial Chamber’s request for documents relating to the first phase of trial, 22 July 2011 (“Co-Prosecutors second document list”).

¹⁶ E109/6 Ieng Sary’s Document and Exhibit List for the first four trial topics, 8 August 2011 (“Fourth Defence Document List”).

¹⁷ E109/6.2 Annex: Ieng Sary’s Document and Exhibit List for the first four trial topics, 8 August 2011.

¹⁸ E109/6 Fourth Defence Document List, *supra* note 16 at p. 1.

¹⁹ Rules (Rev. 8), as revised on 3 August 2011.

to prove; (d) not allowed under the law; or (e) intended to prolong proceedings or is frivolous. These rules of admissibility are consistent with those established at the international level.

i. Relevance and reliability are the cornerstones of admissibility

8. The Trial Chamber has interpreted the effect of Rule 87(3) as requiring evidence to satisfy “certain conditions of relevance and probative value” and “minimum standards of relevance and reliability” *to be admitted*.²⁰
9. In order to be considered relevant, the evidence proffered must be *prima facie* material to the issues and tend to establish the party’s position.²¹ Should this first criterion be satisfied, the inquiry turns to the reliability of the evidence.
10. In order to be considered reliable, the evidence proffered must be *prima facie* credible, the criteria for such assessment depending on the particular circumstances of each case.²² Although a document’s authenticity (in other words, that the document is what it purports to be) is related to its reliability, authenticity itself need not be proven prior to admission of the document and is not a separate requirement for admission.²³
11. In assessing authenticity one aspect that may be considered is whether the document is an original or not. However, there is no general prohibition against the admission of copies. Although 87(3)(c) may be broad enough to incorporate the “best evidence rule”, it clearly does not mandate the production of original documents. At the ICTY, where copies are regularly relied upon, the best evidence rule has been applied as requiring “the best evidence available under the circumstances of the case”²⁴ and depending upon the unique

²⁰ See **E188** *Prosecutor v. Kaing Guek Eav alias “Duch”*, Case No. 001, Judgment, 26 July 2010 (“Duch Judgment”) at para. 41; **E43/4** *Prosecutor v. Kaing Guek Eav alias “Duch”*, Case No. 001, Decision on Admissibility of Material on the Case File as Evidence, 26 May 2009 (“Duch Decision on Evidence”) at para. 7; **E176** Decision on Parties Requests to put Certain Materials before the Chamber Pursuant to Internal Rule 87(2), 28 October 2009, (“Duch Decision on 87(2) Requests”) at para. 3.

²¹ See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Corrigendum to Decision on the Admissibility of Four Documents (ICC Trial Chamber), 20 January 2011 at para. 27 (“First, the Chamber must ensure that the evidence is *prima facie* relevant to the trial, in that it relates to the matters that are properly to be considered by the Chamber ...”).

²² *Prosecutor v. Zejnir Delalić et al.*, Case No. IT-96-21-AR, Decision on Application of Defendant Zejnir Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (ICTY Appeals Chamber), 4 March 1998, at para. 20 (“[There is an] implicit requirement that a piece of evidence be *prima facie* credible - that it have sufficient indicia of reliability.”); *Lubanga, ibid.* at para. 29 (“[I]t is necessary to emphasise that there is no finite list of possible criteria that are to be applied, and a decision on a particular disputed piece of evidence will turn on the issues in the case, the context in which the material is to be introduced ... and a detailed examination of the circumstances of the disputed evidence.”).

²³ See further section IV(b) below.

²⁴ *Prosecutor v. Enver Hadžihasanović*, Case No. IT-01-47-T, Decision on the Admissibility of Documents of the Defence of Enver Hadžihasanović, (ICTY Trial Chamber), 22 June 2005 at para. 15 (following guidelines established in *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Order on the Standards Governing the Admission

“circumstances attached to each document and to the complexity of the case and the investigations that preceded it.”²⁵ At the Special Court for Sierra Leone, the Appeals Chamber has described the best evidence rule as an “anachronism”.²⁶

12. The “probative value” or “weight” of evidence has been described in international jurisprudence and academic commentary as a component of relevance²⁷ or reliability²⁸ or both.²⁹ As such, the requirement for evidence to have a probative value at the admissibility stage can be satisfied by showing indicia of relevance and reliability. On the other hand, the actual probative value or weight to be afforded to the evidence is assessed by the Trial Chamber once all the evidence has been heard.³⁰

ii. Exclusion of evidence on grounds other than relevance and reliability

13. Although *prima facie* relevance and reliability are the primary considerations in the admission of documents, Rule 87(3) also provides for the exclusion of evidence on other grounds. Rule 87(3)(d) specifically prohibits evidence that is “not allowed under the law”.
14. One category of evidence which falls under this broad prohibition is statements made under torture. Rule 21(3), which reflects article 15 of the Convention against Torture (“CAT”) and article 38 of the Cambodian Constitution, specifically prohibits statements made under “inducement, physical coercion or threats thereof” from being admissible before the ECCC. In Case 001, the Trial Chamber confirmed that this prohibition means that statements made under torture cannot be admitted for the truth of their contents but can still be admitted as evidence of the fact that the statement was made and that it was made

of Evidence (ICTY Trial Chamber), 16 April 2002 and *Prosecutor v. Vidoje Blagojevic et al.*, Case No. IT-02-60-T, Guidelines on the Standards Governing the Admission of Evidence (ICTY Trial Chamber), 23 April 2003).

²⁵ See *Prosecutor v. Milomir Stakić*, IT-97-24-T, Provisional Order on the Standards Governing the Admission of Evidence (ICTY Trial Chamber), 25 February 2002, Annex at para. 7; *Blagojevic et al.*, *ibid.* at para. 8; *Prosecutor v. Sefer Halilović*, Case No. IT-01-4S-T, Guidelines on the Standards Governing the Admission of Evidence, 16 February 2005 (ICTY Trial Chamber), Annex A at para. 8; *Prosecutor v. Momčilo Perišić*, IT-04-81-T, Order for Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court (ICTY Trial Chamber), 29 October 2008 at para.36.

²⁶ *Prosecutor v. Sam Hinga Norman et al.*, Case No. SCSL-04-14-AR65 , Fofana–Appeal against decision refusing bail (SCSL Appeals Chamber), 11 March 2005, para. 24.

²⁷ See e.g., *Prosecutor v. Enver Hadžihasanović*, Case No. IT-01-47-T, Decision on the Admissibility of Documents of the Defence of Enver Hadžihasanović, (ICTY Trial Chamber), 22 June 2005 at para. 17 (stating “relevance and probative value have a specific connection”);

²⁸ *Prosecutor v. Duško Tadić*, IT-94-1-T, Decision on Defence Motion on Hearsay (ICTY Trial Chamber), 5 August 1996 at para. 15 (stating “if evidence offered is unreliable, it certainly would not have probative value”) cited in *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Admission of Documents in Connection with Testimony of Defense Witness Dragan Jasović (ICTY Trial Chamber), 26 August 2005 at para. 18.

²⁹ Judge Richard May and Marieke Wierda, *International Criminal Evidence* (Transnational Publishers, 2002), at p. 107 (stating “[p]robative value therefore involves factors such as relevance and reliability”); see also *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence (ICTY Trial Chamber), 19 January 1998, at para. 17-18.

³⁰ See further paragraph 15 below.

under torture.³¹ Consequently, prior to making a determination on the admissibility of statements (or any other associated secondary documents) it is crucial to determine the purpose for which the documents are being introduced.

iii. It is important to distinguish the issues of admissibility and weight

15. The burden on the party seeking to introduce evidence is to demonstrate *minimum* levels of relevance and reliability. This does not require the party to establish that the evidence is of a high probative value. As has been noted by the Trial Chamber and by other international criminal tribunals, the assessment of the actual probative value of, or weight to be assigned to, a piece of evidence is a separate inquiry. This inquiry takes place once the evidence has been admitted with the purpose of determining whether it tends to prove or disprove the allegations in the case.³² This minimum standard for admissibility is appropriate in proceedings before the ECCC, where the evidence is collected or reviewed by an impartial and independent investigative judge and the triers of fact are experienced professional judges and not a jury of lay persons.³³

IV. ARGUMENT

A. The Objections are superfluous, contradictory and unacceptably vague as to the evidence objected to and relief sought

i. The Objections simply reiterate previous Defence arguments

16. The Defence has previously raised challenges to the admissibility of a number of the same broad categories of evidence that are included in the Objections: namely “torture-tainted” documents; DC-Cam documents, “documents obtained by OCP” and witness statements.

³¹ See E176 Duch Decision on 87(2) Requests, *supra* note 20 at para. 8; E1/22.1 Transcript of Proceedings, 20 May 2009 at p.6; E1/27.1 Transcript of Proceedings, 28 May 2009 at pp.8-9.

³² See E188 Duch Judgment, *supra* note 20 at para. 42 (“The probative value of this evidence, and thus the weight to be accorded to it, is ultimately assessed by the Trial Chamber”); E43/4 Duch Decision on Evidence, *supra* note 20 at para. 7 (“Once produced before the Chamber, the probative value of this evidence, and hence the weight to be accorded to it, will then be assessed”); E176 Duch Decision on 87(2), *supra* note 20 at para.3 (“Once produced, the Chamber will assess the probative value of all evidence and determine the weight to be accorded to it.”); *Prosecutor v Pauline Nyiramasuhuko*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence (ICTR Appeals Chamber), 4 October 2004 at para. 6 (“[A] distinction must be drawn between, on the one hand, admissibility of evidence, and, on the other, the exact probative weight to be attached to it [which is] an assessment to be made by the Trial Chamber at the end of the case.”); *Prosecutor v Vujadin Popović et al.*, Case No. IT-05-88, Decision on Admissibility of Intercepted Communications (ICTY Trial Chamber), 7 December 2007 at para. 36.

³³ The distinction between the appropriate standards of evidence in international criminal trials, which are heard by judges, and criminal trials by jury has been remarked upon by other tribunals. See *Tadić*, *supra* note 28 at para. 17; *Delalić*, *supra* note 29 at para. 20; and *Norman* *supra* note 26 at para. 26.

17. In motions dated 4 February 2011 and 24 February 2011 the Defence challenged the use of “torture-tainted” evidence³⁴ and documents obtained from DC-Cam³⁵ respectively and requested the Trial Chamber to declare such evidence inadmissible. The Trial Chamber issued decisions on both motions during the Trial Management Meeting of 5 April 2011 and subsequently confirmed those decisions by way of a memorandum dated 8 April 2011.³⁶
18. With respect to the motion regarding “torture-tainted” evidence, the Trial Chamber declined to grant the requested relief, noting that the Defence requested “no specific relief in relation to any identified material potentially relevant to Case 002”.³⁷ With respect to the motion regarding DC-Cam documents, the Trial Chamber held that it would deal with objections to documents “on a case-by-case basis where they are reasoned.”³⁸ Also on this occasion, the Trial Chamber cautioned the Defence to be mindful of its obligations under Rule 22, noting that it had already recommended the withholding of fees for “voluminous filings that ... lack a legal basis and do little beyond add to the burdens of the Chamber and translation services.”
19. Disregarding the Trial Chamber’s decisions and its admonition regarding the submission of unnecessary filings, the Defence has raised the same broadly-framed objections to the admissibility of “torture-tainted” documents and documents obtained from DC-Cam in its filing of 8 August 2011³⁹ and again in the current Objections without reference to any specific documents.
20. Two other categories of documents covered by the Objections, witness statements and “documents obtained by OCP”, are currently the subject of a request pending before the Trial Chamber. In response to Defence submissions on the admission of witness statements, on 15 June 2011, the Co-Prosecutors filed their *Rule 92 Submission regarding written witness statements before the Trial Chamber*⁴⁰ requesting the Trial Chamber to declare that there is no absolute right to summon all witnesses whose statements are being proffered as evidence. The Defence responded on 22 July 2011, asserting that the right to

³⁴ E33 Ieng Sary’s motion against the use of torture tainted material at trial, 4 February 2011.

³⁵ E59 Ieng Sary’s Motion Against the use of all Material Collected by the Documentation Centre of Cambodia, 24 February (“Defence DC-Cam Motion”).

³⁶ E74 Memo From Nil Nonn, President, Trial Chamber to All Case Parties, Case 002, 8 April 2011 (“Trial Chamber Memorandum”) at p. 3.

³⁷ *Ibid.*, at p.3.

³⁸ *Ibid.*, at p.3.

³⁹ E109/6 Fourth Defence Document List, *supra* note 16 at (a)-(c).

⁴⁰ E96 Co-Prosecutors’ Rule 92 Submission regarding Written Witness Statements before the Trial Chamber, 15 June 2011.

confront witnesses (including witnesses interviewed by OCP) is a fundamental fair trial right.⁴¹ The current Objections do no more than re-iterate the Defence's previous position on this issue upon which the Trial Chamber has yet to rule.

21. Raising the same legal issues in separate successive filings is not only repetitious, it is also disrespectful to the Chamber's decision-making process and places an unnecessary burden on the Trial Chamber's and the parties' time and resources.

ii. The Objections contradict other positions taken by the Defence

22. In recent months, the Defence have filed four document lists, which include all evidentiary documents on the Case File, all documents on the Shared Materials Drive as well as over 1,000 new documents. As noted in the procedural history section above, in filing the lists the Defence emphasised that the Accused should be entitled to rely on any of these documents at trial and to introduce new documents at a later stage.
23. Although it is not possible, due to the generality of the Defence categories, to precisely determine how many documents the Objections claim are inadmissible, the Co-Prosecutors' best estimate is that the Defence objects to the admissibility of more than 75% of all evidentiary documents on the Case File.⁴² The Defence claims a right to rely on every document on the Case File whilst filing Objections in which it asserts the inadmissibility of the vast majority of such documents at trial. As such, the Defence position is wholly contradictory.

iii. Filing is unacceptably vague as to impugned evidence and relief sought

24. The Objections acknowledge that the Trial Chamber has already indicated that it will deal with objections to specific documents "on a case-by-case basis where they are reasoned."⁴³ Nonetheless, the Objections fail to challenge the admissibility of a single, specific piece of evidence. Rather the Objections refer to poorly-defined and extremely broad categories of documents whilst reserving "the right to make objections to specific documents" at a later stage.⁴⁴ This is despite the fact that the Co-Prosecutors have provided detailed lists of the

⁴¹ **E96/3** Ieng Sary's Response to the Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber & Request for a Public Hearing, 22 July 2011 ("Ieng Sary's Response to Co-Prosecutors' Rule 92 Submission").

⁴² The Co-Prosecutors estimate that there are in excess of 14,000 evidentiary (i.e. non-procedural) documents on the Case File. Of these, there are over 4,000 documents which appear to have come DC-Cam; over 5,800 witness statements (including written records, OCIJ interview recordings, statements and complaints); over 600 confessions from S-21 alone; over 770 documents which could be said to comprise "reports, articles and non-contemporaneous documents"; and 79 transcripts from Case 001.

⁴³ **E114** Objections, *supra* note 1 at p.1 (referencing **E74** Trial Chamber Memorandum, *supra* note 36 at p.3).

⁴⁴ *Ibid.*

documents on which they seek to rely in which they identify each document by document number, type, author, date and ERN, describe each document, and provide a reference to the relevant parts of the Indictment which the document seeks to prove.⁴⁵

25. The lack of adequate specificity essentially shifts the burden of identifying which documents are included in the Defence categories to the Trial Chamber and frustrates the Chamber's ability to meaningfully apply the law to the objections raised.
26. Furthermore, it is not clear what the Defence seeks to achieve from the Objections. Whereas the body of the Objections proceeds on the basis that the identified categories of documents are "inadmissible" and should be rejected, in the "relief" section the Defence requests the Trial Chamber to require the parties to "demonstrate the authenticity, reliability and relevance of documents they introduce for admission" and to "reject those documents which do not meet these minimum criteria."⁴⁶ The Defence fails to explain how in its view "authenticity, reliability and relevance" should be demonstrated and at what stage of the proceedings. As stated above, the document lists filed by the Co-Prosecutors already indicate the relevance of the documents they seek to admit. In accordance with the law, the Co-Prosecutors will provide indicia of reliability in response to any specific challenges to those documents or any order of the Trial Chamber.

B. The legal test for admissibility propounded by the Defence is incorrect in law in certain respects

27. Rather than focus centrally on Rule 87(3), the admissibility test propounded by the Defence includes certain aspects which appear to have been derived from an erroneous interpretation of both the Trial Chamber's decision in Case 001 and cases before international criminal courts. The inaccuracies arise in two main areas.
28. Firstly, the Defence concludes from the Trial Chamber's holding in *Duch* that evidence is subject to a three-pronged test of authenticity, reliability, and relevance.⁴⁷ As addressed above, in *Duch* the Trial Chamber clearly stated that relevance and reliability are the primary factors in the admissibility of evidence and did not require authentication to be demonstrated at the admissibility stage. This approach is consistent with the jurisprudence of the *ad hoc* international criminal tribunals, including jurisprudence cited by the Defence in the Objections. In particular in *Delalić et al.*, the ICTY Appeals Chamber held:

⁴⁵ E9/31 Co-Prosecutors first document list, *supra* note 6; E109/4 Co-Prosecutors second document list, *supra* note 15.

⁴⁶ E114 Objections, *supra* note 1 at p.14.

⁴⁷ *Ibid.* at para. 5.

*To require absolute proof of a document's authenticity before it could be admitted would be to require a far more stringent test than the standard envisioned ... There is no legal basis for the Applicant's argument that proof of authenticity is a separate threshold requirement for the admissibility of documentary evidence.*⁴⁸

29. Secondly, referring to “Aristotelian logic” the Defence asserts that the appropriate order for considering admissibility of a document is to examine authenticity, followed by reliability, followed by relevance. The Co-Prosecutors assert that this order does not follow any logic, Aristotelian or otherwise. Unless a document has a minimum level of relevance to the issues in dispute there is no basis for continuing a further inquiry into its reliability or related matters of authenticity which generally require a more complex and time consuming assessment than relevance. Indeed, the order proposed by the Defence is inconsistent with the statement of Judge Shahabuddeen that it quotes in the Objections: “if [evidence] is not relevant, that alone suffices to exclude it.”⁴⁹

C. The Objections are ill-founded and do not demonstrate that the impugned categories of evidence are inadmissible

i. Documents from DC-Cam, CGP and OCP

30. The Defence argues that documents provided by DC-Cam, Cambodia Genocide Program (“CGP”) and the OCP are tainted by bias since the purpose of each entity is to investigate alleged crimes committed by members of the Khmer Rouge regime.⁵⁰ The Defence fails to substantiate its allegation of bias in specific terms, with reference to actual evidence of bias, or specific unfair practices by these entities.
31. In relation to DC-Cam, the Defence criticises the organisation’s position that “there was genocide in Cambodia”.⁵¹ Previous Defence pleadings, incorporated by reference, similarly argue that this renders any document obtained by DC-Cam “unsuitable to prove the facts it purports to prove”.⁵² The Objections now extend this argument to the CGP, as it studies events that occurred in Cambodia between 1975-79 “to help determine who was

⁴⁸ *Delalić et al.*, *supra* note 22, at paras. 20, 25 (cited with approval in *Prosecutor v Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Judgment (ICTY Appeals Chamber), 3 May 2006 at para. 402.

⁴⁹ *Prosecutor v Hassan Ngeze & Ferdinand Nahimana*, ICTR-99-52-I, Decision on the Interlocutory Appeals (ICTR Appeals Chamber), Separate Opinion of Judge Shahabuddeen 5 September 2000, para. 19 (cited in E114 Objections, *supra* note 1 at para. 11).

⁵⁰ E114 Objections, *supra* note 1 at paras. 14-16.

⁵¹ *Ibid.*, para. 14.

⁵² E59 Defence DC-Cam Motion, *supra* note 35 at para. 14.

responsible for the crimes of the Pol Pot regime”⁵³, and to the OCP based on its role to prove the defendant’s guilt.⁵⁴

32. The Defence position essentially claims that any material created or held by an organisation whose mandate is to investigate international crimes committed in Cambodia during the relevant period is inadmissible. It argues that the presupposition that such crimes may have occurred is enough in itself to establish institutional bias and taint all material collected by that organisation.⁵⁵ This argument is illogical, speculative and overstates the significance of factual assumptions in the present context. The basic facts of the atrocities that occurred in Cambodia during this time, such as the great number of Cambodians killed and the significant proportion of victims belonging to certain religious or ethnic minorities, are widely known and accepted. These facts have triggered investigations into, *inter alia*, crimes against humanity, war crimes and genocide at the request of the Royal Government of Cambodia and with the assistance of the United Nations. In relation to DC-Cam and the CGP, there can be no suggestion of bias with respect to the individual criminal liability of the defendants.
33. The argument on general institutional or investigative bias also lacks logic in the context of the criminal justice process. In domestic criminal cases across the principal legal systems of the world, investigations are conducted by law enforcement agencies prompted by information indicating that a specific crime has been committed. The investigating agency has a duty to investigate the allegations and collect evidence. In doing so, it has the discretion to arrest and seek the detention of suspects and ultimately charge them with a specific offence. To suggest that this makes the evidence collected by that agency tainted by bias or otherwise unreliable is contrary to the basic functioning of any criminal enforcement system.
34. In the procedural model applicable before the ECCC, there are specific safeguards to ensure the investigative process is free from bias. A comprehensive judicial investigation is undertaken by an independent judicial organ (the OCIJ) which evaluates and collects evidence, conducts investigations, and drafts the indictment. Once the file is transferred to the OCIJ, the role of the OCP is limited and its ability to collect evidence or request investigations is equal to that of the defence in the pre-trial and trial stages of the proceedings. The Defence argument that material should be excluded if held by an entity

⁵³ E114 Objections, *supra* note 1 at para. 15.

⁵⁴ *Ibid.* at para. 16.

⁵⁵ *Ibid.* at paras. 14-16.

with any discernable position on the facts or liability of the accused ignores the basic protections in the process and underestimates the Chamber's ability to properly adjudicate the case.

35. The Defence also fails to establish bias in relation to specific documents. While there has yet to be a substantive ruling on objections to DC-Cam documents in the present case, the Co-Prosecutors note that in Case 001 the Trial Chamber analysed DC-Cam documents according to their individual merit, implicitly rejecting a blanket prohibition.⁵⁶ Also, as noted earlier, the Trial Chamber has already confirmed that it "will deal with objections on a case-by-case basis, where they are reasoned."⁵⁷
36. The Objections fail to identify specific documents, let alone provide evidence of actual prejudice, interference, or bias in the creation of any material held by the named entities. In fact, as the Co-Prosecutor's Document List indicates, much of the material challenged by the Defence was not actually created by the respective entities but is simply held by them. There has been no attempt to articulate any link between the alleged institutional bias and the reliability of this type of material.
37. The Defence also contests the admissibility of documents collated from authors who are affiliated with the OCP.⁵⁸ The Co-Prosecutors note that the Pre-Trial Chamber has already addressed this issue, when the Defence sought to annul a portion of the judicial investigation based on the supposed bias of OCIJ investigators, one of whom had previously worked for the OCP.⁵⁹ The Pre-Trial Chamber described the allegation as speculative since, as in the present instance, no supporting evidence was provided for it.⁶⁰
38. The Co-Prosecutors observe that the OCP employee named by way of example in the Objections, Dr Craig Etcheson, was deemed objective and impartial by the Trial Chamber in Case 001 when he was admitted as an expert witness.⁶¹ This position is supported by the ICTY Trial Chamber, which held that "the mere fact that an expert witness is or was

⁵⁶ **E43/4** Duch Decision on Evidence, *supra* note 20 at paras. 13-17.

⁵⁷ See *supra* note 36 and accompanying text.

⁵⁸ **E114** Objections, *supra* note 1 at para. 16.

⁵⁹ **D402/1/4** Decision on Ieng Sary's Appeal Against the OCIJ's Order Rejecting Ieng Sary's Application to Seize the Pre-Trial Chamber with a Request for Annulment of all Investigative Acts Performed By or with the Assistance of Stephen Heder & David Boyle and Ieng Sary's Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Evidence Collected from the Documentation Center of Cambodia & Expedited Appeal Against OCIJ Rejection of a Stay of the Proceedings, 30 November 2010 at paras. 32-33.

⁶⁰ *Ibid.*, para. 33.

⁶¹ **E40/1** Decision on Protective Measures for Witnesses and Experts and on Parties' Requests to Hear Witnesses and Experts Reasons, 10 April 2009 at paras. 25-27. See also **E1/20.1** Transcript of Proceedings, 18 May 2009 at p.60.

employed by a party, or testified for a party in other cases, does not disqualify him or her from testifying as an expert witness.”⁶²

ii. *“Torture-tainted” material*

39. The Defence argues that all “torture-tainted” material is “under all its forms and in every circumstance” inadmissible before the ECCC “except against a person accused of torture as evidence that a statement was made”.⁶³ The term ‘torture-tainted’ is vague and goes beyond the Trial Chamber’s previous ruling. The Co-Prosecutors submit that either the terms of Rule 21 (3) or the CAT definition of statements “made as a result of torture” should instead be used.
40. The prohibition against the use of statements made under torture is addressed in section III above. It is noted that the Trial Chamber in Case 001 accepted into evidence annotations made by the accused on confessions obtained by torture at S-21 prison.⁶⁴ The Trial Chamber also admitted entire documents, so long as their use was not to establish the truth of statements made by detainees as a result of the use of torture.⁶⁵
41. In the present case, the Co-Prosecutors intend to follow these recognised standards and note that the Defence has made no attempt to identify what specific items are alleged to be objectionable. This is despite the availability of the Co-Prosecutors’ comprehensive document list indicating the nature of documents and their relevance to the case. Granting the generalised relief sought by the Defence would unduly limit the admission of relevant and probative material and may risk the perverse outcome that evidence of torture itself is excluded to the benefit of the alleged perpetrators.

iii. *Reports, articles and non-contemporaneous documents*

42. The Defence objection to the admission of all “reports, articles and non-contemporaneous documents” is once again unacceptably broad. As with all other evidence, admissibility of such documents must be assessed on a case-by-case basis, the Trial Chamber being best placed to determine the nature and extent to which each item may be relied upon to prove pertinent facts at trial.

⁶² *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Defence Rule 94 bis Notice Regarding Prosecution Expert Witness Richard Butler (ICTY Trial Chamber), 19 September 2007, para. 27. *See also: Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Prosecution’s Motions for Admission of Transcripts Pursuant to Rule 92 bis (D) and of Expert Reports Pursuant to Rule 94 bis (ICTY Trial Chamber), 13 January 2006, paras. 39-42.

⁶³ E114 Objections, *supra* note 1 at para. 17.

⁶⁴ E176 Duch Decision on 87(2) Requests *supra* note 20 at para. 8.

⁶⁵ *Ibid.*

43. The Defence position on this category of documents appears contradictory. The Defence asserts both that the probative value of “certain reports and newspaper articles may be outweighed by their prejudicial effect” and that such documents are more likely to be admitted if they deal with “contextual matters”.⁶⁶ Yet the Defence then concludes that “such documents are unreliable and unsuitable to prove facts they purport to prove, and they are inadmissible pursuant to Rule 87(3)(c),”⁶⁷ suggesting an absolute prohibition is sought.
44. The Defence argument against admission of this category of documents is purportedly based on a number of decisions of the *ad hoc* tribunals. While the decisions cited by the Defence concern certain evidentiary material that was deemed inadmissible, no decisions involved dismissal of non-contemporaneous documents as a class of evidence. Rather, these decisions reflect a preference for individualised assessment of the probative value of specific documents against actual prejudice in the particular circumstances.⁶⁸
45. This approach is consistent throughout the jurisprudence of the *ad hoc* tribunals and the Special Court for Sierra Leone. Accordingly, newspaper reports were admitted by the ICTY Trial Chamber in *Stakić* as evidence of an incipient spiral of ethnic hatred.⁶⁹ Similar material was relied on to prove reported facts such as ‘temporary departures’, ‘mainly [by] Muslims’ as evidence of deportation. These were considered in conjunction with supporting oral testimony.⁷⁰ The ICTY Appeals Chamber has also upheld this approach, finding in *Prlić*, that certain newspaper articles were admissible as evidence, whilst rejecting others that lacked the same indicia of reliability.⁷¹
46. Similarly, the ICTR Trial Chamber relied on newspaper articles and cartoon clippings in its first judgment⁷² and thereafter. In a recent decision, the ICTR admitted a Rwandan government commentary on a draft UN Report as evidence.⁷³ The SCSL has admitted

⁶⁶ E114 Objections, *supra* note 1 at para. 18.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.* at para. 18, fn 51 and the cases cited therein.

⁶⁹ *Prosecutor v Milomir Stakić*, IT-97-24-T, Judgment (ICTY Trial Chamber), 31 July 2003 at paras. 476, 493.

⁷⁰ *Ibid.* at paras. 689-693.

⁷¹ *Prosecutor v Jadranko Prlić et al.*, IT-04-74-AR73.16, Decision on Jadranko Prlić’s Interlocutory Appeal Against the Decision on Prlić Defense Motion for Reconsideration on Admission of Documentary Evidence (ICTY Appeals Chamber), 3 November 2009 at paras. 29-30.

⁷² *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, Judgment (ICTR Trial Chamber), 2 September 1998 at para. 123.

⁷³ *Prosecutor v Callixte Nzabonimana*, ICTR-98-44D-T, Decision on Defence Motion for the Admission of Documentary Evidence: “Official Government of Rwanda Comments on the Draft UN Mapping Report on the DRC” (ICTR Trial Chamber), 31 March 2011.

newspaper articles in the *Charles Taylor* trial on an application brought by the defence, and it relied upon an NGO report published several years after the conflict in the *RUF* case.⁷⁴

47. The practice of the ECCC has so far been consistent with that of other international courts. In Case 001, the Trial Chamber admitted 85 “DK Media Reports” and 135 “International Media Reports”, which represented almost 25% of the total number of trial exhibits admitted into evidence. It is noted that the Pre-Trial Chamber has found an error of law where the OCIJ failed to provide reasoning for rejecting documents which could be categorised as ‘reports’, ‘articles’ or ‘non-contemporaneous documents’.⁷⁵
48. The Defence’s blanket objection against the use of media reports fails to recognise that the admissibility or relevance of media reports will depend on the specific use of that evidence. The jurisprudence of the *ad hoc* international criminal tribunals cited by the Defence would only be relevant if the primary use the Co-Prosecutors intended to make of this kind of evidence were similar to the proposed uses in those cases.
49. Once admitted, the Trial Chamber is best placed to assess the weight to be attached to each such document, and the nature of its use in evidence. The absolute prohibition, suggested by the Defence, undermines this discretion.

iv. Witness Statements and Transcripts of Proceedings

50. The Defence objection to written statements and transcripts of Case 001 proceedings is an abbreviation of its Response to the Co-Prosecutors’ Rule 92 Submission of 22 July 2011.⁷⁶ Despite the availability of the Co-Prosecutors’ Witness List and the tentative Witness List circulated by the Trial Chamber the Defence has failed to narrow its objection to the admission of witness statements from persons who do not appear on these lists. As they stand, the Objections seek the inadmissibility of all witness statements, even statements by persons who will give oral testimony during the trial.
51. In view of the repetitive and general nature of this category of objection, the Co-Prosecutors refer the Chamber to their Rule 92 Submission and Reply to defence responses

⁷⁴ *Prosecutor v Charles Ghankay Taylor*, SCSL-03-1-T, Decision on Public with Annexes A to D Defence Motion for Admission of Document Pursuant to Rule 92bis – Contemporaneous Documentation (SCSL Trial Chamber), 22 September 2010; *Prosecutor v Issa Hassan Seasy et al.*, SCSL-04-15-T, Judgment (SCSL Trial Chamber), 2 March 2009 at paras. 518-519.

⁷⁵ **D365/2/17** Decision on Co-Prosecutors’ Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons’ Knowledge of the Crimes, 27 September 2010 at paras. 66, 81.

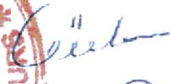
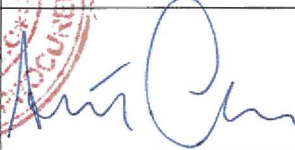
⁷⁶ **E96/3** Ieng Sary’s Response to Co-Prosecutors’ Rule 92 Submission, *supra* note 41.

which set out the applicable international and ECCC principles guiding the exercise of the Trial Chamber's discretion on this issue.

V. REQUEST

52. For the reasons given above, the Co-Prosecutors request that the Trial Chamber:
- (a) dismiss the Objections; and
 - (b) direct the parties that any future objections to evidence must be filed within a prescribed time and in a sufficiently specific manner identifying the particular document and reasons for objection.

Respectfully submitted,

| Date | Name | Place | Signature |
|-------------------|-------------------------------------|------------|--|
| 16 September 2011 | YET Chakrya Deputy Co-Prosecutor | Phnom Penh |  |
| | Andrew CAYLEY Co-Prosecutor | |  |