

BEFORE THE TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** The Defence for IENG Sary**Filed to:** The Trial Chamber**Original language:** ENGLISH**Date of document:** 21 September 2011**CLASSIFICATION****Classification of the document
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**IENG SARY'S REQUEST FOR LEAVE TO REPLY
 &
 REPLY TO THE CO-PROSECUTORS' RESPONSE TO IENG SARY'S
 OBJECTIONS TO THE ADMISSIBILITY OF CERTAIN CATEGORIES
 OF DOCUMENTS**

Filed by:
The Co-Lawyers:
 ANG Udom
 Michael G. KARNAVAS

Distribution to:
The Trial Chamber Judges:
 Judge NIL Nonn
 Judge YA Sokhan
 Judge YOU Ottara
 Judge Silvia CARTWRIGHT
 Judge Jean-Marc LAVERGNE
 Reserve Judge THOU Mony
 Reserve Judge Claudia FENZ

Co-Prosecutors:
 CHEA Leang
 Andrew CAYLEY

All Defence Teams**All Civil Parties**

REQUEST FOR LEAVE TO REPLY

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby requests leave to reply to the Co-Prosecutors’ Response to IENG Sary’s Objections to the Admissibility of Certain Categories of Documents (“Response”).¹ A Reply is made necessary because the OCP: **a.** misconstrues the nature and purpose of IENG Sary’s Objections to the Admissibility of Certain Categories of Documents (“Objections”);² **b.** contrives differences between it and the Defence in relation to the applicable law; and **c.** errs in asserting that the Defence’s objections to certain categories of documents are ill-founded. Further, the OCP’s request for a direction for filing objections within a prescribed time and in a specific manner should be dismissed as gratuitous. In the interest of judicial economy and expeditiousness, the Defence has affixed its Reply hereto.

REPLY**A. The OCP misconstrues the nature and purpose of the Objections**

1. The OCP argues that the Objections are “superfluous, contradictory and unacceptably vague.”³ Regrettably, these assertions misconstrue the nature and purpose of the Objections and the parties’ document lists. The Objections are not repetitious; they constitute the Defence’s first comprehensive filing before the Trial Chamber regarding the interpretation of Rule 87(3) (and of course, the self-serving piety of this allegation has not been lost on the Defence in light of the OCP’s third Request for a direction regarding the Accused’s intention to testify.)⁴ The Objections are not contradictory; they do not purport to move the Trial Chamber to exclude the “vast majority” of documents on the Case File, nor are document lists motions for the admission of evidence⁵ (the Defence adopted an inclusive approach to its three initial document lists so that it would not be

¹ Co-Prosecutors’ Response to “IENG Sary’s Objections to the Admissibility of Certain Categories of Documents”, 16 September 2011, E114/1.

² IENG Sary’s Objections to the Admissibility of Certain Categories of Documents, 6 September 2011, E114.

³ Response, para. 2. The OCP argues that “the Defence has previously raised challenges to the admissibility of a number of the same categories of evidence that are included in the Objections, and “[r]aising the same legal issues in separate legal filings ... is disrespectful to the Chamber’s decision-making process and places an unnecessary burden on the Chamber’s and parties’ time and resources.” *Id.*, paras. 16-21. The OCP further asserts that Objections are “wholly contradictory”; the Defence argues that it should be entitled to rely on any document on the Case File while “filing Objections in which it asserts the inadmissibility of the vast majority of such documents.” *Id.*, para. 23. Finally, the OCP asserts that the Objections are “unacceptably vague” because they fail to challenge the admissibility of specific documents. *Id.*, paras. 24-26.

⁴ Co-Prosecutors’ Additional Request for a Direction Regarding the Intentions of the Accused with Respect to Testifying, 20 September 2011, E101/1. The Defence’s full Response to this Additional Request will follow in due course.

⁵ Indeed, the Defence’s Third Initial List of Documents expressly stated that “since not all documents on the Third Initial List of Documents meet the threshold tests for admissibility at the ECCC, the Defence reserves the right to object to any document listed being put before the Trial Chamber.” IENG Sary’s Third Initial List of Documents, 19 April 2011, E9/25.



precluded from relying on these documents at trial pursuant to Rule 87(4)).⁶ The Objections are not vague; they comprehensively analyze the applicable rules of admissibility and apply them to categories of documents on the Case File. Simply, the Objections provide the Trial Chamber with a set of modalities as to how documents should be screened prior to being admitted as evidence,⁷ with the intention of assisting the Trial Chamber in establishing a smooth and consistent approach to documents' admissibility and to provide certainty.

B. The OCP contrives differences between its position and the Defence's

2. By overlooking substantial areas of common ground between the parties,⁸ the OCP contrives differences between its position and the Defence's regarding the applicable law.⁹ Making *much ado* about whether a *prima facie* showing of a document's "authenticity" is an independent criterion of admissibility or is a component of reliability,¹⁰ the OCP regrettably fails to appreciate that the parties agree that there must be at least a *prima facie* showing of authenticity in order for a document to be admissible pursuant to Rule 87(3)(c).¹¹
3. The Defence never suggested an "absolute prohibition" of reports, articles, non-contemporaneous documents and witness statements,¹² as the OCP suggests.¹³ The Defence merely objects to witness statements coming into evidence "[w]ithout affording

⁶ Rule 87(4) states: "During the trial, either on its own initiative or at the request of a party, the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth. Any party making such request shall do so by a reasoned submission. The Chamber will determine the merit of any such request in accordance with the criteria set out in Rule 87(3) above. The requesting party must also satisfy the Chamber that the requested testimony or evidence was not available before the opening of the trial."

⁷ The Objections are consistent with the pleading practice adopted at the international criminal tribunals, where the parties routinely make submissions on guidelines to be adopted regarding the admissibility of evidence, and reflect the Defence's endeavors to represent Mr. IENG Sary with due diligence. *See* Objections, n. 25.

⁸ For example, in relation to the law, the parties share common ground in that: **a.** the ECCC rules of admissibility are consistent with international standards. Response, para. 7; **b.** Rule 87(3) requires that evidence must meet minimum standards of relevance and reliability. *Id.*, para. 8; **c.** relevant evidence must be *prima facie* material to the issues and tend to establish the parties' position. *Id.*, para. 9; **d.** Rule 87(3)(c) encompasses the 'best evidence' rule. *Id.*, para. 11; **e.** Rule 87(3) also provides for the exclusion of evidence on the basis that it is "not allowed under the law." *Id.*, para. 13; **f.** statements made under torture fall under the broad category of "not allowed under the law," and Rule 21(3) and Article 38 of the Cambodian Constitution prohibit the admission of these statements. *Id.*, para. 14; and **g.** the assessment of weight to be assigned to a piece of evidence is a separate inquiry from admissibility. *Id.*, para. 15.

⁹ *See* Response, para. 2, where the OCP asserts that the Objections are "incorrect in law in certain respects."

¹⁰ *Id.*, paras. 10, 27-28.

¹¹ *Id.*, paras. 10-11. The Objections noted that "[a]lthough [authenticity] is not a rule of admissibility *per se*, the tendering party (as part of a showing of reliability) is expected to provide some indication as to what the document is, and that it is genuine, before it is admitted as evidence." Objections, para. 6.

¹² *See* Response, para. 43.

¹³ The OCP asserts that the "Objections seek the inadmissibility of all witness statements, even statements by persons who will give evidence at trial." *Id.*, para. 50 (emphasis added). Similarly, the OCP asserts that the Defence objects to the admission of all "reports, articles and non-contemporaneous documents." *Id.*, paras. 42, 49.

Mr. IENG Sary his absolute right to confront the witness.”¹⁴ Further, the “probative value of certain reports and newspaper articles may be outweighed by their prejudicial effect on the fairness of the proceedings,”¹⁵ and such documents are inadmissible pursuant to Rule 87(3)(c).¹⁶ The Defence does not dispute that the *ad hoc* tribunals’ jurisprudence reflects “a preference for an individualized assessment of the probative value of specific documents against actual prejudice,”¹⁷ and partly for this reason expressly reserved its continuing right “to make objections to specific documents on a case by case basis.”¹⁸

C. The OCP errs by asserting that the the Defence’s objections to certain categories of documents are ill-founded

4. The OCP asserts that the Defence’s concern that documents obtained by the OCP may be unreliable as a result of institutional bias “lacks logic.”¹⁹ The OCP’s confidence in the institutional objectivity of the ECCC’s investigative organs appears ironic, not least when juxtaposed with the International Co-Prosecutor’s position that the Co-Investigating Judges have contravened their “legal obligation to conduct a complete and impartial investigation” in Case 003.²⁰
5. As to documents authored or collated by individuals affiliated with the OCP, contrary to the OCP’s assertion that “the Pre-Trial Chamber has already addressed this issue,”²¹ consideration of whether a portion of the investigation should be annulled due to procedural defect (pursuant to Rule 76(2)) is distinct from the question of whether documents are inadmissible before the Trial Chamber (pursuant to Rule 87(3)). Even considering, for example, that Dr. Craig Etcheson was deemed objective and impartial when he testified in Case 001, and that the “ICTY Trial Chamber” does not disqualify experts based on their affiliation with a party,²² it does not follow that the prejudicial effect of documents obtained by the OCP does not outweigh their probative value. In relation to that issue, the Defence incorporates by reference the arguments made in

¹⁴ Objections, para. 20.

¹⁵ *Id.*, para. 18 (emphasis added).

¹⁶ *Id.* (emphasis added).

¹⁷ Response, para. 44.

¹⁸ Objections, Introductory Paragraph.

¹⁹ Reponse, para. 33.

²⁰ Case 003/07-09-2009-ECCC/OCIJ, International Co-Prosecutor’s Appeal Against the “Decision on Time Extension Request and Investigative requests by the International Co-Prosecutor Regarding Case 003,” 7 July 2011, D20/4/2.1, Section V(C)(ii).

²¹ Response, para. 37. The OCP asserts that “the Defence sought to annul a portion of the judicial investigation based on the supposed bias of OCIJ investigators, one of whom previously worked for the OCP.”

²² *Id.*, para. 38.

relation to experts affiliated with a party contained in IENG Sary's Appeal Against the Co-Investigating Judges' Order on Request for Additional Expert.²³

6. The Defence derives scarce comfort from the OCP's attempt to assuage its concerns regarding the objectivity of documents gathered by DC-Cam and Cambodian Genocide Program ("CGP"). Whereas the OCP asserts that 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,"²⁴ in fact quite the opposite is true. In relation to DC-Cam, the organization's Director, Mr. Youk Chhang, has written that "circumstantial and testimonial evidence may compensate for the limits of documentary sources of proof, and [Mr. IENG Sary and Mr. KHIEU Samphan] are apt to bear superior responsibility for many of the most heinous crimes of the Pol Pot regime."²⁵ In relation to the CGP, its founding Director, Dr. Ben Kiernan, has written that before 1996 "Nuon Chea, Deuch, Ieng Sary, and Khieu Thirith certainly had little expectation of ever facing legal charges for their violations of international criminal law two decades earlier."²⁶ These statements go beyond the historian's task of marshaling facts in the pursuit of academic inquiry, and reflect their author's prejudice in relation to the legal issues before the Trial Chamber in this case.
7. As to "torture-tainted" material, the OCP "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."²⁷ It is beyond cavil that United Nations funded institutions must adhere to the letter and spirit of the Convention Against Torture when they are bound to do so. All "torture-tainted" material is inadmissible before the Trial Chamber (except against a person accused of torture as evidence that a statement was made). This includes annotations to S-21 confessions, in relation to which the Defence incorporates by reference the arguments made in relation to derivative material contained in IENG Sary's Motion Against the Use of Torture Tainted Evidence at Trial.²⁸

²³ IENG Sary's Appeal Against the Co-Investigating Judges' Order on Request for Additional Expert, 16 September 2009, D140/4/1, paras. 22-29.

²⁴ Response, para. 32.

²⁵ John D. Ciorciari and Youk Chhang, *Documenting the Crimes of Democratic Kampuchea* in JAYA RAMJI & BETH VAN SCHAAK, EDS., *BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS* 221, 285 (Edwin Mellen 2005).

²⁶ BEN KIERNAN, *THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-79* xv (3rd ed. Yale 2008).

²⁷ Response, para. 40.

²⁸ IENG Sary's Motion Against the Use of Torture Tainted Evidence at Trial, 4 February 2011, E33, paras. 20-21.

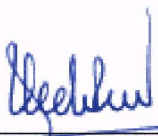

D. The OCP's request for a direction for filing objections within a prescribed time and in a specific manner should be dismissed as gratuitous

8. The OCP's request for the Trial Chamber to "direct the parties that any future objections to evidence must be filed within a prescribed time and in a sufficiently specific manner"²⁹ is gratuitous. The Trial Chamber has already directed that it will decide on the admissibility of specific documents on a case by case basis.³⁰ Further directions are not appropriate at this time when the parties do not yet know which documents the parties definitively intend to introduce during the first stage of trial,³¹ and through which witness and/or the bar table.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to:

- a. GRANT the Defence leave to file this Reply;
- b. REJECT the Response;
- c. REQUIRE the parties to demonstrate the authenticity, reliability and relevance of documents they introduce for admission as evidence in Case 002; and
- d. REJECT those documents which do not meet these minimum criteria.

Respectfully submitted,


 ANG Udom
 

 Michael G. KARNAVAS
 Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **21st** day of **September, 2011**

²⁹ Response, para. 52(b).

³⁰ Trial Chamber Response to Motions E67, E57, E56, E58, E23, E59, E20, E33, E71 and E73 following Trial Management Meeting of 5 April 2011, 8 April 2011, E74, p. 3.

³¹ The parties' document lists for the initial trial stage filed on 22 July 2011 were only intended to provide the Trial Chamber with "early indications" of which documents the parties intended to rely on "to allow the Interpretation and Translation Pool to ascertain the translation status of documents considered key by the parties, and for the Chamber to identify pending difficulties as soon as possible" See email from Trial Chamber Senior Legal Officer to all Parties, 22 July 2011.

