

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:** 6 September 2011**CLASSIFICATION****Classification of the document
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**IENG SARY'S OBJECTIONS TO THE ADMISSIBILITY OF CERTAIN
CATEGORIES OF DOCUMENTS**

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Rules 84(1) and 87(3) of the ECCC Internal Rules (“Rules”), hereby objects to the admissibility of certain categories of documents. The Defence submits that some documents within the following categories do not meet minimum thresholds of authenticity, reliability and relevance: **a.** documents from the Documentation Center of Cambodia (“DC-Cam”); **b.** documents from the Cambodian Genocide Program (“CGP”); **c.** documents obtained by the OCP; **d.** torture-tainted material; **e.** reports, articles, and non-contemporaneous documents; **f.** witness statements; and **g.** transcripts from Case 001. This motion is made necessary as certain categories of documents submitted by the parties are inadmissible pursuant to Rules 84(1) and 87(3). Notwithstanding that the Trial Chamber will deal with objections to specific documents on a case by case basis,¹ these objections are intended to assist the Trial Chamber in its general approach to the admissibility of evidence in Case 002. As these objections are general in nature, the Defence reserves its right to make objections to specific documents on a case by case basis, per the Trial Chamber’s direction.²

I. APPLICABLE LAW

A. Standards for the admission of documentary evidence set by the Establishment Law

1. Article 33 new of the Establishment Law requires that the Trial Chamber shall ensure that trial proceedings are “fair and expeditious [and] ... in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights [(“ICCPR”)].”³ Among the rights guaranteed by Articles 14 and 15 of the ICCPR, Mr. IENG Sary enjoys the right to be presumed innocent, the right to be protected against self-incrimination and the right of confrontation. Article 33 new provides for the twin requirements of “fairness” and “expeditiousness.”

B. Standards for the admission of documentary evidence set by the Rules

¹ See 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.

² *Id.*

³ See also Rule 21(1)(a): “ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties...”

2. Rules 84(1) and 87 together govern the admissibility of testimonial (i.e. non-contemporaneously-recorded) evidence.⁴ Other documentary evidence is admissible subject to the requirements contained in Rule 87(3). The principles of law discussed in this section are limited to consideration of admissibility requirements relating to other documentary evidence. In relation to testimonial evidence, the Defence incorporates by reference its previous legal submissions on the interpretation of Rule 84(1) contained in IENG Sary's Response to the Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber & Request for Public Hearing.⁵
3. Rule 87(1) states that "[u]nless provided otherwise in these IRs, all evidence is admissible." This incorporates the Civil Law principle of the "free evaluation of the evidence" into the ECCC's Internal Rules, under which a court evaluates the evidence according to its free conviction obtained from the entire trial,⁶ subject to the

⁴ The international criminal tribunals also distinguish between the admissibility criteria for testimonial and other documentary evidence. See Christopher Gosnell, *Admissibility of Evidence* ("Gosnell"), in KARIM A. A. KHAN, CAROLINE BUISMAN & CHRISTOPHER GOSNELL EDS., *PRINCIPLES OF EVIDENCE IN INTERNATIONAL CRIMINAL JUSTICE* 403, 404, 406 (Oxford 2010) ("KHAN, BUISMAN & GOSNELL"): "At the ICTR, the two categories are: (i) non-contemporaneously recorded writing, (deemed to be testimonial statements subject to Rule 92*bis* [of the ICTR's Rules of Procedure and Evidence]); and (ii) contemporaneously-recorded writing, (deemed to be documentary evidence subject to the general probative value standard of Rule 89(C)). The two categories at the ICTY are: (i) party-prepared statements (subject to Rule 92*bis*); and (ii) everything else (subject to the general probative value standard of Rule 89(C) [of the ICTY's Rules of Procedure and Evidence]).... The picture that emerges from [the ICTY and ICTR] ... is of non-contemporaneous testimonial statements, subject to a standard that approximates Rule 92*bis*; and contemporaneously-created documentary evidence, subject to the broad flexibility of Rule 89(C).... Both tribunals, at the end of the day, distinguish between testimonial and documentary evidence based upon timing of creation and immediacy of observation in relation to the events described." See also Marc Nerenberg & Wibke Timmermann, *Documentary Evidence* ("Nerenberg & Timmermann") in KHAN, BUISMAN & GOSNELL, at 445-46: "[S]ince different regimes govern their respective admissibility, a useful distinction to be made would be that between 'testimonial' documentary evidence – ie recorded testimonial evidence-(evidence which *replaces* testimony, such as statements, transcripts etc) and everything else, that is, 'non-testimonial' documentary evidence in all its great variety.... It is often important, as well, to distinguish between contemporaneous documents, created as part of, or in direct reaction to the events being scrutinized (such as army records or contemporaneous newspaper reports), and documents confected later, often specifically in preparation for the trial (such as witness statements or expert reports)." See also JUDGE RICHARD MAY & MARIEKE WIERDA, *INTERNATIONAL CRIMINAL EVIDENCE* 209 (Transnational Publishers, 2002) ("MAY & WIERDA") on documentary evidence: "For the purposes of this discussion there are two basic types of documentary evidence in international criminal trials. (1) written statements offered in lieu of oral evidence; and (2) anything on which information is recorded."

⁵ IENG Sary's Response to the Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber & Request for Public Hearing, 22 July 2011, E96/3, paras. 12-20.

⁶ See Cambodian Code of Criminal Procedure ("CPC"), Art. 321: "Unless it is provided otherwise by law, in criminal cases all evidence is admissible. The court has to consider the value of the evidence submitted for its examination, following the judge's innermost conviction." See also French Code of Criminal Procedure, Art. 427: "Except where the law otherwise provides, offences may be proved by any mode of evidence and the judge decides according to his innermost conviction."

understanding that in cases of doubt the evidence should be evaluated in a light most favorable to the accused.⁷

4. At the ECCC the principle of “free evaluation of the evidence” is subject to the qualifications enumerated in Rule 87(3), which confer discretion on the Trial Chamber to reject a request for evidence where it finds that it is: **a. irrelevant or repetitious; b. impossible to obtain within a reasonable time; c. unsuitable to prove the facts it purports to prove; d. not allowed under the law; or e. intended to prolong proceedings or is frivolous.** In its Judgement in Case 001, the Trial Chamber considered these qualifications and held:

[T]o be used as evidence, material on the Case File must satisfy certain conditions of relevance and probative value. The Chamber may reject any material put before it based on the criteria listed in Internal Rule 87(3) (namely irrelevance, inability to prove the facts alleged, impossibility of obtaining evidence within a reasonable time, or due to the existence of breaches of fundamental legal standards concerning the rules of evidence).⁸

5. On another occasion, the Trial Chamber held that the effect of Rule 87(3) was that “[i]n order to be used as evidence, material on the case file must ... satisfy minimum standards of relevance and reliability necessary for it to be produced before the Chamber. Once produced before the Chamber, the probative value of this evidence, and hence the weight to be accorded to it, will then be assessed.”⁹ When determining whether to admit certain film material in Case 001, the Trial Chamber held that the material was admissible, “subject to a review of [its] relevance and authenticity during the substantive hearing.”¹⁰ In sum, the Trial Chamber determined in Case 001 that to be admissible as evidence, a document must meet minimum thresholds of: **a. authenticity; b. reliability; and c. relevance.**

⁷ See Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 31: “The Supreme Court Chamber must stress that the *in dubio pro reo* rule, which results from the presumption of innocence, is guaranteed by the Constitution of Cambodia and has as its primary function to denote a default finding in the event where factual doubts are not removed by the evidence.” At the ICTY, *in dubio pro reo* is widely accepted as a corollary to the presumption of innocence and the burden of proof beyond reasonable doubt. *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, 16 November 1998, para. 601. There, it has been recognized in relation to the findings required for conviction, such as those that make up the elements of the charged crime. *Prosecutor v. Limaj et al.*, IT-33-66-A, Judgement, 27 September 2007, para. 21.

⁸ *Case of KAING Guek Eav alias Duch*, 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010, E188 (“*Duch* Trial Judgement”), para. 41 (emphasis added).

⁹ *Case of KAING Guek Eav alias Duch*, 001/18-07-2007/ECCC/TC, Decision on Admissibility of Material on the Case File as Evidence, 26 May 2009, E43/4 (“*Duch* Decision on Admissibility of Material on the Case File”), para. 7 (emphasis added).

¹⁰ *Case of KAING Guek Eav alias Duch*, 001/18-07-2007/ECCC/TC, Decision on Admissibility of New Materials and Direction to the Parties, 10 March 2009, E/5/10/2 (“*Duch* Decision on Admissibility of New Materials”), para. 16.4.

1. Authenticity

6. A document's authenticity must be determined prior to its admission as evidence. An inauthentic document will be "unsuitable to prove the facts it purports to prove"¹¹ and may be ruled inadmissible pursuant to Rule 87(3)(c). In Case 001, the Trial Chamber excluded two statements tendered by the OCP and based its decision on the statements' origins, content, their contested character, and Duch's inability to challenge their veracity.¹² At the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), a "Chamber may request verification of the authenticity of evidence obtained out of court."¹³ Although this is not a rule of admissibility *per se*,¹⁴ 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.¹⁵ Material which lacks authenticity must, *ipso facto*, lack probative value. The ICTR *Musema* Trial Chamber stated, when assessing the authenticity of documentary evidence, that it considered the form, content, and the purported use of the document as well as: **a.** whether the document is an original or a copy; **b.** if it is a copy, whether it is registered or filed with an institutional authority; **c.** whether it is signed, sealed, stamped, or certified in any other way; and **d.** whether it was duly executed, i.e., written, produced or authorized by the person or party purporting to be its author.¹⁶

2. Reliability

7. A document's reliability must be determined prior to its admission as evidence. An unreliable document will be unsuitable to prove the facts it purports to prove and may be ruled inadmissible pursuant to Rule 87(3)(c).¹⁷ Almost any aspect of the form, content, or

¹¹ *Id.*

¹² *Duch* Decision on Admissibility of Material on the Case File, para. 16.

¹³ ICTY and ICTR Rules of Procedure and Evidence, Rule 89(E).

¹⁴ *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998, para. 20: "The implicit requirement that a piece of evidence be *prima facie* credible – that it have sufficient indicia of reliability – is a factor in the assessment of its relevance and probative value. 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 by Sub-rule 89(C)."

¹⁵ *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole, 13 September 2004, para. 8; *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Admissibility of Intercepted Communications, 7 December 2007, para. 35: "In determining if a document is *prima facie* credible, the Trial Chamber will consider whether a reasonable trier of fact could find the document to be what the tendering party purports it to be," if not, "then the document is patently unreliable and does not possess the probative value required under Rule 89(C)."

¹⁶ *Prosecutor v. Musema*, ICTR-96-13-T, Judgement and Sentence, 27 January 2000, paras. 66-67.

¹⁷ See *Duch* Decision on Admissibility of Material on the Case File, paras. 7, 16.

origin of the information can be an *indicium* of reliability.¹⁸ There is no “finite list of possible criteria” or “automatic reasons for either admitting or excluding a piece of evidence.”¹⁹ Factors that have been taken into account at the *ad hoc* tribunals include the appearance of documents, including any signatures, stamps, fax stamps, sequential numerical designations or any other markings.²⁰ Before a document is deemed admissible, there must be sufficient indicia of reliability to make a *prima facie* case for its admission.²¹ Connected to a document’s reliability is its probative value. According to the jurisprudence of the International Criminal Court (“ICC”), ICTY and ICTR, a document must meet some threshold of reliability to be considered probative.²² Probative value itself is a “quality of necessarily very variable content” but can be said to pertain to the facts at issue, i.e. facts upon which guilt or innocence depends.²³

a. “Best evidence” rule

¹⁸ Gosnell, at 386.

¹⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Corrigendum to Decision on the Admissibility of Four Documents, 20 January 2011, para. 29. See also *Id.*, paras. 28, 32.

²⁰ *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole, 13 September 2004, para. 8: “Indicia of reliability which have justified admission of documents in the jurisprudence of the *ad hoc* Tribunals include: the place in which the document was seized, in conjunction with testimony describing the chain of custody since the seizure of the document; corroboration of the contents of the document with other evidence; and the nature of the document itself, such as signatures, stamps, or even in the form of the handwriting.”; *Prosecutor v. Kordić & Čerkez*, IT-95-14/2, Decision on Prosecutor’s Submissions Concerning “Zagreb Exhibits” and Presidential Transcripts, 1 December 2000, para. 43; *Prosecutor v. Hadžihasanović & Kubura*, IT-01-47-T, Decision on the Admissibility of Certain Challenged Documents and Documents for Identification, 2 August 2004, para. 29: “*prima facie* proof may take different forms, for example the source of the document, its form (signature, stamp), its structure (fax or letter), method of transmission, content or purported use.”

²¹ *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998, para. 20.

²² Admissibility requires “the beginning of proof that evidence is reliable,” a standard that is met, according to the ICTR *Nyiramasuhuko* Appeals Chamber, unless the information is “so lacking in terms of the indicia of reliability, such that it is not probative.” *Prosecutor v. Nyiramasuhuko*, ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence, 4 October 2004, para. 7. See also *Prosecutor v. Hadžihasanović & Kubura*, IT-01-47-T, Decision on the Admissibility of Documents of the Defence of Enver Hadžihasanović, 22 June 2005, para. 21 (emphasis in original): “The document must have ‘some relevance’ and ‘some probative value.’ This means that for evidence to be declared admissible, the Chamber need not determine its precise probative value since this will be done only at a later stage.” See also *Prosecutor v. Lubanga*, ICC-01/04-01/06, Corrigendum to Decision on the Admissibility of Four Documents, 20 January 2011, para. 28; *Prosecutor v. Tadić*, IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996, para. 9: “evidence ‘tending to prove an issue,’ must have some component of reliability”, para. 15: “the focus in determining whether evidence is probative within the meaning of Sub-rule 89(C) should be at a minimum that the evidence is reliable.”; *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, para. 18: “if evidence offered is unreliable, it cannot be either relevant or of probative value”; *Prosecutor v. S. Milošević*, IT-02-54-T, Decision on Admission of Documents in Connection with Testimony of Defence Witness Dragan Jasović, 26 August 2005, para. 18.

²³ MAY & WIERDA, at 107.

8. The “best evidence” rule generally requires primary evidence (i.e. the “best” evidence) for the purpose of proving the content of a document.²⁴ It is a guiding evidentiary principle before the *ad hoc* tribunals.²⁵ The underlying assumption of the “best evidence” rule is that secondary evidence of a document’s content is not as reliable as the document itself.²⁶ Though preference should always be given to the original document, there are of course circumstances when secondary evidence of a document’s contents may be admissible.²⁷

b. Where prejudicial effect value outweighs probative value

9. At the *ad hoc* tribunals, a document is insufficiently reliable when its prejudicial effect on the fairness of the proceedings outweighs its probative value.²⁸ At the ICTY, this

²⁴ See His Honour Judge Peter Murphy & Lina Baddour, *International Criminal Law and Common Law Rules of Evidence* (“Murphy & Baddour”) in KHAN, BUISMAN & GOSNELL, at 115.

²⁵ *Id.*, at 116, quoting *Prosecutor v. Perišić*, IT-04-81-T, Order for Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court, 29 October 2008, para. 36: “None of the Rules of the international tribunals explicitly provide for a best evidence rule. However, several ICTY Trial Chambers have adopted the rule and have placed it explicitly within the guidelines on the admission of evidence in a number of cases. Such guidelines generally state that: ‘the Trial Chamber will rely on the best evidence available in the circumstances of the case.... What is considered the best evidence will depend on the particular circumstances attached to each document and to the complexity of this case and the preceding investigations.’” See also *Prosecutor v. Stanišić & Župljanin*, IT-08-91-PT, Order on Guidelines on the Admission and Presentation of Evidence, 10 September 2009, Annex A, para. 1; *Prosecutor v. Martić*, IT-95-11-T, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, 19 January 2006, Annex A, para. 7; *Prosecutor v. Halilović*, IT-01-48-T, Guidelines on the Standards Governing the Admission of Evidence, 16 February 2005, Annex A, para. 8; *Prosecutor v. Blagojević & Jokić*, IT-02-60-PT, Guidelines on the Standards Governing the Admission of Evidence, 23 April 2003, Annex, para. 8; *Prosecutor v. Stakić*, IT-97-24-T, Provisional Order on the Standards Governing the Admission of Evidence, 25 February 2002, Annex, para. 7.

²⁶ See His Honour Judge Peter Murphy, *No free lunch, no free proof: the indiscriminate admission of evidence is a serious flaw in international criminal trials*, 8(2) J. INT’L CRIM. JUST. 539, 568-69 (2010): “The [best evidence] rule developed by the common law to try to ensure the reliability of a document as evidence of its content is one of the most ancient rules of evidence. It is known as the primary evidence rule or the best evidence rule. Its purpose is to give effect to the terms of the document with as much accuracy and certainty as possible.... The common law rule is that, where a document is adduced as evidence of its own content and the content is disputed, the original document (or in a case where there are counterparts or multiple originals, one of them) must be produced. There are exceptions to the rule,... where production of an original is impossible or may be dispensed with on other grounds. Where the original is required and could be produced, no other evidence (‘secondary’ evidence) may be adduced; but when secondary evidence is, in the exceptional cases, admissible, any kind of secondary evidence may be adduced. Although this is a technical rule, it remains salutary in cases in which there is reason to suspect that the original, or one of several counterpart originals, is different in some material way from other counterparts, or copies, or from the recollection of witnesses. This may suggest some forgery or *ex post facto* alteration which may affect the interpretation and the probative value of the document. In the event of a conflict, some rule of resolution must be adopted, and a preference for the original remains a logical and workable one.”

²⁷ *Id.*

²⁸ For example, the *Kvočka* Trial Chamber decided to exclude, “in the interests of a fair trial,” an extract from a newspaper article about the Omarška camp, as its probative value was low in that it contained unsupported allegations regarding the camp and the “inflammatory nature of those allegations [wa]s so prejudicial to the Defence that this outweigh[ed] any probative value it may have.” See *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Decision on Exhibits, 19 July 2001, p. 2.

principle is expressly codified,²⁹ but ICTR and Special Court for Sierra Leone (“SCSL”) Trial Chambers have applied it based on their broad discretion to determine admissibility based on a document’s relevance and probative value.³⁰ Based on the need to guarantee the fair rights of the accused, ICTR jurisprudence holds that “the Chamber has the inherent power to exclude evidence if its probative value is substantially outweighed by its prejudicial effect or otherwise by the need to ensure a fair trial.”³¹

c. Inadmissibility of statements made pursuant to inducement, coercion or threats

10. Rule 21(3) of the Rules states: “No form of inducement, physical coercion or threats thereof, whether directed against the interviewee or others, may be used in any interview. If such inducements, coercion or threats are used, the statements recorded shall not be admissible as evidence before the Chambers.” The Trial Chamber in Case 001,³² and both the Pre-Trial Chamber³³ and the Trial Chamber in Case 002,³⁴ have applied this principle, with the Trial Chamber holding in Case 001 that pursuant to Rule 21(3) “the fact that a confession has been made, and that it was made under torture is an admissible fact; however, the contents of a confession made under torture cannot be accepted as a truthful statement.”³⁵ Similarly, rules excluding evidence which is antithetical to the integrity of the proceedings, or which would bring the administration of justice into

²⁹ Rule 89(D) of the ICTY Rules of Procedure and Evidence states: “A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.”

³⁰ See Rule 70(F) of the ICTR Rules of Procedure and Evidence: “Nothing in Sub-Rule [70](C) or [70](D) above shall affect a Trial Chamber’s power under Rule 89 (C) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.”; *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ndirumpatse, 2 November 2007, para. 3; *Prosecutor v. Norman et al.*, SCSL-2004-14-T, Decision on Prosecution’s Request to Admit into Evidence Certain Documents Pursuant to Rule 92bis and 89(C), 14 July 2005, para. 3.

³¹ See, e.g., *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ndirumpatse, 2 November 2007, para. 3. See also *Prosecutor v. Bagosora et al.*, ICTR-98-41-AR93 & ICTR-98-41-AR93.2, Decision on Prosecutor’s Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003, paras 16-17: “[T]he Trial Chamber may choose to exclude otherwise relevant and probative evidence where its prejudicial effect will adversely affect the fairness or expeditiousness of the proceedings.... [T]he correct approach is to assess the aggregate probative value of the particular evidence against its aggregate prejudicial effect.”

³² *Case of KAINING Guek Eav alias Duch*, 001/ 18-07-2007/ECCC/TC, Transcript, 20 May 2009, E1/22.1, ERN: 00328970, p. 6; *Case of KAINING Guek Eav alias Duch*, 001/ 18-07-2007/ECCC/TC, Transcript, 28 May 2009, E1/27.1, ERN: 00336854, p. 9.

³³ Decision on Admissibility of IENG Sary’s Appeal against the OCII’s Constructive Denial of IENG Sary’s Requests Concerning the OCII’s Identification of and Reliance on Evidence Obtained through Torture, 10 May 2010, D130/7/3/5, para. 38.

³⁴ 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.

³⁵ *Case of KAINING Guek Eav alias Duch*, 001/ 18-07-2007/ECCC/TC, Transcript, 28 May 2009, E1/27.1, ERN: 00336854, p. 9.

disrepute, or which was obtained through duress or violations of human rights are applicable in ordinary Cambodian courts³⁶ and at the international criminal tribunals.³⁷

3. Relevance

11. A document's relevance must be determined prior to its admission as evidence (to avoid the admission of countless documents which cannot be shown to be relevant or linked to any relevant issue, contextual or otherwise). Relevance has been defined as "evidence that tends to prove or disprove a material issue; in other words, evidence is relevant 'if its effect is to make more or less probable the existence of any fact which is in issue, i.e. upon which guilt or innocence depends.'"³⁸ In ICTY/ICTR Appeals Chamber Judge Mohammed Shahabuddeen's words: "evidence must be relevant, that is to say, it must tend to make credible a fact which has to be established at trial; if it is not relevant, that alone suffices to exclude it."³⁹ An irrelevant document may be ruled inadmissible pursuant to Rule 87(3)(a).⁴⁰

II. ARGUMENT

A. Steps when considering the admission of evidence

12. The requirements of authenticity, reliability and relevance must be considered when determining whether a document may be admitted as evidence in Case 002. The basis for these requirements is Aristotelian logic: unless and until the document being proffered is deemed to possess certain qualities of trustworthiness, it should not be considered. Accordingly, when considering the admissibility of evidence, the Defence submits that the following steps be considered:

First, a determination must be made as to whether the document is authentic.

If the document is not authentic, then it should not be considered. For

³⁶ CPC, Art. 321: "... A confession shall be considered by the court in the same manner as other evidence. Declaration given under the physical or mental duress shall have no evidentiary value."

³⁷ See Rule 95 of the ICTY and ICTR Rules of Procedure and Evidence: "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings." Rule 95 of the SCSL Rules of Procedure and Evidence states: "No evidence shall be admitted if its admission would bring the administration of justice into disrepute." Article 69(7) of the ICC Statute states that "evidence shall not be admissible" when it was "obtained by means of a violation of this Statute or internationally recognized human rights" or the "violation casts substantial doubt on the reliability of the evidence" or the "admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings."

³⁸ MAY & WIERDA, at 102.

³⁹ *Prosecutor v. Ngeze & Nahimana*, ICTR-99-52-I, Decision on the Interlocutory Appeals, Separate Opinion of Judge Shahabuddeen, 5 September 2000, para. 19.

⁴⁰ See *Duch* Trial Judgement, para. 41; *Duch* Decision on Admissibility of Material on the Case File, para. 7; *Duch* Decision on Admissibility of New Materials, para. 16.4.

instance, if the OCP were to proffer “Standing Committee Minutes,” unless and until these minutes are authenticated, they should simply have no value and the information contained within them should be deemed inherently unreliable.

Second, once the document is deemed to be authentic, the next step should be to determine whether the document is reliable. For instance, assuming that the “Standing Committee Minutes” are authentic, then it should be determined whether they are in their original state.

Third, once the document has been determined to be authentic and reliable, the next step would be to determine whether it is relevant to any of the issues before the Trial Chamber. Unless the document is deemed relevant, irrespective of the fact that it is authentic and reliable, it should not be admitted or considered.

B. Inadmissible categories of documents

13. Considering these minimum thresholds of authenticity, reliability and relevance, the following categories of documents (enumerated by the parties in their document lists) give rise to serious concerns regarding their admissibility before the Trial Chamber:

1. Documents from DC-Cam

14. The Defence incorporates by reference its previous legal submissions on the admissibility of DC-Cam documents,⁴¹ which show that the authenticity of DC-Cam documents cannot be verified. DC-Cam documents are tainted by bias. DC-Cam’s position is that there was genocide in Cambodia. This position leads it to collect documents to support this claim. The prejudicial effect of DC-Cam documents on the fairness of the proceedings outweigh their probative value, and DC-Cam documents are unreliable and unsuitable to prove

⁴¹ See IENG Sary’s Response to the Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber & Request for Public Hearing, 22 July 2011, E96/3, paras. 22-24; IENG Sary’s Motion Against the Use of all Material Collected by the Documentation Center of Cambodia, 24 February 2011, E59; 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, 20 July 2010, D387; 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 the OCIJ Rejection of a Stay of the Proceedings, 15 September 2010, D402/1/2.

facts they purport to prove. The Trial Chamber should reject requests for admission of DC-Cam documents pursuant to Rules 87(3)(c).

2. Documents from the CGP

15. Since 1994, the CGP, a project of the Genocide Studies Program at Yale University's MacMillan Center for International and Area Studies, has been studying events that occurred in Cambodia between 1975-79 "to help determine who was responsible for the crimes of the Pol Pot regime."⁴² CGP pre-judges that there was genocide in Cambodia;⁴³ thus, CGP documents are tainted by bias. The prejudicial effect of CGP documents on the fairness of the proceedings outweigh their probative value, and CGP documents are unreliable and unsuitable to prove facts they purport to prove. The Trial Chamber should reject requests for admission of CGP documents pursuant to Rule 87(3)(c).

3. Documents obtained by the OCP

16. The Defence incorporates by reference its previous legal submissions on the admissibility of OCP-obtained documents (e.g., witness interviews, books and newspaper articles).⁴⁴ The interviews conducted by the OCP and the documents collated from authors who are affiliated with the OCP (e.g., Dr. Craig Etcheson) are tainted by bias as the role of the OCP, pursuant to Rule 87(1), is to prove the guilt of Mr. IENG Sary. The prejudicial effect of OCP-obtained documents on the fairness of the proceedings outweigh their probative value. OCP-obtained documents are unreliable and unsuitable to prove facts they purport to prove. The Trial Chamber should reject requests for admission of OCP-obtained documents pursuant to Rule 87(3)(c).

4. Torture-tainted material

17. The Defence incorporates by reference its previous legal submissions on the admissibility of torture-tainted material.⁴⁵ Torture-tainted material is, under all its forms and in every

⁴² See CGP Website available at <http://www.yale.edu/cgp/>.

⁴³ *Id.*

⁴⁴ See IENG Sary's Response to the Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber & Request for Public Hearing, 22 July 2011, E96/3, para. 25. Further, "[t]aking into account that, in the investigations phase, the prosecutor is always in a predominant position – due to the means at his disposal for gathering information before trial – it follows that, to re-establish equality, it is necessary to ban all the unchallenged statements collected in that phase from being used as evidence." Michele Caianiello, *First Decisions on the Admission of Evidence at ICC Trials*, 9(2) J. INT'L CRIM. JUST. 385, 390 (2011).

⁴⁵ See IENG Sary's Motion Against the Use of Torture Tainted Evidence at Trial, 4 February 2011, E33; IENG Sary's Request Concerning the OCJ's Identification of, and Reliance on, Evidence Obtained through Torture, 17 July 2009, D130/7; Letter Concerning the OCJ's Identification of, and Reliance on, Evidence Obtained through Torture, 7 August 2009, D/130/7/2; IENG Sary's Appeal against the OCJ's Constructive Denial of

circumstance (except against a person accused of torture as evidence that a statement was made), inadmissible in judicial proceedings before the ECCC.⁴⁶ This includes all secondary material (including preliminary biographical information and other derivative evidence)⁴⁷ deriving from torture-tainted material. Torture-tainted material is not allowed under the law and it is inherently unreliable. The Trial Chamber should reject requests for admission of torture-tainted material pursuant to Rule 87(3)(d).

5. Reports, articles and non-contemporaneous documents

18. At the *ad hoc* tribunals, newspaper articles “generally are not considered a reliable source of evidence and are often excluded for lack of probative value.”⁴⁸ Their admissibility depends on the circumstances of the particular occasion and the significance of the evidence.⁴⁹ It would be unusual for such evidence to be admitted if it related to a crucial issue in the case, but it is more likely to be admitted if it deals with contextual matters.⁵⁰ The probative value of certain reports and newspaper articles may be outweighed by their prejudicial effect on the fairness of the proceedings.⁵¹ Such documents are unreliable and

IENG Sary’s Requests Concerning the OCIJ’s Identification of and Reliance on Evidence Obtained through Torture, 19 November 2009, D130/7/3/1; IENG Sary’s Reply to Co-Prosecutors’ Response to IENG Sary’s Appeal against the OCIJ’s Constructive Denial of IENG Sary’s Requests Concerning the OCIJ’s Identification of and Reliance on Evidence Obtained through Torture, 14 December 2009, D130/7/3/4.

⁴⁶ See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 (Cambodia’s accession: 15 October 1992), Art. 15: “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.” See also CPC, Art. 321: “... A confession shall be considered by the court in the same manner as other evidence. Declaration given under the physical or mental duress shall have no evidentiary value.”

⁴⁷ See, e.g., IENG Sary’s Motion Against the Use of Torture Tainted Evidence at Trial, 4 February 2011, E33, paras. 17-23; IENG Sary’s Appeal against the OCIJ’s Constructive Denial of IENG Sary’s Requests Concerning the OCIJ’s Identification of and Reliance on Evidence Obtained through Torture, 19 November 2009, D130/7/3/1, paras. 27-33.

⁴⁸ MAY & WIERDA, at 248, citing *Prosecutor v Kvočka et al.*, IT-98-30/1-T, Decision on Exhibits, 19 July 2001.

⁴⁹ MAY & WIERDA, at 248. See also Gosnell, at 408-09: “[M]edia reports are understood to be fraught with ambiguous reliability. Some local media outlets are no more than platforms for propaganda whose reports, as one chamber has commented, are ‘notoriously a servant of morale rather than truth.’ Even the most objective journalism often relies on a confection of unidentified sources that is ‘double or triple hearsay.’ The ICTY Appeals Chamber in another context has warned against reliance upon such information. Allowing media reports into evidence without requiring the journalist’s testimony means that the substance is inserted onto the record without any further clarification of sources. No prejudice will likely arise where the reports are general in nature;...the ambiguity assumes much greater significance when the conduct is specific and highly incriminating, and may not be subject to corroboration or contradiction by other sources. Some chambers have responded to these concerns by treating contemporaneous media reports as documentary evidence, but then excluding them as not meeting the requisite threshold of probative value.”

⁵⁰ MAY & WIERDA, at 248.

⁵¹ See *Prosecutor v Kvočka et al.*, IT-98-30/1-T, Decision on Exhibits, 19 July 2001, p. 2. See also Nerenberg & Timmermann, at 478, citing *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the Request by the Legal Representative of Victims a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0007/08, a/0149/08, a/0155/07, a/0156/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0149/07 and a/0162/07 for Admission of the Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of

unsuitable to prove facts they purport to prove, and they are inadmissible pursuant to Rule 87(3)(c).

19. At the ICTR, a non-contemporaneous newspaper article written by an eyewitness four years after the events described was found to be “akin to a witness statement” and inadmissible pursuant to ICTR Rule 92bis.⁵² In the Cambodian context, there are serious concerns that the media reporting and/or testimonial evidence in the Case File is unreliable, partial and unverifiable.⁵³ Mr. IENG Sary must, pursuant to Rule 84(1), be

Wealth of the Democratic Republic of the Congo as Evidence, 22 September 2009, para. 34, where the ICC *Lubanga* Trial Chamber declined to accept into evidence the final report of the Panel of Experts on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo. A few paragraphs of this report were referred to in the questioning of an expert witness – who was not its author – and who pointed out that the concerns of the report were beyond his area of expertise. The authors of the report were not witnesses, its contents were not directly relevant to the charges faced by the accused, and thus the Chamber found that “[i]n all the circumstances, weighing the slight relevance and the low probative value of the report and its real prejudicial potential, the Chamber is at this stage unpersuaded that it should be admitted.” In the ICTY *Milutinović* case, statements used in a report prepared by NGOs on the basis of interviews of refugees fleeing from a crime scene were held not sufficiently reliable to be admissible, from which it followed that the report itself was inadmissible. See Gosnell, at 404-5, quoting *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams, 1 September 2006, paras. 21-22.

⁵² *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Ntabakuze Motion to Deposit Certain United Nations Documents, 19 March 2007, para. 9. This decision has led one commentator to note: “Textual and contextual factors justify the broader scope of Rule 92bis at the ICTR... Few reliable or impartial sources of reporting or statement-taking are to be found in the context of Rwanda unlike, arguably, the former Yugoslavia... Less than 65 per cent of the adult population of Rwanda is literate, as compared with a rate exceeding 95 per cent in Bosnia. A document signed by a literate person in a language they understand is first-hand hearsay; a document signed by an illiterate person, on the other hand, is only as accurate as the entirely unverifiable on-the-spot oral interpretation. Courtroom experience bears out the greater unreliability of witness statements at the ICTR. Rwandese witnesses frequently complain, when confronted with prior statements, that they do not accurately reflect what was said verbally during an interview.” Gosnell, at 402-03.

⁵³ See ROELAND A. BURGLER, *THE EYES OF THE PINEAPPLE: REVOLUTIONARY INTELLECTUALS AND TERROR IN DEMOCRATIC KAMPUCHEA* 1-2, 4 (NICCOS 1990): “Although quite rapidly published, quite a number of the ‘facts’ in ... atrocity stories ... turned out to be false or distorted. For example, pictures of ‘KR executing people with spades’, ‘forced labour’ and ‘forced marriages’ were published, *inter alia*, in *Paris-Match* and *Stern* (both April 1976), the *Washington Post* (8-4-1977), the London *Observer* (30-10-1977), *Time* (21-11-1977), *Newsweek* (23-1-1978) and *Der Spiegel* (30-1-78)... The pictures were first published in a Thai newspaper just before the April 4th 1976 elections.... A Thai intelligence officer later admitted the pictures had been posed inside Thailand. Peang Sophi, a Cambodian refugee, reported seeing how this had been done. An American State Department intelligence source, who had also been offered the pictures in Thailand, said he considered them fake. He had told both *Time* and the *Washington Post* this. The other publications, too, were told of the falsifications, but refused to even print letters of correction. Only the *Washington Post* published a short item acknowledging the doubts. Nearly two years after the exposure of the photos as fakes *Newsweek* published them, one even being featured on the cover. This is just one example of a long list of distortions and manifest dishonesty by serious and supposedly responsible, non-partisan western journals. Distortions also occurred through the bias in refugee reports, the major source of information.... Hearsay became personal experience.... Stories could be bought. Sometimes standard interviews were handed out, written by people who could neither read nor write and sometimes did not even speak Khmer.... Most journalists responsible for publicizing the stories selected the information most suitable for sensational publicity and ignored the rest. Their role was also often dubious because of their biases, shoddy methods (like interviewing in the presence of camp leaders or Thai officials), the language barrier and an uncritical attitude to what they heard.... Through the media some sort of general standard view of Democratic Kampuchea has come to be imbedded in the minds of the general public.” (internal citations omitted). See also MICHAEL VICKERY, *CAMBODIA: 1975-1982* 29-68 (Silkworm

afforded his absolute right to confront the authors of non-contemporaneous reports and articles (including interviews), which the Defence submits are akin to witness statements, as a condition precedent to their admission into evidence.⁵⁴

6. Witness statements

20. The Defence incorporates by reference its previous legal submissions on the admissibility of witness statements.⁵⁵ Without affording Mr. IENG Sary his absolute right to confront the witness, it will not be possible to verify whether the interview was recorded: **a.** accurately and **b.** in its entirety. For example, without affording Mr. IENG Sary his absolute right to confront the witness, the Defence cannot verify whether what a witness is recorded as having said in a witness statement is actually what the witness intended to say (because, for example, the Defence will have no opportunity to ask follow-up questions). Translation errors may also render witness interviews inaccurate.⁵⁶ Without affording Mr. IENG Sary his absolute right to confront the witness, the probative value of witness statements may be outweighed by their prejudicial effect on the fairness of the proceedings. The statements are unsuitable to prove the facts they purport to prove and are inadmissible pursuant to Rule 87(3)(c).

7. Transcripts from Case 001

21. The admission of transcripts from Case 001 as evidence in Case 002 is subject to Mr. IENG Sary's absolute right to confront the witness whose testimony in Case 001 is sought to be admitted.⁵⁷ Without affording Mr. IENG Sary his absolute right to confront the witness, transcripts from Case 001 are unsuitable to prove the facts they purport to prove and should not be admitted pursuant to Rule 87(3)(c).⁵⁸

1999) for further analysis of evidentiary problems deriving from reports, articles and non-contemporaneous material purporting to document the Democratic Kampuchea period.

⁵⁴ See IENG Sary's Response to the Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber & Request for Public Hearing, 22 July 2011, E96/3.

⁵⁵ *Id.*

⁵⁶ See IENG Thirith Defence Response to 'Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Statements Before the Trial Chamber', 22 July 2011, E96/2, paras. 24-37; Co-Prosecutors' Reply to the Responses Regarding the Admission of Written Witness Statements Before the Trial Chamber, 10 August 2011, E96/6, para. 35.

⁵⁷ See IENG Sary's Response to the Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber & Request for Public Hearing, 22 July 2011, E96/3, paras. 4-21 for explanation of Mr. IENG Sary's absolute right to confront witnesses against him in ECCC proceedings.

⁵⁸ The Trial Chamber has considered that "there is no legal basis in the Law on the Establishment of the ECCC or in the Internal Rules for the Chamber to take judicial notice of adjudicated facts or for facts of common knowledge to be applied before the ECCC." Decision on IENG Sary's Motions Regarding Judicial Notice of

8. Documents not made available in English and Khmer

22. The Defence takes no position regarding the admissibility of any document prior to being provided with both an English and Khmer translation of it and reserves all rights accordingly.

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

- a. REQUIRE the parties to demonstrate the authenticity, reliability and relevance of documents they introduce for admission as evidence in Case 002; and
- b. REJECT those documents which do not meet these minimum criteria.

Respectfully submitted,


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Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 6th day of **September, 2011**