

BEFORE THE TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

**FILING DETAILS**

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**CONSOLIDATED RESPONSE TO OBJECTIONS TO CO-PROSECUTORS'  
DOCUMENT LIST FOR FIRST TRIAL SESSION**

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## I. INTRODUCTION

1. On 1 November 2011, the Co-Prosecutors filed their *Notification of Documents to be put before the Trial Chamber in connection with those witnesses and experts who may be called during the first three weeks of trial with confidential Annex A* (“Co-Prosecutors’ Document List”).<sup>1</sup> According to a direction of the Trial Chamber objections, if any, to the Co-Prosecutors’ Document List were due to be submitted within 10 days of its notification. The defence teams for Ieng Sary, Khieu Samphan and Nuon Chea (together “the Defence”) submitted objections of a very general nature, arguing that they were unable to provide specific and reasoned objections to the Co-Prosecutors’ Document List due to the number of documents listed and the limited time available.
2. In response, the Co-Prosecutors argue that (1) there is no justification for the failure by the Defence to provide specific and reasoned objections to the Co-Prosecutors’ Document List; and (2) the general objections put forward by the Defence are ill-founded and do not satisfy the requirements of Internal rule 87(3) for exclusion of evidence.
3. The Co-Prosecutors request the Trial Chamber to (1) direct the Defence to re-file, by 16 December 2011, specific objections, if any, to the Co-Prosecutors’ Document List identifying particular documents objected to and reasons for objection; (2) admit the documents on the Co-Prosecutors’ Document List which are not the subject of specific and reasoned objections; and (3) schedule a hearing for oral arguments on any specific and reasoned objections that are received. The Co-Prosecutors also take this opportunity to notify the Trial Chamber and the parties that they will shortly file a Rule 92 written submission setting out the indicia of reliability of the documents included on the Co-Prosecutors’ Document List.

## II. PROCEDURAL BACKGROUND

4. On 17 January 2001 the Trial Chamber directed the parties to file a list of the documents they intended to rely on at trial.<sup>2</sup> On 19 April 2011, the Co-Prosecutors filed their document list, which included 6488 documents.<sup>3</sup> On 27 June 2011, during the initial hearing for Case 002, the Trial Chamber directed the parties to identify the documents and exhibits they considered to be relevant to the first phase of the trial (“First Phase

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<sup>1</sup> E131/1/4 and E131/1/4.1 Document List, 1 November 2011.

<sup>2</sup> E9 Trial Chamber’s order to file material in preparation for trial, 19 April 2011.

<sup>3</sup> E9/31 Co-Prosecutors’ Rule 80(3) Trial Document List, 19 April 2011 (“Rule 80(3) Document List”).

- Document Lists”).<sup>4</sup> On 22 July 2011, the Co-Prosecutors filed their First Phase Document List, which included 4768 documents.<sup>5</sup>
5. On 18 October 2011, following the severance of Case 002<sup>6</sup> into a series of smaller cases and the scheduling of the hearing of the first trial,<sup>7</sup> the Trial Chamber issued a memorandum directing the parties to indicate, by no later than 1 November 2011, which documents and exhibits from their First Phase Document Lists they would seek to admit in connection with the witnesses and civil parties who may be called during the first session of the first trial.<sup>8</sup> The memorandum further directed the parties to submit objections, if any, to other parties’ proposed documents and exhibits within 10 days of their notification. The parties were directed to specify particular objections to each document or document category they challenged, according to the criteria set out in Internal Rule 87(3).<sup>9</sup>
  6. On 1 November 2011, the Co-Prosecutors filed their document list, identifying 978 documents that they would seek to admit in connection with the witnesses and civil parties who may be called during the first three weeks of trial.<sup>10</sup> Of these 978 documents, only nine were not previously included in the Co-Prosecutors’ Rule 80(3) Document List and First Phase Document List.<sup>11</sup> Among those nine, only three were not on the case file but are now accessible to all parties on the Shared Material Drive.
  7. On 4 November 2011, the defence for Ieng Sary wrote a letter to the Senior Legal Officer of the Trial Chamber objecting to all documents on the Co-Prosecutors’ Document List that did not “directly relate” to the witnesses and civil parties who may be called during the first three weeks of trial, stating that they were unable to provide reasoned objections, and re-iterating Ieng Sary’s previously filed general objections to various document types.<sup>12</sup> The letter requested the Senior Legal Officer to confirm whether a formal notification of objections was still needed to the Co-Prosecutors’ Document List by the set deadline.<sup>13</sup> The Co-Prosecutors are not aware of any response to this letter and, to date, no formal objections have been filed by Ieng Sary to the Co-Prosecutors’ Document List.

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<sup>4</sup> **E1/4.1** Public Transcript of Initial Hearing; 27 June 2011 at p. 25.

<sup>5</sup> **E109/4** Co-Prosecutors’ response to the Trial Chamber’s request for documents relating to the first phase of trial; 22 July 2011 and its attachments **E109/4.1-4.20** (“First Phase Document List”).

<sup>6</sup> **E124** Severance order; 22 September 2011.

<sup>7</sup> **E131** Scheduling order for opening statements and hearing on the substance in Case 002; 18 October 2011.

<sup>8</sup> **E131/1** Trial Chamber Memorandum entitled *Witness lists for early trial segments; deadline for filing of admissibility challenges to documents and exhibits and response to motion E109/5*; 25 October 2011 (an advance courtesy copy of the memorandum was communicated to the parties by email on 18 October 2011) (“Memorandum”).

<sup>9</sup> *Ibid.*

<sup>10</sup> **E131/1/4** Co-Prosecutors’ Document List, *supra* note 1.

<sup>11</sup> *Ibid.* at note 9.

<sup>12</sup> Letter to Susan Lamb entitled *Notice concerning Ieng Sary’s objections to OCP and Civil Party documents for the initial three weeks of trial (28 November – 16 December 2011)*, 4 November 2011 (“Ieng Sary Objections”) referring to **E114** Ieng Sary’s objections to the admissibility of certain categories of documents, 6 September 2011 (“Ieng Sary Previous Objections”).

<sup>13</sup> As the Co-Prosecutors’ Document List was notified to the parties on 2 November 2011, the deadline for filing objections was 14 November 2011.

Accordingly, the letter of 4 November 2011 is treated here as comprising Ieng Sary's objections to the Co-Prosecutors' Document List. As the Co-Prosecutors have already responded to Ieng Sary's previous general objections, which are incorporated by reference into the letter,<sup>14</sup> they will not be addressed here again except to the extent that they overlap with objections filed by another defence team.

8. On 14 November 2011, Khieu Samphan filed objections to the Co-Prosecutors' Document List in which he objected to all documents not directly relating to the witnesses and civil parties who may be called during the first three weeks of trial.<sup>15</sup> Commenting that it was "impossible" to submit objections to specific documents, he made general objections to various categories of documents, including: documents that are obtained through torture; prior witness statements; non-contemporaneous materials (including books, analytical reports, films); press articles; documents that are inaccessible; and documents collected from DC-Cam.
9. Also on 14 November 2011, Nuon Chea filed his *Objections, observations and notifications regarding various documents to be put before the Trial Chamber* ("Nuon Chea Objections").<sup>16</sup> In this filing, Nuon Chea objected to the admission of any document whose authenticity has not been definitively established. He further adopted the position of the Ieng Sary and Ieng Thirith defence teams (as articulated in letters to the Senior Legal Officer)<sup>17</sup> regarding the filing of specific and reasoned objections, stating that it would be "impossible" to do so within the allocated time period.
10. Due to the commonality of issues raised by the Defence, the Co-Prosecutors are submitting a consolidated response to their various filings (in the case of Khieu Samphan and Nuon Chea) and letter (in the case of Ieng Sary). As the Khmer version of the Nuon Chea Objections was notified on 24 November 2011, the Co-Prosecutors are treating 5 December 2011 as the deadline for response. It is noted, however, that as of the date of filing this response, the Ieng Sary Objections and Khieu Samphan Objections have not been made available in Khmer.
11. On 17 November 2001, the Trial Chamber issued a memorandum stating that at the beginning of the examination of the accused, it would read out the following paragraphs from the Closing Order: paras. 18-32; 862-868; 1577-1850; 1126-1130; and 1598-1600.

<sup>14</sup> E114/1 Co-Prosecutors' response to 'Ieng Sary's objections to the admissibility of certain categories of documents', 16 September 2011 ("Response to Ieng Sary Previous Objections").

<sup>15</sup> E131/6 Exceptions d'irrecevabilité portent sur les listes de documents présentées par les autres parties pour la première session du premier procès, 14 November 2011 (notified in French on 15 November 2011 and in English on 25 November 2011) ("Khieu Samphan Objections"). To date, the Khmer version of the Khieu Samphan Objections has not been notified.

<sup>16</sup> E131/1/9 Nuon Chea Objections, 14 November 2011 (notified in English on 15 November 2011 and in Khmer on 24 November 2011).

<sup>17</sup> Ieng Sary's Objections, *supra* note 12; Letter from the defence team for Ieng Thirith to Senior Legal Officer entitled *Notice concerning Ieng Thirith's objections to OCP and Civil Party Documents for initial three weeks of trial (28 November – 16 December 2011)*, 8 November 2011.

The memorandum confirmed that, absent any further order, the supporting documents referred to in the footnotes to these paragraphs would be considered put before the Chamber pursuant to Rule 87.<sup>18</sup> There are 124 documents referred to in the relevant footnotes, of which 53 are included in the Co-Prosecutors' Document List. These 53 documents are listed in Annex A to this response, organised by document type.

### III. ARGUMENT

#### A. There is no justification for the Defence's failure to submit reasoned objections

12. The Memorandum provided the parties with guidance on what is required when objecting to documents or exhibits of another party. This included the requirement "to briefly specify, in relation to each document or exhibit, or category of document or exhibit challenged, the particular objection raised",<sup>19</sup> and to specify the basis of any objections with reference to Rule 87(3).<sup>20</sup>
13. The Defence argue that they cannot submit specific and reasoned objections to the Co-Prosecutors' Document List within the allocated 10-day period. By way of justification, they point to the large number of documents on the Co-Prosecutors' Document List combined with the document list filed by the Civil Parties. By conflating the two lists, the Defence seek to create the impression that the task of reviewing and formulating objections to the Co-Prosecutors' Document List is a significantly greater than it is. In fact the Co-Prosecutors' Document List includes approximately seven times less documents than the Civil Parties' document list and, as acknowledged in the Ieng Sary objections,<sup>21</sup> identifies the documents by type and relevant points of the Indictment. It also includes a description of each included document, summarising its contents and the facts it purports to prove.
14. The fact that the Co-Prosecutors' Document List includes 978 documents is not a legitimate excuse for the Defence's failure to act. Nor indeed should the defence be surprised, four years into the case, that the Co-Prosecutors are seeking to introduce this many documents given the magnitude of the case and their burden of proof.
15. As noted earlier, all but nine of the documents on the present list were included on the Co-Prosecutors' Rule 80(3) Document List which was filed in April 2011 and their First Phase Document List, which was filed in July 2011. It is simply not credible for the Defence to argue, more than six months after the first filing by the Co-Prosecutors, that they have not been provided with sufficient notice of the documents upon which the Co-Prosecutors seek

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<sup>18</sup> E141 Trial Chamber Memorandum, 17 November 2011 at pp.2-3.

<sup>19</sup> Trial Chamber Memorandum, at page 2.

<sup>20</sup> *Ibid* at page 2.

<sup>21</sup> Ieng Sary's Objections, *supra* note 12 at p. 1.

to rely, or that they were not given sufficient time to review and consider objections to those documents, particularly as the current document list is only 15% of the initial document list. Furthermore, if the Defence genuinely had concerns about lack of time the proper remedy would have been to request an extension rather than fail to comply with the Trial Chamber's direction.

16. Ieng Sary also maintains that it is impossible to submit reasoned objections because the Co-Prosecutors' Document List does not identify which documents will be put to each witness to be called during the first trial session. The Trial Chamber's direction included no such requirement either expressly or impliedly. This is borne out by the fact that none of the defence teams who submitted document lists,<sup>22</sup> in response to the direction, identified which document would be put to which witness. In a clear example of double standards, Ieng Sary attempts to argue that it is immaterial that his own document list did not identify documents by witness because it will be "obvious to anyone reviewing the documents on our list to which witness they relate." A basic exercise of *due diligence* by the Ieng Sary defence team, who have been engaged on this case for four years and had access to each piece of evidence as it was placed on the Case File (in the same manner as the Co-Prosecutors), would have been sufficient to ascertain which witness would be able to comment on which category of documents.

## **B. The objections are ill-founded**

### *i. Objections to documents that do not 'directly relate' to witnesses*

17. Ieng Sary and Khieu Samphan object to any and all documents on the Co-Prosecutors' list that do not "directly relate" to the testimony of any of the Accused who may testify, or to the civil parties and witnesses scheduled to appear in the first trial session.<sup>23</sup> They have not provided any specified basis, with reference to the Rules or otherwise, for this blanket objection to all of the Co-Prosecutors' documents. The underlying assumption behind this objection can only be that there is a requirement for the documents or exhibits that the Co-Prosecutors seek to admit to "directly relate" to the persons that may testify during the first trial session. There is no basis for this assumption.
18. The Trial Chamber's direction spoke of documents to be admitted "in connection" with persons who may be called to testify.<sup>24</sup> There was no requirement for the proposed documents to "directly relate" to the potential witnesses. Nor is there any such requirement in Rule 87(3), which sets out the criteria upon which the Trial Chamber may reject evidence. Given the Defence's failure to provide any further guidance as to exactly what is

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<sup>22</sup> The defence teams for Ieng Sary, Khieu Samphan and Ieng Thirith each filed document lists on 1 November 2011. The charges against Ieng Thirith were subsequently severed from Case 002.

<sup>23</sup> Ieng Sary's Objections, *supra* note 12 at page 1; E131/6 Khieu Samphan's Objections, *supra* note 15 at para. 17.

<sup>24</sup> E131/1 Memorandum, *supra* note 8 at p.1

meant by “directly relate”, the Trial Chamber cannot meaningfully consider or apply this blanket objection. Therefore, not only are the objections unfounded, it is impossible for the Trial Chamber to act on them.

19. In addition, it is noted that Ieng Sary and Khieu Samphan have not even made the minimal effort to exclude from this general objection those documents on the Co-Prosecutors’ Document List which are also included on their own lists.<sup>25</sup> There are 20 documents on Ieng Sary’s Document List<sup>26</sup> that also appear on the Co-Prosecutors Document List. There are 52 documents on Khieu Samphan’s Document List<sup>27</sup> that also appear on the Co-Prosecutors Document List. Presumably, Ieng Sary and Khieu Samphan consider that these documents do “directly relate” to witness testimony and should accordingly have excluded them from their blanket objection. Their failure to do so demonstrates the ill-considered nature of the objection and the Defence’s failure to exercise basic *due diligence* in response to a direction by the Trial Chamber.
20. The Co-Prosecutors submit that the documents on their list have sufficient connection with the civil parties and witnesses who are scheduled to testify in the first trial session.<sup>28</sup> The scheduled witnesses have knowledge of different aspects of the structure of the DK government, of the roles of the Accused and of CPK and DK policies (all first phase topics). The Co-Prosecutors are entitled to put to these witnesses documents relating to first phase topics which can reasonably be expected to be within their knowledge and about which they may be competent to testify even if those documents were not authored,

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<sup>25</sup> **E131/1/3** Ieng Sary’s Document List for the First Trial Segment, 1 November 2011 (“Ieng Sary’s Document List”); **E131/1/6** Indications relatives aux témoins et documents des premières phases du premier procès; 2 November 2011 and its attachment E131/1/6.1 (“Khieu Samphan’s Document List”).

<sup>26</sup> The Case File reference numbers of these documents, and the order in which they appear on the Co-Prosecutors’ Document List are: D22/42 (document 86); D22/42.3 (document 86); D208/2 (document 633); D22/43 (document 85); D22/43.2; (document 85); D208/3(document 956); D232/59; (document 970); D22/3605 (document 87); D232/59.1 (document 971); D91/3 (929); D279/6; (document 974); D279/7(document 975); D279/7.4 (document 345); D234/4 (document 957); D234/8 (document 960); D234/15 (document 972); D234/16 (document 973); D166/166; (document 950); Interview of Rochoem Ton (alias Phy Phuon) dated 19 December 2010 (document 928).

<sup>27</sup> The Case File reference numbers of these documents, and the order in which they appear on the Co-Prosecutors’ Document List are: D161/1.30, D279/6.5 (document 180); D269/9/1.16 (document 103); D279/6.1 (document 544); D279/7.2 (document 544); D279/7.1 (document 558); D262.27 (document 363); D175/3.17 (document 409); D175/3.77 (document 687); IS 21.74 (document 457); D279/6.6 (document 246); D279/6.7 (document 257); D279/6.13 (document 263); D279/6.8 (document 272); D279/6.9 (document 276); D248/3.3 (document 162); D279/7.5 (document 295); D279/6.10 (document 305); D279/7.7 (document 323); D279/6.12 (document 325); D279/6.4 (document 332); D279/6.2 (document 334); D279/6.3 (document 341); D279/7.10 (document 569); D279/7.4 (document 345); D279/7.9 (document 347); IS 3.1, D279/7.8 (document 178); IS 20.3 (document 919); D366/7.1.584 (document 917); D222/1.15 (document 82); D91/3 (document 929); D91/10 (document 930); D91/21 (document 932); D22/43 (document 85); D89 (document 938); D22/42 (document 86); D107/3 (document 940); D125/160 (document 941); D200/3 (document 942); D143 (document 945); D166/166 (document 950); D199/20 (document 952); D208/3 (document 956); D234/4 (document 957); D234/8 (document 960); D208/2 (document 633); D247/1 (document 969); D232/59 (document 970); D234/15 (document 972); D234/16 (document 973); D279/6 (document 974); D279/7 (document 975); D369/36 (document 978).

<sup>28</sup> As previously indicated, the Co-Prosecutors’ reserve their right to use other documents from their First Phase Document List and which relate to “historical background” in connection with any of the Accused who may testify

disseminated, or previously seen by those witnesses. Furthermore, the Trial Chamber has recently confirmed,<sup>29</sup> in response to a request by the Co-Prosecutors,<sup>30</sup> that documents need not be tendered through witnesses and may be submitted directly to the Chamber. In the interests of efficiency, the Co-Prosecutors may introduce directly to the Chamber documents from their list which are of a similar type, or belong to the same category, to other documents which have been put to a witness, rather than introduce each individual document through a witness. The latter is simply not feasible in a case of this size and complexity.

*ii. Statements “obtained through torture”*

21. Khieu Samphan maintains that any documents containing statements obtained through torture are inadmissible against the Accused and requests the Trial Chamber to reject all “confessions obtained through torture”.<sup>31</sup> In his previous objections, Ieng Sary objected to the use of the broader category of “torture-tainted” materials.<sup>32</sup>
22. At the outset the Co-Prosecutors note that the exclusionary rule set out in Article 15 of the United Nations Convention Against Torture (“CAT”) relates only to statements “established to have been made under torture”. It also permits the use of such statements “against a person accused of torture as evidence that the statement was made.”<sup>33</sup> In order for the prohibition to apply, the statement itself must, firstly, be shown to have been obtained under torture and, secondly, its use must be prohibited by the Convention. It is important therefore to distinguish between the various types of evidentiary materials found in security centre files (which are described as “confessions” for simplicity) and between the uses for which these various types of documents are being introduced into evidence.
23. In addition to confessions signed by the detainee, the confession files on the Case File commonly include summaries and reports made by the interrogators noting the identity of the prisoner, date and location of arrest and description of the kind of coercion or torture used against the prisoner. As these statements are recorded by third parties (not subject to torture) and are not based on information obtained from the prisoner under torture, they do not fall under the exclusionary rule. They can be used to prove the identity of individuals arrested, detained and tortured and the details of the arrest, detention and torture. The summaries and reports often include lists of other cadres or persons implicated by the

<sup>29</sup> E141 Trial Chamber Memorandum, 17 November 2011 at p.5.

<sup>30</sup> E136 Co-Prosecutors’ request to establish an efficient system for admitting documentary evidence at trial, 3 November 2011.

<sup>31</sup> E131/6 Khieu Samphan Objections, *supra* note 15 at paras. 18-20.

<sup>32</sup> E114 Ieng Sary Previous Objections, *supra* note 12 at para.17 incorporating by reference E33 Ieng Sary’s Motion Against the use of Torture Tainted Evidence at Trial, 4 February 2011. See also E114/1 Response to Ieng Sary Previous Objections, *supra* note 14 at paras. 39-41.

<sup>33</sup> Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, G.A. Res 39/46, U.N. GAOR, 39<sup>th</sup> Sess., Supp. No. 51, U.N. Doc. A39/51 (1984), Art 15 (“CAT”).



- detainee. These lists can be used to demonstrate the common criminal plan of identifying and eliminating perceived opponents of the regime through the systematic use of torture.
24. Some confessions on the Case File include letters addressed by the prisoners themselves to DK leaders, including the Accused, imploring those leaders to save them. These kinds of documents can be used as evidence of the seniority or authority of the Accused.
  25. The majority of the confession files also include annotations made by third persons, including the Accused, who received and reviewed the confession. These annotations can be relied upon as evidence of, *inter alia*, receipt of the confession by the Accused, of participation in the decision-making process relating to further arrests, and of knowledge of the illegal detention, torture and execution of the prisoner.
  26. Finally information contained in the confession document itself can be used to prove the fact that the torture took place, including the identity of the prisoner, the dates of arrest and detention, the methods of the torture, and the subject matter on which detainees were questioned. Together with other materials the confessions can also demonstrate that information obtained from detainees was used as the basis for future arrests and purges. There is no suggestion that the information contained in a confession would be relied upon by the Co-Prosecutors to establish the truth of its contents (for example that the prisoner or anybody named by him or her was a “spy” or “enemy”) or in ways going beyond the standard set by the Trial Chamber in Case 001. In Case 001, the Trial Chamber admitted a number of S-21 confession documents, noting that they were “not admitted for the truth of their contents” but rather as evidence of the fact that “they were made” and where appropriate that “they were made under torture.”<sup>34</sup>
  27. In order for any particular document on the Co-Prosecutors Document List to be deemed inadmissible by virtue of Article 15 of CAT, it has to be demonstrated that the document contains statements made under torture and that its proposed use falls outside the recognised exception. The general objections submitted to date by Khieu Samphan and Ieng Sary fail to achieve, or even attempt to achieve, this standard.
  28. Khieu Samphan also objects to the introduction of any confessions on the basis that the Severance Order excluded security centres from the first trial. It is noted that the current scope of the first trial still includes the “roles of the Accused in the DK government” and “DK policies” in relation to the matters charged in the indictment. This includes the policy of “re-education of ‘bad elements’ and killing of ‘enemies’.” The Co-Prosecutors may therefore admit confessions, particularly those bearing annotations, or related documents where they tend to prove the existence of this policy and the role and authority of the Accused.

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<sup>34</sup> **E176** Decision on parties requests to put certain materials before the chamber pursuant to Internal Rule 87(2), 28 October 2009, at para. 8.

*iii. Witness statements*

29. Khieu Samphan objects to the admission of witness statements on the Co-Prosecutors' Document List made by persons who are not available for cross-examination at trial.<sup>35</sup> Ieng Sary has previously made a similar objection.<sup>36</sup>
30. The ability of the Trial Chamber to admit witness statements which do not go to proof of the acts and conduct of an accused person, has already been the subject of numerous written submissions by the Co-Prosecutors<sup>37</sup> and other parties and is a matter upon which the Trial Chamber has yet to rule.
31. Accordingly, the Co-Prosecutors will not respond further to this objection other than to note that neither Khieu Samphan nor Ieng Sary made any effort to exclude from their objections the written statements of persons who have been scheduled, or proposed, to appear at trial. In fact, of the 67 documents included on the Co-Prosecutors' Document List which qualify as witness statements (including three civil party applications, 14 prior written statements and 50 written records of interview by the Office of the Co-Investigating Judges) 43 were made by witnesses / civil parties who are on the Trial Chambers list for the first trial session<sup>38</sup> or first trial segments.<sup>39</sup>
32. Specifically, the three civil party applications were made by civil parties who are scheduled to appear during the first trial session.<sup>40</sup> Six of the 14 prior witness statements were made by witnesses or civil parties who are scheduled to appear during the first trial session or first trial segments.<sup>41</sup> Thirty-four of the 50 written records of interview were made by witnesses / civil parties who are scheduled to appear at trial.<sup>42</sup>

<sup>35</sup> **E131/6** Khieu Samphan Objections, *supra* note 15 at paras. 22-23.

<sup>36</sup> **E114** Ieng Sary Previous Objections, *supra* note 12 at para. 20. See also **E114/1** Response to Ieng Sary Previous Objections, *supra* note 14 at para. 50-51.

<sup>37</sup> **E96** Co-Prosecutors' Rule 92 submission regarding the admission of written witness statements before the Trial Chamber, 15 June 2011 and **E96/6** Co-Prosecutors reply to the responses regarding the admission of written witness statements before the Trial Chamber, 10 August 2011.

<sup>38</sup> **E131/1.2** Confidential Annex B to Trial Chamber memorandum, 25 October 2011.

<sup>39</sup> **E131/1.1** Confidential Annex A to Trial Chamber memorandum, 25 October 2011.

<sup>40</sup> TCCP 142 made application D22/3605 (document 87); TCCP 123 made application D22/43 (document 85); and TCCP 185 made application D22/42(document 86)

<sup>41</sup> TCCP 142 made the statement at document 924 ;TCW 564 made the statement at document 928; TCW-694 made the statement IS 3.9 (document 916); TCW 321 made the statement D224.106 (document 923); TCW 395 made the statement D366/7.1.584 (document 917).

<sup>42</sup> Five written records were made by witness TCW-586: D369/36 (document 978), D233/9 (document 967), D91/15(document 933), D91/14 (document 931), D233/2 (document 958). Five statements were made by witness TCW-694: Five statements were made by witness TCW-694: (document (No 945), D91/25(document 935), D91/26(document 936), D147(document 947), D144(document 946). Four written records were made by witness TCW-542: D234/8(document 960), D234/16(document 973), D234/4 (document 957), D234/15(document 972). Three written records were made by TCW-480: D200/9(document 948), D200/3.8(document 948), D200/3(document 943). Three written records were made by TCW-307: D369/4(document 976), D125/160(document 941), D200/4 (document 944). Two written records were made by TCW 564: D107/3 (document 940), D91/10 (document 930). Two written records were made by TCW-695: D232/9(document 962), D232/8(document 961). Two written records were made by TCCP 142: D232/59(document 970), D232/59.1(document 971). Two written records were made by TCW-487: D91/21(document 932), D91/22(document 934). Two written records were made by TCW 583:

iv. *Non-contemporaneous materials (books, analytical reports, films)*

33. The defence for Khieu Samphan objects to the introduction of any “non-contemporaneous materials” including books, analytical reports and documentary films on the Co-Prosecutors’ Document List<sup>43</sup> Ieng Sary previously raised a general objection to the use of “reports, articles and non-contemporaneous documents.”<sup>44</sup>

Books

34. With respect to books, Khieu Samphan argues that they are tainted by personal bias or may rely on secondary sources which are themselves inadmissible (for instance because they were obtained by torture). He has failed to reference any jurisprudence, Cambodian or international, to support his position that books are, as a category, inadmissible. Nor has he pointed to any books on the Co-Prosecutors’ Document List which raise particular concerns about bias or reliance on inadmissible secondary sources. Indeed, two of the books on the Co-Prosecutors’ Document List were authored by Khieu Samphan.<sup>45</sup> Another is included in Khieu Samphan’s own proposed document list.<sup>46</sup> Yet another was referred to by Khieu Samphan’s international defence counsel in his opening statement.<sup>47</sup>
35. The applicable law at the ECCC does not exclude books as a category. In fact, three of the books included on the Co-Prosecutors’ Document List were admitted by the Trial Chamber in Case 001<sup>48</sup> in addition to at least 13 other books.<sup>49</sup> The authors of these books were not all present at trial for cross-examination. In relation to Nic Dunlop’s book, *The*

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D279/6(document 974), D279/7(document 975). One written record was made by TCCP 123:D208/3 (document 956). One written record was made by TCCP 185: D247/1 (document 969). One written record was made by TCW 395: D91/3 (document 929). One written record was made by TCW 297: D166/166 (document 950). The parties were recently informed that TCW 297 is deceased (see E141/2 Memorandum from WESU to the Trial Chamber concerning Witness TCW-297, 4 November 2011). The Co-Prosecutors have requested an investigation to confirm the death of TCW 297 (see E144 Co-Prosecutors’ request for investigation, 29 November 2011).

<sup>43</sup> **E131/6** Exceptions D’Irrecevabilité Portant Sur Les Listes de Documents Présentées par les autres parties pour la première session du premier procès, 14 November 2011, paras. 24-34.

<sup>44</sup> **E114** Ieng Sary Previous Objections, *supra* note 12 at paras. 18-19. See also, **E114/1** Response to Ieng Sary Previous Objections, *supra* note 14 at paras. 46-49.

<sup>45</sup> IS 4.23 (document 81) Khieu Samphan, *Cambodia’s Recent History and the Reasons behind the Decisions I Made*; D213.2 (document 83) Khieu Samphan, *Considerations on the History of Cambodia*.

<sup>46</sup> IS 4.41 Philip Short, *History of a Nightmare*. See Co-Prosecutors’ Document List at document 82; **E131/1/6.2** Listes de documents relatifs aux témoins de trois premières semaines de procès Annexe 1 bis, document 19.

<sup>47</sup> IS 4.2 (document 78) François Bizot, *The Gate*. Transcript, 29 November 2011, p. 39-40.

<sup>48</sup> IS 4.15 (document 74) Craig Etcheson, *The Rise and Demise of Democratic Kampuchea*, admitted as E3/330; IS 4.1 (document 75) Elizabeth Becker, *When the War was Over: Cambodia and the Khmer Rouge Revolution*, admitted as E3/510; and IS 4.2 (document 78) François Bizot, *The Gate*, admitted as E3/4.

<sup>49</sup> Huy Vannak *The Khmer Rouge Division 703: From Victory to Self Destruction*, admitted as E3/391; Meng-Try Ea, *The Chain of Terror: The Khmer Rouge Southwest Zone Security System*, admitted as E3/48; Menry Kamm, *Cambodia: Report from a Stricken Land*, admitted as E3/87; Nayan Chanda *Brother Enemy: The War after the War*, admitted as E3/193; David Chandler, *Voices from S-21: Terror and History in Pol Pot’s Secret Prison*, admitted as E3/427; Ysa Osman, *Oukoubah: Justice for the Cham Muslims under the Democratic Kampuchea Regime*, admitted as E3/404; Stephen Morris, *Why Vietnam Invaded Cambodia: Political Culture and the Causes of War*, admitted as E3/523; David Chandler *et. al*, *Pol Pot Plans the Future: Confidential Documents from Democratic Kampuchea*, admitted as E3/67; Raoul M. Jennar *Les Clés du Cambodge*, admitted as E3/515; Nic Dunlop, *The Lost Executioner*.

*Lost Executioner* the Trial Chamber noted the author was initially included on the witness list but later withdrawn. Notwithstanding this, the Trial Chamber admitted the book on the grounds that it was relevant to the issues at trial.<sup>50</sup>

36. Likewise, there is no practice at the international level of excluding books as a general category of evidence. At the *ad hoc* tribunals, books have been admitted as evidence of historical background or for other contextual purposes not relating to the alleged acts and conduct of the accused.<sup>51</sup> In *Prosecutor v. Bizimungu et. al* (“*Bizimungu*”)<sup>52</sup> the ICTR admitted an extract from General Romeo Dallaire’s book, “*Shake Hands with the Devil*” which referred to one of the accused persons’ participation in an extremist Hutu group. The Trial Chamber found the extract to be of relevance and to have sufficient indicia of reliability as it was “a copy of a recognized published book.”<sup>53</sup> The author was not present at trial for cross-examination by the defence. The Trial Chamber nonetheless determined that admission of the extract would not breach the accused person’s fair trial rights as it would not be used “for the purpose of determining any allegations” but rather to assist the Chamber “in determining the weight” to be attached to a transcript extract of testimony he had given in proceedings.<sup>54</sup>
37. It is noted that of the nine books on the Co-Prosecutors’ Document List that are authored by non-parties, the authors of two are scheduled to appear during the first trial segments;<sup>55</sup> the author of another appeared on the Trial Chamber’s earlier tentative list circulated at the initial hearing;<sup>56</sup> and the authors of all but one other have been proposed as witnesses by the Co-Prosecutors.<sup>57</sup> It is further noted that five of the books on the Co-Prosecutors’ Document List are referred to in the footnotes to the paragraphs of the Closing Order that the Trial Chamber has indicated it will read out prior to the questioning of the Accused persons. In accordance with the Trial Chamber’s direction, once the relevant paragraphs have been read out, these books will therefore be considered to have been admitted absent a further order to the contrary.<sup>58</sup>

<sup>50</sup> **E176** Decision on parties requests to put certain materials before the chamber pursuant to Internal Rule 87(2), 28 October 2009, para. 10.

<sup>51</sup> See May & Weir, *International Criminal Evidence* (2002) at p.248; Khan et al., *Principles of Evidence in International Criminal Justice* (2010) at p.487.

<sup>52</sup> *Prosecutor v Casimir Bizimungu, Justin-Mugenzi, Jerome-Clement Bicamumpaka, Prosper Mugiraneza*, Case No. ICTR-99-50-T, *Decision on Prosecutor’s motion to admit extracts from General Romeo Dallaire’s Book* (ICTR Trial Chamber), 18 November 2008.

<sup>53</sup> *Ibid.* at para 11.

<sup>54</sup> *Ibid.* at para 14.

<sup>55</sup> Elizabeth Becker (TCE-80), Ben Kiernan (TCE-38). See **E131/1.1** Confidential Annex A to Trial Chamber memorandum, 25 October 2011.

<sup>56</sup> Philip Short (TCE-65). Trial Chamber’s tentative list of experts for the first phases of the trial (circulated 27 June 2011).

<sup>57</sup> Jon Swain (P-006); Francois Bizot (P-007); Ong Thong Hoeung (P-072); Stephen Heder (P-037); Craig Etcheson (P-295). Only the author Margaret Slocomb has not been proposed by the Co-Prosecutors. See E9/4 Co-Prosecutors’ Rule 80 expert, witness, and civil party lists, 28 January 2011.

<sup>58</sup> See Annex A and *supra* note 29.

### Analytical reports

38. Khieu Samphan objects to the admission of non-contemporaneous analytical reports on the grounds that they are irrelevant and can only be admitted if their authors are available at trial for cross-examination.<sup>59</sup> There are five documents categorised as analytical reports on the Co-Prosecutors' Document List. One of these, however, was prepared in 1976 and is therefore contemporaneous.<sup>60</sup> As such, it is assumed that Khieu Samphan's objection does not extend to this document.
39. The Khieu Samphan cites the case of *Lubanga*<sup>61</sup> before the International Criminal Court in support of its objection<sup>62</sup> yet fails to draw sufficient analogies with this case to make such a comparison meaningful. *Lubanga* concerned the admission into evidence of an extensive report on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo. In that case, the Trial Chamber stated that this report was repetitive of other documentary evidence already admitted; that the contents of the report were controversial and open to criticism; and that none of its contents were directly relevant to the charges faced by the accused.<sup>63</sup> It was the combination of these factors, and the fact that the author was not to be called as a witness, that the Trial Chamber ruled that the prejudicial effect of the evidence would outweigh its probative value. The defense for Khieu Samphan has failed to show that similar circumstances exist with respect to the analytical reports proposed by the Co-Prosecutor such that the documents should not be admitted.
40. As with books, there is no general rule at the ECCC or in international procedure excluding the admission of analytical reports as a category. They may be admitted for historical background or contextual purposes. In this regard, it is noted that one<sup>64</sup> of the four non-contemporaneous analytical reports on the Co-Prosecutors' Document List was admitted into evidence in Case 001 in addition to 15 other documents that can be categorised as analytical reports.<sup>65</sup>

### Documentary films

41. Khieu Samphan objects to the admission of non-contemporaneous documentary films on the grounds that they are "even more unreliable [than books or analytical reports] as they

<sup>59</sup> **E131/6** Khieu Samphan Objections, *supra* note 15 at paras. 31- 32.

<sup>60</sup> D84-Annex A-01 (document 69).

<sup>61</sup> *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 Decision on request for [admission of report] (ICC Trial Chamber), 22 September 2009, ("Lubanga").

<sup>62</sup> **E131/6** Khieu Samphan Objections, *supra* note 15 at para 32.

<sup>63</sup> *Lubanga*, para. 33.

<sup>64</sup> D2-15 (document 72: admitted as E3/32).

<sup>65</sup> D2-15.31 admitted as E3/191; D108/41 admitted as E3/511; IS 18.69 admitted as E3/190; D108/51/1.5 admitted as E3/220; IS 2.3 admitted as E3/46; IS 2.1 admitted as E3/45; D108/43/14 admitted as E3/201; IS19.101 admitted as E3/221; D2-15.7 admitted as E3/102; IS 18.81 admitted as E3/366, E3/367; D86/12/1/13/2 admitted as E3/226; D108/19/1 admitted as E3/232, E3/16; D66-Annex A admitted as E3/506; D108/28.43 admitted as E3/521; D108/50/1.10 admitted as E3/520.

are driven by artistic or cinematic ambition”<sup>66</sup> Again there is no legal basis cited in support of this assertion. As it happens, there are no “documentary films” included on the Co-Prosecutors’ Document List. As such, the objection is misplaced. In any event, the Co-Prosecutors’ submit that documentary films which are on the Case File and which may be introduced in later stages of proceedings are both probative and relevant insofar as they contain numerous statements by the Accused, by witnesses, and by experts, and footage of places and events relevant to the Closing Order.

v. *Press articles*

42. Khieu Samphan objects to the admission of media reports reporting the prior statements of the Accused or any other individual unless a recording is also available.<sup>67</sup> Ieng Sary has also previously objected to the admission of newspaper articles.<sup>68</sup>
43. Apart from referring to international jurisprudence bearing generally on the issue of admissibility of press articles, Khieu Samphan does not cite any legal support for his objection. There is no legal basis for his contention that recordings must be available if a media report which the Co-Prosecutors seek to admit includes a statement of the Accused or any other individual. In addition, it is noted that Khieu Samphan himself seeks to admit three media reports, which quote or paraphrase comments by the Accused or other persons.<sup>69</sup>
44. As the Co-Prosecutors noted in their response to Ieng Sary’s previous objections to newspaper articles, the practice of the ECCC has been to admit media reports having the minimum levels of relevance and reliability.<sup>70</sup> This practice is in line with the international tribunals where press reports are often admitted and are generally treated as documentary evidence rather than witness statements (particularly if they are contemporaneous reports) and therefore subject to the regular rules relating to hearsay evidence. In *Brđanin*, a case cited by Khieu Samphan, the ICTY stated:

*The Trial Chamber does not agree that a newspaper article is a witness statement or that such evidence has been tendered as such. Consequently, the Trial Chamber, at no time, has treated the newspaper reports and articles as witness statements but merely as newspaper reports and articles admissible as documentary evidence under the procedural practice of this Tribunal, particularly that relating to hearsay evidence but with the limitations set out above. The same applies to several*

<sup>66</sup> E131/6 Khieu Samphan Objections, *supra* note 15 at para. 33.

<sup>67</sup> E131/6 Khieu Samphan Objections, *supra* note 15 at para. 37.

<sup>68</sup> E114 Ieng Sary Previous Objections, *supra* note 12 at paras. 18-19. See also, E114/1 Response to Ieng Sary Previous Objections, *supra* note 14 at paras. 42-49.

<sup>69</sup> Herald Tribune article of 11 May 1976 (listed on Annex 1 of E131/1/6.2 Listes de documents relatifs aux témoins de trois premières semaines de procès); D366/7.1.283 (listed on Annex 1 *bis* at document 53). document 19; D262.27 (listed on Annex 1 *bis* at document 54).

<sup>70</sup> See E114/1 Response to Ieng Sary Previous Objections, *supra* note 14 at para. 47 noting that in Case 001 there were 85 “DK media reports” and 135 “international media reports” admitted into evidence.

*unauthored scripts of what were allegedly radio and/or television news broadcasts.*<sup>71</sup>

45. Under the international jurisprudence, newspaper articles will be taken at their highest when they meet the following criteria: they are reliable; contemporaneous; corroborate other evidence; and go to the general nature of the events or the historic background, or show that the facts were in the public domain; and are trustworthy and truthful. Failure to meet these criteria does not amount to inadmissibility. Rather it amounts to factors to be taken into account when weighing the probative value of the evidence.
46. The majority of the media reports included on the Co-Prosecutors' Document List are proposed to be admitted for the purposes of providing relevant context, corroborating other evidence and indicating knowledge by the Accused of relevant events during the DK period. The majority of the media reports included are contemporaneous articles, published during or immediately before or after the DK regime, and relating to the events occurring at that time. As such, they should be treated as documentary rather than testimonial evidence. To the extent that newspaper articles include prior statements of the Accused, these statements are admissible according to the regular rules governing admission of prior statements, regardless of the medium in which they appear.
47. With regard to all non-contemporaneous materials (including books, analytical reports, documentary films, and press articles), any submissions by the Defence as to the veracity of the information in the materials can be dealt with adequately by the Chamber at a later stage when it determines the evidentiary weight to be given to the materials.
48. Finally, it is further noted that six of the media reports on the Co-Prosecutors' Document List are referred to in the footnotes to the paragraphs of the Closing Order that the Trial Chamber has indicated it will read out prior to the questioning of the Accused persons. In accordance with the Trial Chamber's direction, once the relevant paragraphs have been read out, these reports will therefore be considered to have been admitted absent a further order to the contrary.<sup>72</sup>

*vi. Documents that are inaccessible (translations; new; strictly confidential);*

49. Khieu Samphan objects to documents that are "inaccessible", either because they are strictly confidential, are not yet on the case file and have not yet been disclosed, or are not available in both Khmer and French (the working languages of his legal team).<sup>73</sup> Ieng Sary has also raised concerns about documents on the Co-Prosecutors' Document List that have not been translated into both Khmer and English (the working languages of his legal team) or that have not been disclosed to all parties.<sup>74</sup>

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<sup>71</sup> *Prosecutor v. Radoslav Brđanin*, IT-99-35-T, Judgment, 1 September 2004 at para. 33 (authorities omitted).

<sup>72</sup> See Annex A and *supra* note 29.

<sup>73</sup> E131/6 Khieu Samphan Objections, *supra* note 15 at paras. 39-45.

<sup>74</sup> Ieng Sary Objections, *supra* note at 12 at note 5.

Strictly confidential documents

50. There are no documents on the Co-Prosecutors' Document List classified as strictly confidential. As such, the objection by Khieu Samphan is misplaced. It is also noted that the Trial Chamber has recently addressed the issue of access to strictly confidential documents.<sup>75</sup>

New documents

51. There are 44 documents on the Co-Prosecutors' Document List marked as "new". Of these, two<sup>76</sup> are excerpts of documents already on the Case File and for which the reference number is given, and 24 are already available to all parties on the Shared Materials Drive. All the others are available to all parties on the Shared Material Drive in the folder entitled "Case 002 OCP New Documents".

Documents not available in both working language of defence teams

52. The Defence do not have an absolute right to have all documents translated into both of their working languages prior to trial. The Trial Chamber has stated that documents to be introduced in Case 002 should "ordinarily" be available in all three ECCC official languages.<sup>77</sup> This wording is significant, suggesting that documents which are not available in all three languages may be introduced in certain circumstances. This was the approach taken in Case 001, where the Trial Chamber stated that it would accept documents available in Khmer and one other language of the court.<sup>78</sup> In taking this approach, the Trial Chamber pointed to the limited translation resources available and the extensive nature of the Case File.<sup>79</sup>
53. The Pre-Trial Chamber has also held, in this case, that there is no automatic right to have all documents on the Case File available in all three official languages.<sup>80</sup> In its decisions, the Pre-Trial Chamber referred to the jurisprudence of the international criminal tribunals, including the International Criminal Court (ICC), which has held that the fairness principle does "not grant [the defendant] the right to have all procedural documents and all evidentiary materials disclosed by the Prosecution translated".<sup>81</sup> The Chamber also noted that in addition to the defence legal team, the accused persons have been allowed "free of

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<sup>75</sup> E118/4 Response to Ieng Sary Request for Access to Strictly Confidential Documents on the Case File, 28 November 2011.

<sup>76</sup> Documents at 372 and 374 on Co-Prosecutors' Document List.

<sup>77</sup> E131/1 Memorandum, *supra* note 8 at p.3.

<sup>78</sup> Transcript, 19 May 2009, p. 32 (Case 001).

<sup>79</sup> *Ibid.*

<sup>80</sup> A190/I/9 Decision on Ieng Sary's Appeal on OCIJ order on translation rights and obligations of parties, 20 February 2009 at paras. 24-44; A190/I/20 Decision on Khieu Samphan's Appeal Against the Order on Translation Rights and Obligations of the Parties, 20 February 2009 at paras. 41-50.

<sup>81</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06, "Decision on the Request of the Defence of 3 and 4 July 2006", Pre-Trial Chamber I, 4 August 2006, at p 6. The European Court of Human Rights (ECHR) has held that a defendant's fair trial rights were not violated by the fact that not all the documents in his case file were in a language he understood: *Kamasinski*



charge and full time, assistance of a translator to ensure that the charged persons and the defence teams can have certain documents translated as required, to assess the team's translation requirement for transmission to CMS and to assist the team's collaboration with CMS".

54. It is noted that, as of the date of filing, there are only 16 documents<sup>82</sup> on the Co-Prosecutors' list that are not yet available in either Khmer or French, the two working languages of the Khieu Samphan defence team. There is only one document<sup>83</sup> that is not yet available in both English and French, the two working languages of the Ieng Sary defence team. The Co-Prosecutors have requested CMS to translate all documents on their list as a matter of priority and new translations are being added to the Case File on a near daily basis.

*vii. DC-Cam documents and documents whose authenticity not demonstrated*

55. Khieu Samphan expresses concerns about the authenticity and chain of custody of documents obtained from DC-Cam and requests the Trial Chamber to "obtain the originals of the documents, satisfy itself of their authenticity and systematically require that the content of documents be corroborated by other evidence."<sup>84</sup> Ieng Sary has also previously objected to the admission of documents obtained from DC-Cam on the grounds of bias.<sup>85</sup> Nuon Chea objects to the admission of "any document whose authenticity has not been definitely established by the party seeking its admission (or by the Chamber should it chose to rely on documentary material *sua sponte*").<sup>86</sup>
56. It is noted that despite Khieu Samphan's stated concerns as to the reliability of documents obtained from DC-Cam, he himself has proposed admission of 35 documents collected from DC-Cam.<sup>87</sup> This is a relevant factor in considering the legitimacy of his objection.
57. The Co-Prosecutors' have previously made written submissions on the applicable test for the admission of evidence before the ECCC.<sup>88</sup> These submissions are incorporated by reference and will not be re-iterated in detail. By way of summary, the Co-Prosecutors

<sup>82</sup> D366/7.1.820 (document 19); D56-document.137 (document 21); document 41; document 84; D366/7.1.824 (document 484); document 498; D313/1.2.52 (document 508); document 528; document 669; document 868; D108/31.20 (document 646); document 686; document 667; D108/26.281 (document 913); document 926; document 927.

<sup>83</sup> D56-Doc. 137 (document 21).

<sup>84</sup> **E131/6** Khieu Samphan Objections, *supra* note 15 at paras. 46-7.

<sup>85</sup> **E114** Ieng Sary Previous Objections, *supra* note 12 at para. 14 and **E114/1** Co-Prosecutors' Response to Ieng Sary Previous Objections, *supra* note 14 at 30-38.

<sup>86</sup> **E131/1/9** Nuon Chea Objections, *supra* note 16 at 19.

<sup>87</sup> IS 20.3, D248/3.3, D366/7.1.157, IS 3.1, IS 21.140, D161/1.9, D161/1.4, IS 21.147, D279/6.3, D161/1.25, D161/1.21, D161/1.20, D161/1.7, IS 21.142, D161/1.13, D161/1.31, D161/1.14, D161/1.30, D279/6.12, D279/7.4, NA (notebook of YEN), D175/3.17, IS 21.74, NA (Swedish Collection Document), D366/7.1.283, IS 13.11, IS 13.2, IS 13.14, D56-Doc, D248/6.1.2, D279/7.11, D175/3.77, D210/5, D210/5R, D161.1.50. All but two of these documents can be clearly identified as DC-Cam documents from number appearing in the top right corner.

<sup>88</sup> See generally **E114/1** Co-Prosecutors' Response to Ieng Sary Previous Objections, *supra* note 14 at paras. 8-12.

recall that for evidence to be admitted at the ECCC, it must meet “minimum standards of relevance and reliability”. This test applies to all documentary evidence and comports with the approach taken by all the international criminal tribunals.

58. There is no requirement, at the ECCC or in other tribunals, for original documents to be produced in all circumstances. Where original documents are not readily available, copies of documents can be introduced. In the present case, the vast majority of documents on the Case File were obtained from DC-Cam and the originals of these documents are held in secure facilities in numerous different locations. To require the production of thousands of original documents would bring the trial to a standstill. Where there are concerns as to the authenticity of any particular document those concerns should be assessed on a case by case basis having regard to the indicia of reliability.
59. Nor is there any requirement for authenticity of a document to be “definitively established” as suggested by Nuon Chea. Rather evidence must have sufficient indicia of reliability (considered as a whole) to be admissible. Proof as to the origin of the document and chain of custody is relevant in considering whether a document has sufficient indicia of reliability but it is not a pre-requisite for admission. One leading commentator, drawing on the case law of the international criminal tribunals (a number of which have previously been cited by the Co-Prosecutors),<sup>89</sup> summaries the position as to authenticity as follows:

*The tendering party, as part of showing reliability, is expected to provide some indication as to what the document is, and that it is genuine. This requirement is often referred to as ‘authentication’, but the concept bears no relation to the technical concept of authentication in some domestic legal systems. Authentication in international courts means no more than that ‘the document is actually what the moving party purports it to be based on the available indicia of reliability. The author or custodian of a document need not, for example, testify in court for a document to be authenticated, nor need it be recognised or commented upon by any witness whatsoever. No chain of custody need be established and submissions about the provenance of a document by the parties themselves are often accepted in lieu of direct testimony of, or submissions by, an investigator.’<sup>90</sup>*

60. As stated in Section I above, a submission detailing the indicia of reliability for all of the documents on the Co-Prosecutors Document List will shortly be filed pursuant to Rule 92. While the Co-Prosecutors do not consider that such a submission is required, it will be submitted in the interests of assisting the Trial Chamber in considering the various (general) objections to these documents that have already been raised or any particularised objections that may be raised in the future.

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<sup>89</sup> *Ibid.*


<sup>90</sup> Christopher Gosnell, Admissibility of Evidence in Khan et al., *Principles of Evidence in International Criminal Justice* (2010) at 387-388 (citations omitted).

#### IV. RELIEF REQUESTED

61. For the reasons expressed above, the Co-Prosecutors request the Trial Chamber to:

- (1) direct the Defence to re-file, by 16 December 2011, specific objections, if any, to the Co-Prosecutors' Document List identifying particular documents objected to and reasons for objection;
- (2) admit the documents on the Co-Prosecutors' Document List which are not the subject of specific and reasoned objections; and
- (3) schedule a hearing for oral arguments on any specific and reasoned objections that are received.

Respectfully submitted

Date	Name	Place	Signature
1 December 2011	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		