

BEFORE THE TRIAL CHAMBER OF THE
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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**IENG THIRITH DEFENCE'S OBJECTIONS TO CO-PROSECUTORS' AND CIVIL PARTIES'
LISTS OF DOCUMENTS TO BE USED AT FIRST PHASE OF TRIAL**

Defence for Ieng Thirith:

PHAT Pouy Seang
Diana ELLIS, QC

Trial Chamber Judges:

NIL Nonn, President
Silvia CARTWRIGHT
YOU Ottara
Jean-Marc LAVERGNE
Ya SOKHAN

Civil Party Co-Lead Lawyers:

PICH Ang
Elisabeth SIMONNEAU FORT

Co-Prosecutors:

CHEA Leang
Andrew CAYLEY

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I INTRODUCTION

1. On 25 October 2011, the Trial Chamber informed the parties by way of a Memorandum that the hearing of evidence in Case 002 will commence on 28 November 2011.¹ The Trial Chamber requested the parties to the proceedings to indicate, no later than 1 November 2011, which documents and exhibits from their earlier lists they will seek to admit before the Chamber in connection with those witnesses and experts who may be called during the first three weeks of the trial.² The Trial Chamber ordered that objections to those documents and exhibits by the opposing parties should be filed within 10 days of notification of those documents and exhibits the parties intend to introduce during the first phase of trial.³
2. On 1 November 2011, the Co-Prosecutors filed their 'Co-Prosecutors' Notification of Documents to be Put before the Chamber in Connection with those Witnesses and Experts who may be called during the First Three Weeks of trial with Confidential Annex A' (**OCP List of Documents**).⁴ The Co-Prosecutors' Annex A is 217 pages long and lists 978 documents.⁵
3. On 1 November 2011, the Civil Party Lead Co-Lawyers filed their 'Civil Parties List of Documents Relevant to the Initial Trial Session (28 November 2011 – 16 December 2011)' (**Civil Parties List of Documents**)⁶ in which the Civil Party Lead Co-Lawyers requested the Trial Chamber to admit as evidence for the first phase of the trial all the annexes of E109/2 namely E/109/2.1, Attachment 1 (Revised Annex 7a), E109/2.2 Attachment 2 (Revised Annex 7a (iii) and

¹ TC, 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, Document No. E131/1.

² *Ibid.*, p. 1.

³ *Ibid.*, p. 1-2.

⁴ Co-Prosecutors' Notification of Documents to be Put before the Chamber in Connection with those Witnesses and Experts who may be called during the First Three Weeks of trial with Confidential Annex A, 1 November 2011, Document No. E131/1/4 (notified to the defence on 2 November 2011).

⁵ Co-Prosecutors' Annex A, 1 November 2011, Document No. E131/1/4.1.

⁶ Civil Parties List of Documents Relevant to the Initial Trial Session (28 November 2011 – 16 December 2011), 1 November 2011, Document No. E131/1/2 (notified to the defence on 2 November 2011).

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E109/2.3 Attachment 3 (Revised Annex 7b).⁷ All three annexes are 855 pages long, listing thousands of documents.

4. On 4 November 2011, the defence for Madame Ieng Thirith (**Accused**) filed its 'Defence for Ieng Thirith's Note on Admissibility of Evidence'⁸ in which the defence respectfully requested the Trial Chamber to treat as inadmissible any evidence or other material which was or may have been obtained by the use of torture; to declare inadmissible evidence of unknown provenance; to allow the defence the right to examine in court each witness who provides evidence against the Accused and to allow the defence in principle the right to examine witnesses who have provided inculpatory information about the Accused.⁹
5. On 8 November 2011, the defence communicated by email a 'Notice Concerning IENG Thirith's Objections to OCP and Civil Party Documents for the first three weeks of the trial (28 November 2011 – 16 December 2011)' in which the defence endorsed many points raised by the Ieng Sary defence team in its 'Notice Concerning IENG Sary's Objections to OCP and Civil Party Documents for the initial three weeks of trial (28 November 2011 – 16 December 2011)' dated 4 November 2011. The defence submitted that it was not possible in the time available for the defence to consider fully all the documents relied upon by the Co-Prosecutors and the Civil Parties for the first trial phase in order to determine whether a particular document or category of documents could be subject to a reasoned objection.
6. The defence hereby provides the Trial Chamber with objections to documents and exhibits that the Co-Prosecutors and Civil Parties intend to use during the first phase of trial. The defence has endeavoured to do its best in order to comply with the direction of the Trial Chamber. The defence requests the right to make further

⁷ *Ibid.*, para. 12.

⁸ Defence for Ieng Thirith's Note on Admissibility of Evidence, 4 November 2011, Document No. E131/5.

⁹ *Ibid.*, para. 10.

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submissions on the admissibility of the documents should it become apparent that there is other inadmissible material.

II Relevant Provisions

7. As a matter of general principle evidence which is irrelevant is inadmissible, it cannot assist the Chamber in coming to a determination of the issues in the case.

8. Internal Rule 87 sets out the Rules of Evidence.

Internal Rule 87(1) provides that all evidence is admissible unless provided otherwise in the Internal Rules.

Internal Rule 87(2) states that any decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination.

Internal Rule 87(3) sets out that the Chamber may reject 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.
9. Rule 87(3), therefore, provides for circumstances in which evidence may be relevant but not admitted because it is repetitious, impossible to obtain within a reasonable time or intended to prolong the proceedings.

III SUBMISSIONS

10. The defence repeats its submission dated 8 November 2011 that the time constraints imposed by the Trial Chamber (10 days) have not permitted the defence to meaningfully consider all the documents relied upon by the Co-Prosecutors and the Civil Parties Lead Co-Lawyers for the first trial phase and to determine whether they can be the subject of a reasoned objection. As previously

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noted, the Co-Prosecutors listed 978 separate documents to be presented during the first phase of trial. These documents frequently comprise many pages. The Civil Parties' Lead Co-Lawyers have listed several thousands of documents. Any objections will therefore necessarily have to be in the form of general observations on the basis of the work done by the defence to date.

11. It is difficult for the defence to assess whether the lists of documents presented by the Co-Prosecutors and the Civil Parties are repetitious pursuant to Internal Rule 87(3)(a). In order to be confident in this assertion, the defence would need to have read the totality of the documents. The defence has not been able to complete this task in the given time as the material is too voluminous.
12. The defence also asserts that it is in a difficult position to ascertain whether the documents listed in the OCP and Civil Parties' Lists of Documents are relevant to the first witnesses and civil parties who are to testify for the first phase of the trial pursuant to Internal Rule 87(3)(a) or if the documents are suitable to prove the facts it purports to prove pursuant to Internal Rule 87(3)(c). Both the Co-Prosecutors and the Civil Parties Lead Co-Lawyers have failed to indicate which documents they intend to put to witnesses and civil parties so that the defence can identify which witnesses they will question on the specific documents. As a result, the defence objects to the admission of any documents that do not directly relate to the witnesses and civil parties who are expected to testify during the first phase of trial.
13. The defence notes that the Co-Prosecutors refer to 42 'new documents' and the Civil Parties Lead Co-Lawyers to 19 'new documents'. The defence has not been provided with those 'new' documents yet. As a result, it is not in a position to comment on their relevance, repetitiousness, unsuitability, legality and their frivolousness.

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14. The defence hereby provides the Trial Chamber with general objections to both the OCP and the Civil Parties' Lists of Documents.

3.1 General Objection on the Length of the OCP and Civil Parties' Lists of Documents

15. The defence submits that both the OCP and the Civil Parties' Lists of Documents contain a huge number of documents and that admitting all those documents during the first phase of the trial would certainly prolong the proceedings as envisaged in Internal Rule 87(3)(e). Admitting the totality of the documents listed in the OCP and Civil Parties' Lists of Documents would impede on the right of the defence to have sufficient time to prepare its defence.

16. The defence notes that the Civil Parties Lead Co-Lawyers have failed to comply with the order of the Trial Chamber to identify which documents from their previous lists of documents they intend to use during the first phase of trial. Instead, the Civil Parties requested that the Trial Chamber admit the totality of the documents that they previously intended to use for the four first trial segments.

17. The OCP List of Documents includes a substantial amount of documentary material referred to as 'S-21 Execution Logs', 'S-21 Interrogation Logs' and 'S-21 Prisoner Lists'. It is submitted that the information contained therein is repetitious and should be excluded in its present form as contravening Internal Rule 87(3)(a).

3.2 Objection on the Admission of Books in their Entirety as Evidence

18. The defence notes that both the OCP and the Civil Parties' Lists of Documents frequently refer to very substantial sections of books which are to be presented during the first phase of trial, instead of specific parts.

19. The defence objects to the admission of material in this manner at trial. The party seeking to produce the content of books has not sought to identify specifically the

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purpose for which each section is relied upon. Furthermore, the parties have failed to name the witness who in respect of each of documentary evidence is to produce the document and answer questions on it. In the absence of this information the defence is hampered in fully formulating its objections.

20. Where the author of any specified book is not to be called as a witness, the defence submits that passages in the book considered relevant by the party seeking to rely on them must be put to a witness who can then be questioned on the specific material contained in the book. If a book were allowed to be merely put before the Chamber without the content being subject to examination the Chamber would not be entitled to rely upon it in coming to its Decisions.¹⁰

3.3 Objection on the Admission of Documents Authored by Persons who are not Giving Evidence during the First Phase of Trial

21. The defence notes that both the Co-Prosecutors and the Civil Parties refer to documents in their respective lists which are authored by persons who are not being called to give evidence during the first phase of trial. The defence objects to the admission of those documents before the Trial Chamber as in the circumstances they cannot be considered admissible. The defence notes that Stephen Heder and Craig Etcheson are not being called as 'experts' during the first phase of trial, however the Co-Prosecutors seek to refer to their books and Analytical Reports in the lists of documents.
22. With regard to the Co-Prosecutors' List of Documents, the defence objects to the admission of works authored by Stephen Heder, KIM Keo Kanitha, CHOUNG Sphearith and LONG Deng, Craig Etcheson, Richard Moore, Jon Swain, Francois Bizot, Philip Short and Margaret Slocomb.
23. The defence specifically objects to the admission of Craig Etcheson's report entitled 'Written Record of Analysis'.¹¹ The defence hereby refers to its

¹⁰ Internal Rule 87(2).

¹¹ Document No. D2-15.

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submissions previously submitted in its 'Ieng Thirith Defence Request for Exclusion of the Report of Dr. Craig C. Etcheson'¹² as it does not meet the minimum standard required for an expert report to be admissible.

3.4 Objection on Documents which Prevent the Accused from Exercising her Right to Examine Witnesses and Civil Parties who Testify against the Accused

24. The defence notes that the Co-Prosecutors and the Civil Parties Lead Co-Lawyers listed Office of the Co-Investigators' written records of interviews of witnesses (**OClJ written records**) to be used during the first phase of trial although such witnesses are not being called to testify during the first phase of trial and nor, in respect of some, are they to be called during the four first trial segments.
25. The defence objects that the admission of those OClJ written records during the first phase of trial Witnesses whom the Co-Prosecutors and the Civil Parties Lead Co-Lawyers seek to rely upon should be called to testify so that the defence is afforded an opportunity to exercise its right to examine such witnesses pursuant to Internal Rule 84. The defence hereby refers to its previous submissions in its 'Defence for Ieng Thirith's Note on Admissibility of Evidence'¹³ and in its 'Ieng Thirith Defence Response to 'Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements before the Trial Chamber'.¹⁴
26. The defence reiterates its submissions that the OClJ written records of interviews are not reliable and accurate for the reasons set out in its 'Ieng Thirith Defence Response to 'Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements before the Trial Chamber'.¹⁵As a result, such OClJ written statements listed in both the OCP and Civil Parties' Lists of Documents

¹² Ieng Thirith Defence Request for Exclusion of the Report of Dr. Craig C. Etcheson, 11 August 2009, Document No. D122.

¹³ Defence for Ieng Thirith's Note on Admissibility of Evidence, 4 November 2011, Document No. E131/5, para. 9.

¹⁴ Ieng Thirith Defence Response to 'Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements before the Trial Chamber', 22 July 2011, Document No. E96/2, paras. 4-11.

¹⁵ *Ibid.*, paras. 13-22..

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should be not admitted as evidence during the first phase of trial or during any other phases unless the witnesses are brought to trial to testify to give the defence an opportunity to cross-examine them pursuant to Internal Rule 84.

27. Similarly, the defence objects to the admissibility of Civil Party applications where it is not proposed that the Civil Party will testify.

3.5 Objection on the Admissibility of Torture Tainted Evidence

28. The defence notes that the Co-Prosecutors, in their List of Documents to be used at the first phase of trial, list 69 'S-21 confessions'. The Civil Parties Lead Co-Lawyers also refer to a number of confessions. Evidence of this nature is inadmissible and should be excluded pursuant to the provisions of Internal Rule 87(3)(d) in that it is not allowed under the law.

29. The defence refers to its previous submissions endorsed in its 'Defence for Ieng Thirith's Note on Admissibility of Evidence' in that evidence obtained as a result of torture is not admissible *per se*¹⁶ and that such evidence should be declared inadmissible by the Trial Chamber as not allowed under the law pursuant to Internal Rule 87(3)(d).

3.6 Objection on the Admissibility of Evidence from Unknown Provenance

30. The defence is not in a position to verify the provenance of each of the documents listed in the OCP and the Civil Parties Lead Co-Lawyers' Lists of Documents as there are thousands of them listed.

31. The defence submits that the Trial Chamber should not admit in evidence any document of unknown provenance. The defence hereby refers to its previous

¹⁶ Defence for Ieng Thirith's Note on Admissibility of Evidence, 4 November 2011, Document No. E131/5, paras. 3-4.


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submissions made in its 'Defence for Ieng Thirith's Note on Admissibility of Evidence'¹⁷

IV CONCLUSION

32. For the reasons set out herein, it is submitted that the OCP and the Civil Parties in seeking to admit documents should be required to identify the witnesses through whom admission is sought. Furthermore, the documents should be properly analysed and the passages which it is said are relevant should be specifically and clearly identified so that the lengthy and repetitious information is not placed before the Trial Chamber. The defence has not been permitted sufficient time to read all the material and thus the right of the Accused to have sufficient time in which to prepare for the trial is violated.

33. The Trial Chamber should exclude those documents that are not admissible pursuant to well-recognised international jurisprudence as having been obtained under torture and those documents whose admission would be in breach of Rule 84 and Rule 87(2) and (3) of the Internal Rules.

Party	Date	Name Lawyers	Place	Signature
Co-Lawyers for Ieng Thirith	14 November 2011	PHAT Pouy Seang Diana ELLIS, QC	Phnom Penh	 P.P.

¹⁷ *Ibid.*, paras. 5-7.