

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

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**OBJECTIONS, OBSERVATIONS, AND NOTIFICATIONS REGARDING
VARIOUS DOCUMENTS TO BE PUT BEFORE THE TRIAL CHAMBER**

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I. INTRODUCTION

1. Counsel for the Accused Nuon Chea (the ‘Defence’) hereby submits these objections, observations, and notifications regarding documents to be put before the Trial Chamber in Case 002.¹ As a preliminary matter, the Defence takes the position that the instant submission should be classified as public.² In any event, the Defence will treat it as such.

II. RELEVANT FACTS

2. On 22 July 2011, in response to the Chamber’s previous requests for an indication of documents and exhibits the parties ‘considered to be relevant to [the] early trial segments’,³ the Defence indicated that it would potentially ‘rely upon any document—including those on the case file, in the Shared Materials Drive (the ‘SMD’), or elsewhere—at any time prior to the close of the substantive hearing’ and declined to provide further specific information.⁴ The Office of the Co-Prosecutors (the ‘OCP’) took issue with this position and encouraged the Chamber to penalize the Defence for exercising its right under existing Cambodian procedure.⁵
3. On 6 September 2011, the Ieng Sary Defence Team filed its ‘Objections to the Admissibility of Certain Categories of Documents’ (the ‘Ieng Sary Document Objections’).⁶ Among other things, counsel for Ieng Sary: (i) contends that certain documents on the case file ‘do not meet minimum thresholds of authenticity, reliability, and relevance’;⁷ (ii) argues that any document’s authenticity, reliability, and relevance must be determined prior to its admission as evidence;⁸ and (iii) proposes a number of

¹ Document No E-124/2, 3 October 2011, ERN 00744254–00744269.

² See Document No E-116/1/5, ‘Reply to Co-Prosecutors’ Response to Nuon Chea’s Immediate Appeal Against the Trial Chamber Decision Regarding the Fairness of the Judicial Investigation’, 8 November 2011, ERN 00752449–00752454, paras 1, 5–7.

³ Document No E-1/4.1, Public ‘Transcript of Initial Hearing’, 27 June 2011, ERN 00712135–00712252, p 25:11–13.

⁴ Document No E-109/3, ‘Observations Regarding Documents Considered Relevant to the Early Segments of the Trial’, 22 July 2011, ERN 00717666–00717670 (the ‘Second Document Submission’); see also Document No E-9/26, ‘Notice of Joinder in Ieng Sary’s Initial Submissions Regarding Documents to be Relied Upon at Trial & Additional Submissions Regarding New Documents’, 19 April 2011, ERN 00665543–00665546 (the ‘First Document Submission’).

⁵ See Document No E-109/5, ‘Co-Prosecutors’ Request Regarding Nuon Chea’s Second Failure to Comply with the Trial Chamber’s Orders to Provide Their List of Documents and Exhibits Which They Intend to Put Before the Trial Chamber’, 5 August 2011, ERN 00722647–00722659 (the ‘OCP Request for Sanctions’), para 32 (where the OCP recommends the imposition of ‘preclusive sanctions’).

⁶ Document No E-114, ERN 00728906–00728921.

⁷ Ieng Sary Document Objections, p1 (unnumbered introductory paragraph) and paras 13–22.

⁸ Ieng Sary Document Objections, paras 6–11.

steps to be undertaken by the Chamber in this regard.⁹ Notably, the OCP takes the position that: ‘authenticity itself need not be proven prior to admission of [a] document and is not a separate requirement for admission’.¹⁰ However, both sides appear to agree that ‘there must be a least a *prima facie* showing of authenticity in order for a document to be admissible pursuant to Rule 87(3)(c)’.¹¹

4. On 22 September 2011, the Trial Chamber announced that it would divide the proceedings in Case 002 into several separate trials, with the first (the ‘First Mini-Trial’) to focus solely on: (i) the four previously-announced general topics related to Democratic Kampuchea (‘DK’) as a political regime (collectively, the ‘Initial Trial Topics’);¹² and (ii) the alleged crimes against humanity said to have been committed during the DK period in connection with so-called ‘population movement phases 1 and 2’.¹³ Calls for reconsideration of this long overdue, though welcome,¹⁴ dissection were unsuccessful.¹⁵
5. On 6 October 2011, in requesting disclosure to the parties in Case 002 of certain witness statements obtained in Cases 003 and 004, the international Co-Prosecutor ‘has noted a number of inconsistencies or omissions when comparing the written statements [...] to the audio recordings of those interviews’.¹⁶ Similarly troubling irregularities have been independently uncovered by the Defence with respect to previously filed Case 002 witness statements.¹⁷

⁹ Ieng Sary Document Objections, para 12.

¹⁰ Document No **E-114/1**, ‘Co-Prosecutors’ Response to “Ieng Sary’s Objections to the Admissibility of Certain Categories of Documents”’, 16 September 2011, ERN 00742205–00742220, para 10.

¹¹ Document No **E-114/2**, ‘Ieng Sary’s Request for Leave to Reply & Reply to the Co-Prosecutors’ Response to Ieng Sary’s Objections to the Admissibility of Certain Categories of Documents’, 21 September 2011, ERN 00743291–00743296, para 2 (citing OCP Response, paras 10–11).

¹² See Document No **E-124**, ‘Severance Order Pursuant to Internal Rule 89ter’, 22 September 2011, ERN 00728906–00728921 (the ‘Severance Order’), para 1 (reiterating the four previously-announced initial topics: ‘(a) The structure of Democratic Kampuchea; (b) Roles of each Accused during the period prior to the establishment of Democratic Kampuchea, including when these roles were assigned; (c) Role of each Accused in the Democratic Kampuchean government, their assigned responsibilities, the extent of their authority, and the lines of communication throughout the temporal period with which the ECCC is concerned; and (d) Policies of Democratic Kampuchea on the issues raised in the Indictment.’)

¹³ Severance Order, para 5(a).

¹⁴ See Document No **E-124/5**, ‘Response to Co-Prosecutors’ Request for Reconsideration of the Severance Order’, 11 October 2011, ERN 00746764–00746766.

¹⁵ See Document No **E-124/7**, ‘Decision on Co-Prosecutors’ Request for Reconsideration of the Terms of the Trial Chamber’s Severance Order and Related Motions and Annexes’, 18 October 2011, ERN 00747737–00747742.

¹⁶ Document No **E-127**, ‘International Co-Prosecutor’s Disclosure to Trial Chamber Regarding Interviews of Case 002 Witnesses in Cases 003 and 004 with Strictly Confidential Annex A’, 6 October 2011, ERN 00746159–00746164, para 14.

¹⁷ See ‘Request for Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews’. *N.B.* This document is currently being translated and will be filed as soon as possible. Courtesy copies in English will be made available to the Chamber and the parties.

6. On 18 October 2011—despite outstanding fitness-to-stand-trial issues,¹⁸ unresolved requests related to political interference,¹⁹ and the worst crisis of confidence facing the ECCC to date²⁰—the Trial Chamber announced that opening statements in Case 002 would be held during the week of 21 November, with the substantive hearing to begin on the following Monday.²¹ A reasoned Defence request to temporarily stay the proceedings—pending a satisfactory remediation of RGC interference—was summarily dismissed.²²

7. On 25 October 2011, the Chamber issued the following notice:

In preparation for the first trial segment, the Chamber orders the parties to indicate, no later than 1 November 2011, which documents and exhibits from its earlier list 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 trial (confidential Annex B). Objections, if any, to these documents and exhibits by the opposing parties shall be filed within 10 days of notification of those documents and exhibits the parties intend to introduce during the first trial segment.²³

The 1 November 2011 deadline was later extended by ten days.²⁴ However, as 11 November 2011 fell within a subsequently announced judicial recess, the deadline was further postponed until 14 November 2011.²⁵

8. Additionally, with respect to documents intended to be put before the Chamber, the parties were informed as follows:

¹⁸ See, e.g., Inter-Office Memorandum from William Smith to Susan Lamb re ‘Issues to Be Raised Before Trial’, 1 November 2011, para 2 (in which the OCP noted, among other things: ‘The issue of Ieng Thirith’s and Nuon Chea’s fitness to stand trial is still to be decided by the Trial Chamber.’)

¹⁹ See Document No **E-116/1**, ‘Immediate Appeal Against the Trial Chamber Decision Regarding the Fairness of the Judicial Investigation’, 10 October 2011, ERN 00746636–00746658; Document No **E-131/2**, ‘Request for Adjournment of Opening Statements and Substantive Hearing’, 26 October 2011, ERN 00749600–00749600.

²⁰ *Ibid.*

²¹ Document No **E-131**, ‘Scheduling Order for Opening Statements and Hearing on the Substance in Case 002’, 18 October 2011, ERN 00747479–00747479.

²² See Document No **E-131/2/1**, Trial Chamber Memorandum regarding ‘Trial Chamber Response to Nuon Chea’s Request to Temporarily Stay the Proceedings in Case 002’, 2 November 2011, ERN 00750105.

²³ Document No **E-131/1**, Trial Chamber Memorandum regarding ‘Witness lists for early trial segments, deadline for filing of admissibility challenges to documents and exhibit, and response to Motion E-109/5’, 25 October 2011, ERN 00747683–00747686 (the ‘Witness & Document Memo’), p 1.

²⁴ See Email from Senior Legal Officer to parties re ‘Letter from Ieng Sary Defence re questions and issues arising from the scheduling of substantive trial’, 26 October 2011 (the ‘26 October SLO Email’) (noting: ‘The parties are reminded that the deadline for filing lists of documents is 1 November. Where any party is unable to comply with this deadline, the lists must be filed by 11 November. The Chamber will not extend this deadline further.’) *N.B.* On 27 October 2011, the Defence informed the Senior Legal Officer by email that it was ‘unable to file [its] document list by 1 November’ and therefore would ‘take advantage of the extension and file by 11 November’.

²⁵ See Document No **E-133**, Trial Chamber Memorandum regarding ‘Judicial Recess During the Water Festival Period’, 2 November 2011, ERN 00750474.

- a. ‘If any party wishes to place new documents on the case file they should be filed in Khmer and in at least one other working language.’²⁶
- b. ‘The parties may file only those documents which comply with the provisions of Rules 87(4) and (3).’²⁷
- c. ‘[Document] notifications and any objections to these documents or exhibits may, exceptionally, be filed in one official language only.’²⁸
- d. ‘In [objecting to documents], [they parties] shall make reference to the criteria contained in Internal Rule 87(3) [...].’²⁹
- e. ‘The party seeking to introduce a document bears the responsibility of ensuring the timely availability of this document in all ECCC official languages.’³⁰

Many other questions—such as those raised by the Ieng Sary Defence Team³¹—were not addressed *sua sponte* by the Chamber.

9. Regarding an OCP motion to ‘preclude the [...] Defence from introducing at trial documents which were not identified pursuant to previous orders’,³² the Chamber held as follows:

[D]ocuments not filed in accordance with previous deadlines must satisfy, in accordance with Internal Rule 87(3), the *extremely high threshold* of showing that they could not have been disclosed within the applicable deadlines with the exercise of due diligence, and that their late admission is *vital in the interests of justice*. It follows that *most belated requests to admit documents are unlikely to be successful*.³³

No legal support for this exaggerated proposition—‘the Chamber’s official response’³⁴—is cited. Upon information and belief, none exists. In fact, the paragraph

²⁶ 26 October SLO Email.

²⁷ *Ibid.*

²⁸ Witness & Document Memo, p 2.

²⁹ *Ibid.*

³⁰ *Ibid.*, p 3.

³¹ *See* n 38, *infra*.

³² Witness & Document Memo, p 4 (referring to OCP Request for Sanctions); *see also* Document No E-109/5/1, ‘Response to Co-Prosecutors’ Request Regarding Nuon Chea’s Second Failure to Comply with the Trial Chamber’s Orders to Provide Their List of Documents and Exhibits Which They Intend to Put Before the Trial Chamber’, 15 August 2011, ERN 00725817–00725817 (the ‘Document Response’).

³³ Witness & Document Memo, p 4 (emphasis added).

³⁴ *Ibid.*

is couched in terms that seem designed to somehow chastise the Defence for its insistence on proceeding in accordance with applicable Cambodian procedure.

10. On 2 November 2011, the parties filed their various lists of documents relevant to the first session of the First Mini-Trial.³⁵ Notably, in particular response to the OCP and Civil-Party lists, the Ieng Sary and Ieng Thirith Defence Teams drew welcome attention to a significant oversight in the Trial Chamber's approach to document objections thus far: given the size and scope of the submitted lists, it would be impossible to provide meaningful, reasoned objections in writing within the time-frame envisaged by the Chamber.³⁶ The Ieng Thirith Defence Team reiterated its 'general objections to certain categories of documents', which appear to have been previously submitted but not yet notified to the parties.³⁷
11. From 17 October until 4 November 2011 (the last day for placing official notifications on the case file prior to the recent judicial recess), a one-sided exchange of letters between the Ieng Sary Defence Team and the Trial Chamber's Senior Legal Officer (the 'SLO') ensued. In no fewer than six letters to the SLO, counsel for Ieng Sary raised a number of pertinent questions and concerns related to the substantive management of the upcoming trial session,³⁸ nearly all of which affect all of the parties. To date, the issues highlighted

³⁵ See Document No **E-131/1/2**, 'Civil Parties' List of Documents Relevant to the Initial Trial Session', 2 November 2011, ERN 00749568-00749572; Document No **E-131/1/3**, 'Ieng Sary's Document List for the First Trial Segment', 2 November 2011, ERN 00750234-00750235; Document No **E-131/1/4**, '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', 2 November 2011, ERN 00750245-00750248; Document No **E-131/1/5**, 'List of Documents to Be Admitted Before the Trial Chamber in Connection with the Witnesses and Civil Parties Who May Be Called During the First Trial Session', 2 November 2011, ERN 00749958-00749960; and Document No **E-131/1/6**, 'Indications of Witnesses and Documents Germane to the Initial Phases of the First Trial', 2 November 2011, ERN 00752036-00752043.

³⁶ See Letter from Ieng Sary Defence Team to Senior Legal Officer, re 'Notice Concerning Ieng Sary's Objections to OCP and Civil Party Documents for Initial Three Weeks of Trial', 4 November 2011; Letter from Ieng Thirith Defence Team to Senior Legal Office, re 'Notice Concerning Ieng Thirith's Objections to OCP and Civil Party Documents for Initial Three Weeks of Trial', 8 November 2011 (the 'Ieng Thirith Letter').

³⁷ See Ieng Thirith Letter.

³⁸ See, e.g., Letter from Ieng Sary Defence Team to Senior Legal Officer, re 'Scheduling of the substantive trial', 17 October 2011; Letter from Ieng Sary Defence Team to Senior Legal Officer, re 'Request for clarification of Trial Chamber Memorandum entitled "Witness Lists for Early Trial Segments, Deadline for Filing of Admissibility Challenges to Documents and Exhibits, and Response to Motion E-109/5"', 21 October 2011; Letter from Ieng Sary Defence Team to Senior Legal Officer, re 'Issues which impede the efficiency of the early portion of the substantive hearing', 1 November 2011; Letter from Ieng Sary Defence Team to Senior Legal Officer, re 'Request for Clarification Concerning Objections to OCP and Civil Party Document Lists', 3 November 2011; Letter from Ieng Sary Defence Team to Senior Legal Officer, re 'Notice Concerning Ieng Sary's Objections to OCP and Civil Party Documents for the initial three weeks of trial', 4 November 2011; and Letter from Ieng Sary Defence Team to Senior Legal Officer, re 'Request for information concerning outstanding preliminary objections', 4 November 2011.

in those letters remain unaddressed. Moreover, an informal trial management meeting—expected to take place in advance of the recent judicial recess³⁹—failed to materialize. Such confusion, compounded by the unresolved matters mentioned above,⁴⁰ has left the parties largely in the dark. In short, one week before the curtain is set to rise on what has been described as the largest and most complex trial since Nuremberg,⁴¹ the way forward in Case 002 is—for lack of a better expression—as clear as mud.

III. RELEVANT LAW

A. Previous Submissions

12. The Defence hereby adopts by reference the legal submissions set out in the following previously-filed documents: (i) the Sixteenth Request for Investigative Action,⁴² (ii) the Seventeenth Request for Investigative Action,⁴³ (iii) the First Document Submission,⁴⁴ (iv) the Second Document Submission,⁴⁵ (v) the Document Response,⁴⁶ and (vi) the Ieng Sary Document Objections.⁴⁷

B. Admissibility of Documentary Evidence

13. Rule 87 purports to set out the ‘Rules of Evidence’ applicable at trials before the ECCC. Generally, ‘[u]nless provided otherwise in [the Rules], all evidence is admissible’ before the Trial Chamber.⁴⁸ ‘Any decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination.’⁴⁹ These provisions, Rules 87(1) & (2), are fully consistent with existing Cambodian procedure.
14. However, in a clear and unjustified departure from domestic law, Rule 87 makes a distinction between the admission of ‘evidence from the case file’ and ‘new evidence’:

³⁹ See 26 October SLO Email (noting, among other things, that the Senior Legal Officer was ‘likely to hold an informal meeting with the parties’).

⁴⁰ See para 6, *supra*.

⁴¹ See BBC, ‘Cambodia: First hearing ex-Khmer Rouge leaders’ trial’, 27 June 2011 (“‘There hasn’t been a case as large and complex as this since Nuremberg,’” international co-prosecutor Andrew Cayley told the AFP news agency in a recent interview, referring to the historic Nazi trials after World War II.)

⁴² See Document No **D-253**, 30 November 2009, ERN 00410803–00410810, paras 7–9.

⁴³ See Document No **D-265**, 8 December 2009, ERN 00411348–00411357, paras 9–13.

⁴⁴ See First Document Submission, paras 3(e) and 4.

⁴⁵ See Second Document Submission, para 2(d).

⁴⁶ See Document Response, paras 5–8.

⁴⁷ See Ieng Sary Document Objections, paras 1–11.

⁴⁸ Rule 87(1).

⁴⁹ Rule 87(2).

Evidence from the case file is considered put before the Chamber or the parties if its content has been summarised, read out, or appropriately identified in court. The Chamber may 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.⁵⁰

During the trial, either on its own initiative or at the request of a party, the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth. Any party making such request shall do so by a reasoned submission. The Chamber will determine the merit of any such request in accordance with the criteria set out in Rule 87(3) above. The requesting party must also satisfy the Chamber that the requested testimony or evidence was not available before the opening of the trial.⁵¹

While the exceptional limitations placed on the admission of material under Rule 87(3) appear reasonably consistent with any court's inherent power to effectively manage its own proceedings, the final *additional* requirement of Rule 87(4)—as it professes to apply to so-called 'new evidence'—is plainly at odds with an important substantive guarantee contained in the Cambodian Code of Criminal Procedure (the 'CCP').⁵²

15. Elegant in its simplicity, the CCP provides no advance-notice requirement nor any additional hurdles with respect to the right to present material at trial: '*Until the end of the trial hearing, the accused [...] may [...] submit all documents and evidence that [he] think[s] will be conducive to ascertain[ing] the truth.*'⁵³

C. Authenticity of Documentary Evidence

16. In addition to the legal submissions adopted by reference above, the Trial Chamber's approach to authenticity of documents in Case 001 merits a brief recapitulation here. In that case, the Chamber held that the verification of a document's authenticity is 'a pre-

⁵⁰ Rule 87(3).

⁵¹ Rule 87(4).

⁵² *N.B.* The Defence has consistently objected to departures from existing Cambodian procedure unjustified by specific reference to Article 12(1) of the ECCC Agreement. *See, e.g.*, Document No **E-51/3**, 'Consolidated Preliminary Objections', 25 February 2011, ERN 00648279–00648310. As far as the Defence is aware, no such justification has ever been provided with particular respect to Rule 87. The Defence does not accept the position advanced on this point by the Trial Chamber. *See* Document No **E-51/14**, 'Decision on Nuon Chea's Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules', 8 August 2011, ERN 00707531–00707535. However, as this decision is not subject to immediate appeal, the Defence hereby reiterates its objections for an eventual appellate record.

⁵³ CCP, Article 334 (emphasis added). *N.B.* The CCP mentions the term 'new evidence' three times, but never in the context envisaged by Rule 87(4). *See* CCP, Article 251 (Re-opening of Judicial Investigation) ('When there is *new evidence*, even after a non-suit order or a dismissal order of the Investigation Chamber has become final, the investigating judge may re-open the investigation at the initiative of the Royal Prosecutor.');

Article 265 (Re-opening of Judicial Investigation) ('When there is *new evidence*, even after a non-suit order or a dismissal order of the Investigation Chamber has become final, the judicial investigation may be re-opened at the initiative of the Royal Prosecutor.');

and Article 445 (Cases of Review of Proceeding) ('A motion for review may be filed: [...] 4. Where new facts, documents, or other *new evidence* lead to reasonable doubt as to the guilt of a convicted person.')

condition for its use as evidence’.⁵⁴ The logical corollary of this position is that unauthenticated and/or inauthentic material must be ultimately excluded from any trial and may not support any finding of fact against any accused person.⁵⁵

IV. ARGUMENT

A. The Defence Objects to the Admissibility of Any Unauthenticated Documentary Material

17. The Defence supports the proposition put forward by the Ieng Sary Defence Team that ‘[a] document’s authenticity must be determined prior to its admission as evidence’.⁵⁶ Such position is consistent with previous arguments advanced by the Defence⁵⁷ and, given the passage of time and questionable provenance of much of the documentary material likely to be proffered at trial in the instant case, is the only prudent course of action open to the Chamber. An inauthentic document is inherently unreliable and carries no evidentiary weight whatsoever. As put by counsel for Ieng Sary, such material ‘must, *ipso facto*, lack probative value’.⁵⁸
18. Allowing for the provisional admission of unauthenticated material, subject to subsequent authenticity determinations (as the OCP suggests), threatens to taint the overall process. In any large trial such as this one, the natural tendency will be to evaluate evidence—both in its own right and as it relates to other admitted material—gradually over the course of the proceedings. Thus, undue probative value will undoubtedly be assigned to material, which may—at some indeterminate later stage—be excluded as inauthentic. By then, the damage will be irreparable. Even professional

⁵⁴ See Case File No 001/18-07-2007-ECCC/TC, Document No E-5/10/5, ‘Decision on the Vietnamese Film Footage Filed by the Co-Prosecutors and on Witnesses CP3/3/2 and CP3/3/3’, 29 July 2009, ERN 00356281–00356285 (the ‘Vietnamese Film Decision’), para 8. (In that case, on request by the OCP, the Chamber provisionally admitted *prima facie* relevant film footage provided by the government of Vietnam to the Documentation Center of Cambodia (DC-Cam) ‘subject to a review of its relevance and authenticity during the substantive hearing’. Vietnamese Film Decision, para 1. Counsel for Duch ultimately ‘contest[ed] the authenticity of this footage on a number of grounds’, arguing that ‘[i]n order to clarify the circumstances in which this footage was created, and thus to satisfy itself as to its accuracy and reliability, the Chamber would have to undertake a number of supplementary investigations, including the identification and summoning of additional witnesses’. *Ibid*, para 6; see also para 2. Finding that such verification was ‘unlikely to be obtained within a reasonable time’, the Chamber excluded the footage. *Ibid*, para 8.)

⁵⁵ See, e.g., *Prosecutor v Milutinović et al*, IT-05-87-T, ‘Judgment’, 26 February 2009, para 61 (‘[w]here the Chamber relies upon documents in the course of its Judgment, this is because it finds them to be authentic and reliable in relation to the point in issue’).

⁵⁶ Ieng Sary Document Objections, para 6.

⁵⁷ See Sixteenth and Seventeenth Requests for Investigative Action, para 12, *supra*.

⁵⁸ Ieng Sary Document Objections, para 6.

judges will have great difficulty expunging whatever value they will have already assigned to the discredited ‘evidence’.

19. Accordingly, the Defence objects to the admission of any document whose authenticity has not been definitively established by the party seeking its admission (or by the Chamber should it chose to rely upon any documentary material *sua sponte*).

**B. The Defence is Unable to Formulate Specific Objections
to the Documents Proposed by the OCP and the Civil Parties**

20. In this regard, the Defence supports and adopts the positions advocated by the Ieng Sary and Ieng Thirith Defence Teams.⁵⁹ Given the size and scope of the document lists submitted by the OCP and the Civil Parties, it would be impossible to provide meaningful, reasoned, and specific objections in writing within the timeframe envisaged by the Trial Chamber.

**C. The Defence Objects to the Suggestion that Witnesses Be Permitted
to Study Their Previous Statements in Advance of Giving Testimony**

21. The OCP has requested that, ‘before witnesses testify, they are given sufficient opportunity to refresh their memory by reviewing any prior statements’.⁶⁰ The Defence strongly objects to this misguided proposal. The primary purpose of hearing witnesses in court is to gauge whether they remember *what* happened to them, not whether they remember *what they said* happened to them in interviews with members of the Office of the Co-Investigating Judges (the ‘OCIJ’).⁶¹ This latter determination—largely the province of defence counsel on cross-examination—will be undermined if witnesses are permitted to study, memorize, and, where necessary, harmonize any discrepancies in their various statements prior to providing *viva voce* testimony before the Chamber and the public. The OCP’s proposal threatens to further undermine the reliability and credibility of already suspect witness testimony,⁶² especially in light of recent discoveries. As noted above, the international Co-Prosecutor and the Defence have uncovered several

⁵⁹ See para 10, *supra*.

⁶⁰ Inter-Office Memorandum from William Smith to Susan Lamb, re ‘Issues to Be Raised Before Trial’, 1 November 2011, para 3.

⁶¹ Or not, as it seems in some cases, *what the OCIJ investigators* said that the Witnesses said happened to them. See, n 17, *infra* (referring to a forthcoming filing in which the Defence notes significant discrepancies between audio-recorded witness statements and the OCIJ written record of such statements).

⁶² See, e.g., Consolidated Preliminary Objections, paras 15–19, 58–61.

discrepancies in various witness statements, the full extent and cause of which are currently unknown.⁶³

**D. The Chamber's General Approach to the Parties
Amounts to an Obstacle to the Efficiency of the Trial**

22. In response to the Trial Chamber's request for input from the parties regarding 'any issues that they consider may impede the efficiency of the early portions of the hearing',⁶⁴ the OCP, the Civil Parties, and the Ieng Sary Defence Team made various observations.⁶⁵ With the exception discussed in the previous paragraph, the Defence echoes these concerns. Moreover, as a general matter, it must be said that the principal obstacle to an efficient trial in Case 002 is undoubtedly the Chamber's consistent failure to engage the parties in anything resembling a meaningful discussion.⁶⁶
23. Despite several reasoned and reasonable calls (as early as 17 October 2011) for a trial management meeting in advance of the opening statements,⁶⁷ as well as a provisional indication by the SLO that such meeting would in fact take place,⁶⁸ nothing in this regard has been scheduled by the Trial Chamber. As noted by the OCP, such a conference would serve as a 'mechanism for the parties to communicate on issues relating to the fair and expeditious conduct of the trial'.⁶⁹ One need only review the submissions of the various parties—especially the correspondence from counsel for Ieng Sary—to appreciate the pressing need for clarity and transparency from this Chamber.

⁶³ See para 5, *supra*.

⁶⁴ Email from Senior Legal Officer to parties re 'Communication to parties in Case 002 regarding scheduling of opening statements and the hearing of the substance in Case 002, and information in advance of hearing on 19-20 October 2011', 17 October 2011.

⁶⁵ See Inter-Office Memorandum from William Smith to Susan Lamb, re 'Issues to Be Raised Before Trial', 1 November 2011; Document No E-132/2, 'Civil Parties' Request for a Trial Management Meeting and Regular Trial Status Meetings for Case 002 and for Clarification on Trial Scheduling and Preparation', 28 October 2011, ERN 00749911-00749917; and Letter from Ieng Sary Defence Team to Senior Legal Officer, re 'Issues which impede the efficiency of the early portion of the substantive hearing', 1 November 2011.

⁶⁶ *N.B.* This was also one of the OCII's chief errors, leading to a protracted and now largely unnecessary judicial investigation.

⁶⁷ See Document No E-132, 'Co-Prosecutor's Request for a Trial Management Meeting and Regular Trial Status Meetings for Case 002', 21 October 2011, ERN 00748216-00748216 (the 'OCP TMM Request'); Document No E-132/1, 'Ieng Sary's Support to the Co-Prosecutor's Request for a Trial Management Meeting and Regular Trial Status Meetings for Case 002', 24 October 2011, ERN 00748526-00748527; Document No E-132/2, 'Civil Parties' Request for a Trial Management Meeting and Regular Trial Status Meetings for Case 002 and for Clarification on Trial Scheduling and Preparation', 28 October 2011, ERN 00749911-00749917 (the 'Civil Party TMM Request').

⁶⁸ See Civil Party TMM Request, para 8 (noting that the Senior Legal Officer indicated by email on 26 October 2011 that the Chamber would 'likely hold an informal meeting with the parties').

⁶⁹ OCP TMM Request, para 1.

24. Any reasonable observer, apprised of the relevant facts, would discern a breakdown in the Trial Chamber's ability to relate crucial information to the parties and to organize the proceedings in a comprehensible manner. For example, the parties now have until 24 November 2011 to object to the instant submissions. That leaves one working day in advance of the scheduled testimony of the first civil party (28 November 2011) for the Chamber to rule on those objections. Moreover, the terminology employed by the Chamber in describing the shape of things to come has been perplexing, to say the least.⁷⁰ As the Defence understands it, we are about to hear the first tranche of testimony related to the first four segments of the first Mini Trial. Yet precisely what will take place in two weeks' time remains largely a mystery. Apart from the numerous red flags already raised by the other parties, two additional issues are apparently easier to ignore than to address: Will Nuon Chea be expected to participate for full trial days, five days per week? And will Ieng Thirith be part of the proceedings at all? As noted, these questions remain open ones.
25. Regarding the Chamber's position with respect to the admission of new documents at trial,⁷¹ it is baffling that judges in a civil-law trial should wish to articulate such an exclusionary approach to potential evidence—especially before the proceedings have even begun. The primary role of this Chamber, rather than simply mediating evidentiary disputes among the various parties, is to affirmatively ascertain the truth regarding the charges contained in the Modified Indictment. Yet the judges appear to have already preempted the admission of as-yet unseen and potentially relevant evidence through the imposition of an unnecessarily strict standard (with no basis in law). Worse still, it seems they have done so with a view to castigating the Defence for asserting and standing by its position with respect to applicable Cambodian procedure. Despite this aggressive posture, the Defence will continue to assist the Chamber in its search for the truth by submitting any new relevant evidence in due course.
26. The Defence appreciates that the Trial Chamber is under enormous political pressure to commence the substantive proceedings in Case 002 as soon as possible. However, by shutting out the parties, the judges are virtually ensuring a cumbersome, contentious, and unnecessarily costly endeavor. In this case, the price will be paid not only in dollars, but in damage to rights, reputation, and any reasonable hope for a speedy trial.

⁷⁰ See, e.g., Letter from Ieng Sary Defence Team to Senior Legal Officer, re 'Scheduling of the substantive trial', 17 October 2011.

⁷¹ See para 9, *supra*.

E. The Defence Intends to Submit at Trial All Documents and Evidence it Considers Conducive to Ascertaining the Truth

27. As previously stated, in accordance with applicable Cambodian law, the Defence intends to rely upon any document—including those on the case file, in the SMD, or elsewhere—at any time prior to the close of the substantive hearing. Despite the erroneous position recently advanced by the Trial Chamber, the Defence stands by the position set out in the First and Second Document Submissions.⁷² As noted, while the Chamber clearly has the inherent power to implement measures designed to effectuate a smooth and efficient trial, it cannot deny fundamental substantive rights by procedural fiat,⁷³ especially where there has been no prejudice to any party or to the proceedings in general.

1. Documents Specifically Related to the First Three Civil Parties and First Five Witnesses

28. At present, the Defence does not intend to put any ‘new documents’ before the Trial Chamber with respect to these eight individuals (the ‘Initial Witnesses’), but reserves its right to do so at any later stage of the proceedings.

29. However, during the upcoming session, the Defence may proffer any number of documents already on the case file related to the relationship between DK and the Socialist Republic of Vietnam, for example: the ‘Black Paper’.⁷⁴ Such material is clearly relevant to the fourth Initial Trial Topic: ‘Policies of Democratic Kampuchea on the issues raised in the Indictment’.⁷⁵ Accordingly, the Defence may seek to question any of the Initial Witnesses on such documentary material, as it relates to (for example) objective political and military realities during the DK era and/or Nuon Chea’s subjective state of mind.

30. Should the Defence decide to cross-examine any of the Initial Witnesses, it reserves its right to rely upon additional material already on the case file, *for example*: (i) any

⁷² See paras 2, 12, *supra*.

⁷³ See para 9, *supra*.

⁷⁴ Document No **D-135.1**, ‘Black Paper: Facts and Evidence of the Acts of Aggression and Annexation of Vietnam Against Kampuchea’, September 1978, ERN 00082510–00082560.

⁷⁵ *N.B.* Vietnam is mentioned no less than thirty-one times in the Indictment, as modified by the Severance Order (the ‘Modified Indictment’). See paras 19, 22 (re historical background); 43 (re administrative structures); 77, 109, 111, 112 (re communications structure); 132 (re military structure); 157 (re factual findings JCE); 249, 278 (re reasons given and justification of policy: population movement phases 1 and 2); 863, 876, 879, 890, 897 (re role of Nuon Chea); 1353, 1358, 1369, 1373, 1381, 1386, 1398–1400, 1407, 1422, 1424, 1454, 1468 (re legal findings); and 1581 (re NC character).

statement made to the OCP or the OCIJ by any one of the Initial Witnesses; (ii) any other statement that contradicts or otherwise relates to any account made by any one of the Initial Witnesses; and/or (iii) any document referenced in any such statement. This material is well known to the parties and the Chamber, and it has already been translated into the Tribunal's three official languages.

2. Documents to Be Tendered at Any Later Stages of the Proceedings

31. The Defence is currently in the process of collecting, reviewing, translating, and/or authenticating a number of documents relevant to various issues raised by the Modified Indictment. In due course, depending on the manner in which the Trial Chamber proceeds, the Defence intends to proffer such material as evidence. By way of advance notice, the Defence hereby: (i) identifies certain relevant portions of the Modified Indictment; (ii) describes the particular character of the documents to be tendered; and (iii) provides a brief preliminary justification for the material's eventual admission. Such advance notice and information is beyond any obligation imposed by Cambodian law. The information provided herein is *simply indicative and entirely provisional*. The Defence reserves its right to make further submissions on these and other matters. In any event, the documents will be submitted in advance of any substantive hearing on the issues to which they relate in order to avoid any prejudice to the other parties.

a. Alleged Population Movement: Phases One & Two⁷⁶

32. Certain individuals who are currently not listed as witnesses in Case 002 have been factually linked to the so-called 'population movement phases 1 and 2'.⁷⁷ Indeed, according to credible reports, these men may have participated in crimes against humanity as charged in the Modified Indictment. While some of these individuals failed to appear before the OCIJ pursuant to validly issued summonses, one of them was never subpoenaed (although the Defence sought such action⁷⁸). Documents related to the possible criminal activity of these individuals during the first and second phases of the

⁷⁶ See Modified Indictment, paras 221–260, 262–281.

⁷⁷ *N.B.* These individuals are: Hun Sen, currently the Prime Minister of Cambodia; Chea Sim, currently the President of the Cambodian Senate; Heng Samrin, currently the President of Cambodian National Assembly; Ouk Bunchhoeun, currently a member of the Cambodian Senate; and Sim Ka, also currently a member of the Cambodian Senate.

⁷⁸ See Document No **D-136**, 'Tenth Request for Investigative Action', 24 February 2009, ERN 00284473–00284483 (seeking, among other things, the interview of Hun Sen).

alleged population movement will be relevant to establish that subordinate Khmer Rouge cadres may have acted contrary to any established DK policies.

b. Alleged Overall Death Toll

33. According to the Modified Indictment, under the rubric devoted to crimes against humanity, the alleged criminal ‘system [implemented in DK] resulted in millions of victims, including 1.7 to 2.2 million deaths, of which some 800,000 were violent’.⁷⁹ Though rarely discussed openly in this country, it has been publicly reported that upwards of 50,000 individuals may have died in the implementation of the so-called ‘K-5 Plan’,⁸⁰ which took place shortly after the DK period but well before any assessments of the regime’s alleged death toll were undertaken. As far as the Defence is aware, none of those forensic inquiries took the potentially numerically-distorting effect of the K-5 episode into account. The Defence has recently obtained certain documents indicating that Hun Sen may bear responsibility for the implementation of the K-5 Plan and resulting deaths; at the very least, he is surely in possession of information related to what was described in 1986 as ‘Cambodia’s new genocide’.⁸¹ Given its extremely sensitive nature, such information has been difficult to verify. And finding fluent Khmer speakers willing to assist in the translation and analysis of relevant documents has proven equally complicated. Yet the Defence is making progress.

c. Political Interference

34. The soundness of the Modified Indictment, in its entirety, has been called into question by the lack of independence associated with the judicial office that produced it. In addition to the various material submitted to date,⁸² the Defence will continue to submit any new evidence supporting the proposition that the OCIJ has always been a wholly-owned subsidiary of the Royal Government of Cambodia.

⁷⁹ Modified Indictment, para 1360.

⁸⁰ *N.B.* While there is some disagreement among historians and scholars as to what the term ‘K-5’ actually referred to, all agree that the plan itself related to or encompassed in some way a project implemented under the People’s Republic of Kampuchea that used conscripted Cambodian labor to build a barrier of spiked ditches, barbed wire, and minefields to close off Cambodia’s border with Thailand and prevent or hamper the infiltration of Khmer Rouge and other rebel forces into Cambodia’s towns and provinces.

⁸¹ Philippe Pacquet, *La Libre Belgique*, ‘Un nouveau genocide’, 26 May 1986 (cited in Esmeralda Lucioli, *LE MUR DE BAMBOU: LE CAMBODGE APRÈS POL POT* (Medecins sans Frontières 1988).

⁸² See, e.g., Mark Ellis, *International Bar Association*, ‘Safeguarding Judicial Independence in Mixed Tribunals: Lessons from the ECCC and Best Practices for the Future’, September 2011.

V. CONCLUSION

35. Accordingly, for the reasons stated herein and previously, the Trial Chamber should:
- a. admit at trial only those documents whose authenticity has been sufficiently established by the party seeking their admission;
 - b. formulate, *in consultation with the parties*, a reasonable mechanism for lodging specific objections to the various documents intended to be put before the Chamber;
 - c. reject the OCP proposal that witnesses should be permitted to study their previous statements in advance of providing *viva voce* testimony to the Chamber;
 - d. hold a trial management meeting at the first available opportunity and, in any event, prior to the commencement of the substantive hearing; and
 - e. accept the Defence position with regard to documentary evidence as being: (i) in conformity with applicable Cambodian procedure; (ii) reasonable under the circumstances; and (iii) without actual prejudice to any other party.

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