

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

FILING DETAILS

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DEFENCE FOR IENG THIRITH'S NOTE ON ADMISSIBILITY OF EVIDENCE

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I Introduction and Petition

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 Parties to the proceedings were invited to indicate their objections to any documents and exhibits relied upon by the opposing parties within 10 days of notification of this material.² Furthermore, the Trial Chamber stated that any such objections should make reference to the criteria contained in Internal Rule 87(3) and that they would not at this stage entertain any submissions regarding the probative value or weight to be accorded to any document or exhibit.
2. The defence for Madame Ieng Thirith (**Accused**) will accordingly indicate its specific objections to any material once the notifications of documents to be used in the trial have been received. However, at this stage, and very shortly and succinctly, the defence seeks to put before the Trial Chamber its contention that there are categories of evidence which are inadmissible and as such the issue of the weight of the evidence does not fall to be considered.

II Submissions

3. In the first instance, it is submitted that evidence obtained as a result of torture is not admissible per se.³ The basis for this argument is set out length in the 'Defence Request for Exclusion of Evidence Obtained Through Torture',⁴ in which it is essentially submitted that the use of torture tainted material is

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 Having particular regard to Internal Rule 87(c) and/or 87(d).

⁴ 'Defence Request for Exclusion of Evidence Obtained through torture', 11 February 2009, Document No. D130; See also Ieng Sary's Motion against the use of Torture Tainted Evidence at Trial, 4 February 2011, Document No. E33.



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inadmissible as it violates provisions of international and national law⁵ and the Accused's right to a fair trial and the presumption of innocence.

4. Whilst this request was dismissed by the Office of the Co-Investigating Judges on 28 July 2009 (**OCIJ Order**), they did rule that the *reliability* of statements obtained through torture is at issue.⁶ The defence subsequently filed an Appeal against the OCIJ Order,⁷ which was ruled inadmissible by the Pre-Trial Chamber,⁸ although they observed that Article 15 of the 1984 United Nations Convention Against Torture is to be strictly applied and that there is no room for a determination of the truth or for use otherwise of any statement obtained through torture.⁹ Further, the Pre-Trial Chamber noted that the Trial Chamber's decision in the case of KAING Guek Eav 'Duch' ('the *Duch* case') endorsed this very approach.¹⁰

5. Secondly, the defence respectfully submits that the Trial Chamber should not admit in evidence any document of unknown provenance. In the absence of clear evidence as to the source of the material to be placed before the Trial Chamber, it cannot be demonstrated that the document in question is either authentic or reliable in its content; it has no evidential weight and its inclusion in evidence would jeopardize the fundamental fairness of the trial process. Furthermore, establishing the provenance of documents and a satisfactory chain of custody is a safeguard against the risk of admitting evidence that has been tampered with.

⁵ In particular, Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975, entered into force 26 June 1987.

⁶ OCIJ, Order on use of statements which were or may have been obtained by torture, 28 July 2009, Document No. D130/8, para. 28.

⁷ Defence Appeal against OCIJ 'Order on Use of Statements Which Were or May Have Been Obtained by Torture' of 28 July 2009', 10 September 2009, Document No. D130/9/6.

⁸ PTC, Decision on Admissibility of the Appeal Against Co-Investigating Judges' Order on Use of Statements which were or may have been obtained by Torture, 18 December 2009, Document No. D130/9/21.

⁹ *Ibid.*, para. 30.

¹⁰ *Ibid.*, para. 29 citing Case No. 001/18-07-2007/ECCC/TC, Decision on Parties Requests to Put Certain Documents before the Chamber Pursuant to Rule 87(2), 28 October 2009, Document No. E176, para 8.

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6. In the *Duch* case, for example, the Trial Chamber declined to admit several documents due to concerns over their provenance and based upon chain of custody rationales. In particular, several documents were excluded under Internal Rules 87(3) because they were improperly identified¹¹ and two statements offered by the prosecution were excluded due to questions over their origins, content, character and the inability of the accused to challenge their veracity.¹²
7. The defence therefore contends that it has the right to challenge the authenticity of all documents put into evidence before the Chamber. Where the provenance of a document cannot be demonstrated, the said document should not be admitted into evidence.¹³
8. These arguments regarding torture tainted evidence and provenance have also been set out in 'Ieng Sary's Objections to the Admissibility of Certain Categories of Documents',¹⁴ and 'Ieng Sary's Motion Against the Use of all Material Collected by the Documentation Center of Cambodia'.¹⁵ The defence will not restate these submissions here but relies on them in full.
9. Further, the defence contends, as previously submitted,¹⁶ that proper regard should be had to the provisions of Internal Rule 84 and the mandatory requirement that those witnesses whom the Co-Prosecutors 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. The Co-Prosecutors should not be permitted to place into evidence statements of witnesses which are relied upon to

¹¹ Case No. 001/18-07-2007/ECCC/TC, Decision on Parties Requests to Put Certain Documents before the Chamber Pursuant to Rule 87(2), 28 October 2009, Document No. E176.

¹² *Ibid.*, paras. 13-17.

¹³ Having regard in particular to Internal Rule 87(c).

¹⁴ Ieng Sary's Objections to the Admissibility of Certain Categories of Documents, 6 September 2011, Document No. E114.

¹⁵ Ieng Sary's Motion Against the Use of all Material Collected by the Documentation Center of Cambodia, 24 February 2011, Document No. E59.

¹⁶ 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.



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support the case against the Accused but which cannot be tested to ascertain their reliability, accuracy and veracity.

III Conclusion

10. For the reasons stated above, the defence respectfully requests the Trial Chamber to:

- (a) Treat as inadmissible any evidence or other material which was or may have been obtained by the use of torture;
- (b) Declare inadmissible evidence of unknown provenance;
- (c) Allow the defence the right to examine in court each witness who testifies against the Accused and to allow the defence in principle the right to examine witnesses who have provided inculpatory information about the Accused.

Party	Date	Name Lawyers	Place	Signature
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