

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC

Party Filing: The Defence for IENG Sary

Filed to: The Trial Chamber

Original language: ENGLISH

Date of document: 26 April 2011

CLASSIFICATION

Classification of the document suggested by the filing Party: PUBLIC

Classification by OCLJ or Chamber:

សាធារណៈ / Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

IENG SARY'S MOTION FOR ALL STATEMENTS OF KAING GUEK EAV ALIAS "DUCH" NOT TO BE ADMITTED AS EVIDENCE UNLESS DUCH APPEARS IN COURT AS A WITNESS

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FOR DISCLOSURE BY THE OCP AND TRIAL CHAMBER OF DUCH'S UNTRUTHFUL STATEMENTS

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ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception): 26 / 04 / 2011	
ម៉ោង (Time/Heure) : 16:00	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier: Ratanak	

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), moves for the Trial Chamber to rule that all out of court statements and in court unsworn statements (hereinafter referred to as “statements”) made by KAING Guek Eav “Duch” should not be admitted as evidence unless Duch appears in court as a witness under oath and is fully subjected to cross-examination. Additionally, if Duch testifies in Case 002, the Defence moves for the Office of the Co-Prosecutors (“OCP”) and the Trial Chamber to list all instances they found Duch to be untruthful in his statements. This motion is made necessary because: **a.** the use of Duch’s statements without an opportunity for the Defence to examine their veracity violates Mr. IENG Sary’s right to confrontation; **b.** a Prosecutor shall never knowingly offer evidence which he or she knows to be untruthful; and **c.** disclosure of instances the Trial Chamber and OCP found Duch’s statements to be untruthful is necessary to ensure protection of Mr. IENG Sary’s right to adequate facilities for the preparation of his defence.

I. BACKGROUND

1. The Closing Order in Case 002 cites statements Duch made about his duties and activities at S-21 and his view of the system, policy, and guiding principles of the Democratic Kampuchea regime.¹ These statements were made to the OCIJ,² before the Trial Chamber,³ and through written submissions during Case 001 proceedings.⁴
2. The OCP challenged the veracity of these statements in Case 001. In its Final Trial Submission, the OCP questioned Duch’s account, stating *inter alia*, that “the Accused is putting forward two mutually exclusive (and both implausible) theories”⁵ and that Duch’s

¹ See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Closing Order, 15 September 2010, D427, ERN: 00604508-00605246 (“Closing Order”), para. 21, where the Office of the Co-Investigating Judges (“OCIJ”) referred to Duch’s description of the policy of the communist movement in Cambodia; *Id.*, para. 35, where Duch discussed the roles of the Central and Standing Committees in the Communist Party of Kampuchea; *Id.*, para. 53, where the OCIJ quoted Duch, who described the functions of Office S-71 as “the protection of the central office and cadre, welcoming guests, communications, logistics, food, transport.” See also *Id.*, para. 61, where the OCIJ quotes Duch as stating that Office 870 was the headquarters of the “Party leading bodies.”

² See, e.g., *id.*, para. 21 citing Duch’s interview before the OCIJ. “Already in 1960, the Worker’s Party established a ‘Secret Defence Unit’ to protect its cadres ... as well as to smash the enemy. Duch states this policy was adopted ... ‘to entice the forces that can be lured; to neutralize the forces that can be neutralized; to isolate and smash the isolated forces.’”

³ See, e.g., *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Transcript of Proceedings - “Duch” Trial, 22 June 2009, E1/35.1, ERN: 00344105-00344224 (“22 June 2009 Transcript”), p. 64.

⁴ See, e.g., *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Final Defence Written Submissions, 11 November 2009, E159/8, ERN: 00401125-00401140.

⁵ See *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Co-Prosecutors’ Final Trial Submission with Annexes 1-5, 11 November 2009, D288/6.159/9, ERN: 00400521-00400678, para. 182.



statements about whether he had authority to order killings at S-21 were “not a truthful account.”⁶

3. The OCP argued that Duch’s statements lacked credibility, providing examples such as:
- a. When questioned on his authority to order the killings, the Accused claimed that he had no choice: all prisoners were executed by decisions of the ‘upper echelon,’ and his subsequent execution orders were therefore perfunctory. He claimed that his annotations ordering both torture and executions were made under the direct and specific direction of Son Sen, to whom he spoke by telephone daily. In the Prosecutors’ submission, this is not a truthful account.⁷
 - b. The Accused asserted that Son Sen received the Accused’s interrogation reports and then made decision thereon, directing the purge with Sou Met. He further argued that Son Sen continued to direct the purge even after he left to inspect troops in the battlefields. When asked why Son Sen’s name did not appear on the letters, he ... failed to give any logical reason for such subterfuge. Other than the Accused’s assertions, nothing in the evidence supports the theory of his low-key role in this purge - the evidence clearly shows the contrary.⁸
 - c. The Accused’s assertion that he was unaware of Ke Kim Huot’s torture is obviously a falsehood. His close relationship with Ke Kim Huot, and the fact that he received and noted the report of interrogation makes it impossible to accept that he had not read the report.⁹
 - d. On numerous occasions during the trial, when confronted with questions on the issue of his power to order, his willingness, intent and level of participation in the crimes the Accused has given incomplete, evasive and misleading testimony.¹⁰
 - e. Throughout the whole investigation and trial, the Accused has: (a) refused to divulge the whole truth of the events at and surrounding 2-21, (b) sought to minimize his role and personal participation in the crimes and (c) claimed failure and refused to answer questions on issues clearly within his knowledge.¹¹
 - f. However ... the Accused’s admissions did not amount to a full and unequivocal acceptance of his responsibility. He admits that he is responsible for his crimes at S-21. Yet he simultaneously claims that

⁶ *Id.*, para. 176.

⁷ *Id.*

⁸ *Id.*, para. 199.

⁹ *Id.*, para. 220.

¹⁰ *Id.*, para. 425.

¹¹ *Id.*, para. 426.

he was unable to counter the wishes of his supervisors. His efforts to minimize his active role in, and importance to the commission of the crimes contradict both physical and testimonial evidence that proves otherwise.¹²

- g. At different stages of the trial, usually when confronted with evidence or questions relating to his own involvement he has been evasive and often non-responsive to direct questions. On these issues, he has also disingenuously claimed inability to recollect significant events (despite his excellent memory of matters which are beneficial to him) or given implausible accounts which are inconsistent with the evidence before the Court.¹³
- h. The Accused's claims that he was ordered what to do on a daily basis by a small group of senior officials who were efficiently in charge of the entire country simply cannot be accepted — these claims are clearly untrue.¹⁴

4. An entire section of the OCP's Appeal against the Judgement in Case 001 focused on Duch's "selective and opportunistic" cooperation with the Court.¹⁵ It stated that:

[A]t different stages of the trial, usually when confronted with evidence or questions relating to his personal involvement, he was evasive and often non-responsive to questions. On these issues, he disingenuously claimed an inability to recollect significant events (despite his excellent memory of matters which were beneficial to him) or gave implausible accounts which were inconsistent with the evidence before the Court.¹⁶

5. In the Judgement in Case 001, the Trial Chamber also found that Duch was untruthful in his statements because, among other findings, he was more responsible at S-21 than he admitted¹⁷ and:

The Accused claimed that SON Sen and later NUON Chea's names were excluded from the correspondence to hide their involvement, but that the communications were either known to them or directed by them, and were handed to the Accused by his supervisor. The explanation given by the Accused that these letters were given to him by SON Sen personally lacks credibility, as in some letters he is informed by SOU Met that detainees would be sent to him that evening. The fact that he was expecting

¹² *Id.*, para. 433.

¹³ *Id.*, para. 440.

¹⁴ *Id.*, para. 482.

¹⁵ *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Co-Prosecutors' Appeal against the Judgement of the Trial Chamber in the Case of Kaing Guek Eav Alias Duch, 13 October 2011, F10, ERN: 00613385-00613450, para. 70.

¹⁶ *Id.*, para. 69.

¹⁷ *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Judgement in Case 001, 26 July 2010, E188, ERN: 00572517-00572797 ("Judgement"), para. 597.

detainees and ready to receive them implies that the letters came to him personally....¹⁸

6. Even though the OCP repeatedly argued that Duch was untruthful and the Trial Chamber found him to have been economical with the truth, the OCP named him as a potential witness in Case 002.¹⁹

II. APPLICABLE LAW

A. Right to Confront a Witness

7. Article 13(1) of the Agreement states: “The rights of the Accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process. Such rights shall in particular, include ... to examine or have examined the witnesses against him or her.”
8. Article 35 new of the Establishment Law states: “In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights ... to examine evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them.”
9. Rule 87(2) of the ECCC Internal Rules (“Rules”) states: “Any decision of the Chamber shall be based on evidence that has been put before the Chamber and subjected to examination.”
10. Article 14(1) of the International Covenant on Civil and Political Rights (“ICCPR”) states: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” Article 14(3)(e) further states: “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality... To examine, or have examined, the witnesses against him

¹⁸ *Id.*, para. 170.

¹⁹ *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Co-Prosecutors’ Rule 80 Expert, Witness, and Civil Party Lists, Including Confidential Annexes, 1, 2, 3, 3A, 4 and 5, 28 January 2011, E9/4, ERN: 00640752-00640778, Annex 3, p. 8.



and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”

B. Adequate Facilities for the Preparation of a Defence

11. Article 13(1) of the Agreement states: “The rights of the Accused enshrined in Articles 14 and 15 of the 1966 International Covenant of Civil and Political Rights shall be respected throughout the trial process. Such rights shall in particular, include ... to have adequate time and facilities for the preparation of his or her defence.”
12. Article 35 new of the Establishment Law states: “In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights ... to have adequate time and facilities for the preparation of their defence.”

C. Equality of Arms

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

III. ARGUMENT

A. The use of Duch’s statements without an opportunity for the Defence to examine their veracity violates Mr. IENG Sary’s right to confrontation

14. Duch’s statements must not be admitted as evidence in Case 002 unless he appears in court as a witness under oath and is subject to cross-examination in this case. The right to examine evidence is a fundamental legal right protected by Article 35 new of the Establishment Law. It is also protected by Rule 87(2), which states: “Any decision of the Chamber shall be based on evidence that has been put before the Chamber and subjected to examination.”
15. The Trial Chamber in Case 001 applied Rule 87(2) when it rejected the admission of two witness statements taken by DC-Cam because: **a.** the witnesses died prior to trial and Duch was unable to examine the veracity of their statements; **b.** the statements were not made under oath; and **c.** the statements referred to Duch’s alleged criminal acts and



conduct.²⁰ Duch's statements are analogous with the DC-Cam witness statements excluded by the Trial Chamber. First, Duch's statements were not made under oath.²¹ Second, Duch's statements refer to Mr. IENG Sary's alleged criminal acts and conduct.²² Third, Duch's statements were immune from challenge by the Defence. Unless Duch testifies under oath and is subject to cross-examination, Mr. IENG Sary will not have an opportunity to test the veracity of Duch's statements. As previously submitted by the Defence, if Duch testifies he must take an oath. Cambodian and ECCC law requires all witnesses to do so unless they fall within certain narrow exceptions, which Duch does not.²³

16. In Case 001, the right to cross-examine witnesses who had made prior statements was confirmed by the Trial Chamber.²⁴ Guidance may also be sought from the jurisprudence of the international criminal tribunals due to the similarity of the crimes alleged and the scale of evidence used. The Trial Chamber in *Prosecutor v. Blagojević & Jokić* considered whether an Accused may be deprived of his right of cross-examination if prior statements of an Accused in a joint trial are admitted as evidence and the maker of the prior statement invokes his right to remain silent.²⁵ Although Mr. IENG Sary is not being tried together with Duch in Case 002, the OCP's alleges that Duch and Mr. IENG Sary

²⁰ *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Decision on Admissibility of Material on the Case File as Evidence, 26 May 2009, E43/4, ERN: 00332849-00332857, paras. 13-17.

²¹ *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Transcript of Proceedings - "Duch" Trial, 30 March 2009, E1/5.1, ERN: 00301476-00301548, p. 5.

²² 22 June 2009 Transcript, p. 64.

²³ See Rule 24, which states that the following witness shall make a statement without having taken an oath, and from the knowledge of the Defence, Duch does not meet these exceptions:

- a) The father, mother and ascendants of the Charged Person, Accused or Civil Party;
- b) The sons, daughters and descendants of the Charged Person, Accused or Civil Party;
- c) The brothers and sisters of the Charged Person, Accused or Civil Party;
- d) The brother-in-laws and sister-in-laws of the Charged Person, Accused or Civil Party;
- e) The husband or wife of the Charged Person, Accused or Civil Party, even if they have been divorced; and
- f) Any child who is less than 14 (fourteen) years old.

See also Cambodian Code of Criminal Procedure, Art. 156.

²⁴ *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Direction on the Scheduling of the Trial, 20 March 2009, E26, ERN: 00290318-00290322, para. 9.2, noting that questioning by the Parties entails "the confrontation with statements of witnesses who will be heard at trial" and will be done "during the testimony of that particular witness."

²⁵ *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Decision on Prosecutor's Motion for Clarification of Oral Decision Regarding Admissibility of Accused's Statement, 18 September 2003, para. 18. Ultimately, the Trial Chamber was not required to make a holding on this question as the statements were found to be inadmissible. *Id.*, para. 28.



participated in the same Joint Criminal Enterprise.²⁶ If Duch's statements are admitted into evidence, Mr. IENG Sary's right to confrontation will only be protected if Duch testifies as a witness and is subject to cross-examination.

B. The OCP must not offer evidence which it knows to be untruthful

17. If Duch does testify as a witness, the OCP must indicate the specific instances it believed Duch's statements to be untruthful. The OCP, as an independent office *within* the ECCC,²⁷ has an obligation to promote justice and the fair and effective conduct of proceedings. This is pursuant to Rule 21(1)(a) which states: "ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties."²⁸
18. The OCP also has an obligation not to put a witness on the stand it knows will commit perjury. Under Cambodian law, Prosecutors must possess "honesty and justice" when performing prosecutorial duties.²⁹ The Code for Crown Prosecutors similarly upholds "fair and effective prosecution"³⁰ and the United Nations Guidelines on the Role of Prosecutors state that a Prosecutor should perform his or her duties "fairly, consistently, and expeditiously" to ensure due process and the smooth functioning of the criminal justice system.³¹
19. A lawyer must "in all circumstances ... respect the obligations of his or her oath and the principles of conscience, humanity, and tact" under Cambodian rules of legal professional conduct.³² To assist the court to find the material truth, it is important that a lawyer never present evidence that he or she knows to be false,³³ not least because the Trial Chamber bases its judgement on evidence put before the Chamber.³⁴ Codes of Professional

²⁶ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Introductory Submission, 18 July 2007, D3, ERN: 00141011-00141166, para. 8.

²⁷ See Rule 13.

²⁸ See United Nations, *Basic Principles on the Role of Lawyers*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Principle 12, which requires lawyers to "maintain the honour and dignity of their profession as essential agents of the administration of justice."

²⁹ Kingdom of Cambodia, Code of Ethics for Judges, p. 2.

³⁰ The Code for Crown Prosecutors, February 2009, Article 2.1.

³¹ Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 189 (1990), Art. 12.

³² Code of Ethics for Lawyers Licensed with the Bar Association of the Kingdom of Cambodia, Art. 6.

³³ Stuart Coghill, *Resource Guide to the Criminal Law of Cambodia*, INTERNATIONAL HUMAN RIGHTS LAW GROUP CAMBODIAN DEFENDERS PROJECT, 2000, § 3.102.

³⁴ Rule 87(3).



Conduct for lawyers practicing before the international criminal tribunals state that a Prosecutor “shall never knowingly ... offer evidence which he or she knows to be incorrect.”³⁵ The OCP is able to identify specific segments of Duch’s statements that are not reliable as it has publicly stated that Duch was not truthful in Case 001. It would, at a minimum, be disquieting and may border on the unethical for the OCP to rely on Duch’s statements without indicating where it considers those statements to be false.

20. Again, guidance may be drawn from the jurisprudence of the international criminal tribunals. In *Prosecutor v. GAA*, a contempt case before the ICTR, the Trial Chamber stated that false testimony constitutes a “direct challenge to the integrity of the judicial system.”³⁶ In *Prosecutor v. Lubanga*, an ICC Trial Chamber ordered the Prosecution to produce an intermediary of its investigators to give evidence on whether he or she corrupted evidence after a number of defence witnesses stated that the intermediary instructed witnesses to give false testimony.³⁷ In *Prosecutor v. Tadić*, an ICTY Appeals Chamber found that the presentation of a witness who the lawyer knew made untrue statements constituted contempt of the tribunal because this conduct “obstructs, prejudices, or abuses the Tribunal’s administration of justice.”³⁸ The lawyer had put forward a case “which was known to him to be false in relation to the weight to be given to statements.”³⁹ Similarly, the OCP has made extensive note of Duch’s untrue statements in Case 001 and brought specific examples to the Court’s attention. If the OCP proposes to put someone on the stand who has made false statements, this will violate its ethical obligations and frustrate the Court’s administration of justice; a witness who knowingly provides false testimony will be given the opportunity to do so again. This can be cured if the OCP provides a list of what statements it believes are untruthful.

³⁵ The Code of Professional Conduct for Prosecutors of the International Criminal Court, Art. 7(5). *See also* ICTY Regulation No. 2, Standard of Professional Conduct for Prosecution Counsel, Art. 2(e); ICTR Prosecutor’s Regulations, Standards for Professional Conduct, Art. 2(e).

³⁶ *Prosecutor v. GAA*, ICTR-07-90-R77-I, Judgement and Sentence, 4 December 2007, para. 10.

³⁷ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Redacted Decision on Intermediaries, 31 May 2010, paras. 40, 41. This decision came about because some witnesses claimed that this intermediary bribed individuals who were never child soldiers to lie to investigators that they were former members of the Union des Patriotes Congolais (“UPC”). Some of these individuals reportedly went on to testify as prosecution witnesses and to claim that they were conscripted into the UPC.

³⁸ *Prosecutor v. Tadić*, IT-94-1-A-R77, Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, 31 January 2000, paras. 18, 160.

³⁹ *Id.*, para. 160.



21. Moreover, Mr. IENG Sary has the fundamental right to adequate time and facilities for the preparation of his defence.⁴⁰ In order to ensure that this right is protected, the OCP must inform the Defence of statements it believes are not truthful before the lists of material to be relied on are provided by the Parties.⁴¹ To defend Mr. IENG Sary, the Defence must know what material to prioritize and when to object. Not knowing which statements the OCP considers untruthful would prevent the Defence from having adequate time to prepare for trial because the Defence will have to devote its time to determining this itself.

C. The Trial Chamber must provide a list of all instances it found Duch's statements untruthful to ensure Mr. IENG Sary's adequate facilities for the preparation of his defence

22. If Duch testifies, the Trial Chamber must also provide the Parties with its findings of Duch's untruthfulness prior to him giving testimony in Case 002. The disclosure would be consistent with the Trial Chamber's objective to ascertain the truth,⁴² and would assist the Parties to prioritize their material and prepare for cross-examination of Duch. The Trial Chamber based its Judgement in Case 001, *inter alia*, on Duch's statements.⁴³ In doing so, it distinguished which of Duch's statements it found truthful and those which it found to be untruthful. While the Judgement listed specific instances of Duch's untruthfulness,⁴⁴ it does not state if this is an exhaustive list of all instances where the Trial Chamber found Duch's statements to be untruthful. Any further guidance from the Trial Chamber as to how the Parties may discern instances of Duch's dishonesty would be warmly welcomed.

WHEREFORE, the Defence requests the Trial Chamber to **RULE** that all statements made by Duch should not be admitted as evidence unless he appears in court as a witness, under oath, and subject to cross-examination. Should Duch testify in Case 002, the Defence further requests the Trial Chamber to **ORDER** the OCP to disclose all instances where it considers

⁴⁰ Agreement, Art. 13(1); Establishment Law, Art. 35 new; ICCPR, Art. 14.

⁴¹ *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Order to File Material in Preparation for Trial, 17 January 2011, E9, ERN: 00635754-00635759, para. 6, stating that "the Parties shall provide, no later than 23 February 2011: (i) a summary of the facts on which each proposed witness is expected to testify."

⁴² See Rules 85(1), 87(4).



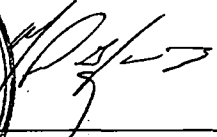
⁴³ See, e.g., Judgement, para. 121, referring to Duch's interview with the Co-Investigating Judges to find when Duch began supervising S-21. See also paras. 131 138. 143, 144, 177, 196, 201, 211.

⁴⁴ See, e.g., *id.*, para. 149.



Duch's statements to be untruthful, and to DISCLOSE a list of instances where it found Duch's statements in Case 001 to be untruthful.

Respectfully submitted,

ANG Udom Michael G. KARNAVAS

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Signed in Phnom Penh, Kingdom of Cambodia on this 26th day of April, 2011