

អសដក: D 192

**BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

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**IENG THIRITH DEFENCE REQUEST FOR EXCLUSION OF THE REPORT OF DR. CRAIG C. ETCHESON**

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<b>ឯកសារចម្លងតាមត្រឹមត្រូវតាមច្បាប់ដើម</b>	
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## I INTRODUCTION AND PETITION

1. The defence respectfully submits that the Report entitled 'Written Record of Analysis' by Dr. Craig Etcheson, dated and filed on 18<sup>th</sup> July 2007, does not meet the minimum standard required for an expert report to be admissible in international criminal proceedings. Hence, the Report should be ruled inadmissible and excluded from the Case File.
2. This Request is made on the basis of Rule 55(10) of the Internal Rules which provides that at any time during the investigation a Charged Person may request the OCIJ to make such orders as they consider necessary for the conduct of the investigation.

## II BACKGROUND

3. On 20 July 2007 the Office of the Co-Prosecutors (OCP) filed the Introductory Submission,<sup>1</sup> charging Madame Ieng Thirith (**Charged Person**) and her co-accused with crimes allegedly committed during the Democratic Kampuchea (**DK**) regime.
4. Two days earlier, the OCP had filed a report by Dr. Craig C. Etcheson entitled 'Written Record of Analysis' (**Report**),<sup>2</sup> which document sets out the alleged command structure of the Communist Party of Kampuchea (**CPK**).
5. The reason that the defence submits the Report should be excluded from the Case File is that it can be demonstrated that its flawed methodology has resulted in demonstrable errors, inaccuracies and inadequacies which render it unreliable and irrelevant and lacking in probative value. Further on the material provided it cannot be demonstrated that Dr. Craig Etcheson can be regarded as an 'expert' properly qualified to comment upon the information contained within the Report.
6. Given the limit imposed on the defence in respect of the number of pages and the fact that the Report contains a total of 355 footnotes, this Request can provide only selected

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<sup>1</sup> Introductory Submission, 20 July 2007, Document No. D3.

<sup>2</sup> Written Record of Analysis, 18 July 2007, Document No. D2-15.

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examples of the many errors, inaccuracies and inadequacies in the Report. A more comprehensive overview of these in the attached **Annexes A through F**.<sup>3</sup>

### III PRELIMINARY ISSUE: STATUS OF THE REPORT AND TIMING OF REQUEST

7. The Report has been added to the Case File by the OCP. No description as to the nature of the document was provided; it has been added to the Case File as a 'Written Record of Analysis'. Given that Dr. Etcheson is on the Prosecution's Witness List, the inference must be that it is intended to rely on him as an expert witness.<sup>4</sup>
8. The defence submits arguments as to the admissibility of the Report should be advanced at this stage in the proceedings given that the Report forms part of the underlying material linked to the Introductory Submission, and in view of the important role assigned to Dr. Etcheson in Case 001. If the Report is admissible then its content may be used by the OCIJ in preparation of the Closing Order.
9. This Request applies the common law test on the admission of expert evidence in international trials. However, it is submitted that admission of such evidence should be more restricted within a civil system, such as the ECCC, where all kinds of documents can be added to the Case File, which immediately form part of the evidence on which the OCIJ bases its investigations and ultimately the Closing Order. In the case of *Brima et al.* at the Special Court for Sierra Leone it was stated that information provided by an expert is not treated as evidence until the witness gives sworn evidence at trial, and the expert report only becomes evidence once it is tendered at trial.<sup>5</sup> This reflects the position at other international tribunals which adopt the common law approach. An expert report does not fulfill any role until tendered at trial, when the expert can be examined and

<sup>3</sup> Given that the Report was drafted in English, the references made to ERN numbers in this Request are to the English language documents, unless otherwise indicated.

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<sup>5</sup> *Prosecutor v. Brima et al.*, Decision on Joint Defence Motion on Admissibility of Expert Witnesses/Expert Evidence and Filing of Notice Pursuant to Rule 94bis(B)(i) and (ii), on Re-Filed Defence Request for Disclosure, and on the Joint Defence Motion for Exclusion of Medical Information, Statistics and Abstracts Pertaining to Witnesses TF1-081 and TF1-188, 16 June 2005, Case No. SCSL-04-16-T, para. 10.

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cross-examined on the content of his or her report. In the current case, as part of the Case File in the pre-trial proceedings, it constitutes evidence upon which the OCIJ can rely in the course of conducting its investigations and formulating the Closing Order.

10. If, as is submitted, the Report does not fulfill the requirements of an expert report as established by international criminal law it should be excluded from the Case File as lacking probative value.
11. The Report has been in the public domain since its use in the Duch case; it can be downloaded from the internet, inclusive of the footnotes.<sup>6</sup> The defence submits there is no reason for this Request, which exclusively deals with that Report, to be filed confidentially.

#### IV THE REPORT DOES NOT MEET THE MINIMUM STANDARD

##### 4.1 Definition of Minimum Standard for Expert Report to be Admissible

12. The ICTY Appeals Chamber in the case of *Dragomir Milosevic* formulated a minimum standard that expert reports have to abide by in order to be admissible in court, where it states that '[t]he sources must be clearly indicated and accessible in order to allow the other party or the Trial Chamber to test or challenge the basis on which the expert witness reached his or her conclusions.'<sup>7</sup> The *Galic* Trial Chamber held that 'an expert witness is expected to give his or her expert opinion in full transparency of the established or assumed facts he or she relies upon, which supposes that the sources used in support of any expert witness statement be clearly indicated and easily accessible.'<sup>8</sup> Further, the *Martic* Trial Chamber formulated two requirements: '(1) the facts and statements upon which the expert bases his or her opinion include references to the sources of such facts

<sup>6</sup> This document is part of the public Case File in *Prosecutor v. Kaing Guek Eav aka Duch*, Case File 001, Written Record of Analysis, Document No. E3/32, can be found at URL: [http://74.125.77.132/search?q=cache:psISrVXbdOoJ:www.eccc.gov.kh/english/cabinet/courtDoc/364/E3\\_32\\_EN.pdf+%22CPK+Statutes+explain+that+all+units+of+the+REvolutionary+army+are+under+the+control+of%22&cd=1&hl=en&ct=clnk](http://74.125.77.132/search?q=cache:psISrVXbdOoJ:www.eccc.gov.kh/english/cabinet/courtDoc/364/E3_32_EN.pdf+%22CPK+Statutes+explain+that+all+units+of+the+REvolutionary+army+are+under+the+control+of%22&cd=1&hl=en&ct=clnk).

<sup>7</sup> *Prosecutor v. Dragomir Milosevic*, Decision on Defence Expert Witnesses, 21 August 2007, Case No. IT-98-29/1-T, para. 7.

<sup>8</sup> *Prosecutor v. Galic*, Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Prof. Radinovic, 21 February 2003, Case No. IT-98-29-T, para. 9 (footnote omitted).

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or statements; (2) the underlying sources must *prima facie* show indicia of reliability or the Trial Chamber must be able to test the reliability of such sources.’<sup>9</sup> Additionally, whilst an expert may voice an opinion without providing sources for his statements, ‘if the Trial Chamber does not accept that the facts upon which the opinion is based have been established, that opinion has no probative value and it is inadmissible for that reason.’<sup>10</sup>

13. The *Martić* Trial Chamber furthermore held:

The Report is poorly cited throughout, and for some of its propositions refers to newspapers or books rather than to primary sources. For large portions of the Report there are no references at all. [...] The Trial Chamber finds that the lack of references makes it difficult to assess the probative value of the contents of this Report as the statements contained therein are accordingly impossible to verify.<sup>11</sup>

14. The ICTY Appeals Chamber in the case against *Delalić et al.* held that ‘[a]n expert opinion is relevant only if the facts upon which it is based are true’.<sup>12</sup>

15. The *Dragomir Milošević* Trial Chamber summarised the ICTY’s jurisprudence on requirements for admissibility of expert reports as follows:

- the witness is an expert;
- the statement/report is reliable;
- the statement/report is relevant and of probative value; and
- the contents of the statement/report fall within the accepted expertise of the witness.<sup>13</sup>

16. This jurisprudence is also applied at the ICTR, as evidenced in the case of *Karemera and others*, where the ICTR Trial Chamber adopted the four requirements.<sup>14</sup>



<sup>9</sup> *Prosecutor v. Martić*, Decision on Defence’s Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94bis, 9 November 2006, Case No. IT-95-11-T, para. 9.

<sup>10</sup> *Prosecutor v. Kunarac et al.*, Decision on Prosecution’s Motion for Exclusion of Evidence and Limitation of Testimony, 3 July 2000, Case No. IT-02-60-T, para. 4.

<sup>11</sup> *Prosecutor v. Martić*, Decision on Defence’s Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94bis, 9 November 2006, Case No. IT-95-11-T, para. 19.

<sup>12</sup> *Prosecutor v. Delalić et al.*, Judgement, 20 February 2001, Case No. IT-96-21-A, para. 594.

<sup>13</sup> *Prosecutor v. Dragomir Milošević*, Decision on Admission of Expert Report of Robert Donia, 15 February 2007, Case No. IT-98-29/1-T, para. 6.

<sup>14</sup> *Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera’s Motion to Preclude Testimony by Charles Ntampaka, 26 September 2007, Case No. ICTR-98-44-T, para. 8.

#### 4.2 Provision of Information Concerning the Expertise of Dr. Etcheson

17. Annex B to the Introductory Submission, the Witness List for the Charged Person, specifies that Dr. Etcheson is:

Author and authority on Cambodia", whilst indicating that he is "[a]uthor of international Book entitled 'The Rise and Demise of Democratic Kampuchea'. Investigator with the OCP at the ECCC.<sup>15</sup>

18. The 'The Rise and Demise of Democratic Kampuchea' is the only source the OCP relies upon to establish Dr. Etcheson's alleged expertise. The OCP has provided only eight pages of this book to the defence and these refer to the period prior to 1975.<sup>16</sup> The material does not include the footnotes referred to in the eight pages of that book, i.e. the defence cannot verify on what sources the statements made in those eight pages rely.

#### 4.3 Analysis of the Report

19. The Report refers to some 160 documents in 355 footnotes. The footnotes contain many inaccuracies and inadequacies on several interrelated issues, as will be highlighted below.

##### *4.3.1 Khmer Language Documents*

20. The footnotes in the Report refer on almost 300 occasions to Khmer language documents solely.<sup>17</sup> In the Report, Dr. Etcheson fails to mention that he does not speak or read Khmer. However, when confronted with this by Judge Cartwright in court, Dr. Etcheson responded as follows:

I neither speak nor read Khmer. [...] In my research I examined Khmer language materials with the help of translators and interpreters and I also examined Khmer language materials that have been translated into languages I can read [...].<sup>18</sup>

21. Since Dr. Etcheson in his Report relied heavily upon material in a language he does not speak or read, he was necessarily dependent on the assistance of unidentified interpreters and translators providing an unofficial translation or interpretation, which has generally

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18 *Prosecutor v. Kaing Guek Eav aka Duch*, Case File 001, Transcript 18 May 2009, p. 65 (lines 11-17).

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not been disclosed to the defence.<sup>19</sup> It is thus impossible for the defence, or the Judges and other parties, to verify these translations.

22. In footnote 221, for instance, Dr. Etcheson refers to the Khmer version of a DK Military Telegram, stating that 'a chhlop unit [...] "caught" a man accused of being a Lon Nol officer [...].'<sup>20</sup> The English translation of this telegram does not mention this event.<sup>21</sup> This is just one example of Dr. Etcheson's reference to Khmer language documents, which are not supported by the English translated versions thereof, which are now available to the defence. The defence has compiled **Annexes B and C**, in which are set out specific references to Khmer documents and incorrect references in the text of the Report.

23. Similarly, on some occasions the text of the English translation of the Khmer original document is incomprehensible. One example is the translation of S-21 Confession of SEAT Chhae *alias* Tum (referred to in footnotes 257-262, 264, 266, 267 and 294 of the Report). It is thus impossible for the defence to verify whether the references by Dr. Etcheson can substantiate the conclusions he draws from that document.<sup>22</sup>

24. In most cases, Dr. Etcheson provides a Khmer ERN number only, even though he quotes from them in English. The defence has located many of the English documents through an elaborate search of the Case File, and has provided the English ERN numbers, where available, in the Annexes attached. In spite of the best efforts made by the defence to identify all references cited by Dr. Etcheson, not all the references have been found in the documents to which he refers. The defence cannot be expected to sift through numerous documents to verify whether Dr. Etcheson's quotes are to be found. The onus to provide specific references must rest on the author of the Report.

<sup>19</sup> For instance, Dr Etcheson refers on nine occasions to the Khmer ERN number of the S-21 confessions of TAUCH Pheuan *alias* Phin, which is a document of 353 pages. This document is not available to the defence in English, only a summary translation consisting of eight pages; see

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#### 4.3.2 *Incorrect References or Failure to Mention Any Source*

25. On several occasions, Dr. Etcheson refers to incorrect ERN numbers,<sup>23</sup> on other occasions he fails to provide any ERN number.<sup>24</sup> At times, the document referred to cannot be found with the information provided,<sup>25</sup> or Dr. Etcheson merely indicates that there are many sources in support of his statement, without identifying those sources. For example, paragraph 146 of the Report refers to reports addressed to Khieu Samphan. Accompanying footnote 341 states:

The archives of the Documentation Center of Cambodia contain more than six hundred examples of these kinds of communications to Khieu Samphan at Office 870 obtained from the Cambodian National Archives ranging from daily reports of rice production through to yearly reports concerning the activities of the Zones, ministries and other echelons.

26. No specific documents are referred to or made available to the defence to make it possible to verify this assertion.

27. A 'Request for Correction' has been added to the Case File in May 2009.<sup>26</sup> This document provides corrections for some of the incorrect references provided in the Report, but fails to specify to which footnotes those references relate. Also, it only relates to a small fraction of the incorrect references in the Report, most of which are still left uncorrected.

#### 4.3.3 *Lack of Specificity in References*

28. On more than 100 occasions, Dr. Etcheson fails to mention the relevant page number(s) of the reference used.<sup>27</sup> Instead, he makes references to and even quotes from the text, without mentioning the section or page number he refers to or is quoting from. For instance, in paragraph 9 of the Report, the reader is expected to sift through 139 pages of text, where the Report states:



<sup>23</sup> See Annex B for examples.

<sup>24</sup> See Annex B for examples.

<sup>25</sup> See Annex B for examples.

<sup>26</sup> Request for Correction, 22 May 2009, Document No. D2-15/Corr-1.

<sup>27</sup> See Annex D attached to this Request.



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Districts were a key entity in the DK hierarchy because Districts maintained "security offices" which distinguished between "enemies" who were to be disposed of locally and "enemies" who would be sent up the chain of command to higher-level authorities.

29. Footnote 12 following this far-reaching conclusion refers to the entire book of Meng-Try Ea.<sup>28</sup> there is a failure to provide any specific references against which this assertion can and should be tested. This is not only the case in respect of references to Khmer language documents, but also relates to documents which can be read in English by Dr. Etcheson, such as the aforementioned book by Meng Try-Ea.
30. The defence submits that the flaws complained of in the citations above are a fair reflection of the flaws encountered in the Report prepared by Dr. Etcheson.
31. The defence objects in general terms to the Report's failure to mention sources, the fact that the Report 'for some of its propositions refers to newspapers or books rather than to primary sources' and '[f]or large portions of the Report there are no references at all.'<sup>29</sup>

#### 4.3.4 *Incorrect Representation of Content of Documents*

32. On several occasions, Dr. Etcheson quotes from a document, but changes the wording. On other occasions he paraphrases a document, in a manner which alters the meaning from the original document.<sup>30</sup> For instance, the Report makes the following statement:

The [Standing Committee] also had the authority to order mass relocations of people on grounds of security concerns, for example it ordered 50,000 Chams from the Eastern Zone to be dispersed into the Northern Zone.<sup>31</sup>

33. This statement incorrectly reflects the telegram referred to in the following ways:<sup>32</sup>
- a) The telegram merely mentions a policy of relocation, and not that there would be a need to order mass relocations of people on the basis of 'security concerns'.
  - b) The document does not indicate the ethnicity of the 50,000 people ordered to be relocated, whilst Dr. Etcheson asserts they are Cham.

<sup>28</sup> Meng-Try Ea, "The Chain of Terror" [REDACTED]

<sup>29</sup> *Prosecutor v. Martić*, Decision on Defence's Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94bis, 9 November 2006, Case No. IT-95-11-T, para. 19.

<sup>30</sup> See Annex C.

<sup>31</sup> Report, para. 24.

<sup>32</sup> [REDACTED]

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c) The telegram does not mention the Standing Committee, let alone that this committee 'had the authority to order mass relocations'.

34. There are other examples in which it can be seen that, the document referred to does not mention the subject matter discussed by Dr. Etcheson. See for example paragraph 35 of the Report, which states:

The [Standing Committee], in a meeting on 22 February 1976, decided on military training, armaments manufacture, establishing a new military airport, ammunition depots, and military hospitals.

The document Dr. Etcheson refers to does not deal with military matters at all.<sup>33</sup>

#### 4.3.5 Generalisations

35. Throughout the Report, Dr. Etcheson makes generalisations based on a single example.<sup>34</sup>

Statements such as:

- 'The available evidence shows that, in general, Zone communications were organized in a vertical fashion, along the lines of the chain of command.'<sup>35</sup>
- 'Division Commanders collected information from subordinate units and reported to the upper echelon on a variety of matters beyond external military issues, including organizational matters, internal security problems, and economic issues.'<sup>36</sup>
- 'The Standing Committee engaged in continuous communications [...] with all other echelons of the Party [...]. The SC controlled all communications networks within the DK regime, and all communications were organized in a strictly hierarchical manner.'<sup>37</sup>

36. Each of these general conclusions is supported by only a single example, and does not provide a sufficient basis for the generalisations. The conclusions which are in turn based

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See Annex E for more examples.

<sup>35</sup> Report, para. 56, footnote 121. Dr. Etcheson provides only one example for this,

<sup>36</sup> Report, para. 127, footnote 297, referring to

The statement in the Report moreover not be deduced from the document provided.

<sup>37</sup> Report, para. 36, footnote 77, referring to a document that cannot be found in the Case File.

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on those generalized statements are without a proper foundation. An example can be seen in paragraph 40 of the Report where it is stated that 'the Standing Committee exercised effective authority over all aspects of political, economic, internal security, and military affairs in Democratic Kampuchea'.

#### 4.3.6 CPK Statute Forms No Proof of Practice

37. Throughout the Report Dr. Etcheson refers to the CPK Statute.<sup>38</sup> On numerous occasions he relies on the CPK Statute to support the existence of a practice in the DK. However, in paragraph 11 of the Report Dr. Etcheson implicitly acknowledges that the CPK Statute on its own cannot be relied upon to show a practice in the DK. The law is not a reflection of everyday life in the DK, and without further substantiation merely quoting the law is insufficient.

38. In paragraph 11 of the Report, Dr. Etcheson then adopts a contrary position, and quotes from the Statute and then states that the practice was contrary to that provision, without providing any source for this assertion. In the same paragraph after citing from the CPK Statute that the Central Committee's duties included *inter alia* the implementation of Party lines throughout the country, Dr. Etcheson draws the following conclusion, for which he fails to provide any reference:

However, the Central Committee rarely met and in practice the Standing Committee, an executive committee of the Central Committee, exercised the powers assigned to the Central Committee and had the highest authority in the Party, the State and the Army.

39. This is an unsupported statement, which does not derive from the provisions of the Statute or from any other named source.

#### 4.3.7 Reliance on Content of Confessions

40. In his Report, Dr. Etcheson relies heavily on information contained in confessions, which may have been extracted by way of torture. On 28 July 2009, the OCIJ issued its 'Order on Use of Statements Which Were or May Have Been Obtained by Torture' (Torture

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<sup>38</sup> See Annex B.



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#### 4.3.8 Failure to Mention Source

44. The defence notes that Dr. Etcheson on one occasion fails to mention the source from which he derived his statement, namely 'Seven Candidates for Prosecution' by Stephen Heder and Brian Tittlemore.<sup>46</sup> Annex F provides the text of paragraph 99 of the Report and the relevant part of pages 50-51 of Heder & Tittlemore's book, including the footnotes of both documents. It can be seen that the texts are almost identical. Dr. Etcheson uses the text from Heder's book,<sup>47</sup> but refers to different sources for footnotes 240, 241 and 242 in the Report (an interview with Ieng Sary by Stephen Heder). Footnotes 239, 243 and 244 are an abridged version of the footnotes in the text of Heder & Tittlemore's book. Indicative is a comparison between Dr. Etcheson's footnote 243 and Heder & Tittlemore's footnote 195. Dr. Etcheson's footnote 243 reads:

This listing of "Van" (IENG Sary's revolutionary name) may be a mistranscription for Von (VORN Vet's revolutionary name); this question can be resolved if and when the original Khmer-language notebook becomes available.

Heder & Tittlemore's footnote 195 reads:

This identification of "Van" as a member of the Military Committee has significant implications for the role of Ieng Sary in the Committee's functions given that Van was his official *alias*. At the same time, it is possible that this reference might be a mistaken transcription for "Von." The matter should therefore be revised if and when the original Khmer-language notebook becomes available.

45. An expert report should not duplicate text from another book without providing the source of its information. This again goes to the reliability of the Report; if the Report fails to provide appropriate references, it is impossible to verify the reliability thereof.

#### 4.4 The Report Does Not Meet the Requisite Standard

46. As indicated above, the ICTY and ICTR have formulated a four-prong test in order to determine whether an expert report is admissible:

- (i) the witness is an expert;
- (ii) the report is reliable;

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<sup>47</sup> Given that Heder & Tittlemore's book was published in 2001, and Dr. Etcheson's report in 2007, it is highly unlikely that the latter would have been the author of that text, and that it would have been copied by Heder & Tittlemore.

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- (iii) the report is relevant and of probative value;
- (iv) the contents of the report fall within the accepted expertise of the witness.<sup>48</sup> These elements will be dealt with below.

#### 4.4.1 *The Witness Must Be an Expert*

47. The defence submits that the OCP has failed to provide sufficient information to assess whether Dr. Etcheson qualifies as an expert or not. No *curriculum vitae* has been submitted; only eight pages from his book written in 1984 have been exhibited show that he is an 'authority on Cambodia'.<sup>49</sup> This is insufficient to establish that Dr. Etcheson qualifies as an expert.

#### 4.4.2 *The Report Must Be Reliable*

48. The defence has demonstrated herein and by reference to the content of the Annexes, the inherent unreliability of the information contained in the Report in many different areas. The fact that Dr. Etcheson was unable to verify most of the sources he used, but instead relied upon translations and interpretations which may very well have been inaccurate or erroneous, makes the conclusions he draws in his Report unreliable. This is demonstrated by his use of many incorrect references, his frequent failure to refer to any source at all; his lack of reference to sections of large documents; and his use of incorrect quotations. It is fundamental that an expert should verify the material upon which he seeks to rely and upon which his conclusions are based otherwise the Report cannot be relied upon by the court. As is evident in this case, far reaching conclusions have been drawn without the provision of reference material. An example of this can be seen in that the Report implies a more direct command structure between the different layers of organization in the CPK than the content of his sources would support.

<sup>48</sup> *Prosecutor v. Dragomir Milosevic*, Decision on Admission of Expert Report of Robert Donia, 15 February 2007, Case No. IT-98-29/1-T, para. 6; and *Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera's Motion to Preclude Testimony by Charles Ntampaka, 26 September 2007, Case No. ICTR-98-44-T, para. 8.

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49. Moreover, large portions of the Report rely entirely on information obtained from the content of confessions which may have been the result of torture and are thus inherently unreliable. The conclusions based on that information are similarly unreliable. The defence in this respect refers to its Torture Request. This document extensively argues that Article 15 of the Convention against Torture, to which Cambodia is a party, forms an absolute prohibition of the use of information tainted by torture in a criminal trial, other than against the torturer to show that torture has been committed.<sup>50</sup> This request is still pending before the PTC.

50. The Report thus fails to fulfill the reliability requirement of the ICTY/ICTR test.

#### 4.4.3 *The Report Must Be Relevant and of Probative Value*

51. As stated above, the ICTY Appeals Chamber in the case against *Delalic et al.* held that '[a]n expert opinion is relevant only if the facts upon which it is based are true'.<sup>51</sup>

52. The defence has demonstrated herein that, contrary to the assertion of Dr Etcheson that his Report is 'accurate'<sup>52</sup> it is fundamentally flawed and as such devoid of probative value and as such cannot assist in determining the truth in this case.

#### 4.4.4 *The Contents of the Report Must Fall within the Accepted Expertise of the Witness*

53. As submitted in section 3.3.1 the OCP has not provided sufficient information to allow an assessment as to whether Dr. Etcheson is properly qualified to be relied upon as an expert.

## V CONCLUSION

54. The Report by Dr. Etcheson must fulfill the four cumulative criteria set out by the international tribunals for it to be admitted as an expert report. The Report fails to fulfill the second and third requirements, and the OCP has provided insufficient information to

<sup>50</sup> See also Trial Chamber consideration in *Prosecutor v. Kaing Guek Eav aka Duch*, Case File 001, Transcript 28 May 2009, p. 9 (lines 1-11).

<sup>51</sup> *Prosecutor v. Delalic et al.*, Judgement, 20 February 2001, Case No. IT-96-21-A, para. 594.

<sup>52</sup> Report, p. 1.

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assess the first and fourth requirements. The Report thus fails to fulfill the admissibility test formulated by the ICTY and ICTR, and applicable to these proceedings.

55. The admissibility test for expert reports at the other international tribunals may not be required at the pre-trial stage of those proceedings, however, a different procedure exists before the ECCC as the expert report already forms part of the evidence and is within the Case File, and forms the basis for the OCIJ's investigations and Closing Order. In the light of these matters, it is essential to address the admissibility of the Report at this stage in the proceedings.

56. The many errors in the Report, whoever they may be attributable to, make it impossible for the parties to verify the truth of the author's arguments, which is a minimum requirement before an expert report can be admitted in legal proceedings. The Report is demonstrably unreliable and lacks probative value and is not the work of an 'expert'. In the premises it should not be admitted in the proceedings.

## VI RELIEF REQUESTED

57. For these reasons, the defence respectfully requests the Office of the Co-Investigating Judges to:

- Treat as inadmissible the Report by Dr. Etcheson from the Case File for lack of any probative value; and
- Issue to the OCP and Civil Parties filing instructions so that this Request may be dealt with within a reasonable period of time, so as to allow the defence to properly organise the preparation of its case and to avoid undue delay in the proceedings.

Party	Date	Name Lawyers	Place	Signature
Co-Lawyers for Ieng Thirith	11 August 2009	PHAT Pouv Seang Diana ELLIS, QC	Phnom Penh	