



Objections raised by Ieng Sary's defense were the focus of much of the prosecution's arguments in the ECCC on Wednesday.

**Continued Documentary Debates:
Prosecution and Civil Parties Respond to Defense's Document Objections**

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On Wednesday, March 14, 2012, the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) continued trial proceedings in Case 002 against accused Nuon Chea, Ieng Sary and Khieu Samphan. The day's proceedings were dedicated to the continuation from the previous two days of debates on the admissibility of certain pieces of documentary evidence proposed by the parties. Scheduled were the completion of the prosecution's response to defense team objections to specific documents, along with the civil party response to the objections.

Prosecution Continues Response to Defense Objections

International counsel Vincent De Wilde d'Estmael began the prosecution's continued response to objections to documents raised by the defense teams for the day. During this portion of the prosecution's submissions, Mr. De Wilde d'Estmael argued that documents such as reports by Amnesty International discussing the flow of refugees into Thailand during the Democratic Kampuchea (DK) period and United Nations (UN) reports should be admitted by the Trial Chamber.

Mr. De Wilde d'Estmael also argued for the admission of Communist Party of Kampuchea (CPK) propaganda documents and international reports on radio broadcasts emanating from Cambodia during the DK period. As for documents related to Ieng Sary's conviction for genocide by the People's Revolutionary Tribunal (PRT), he argued that documents from this trial should be admitted because they have already been relied upon by the Ieng Sary defense team, which has argued that Ieng Sary's amnesty and pardon for the death sentence imposed by the PRT prevent his prosecution at the ECCC.



The response presented by national prosecution counsel Chan Dara Reasmeay focused on documents sourced from Tram Kak district.

Mr. De Wilde d'Estmael then turned the floor over to national prosecution counsel Chan Dara Reasmeay, who first discussed documents sourced from Tram Kak district. He submitted that the prosecution had submitted a longer list of documents related to Tram Kak prior to the Severance Order issued by the Trial Chamber that divided Case 002 into a series of trials. Chan Dara Reasmeay then noted that the prosecution sought to use documents sources from Tram Kak district, including those from Kraing Ta Chan security office, as a case study example to illustrate the typical “flow of information” up and down the chains of command in DK.

Chan Dara Reasmeay next provided an overview of some of the individual documents the prosecution had submitted from Tram Kak, arguing that while the topics of the communiqués in question sometimes fall outside the scope of Case 002, Trial 1, the language used in the documents, as well as identifiable patterns and processes and other information contained in the communiqués, are critical to understanding the inner workings of the CPK and its administrative structures.

Following Chan Dara Reasmeay's presentation, counsel De Wilde d'Estmael continued the prosecution's submission and discussed the topic of periodical articles to which the defense had objected. He argued that this category of documents should be admitted because they are publicly accessible, can be easily authenticated and provide important contextual evidence. Mr.

De Wilde d'Estmael also argued that FBIS (Foreign Broadcast Information Service) reports and the “Swedish” documents should be admitted. He also noted that other parties, including defense parties, had previously sought to use press clippings and similar documents themselves, despite their current objections.

Mr. De Wilde d'Estmael summed up his argument by asserting that FBIS reports and other transcripts of DK period radio broadcasts are demonstrably “word for word” republications of CPK radio broadcasts and propaganda materials, making them “highly reliable and relevant” and thus *prima facie* admissible.

Ieng Sary Retires to Holding Cell at Usual Time

At this point, the Chamber prepared to take its regular morning break. Prior to the break, the Ieng Sary defense made its usual request that Ieng Sary be permitted to waive his right to be present and retire to the courtroom holding cell to participate via audio-visual link because of health concerns. As per usual, Chamber President Nil Nonn granted this request, contingent upon receipt of a written waiver signed by Ieng Sary.



International assistant co-prosecutor Dale Lysak concluded the prosecution’s response to the defense’s document objections.

Prosecution Resumes Response Submissions

Following the morning break, international counsel Dale Lysak took over for the prosecution and discussed the five additional annexes of documents remaining. He began with a discussion of biographies and documents collected from S-21 *Tuol Sleng* prison in Phnom Penh. During this presentation, Mr. Lysak displayed example biographies on the courtroom monitors, pointing out indicia of reliability along the way. Broaching the delicate issue of the role of potential torture in the collection of biographies, Mr. Lysak argued that, for the biographies of S-21 staff members, these documents were collected as a routine practice without any specific threats of torture. He further argued that such documents, along with S-21 prisoner lists, help to elucidate the chains of command within the CPK.

Mr. Lysak then addressed comments by Ieng Sary defense counsel Michael Karnavas alleging that the prosecution was trying to “sneak in” witness statements in the guise of biographies and calling into question the ethics of the prosecution lawyers. He stated that where biographies exist of individuals who have also given witness statements, the prosecution has not mischaracterized any such documents, noting that all witness statements are included in a separate annex from biographies, covering all examples cited by the Ieng Sary defense. Mr. Lysak argued further that any disparaging comments by Mr. Karnavas regarding ethics were “demonstrably unfounded” and “unwarranted” and stated his hope that all parties would refrain from making such disparaging comments moving forward.

Following these observations, Mr. Lysak turned to revolutionary biographies of Khmer Rouge cadres. He noted that such biographies were completed on standardized forms and were routinely collected, making them an important source of “general evidence” about the functioning of the DK government. Mr. Lysak also noted that witnesses have corroborated the accuracy of biographical forms, and he provided an overview of the types of information collected by forms. He noted that one of the first questions appearing on each form was “how many close friends do you have?” Mr. Lysak noted that it struck him that on every form he has viewed the answer provided was “none.”

Mr. Lysak then read out some portions of the testimony of Long Norin, a former member of the CPK department of foreign affairs who previously testified before the Trial Chamber. In his testimony, Long Norin stated that he had written his biography and noted that he was susceptible to suspicion by the regime because he had lived abroad and married a French woman. Mr. Lysak then compared this testimony to some information contained in surviving copies of Long Norin’s biography created during the DK period. He argued that the testimony and biography corroborate one another and suggest the overall authenticity of biography documents.

Mr. Lysak then spent the remainder of the morning session going through several biographies and witness statements. During this process, he argued that the biographies demonstrate the concerns of the CPK at the time and what groups the Party viewed as enemies. Regarding the content of the biographies, Mr. Lysak denied that the prosecution sought to characterize biographies as “witness statements.” He stated that the actual content in biographies, such as labeling an individual “contemptible,” is not important and not submitted for its truth. Rather, he reasoned, it was the process of creating the biography forms and the pattern of information elicited that provide important information, such as who the CPK leadership considered “contemptible.” Mr. Lysak then mentioned the fates of many individuals who had come under suspicion and then been purged by the CPK during the DK period.



As has become his usual practice, Nuon Chea chose to participate via audio-visual link for the afternoon session.

Nuon Chea Retires to Holding Cell at Usual Time

At this point, the Chamber prepared to adjourn for lunch. Prior to the adjournment however, the Nuon Chea defense made its regular request that Nuon Chea be permitted to waive his right to be present in the courtroom and retire to the holding cell for the remainder of the day. Chamber President Nil Nonn granted this request, as usual, contingent upon receipt of the necessary signed waiver documents.

Prosecution Completes Response to Defense Objections to Documents

Following the lunch break, Mr. Lysak completed the prosecution's response to defense objections to specific documents. During this portion of the prosecution's submission, Mr. Lysak discussed video and audio recordings, arguing that all such documents should be admitted. As an example, he showed a brief clip of a video-recorded interview with Khieu Samphan and thereafter submitted that the authenticity and reliability of the video are self-evident from its contents.

Mr. Lysak also argued that previous statements made by Kaing Guek Eav, alias Duch, should be admitted when he testifies (scheduled for Monday, March 19) and treated in the same way as sworn statements by any other witness, despite his status as the now-convicted accused in Case 001.

The final documents discussed by Mr. Lysak were actual confessions from S-21. First, he noted that the authenticity of such documents cannot be seriously questioned because they have been authenticated by Duch and were found at S-21 itself. As for the recurring issue of torture-derived evidence, Mr. Lysak submitted that the defense teams sought to convince the Chamber to "build a wall around S-21" barring the use of any evidence from S-21 and that such requests overstated the prohibition on the use of torture evidence under international law.

Mr. Lysak argued that the Convention Against Torture (CAT) does not bar the use of S-21 confessions to elucidate facts regarding how the confessions were used by the CPK. He stated that to do so would compromise the goals of the CAT itself, as it would tend to obscure “one of the largest schemes of torture that the world has ever seen.” Mr. Lysak also argued that communiqués from S-21 and notations on confessions made by prison staff clearly fall outside the scope of the evidentiary ban contained in the CAT because such information shows channels of communication and simply does not consist of statements made under torture or the threat thereof. As for uses of the confessions, Mr. Lysak stated that 26 confessions obtained by the prosecution contain annotations stating that they were forwarded to Nuon Chea, which demonstrate his authority in DK. For other confessions, he noted that Duch had identified the handwriting of Nuon Chea in annotations appearing on some confessions. Mr. Lysak argued that such annotations demonstrate which leaders had authority over S-21 and tend to show the chains of command more generally. He also read out letters and notes written by Duch, including one that stated “Brother Number Two” (*i.e.*, Nuon Chea) had instructed that names of certain individuals from the East Zone were to be redacted if they appeared in any confessions. Mr. Lysak then argued that such correspondence demonstrates the chains of command generally and will become critical in later trials related to torture or other charges.

Mr. Lysak also argued that radio broadcasts of S-21 confessions that occurred during the DK period were critical methods of connecting disparate sources of evidence. He noted that many confessions held by the prosecution contain verbatim transcripts of radio broadcasts captured and recorded in FBIS reports. According to Mr. Lysak, this fact tends to corroborate and authenticate the FBIS reports, while also demonstrating that CPK senior leaders were aware of and involved in S-21 confession-taking and publication over the radio. Thus, the confessions, FBIS reports and testimony regarding the practice of broadcasting confessions all corroborate one another and elucidate the CPK command structure and authority of the Central and Standing Committees over security issues in DK. Mr. Lysak then concluded the prosecution’s response to the defense objections, and the Chamber took its regular afternoon break.

Civil Party Response to Defense Objections to Specific Documents

Following the break, the floor was given to the civil parties to voice their response to the defense objections to documents. National civil party co-lead lawyer Pich Ang began the response for the civil parties by stating that some objections made by the defense had gone to the issue of probative value, rather than *prima facie* admissibility and thus should be dismissed. Pich Ang also argued that the fact that Duch was not a senior CPK leader does nothing to render his knowledge of the Party’s command structure and inner workings inadmissible or to devalue it, contrary to the assertions by the defense. He also argued once again that the defense teams had conflated burdens of proof and improperly asserted that documents must be verified beyond a “reasonable doubt” as a condition for admission. Finally, Pich Ang argued that civil parties are exempt from the oath-taking requirement that applies to regular witnesses at the ECCC.

This final statement by Pich Ang prompted a response from Ieng Sary defense counsel Michael Karnavas, who stated that he agreed with Pich Ang’s position and had indeed never argued that civil parties are required to take an oath.



Civil party co-lead lawyer Elisabeth Simonneau-Fort presents some of the civil parties' responses to objections raised by the defense.

The floor was then given over to civil party co-lead lawyer Elisabeth Simonneau-Fort, who began by observing that the current debates consisted of the third hearing on evidentiary issues in recent months. She next stated that she believes some parties and counsel have differing views of the current procedural stage of documentary arguments the Chamber was actually at. Thus, Ms. Simonneau-Fort made some general comments on evidentiary admission standards. She cited the ECCC Law and previous decisions by the Trial Chamber for the general inclusionary evidentiary regime in place at the ECCC, along with specific holdings on evidentiary issues.

Ms. Simonneau-Fort then referred to Trial Chamber decisions on evidentiary rulings in Case 001 and the topic of objections to relevance and scope of documents in relation to Case 002, Trial 1. She argued that these decisions establish that the five main general CPK policies are proper subjects for discussion in Case 002, Trial 1. Next, she noted that prior rulings stated that the current discussion was supposed to be limited to elaboration on written objections to documents, which were due on January 5, 2012, and some arguments appeared to fall outside scope of the relevant written submissions.

Ms. Simonneau-Fort also requested that the Chamber apply the CAT provisions regarding the use of torture-based evidence and stated that the concept of “witness” testimony should be limited, according to standard civil law procedures, to statements put before the Chamber and to exclude authors of articles and books and others from falling under this category. She also returned to a previous argument made by the civil parties that evidence had been collected by professional investigating judges and thus rogatory letters and other documents created during the investigation are properly part of the case file.

Ms. Simonneau-Fort also argued that translation problems should not, at this juncture, prevent the admission of any documents. She then addressed the main argument of the defense teams that many documents fall outside the scope of the first Case 002 trial. First, Ms. Simonneau-Fort stated that the Chamber had explicitly left open the possibility to delve into additional matters beyond the scope of the first trial, also allowing witnesses to be heard on the totality of their

knowledge. She argued that these facts necessitate the inclusion of documents related to such potential additional topics of discussion.

Next, Ms. Simonneau-Fort turned to objections against student written articles and documents by the Khieu Samphan defense. She contended that just because an article was written by a 22-year-old student does not necessarily render the document unreliable. Similarly, politically “partisan” documents, such as a document dealing with the Vietnamese arrival in Cambodia in 1979, should also not be excluded, she maintained.

In conclusion, Ms. Simonneau-Fort stated that the civil parties disagree with all challenges to their ten proposed documents by the defense and requested that the Chamber reject such challenges.

At this point, prior to the adjournment, the Chamber President stated that during the following day’s proceedings, the defense teams would be provided with a total of one hour to reply to the responses to their objections by the prosecution and civil parties. The President also stated that the next witness scheduled to testify would be Professor Ben Kiernan, whose identity was no longer confidential.

Nuon Chea defense counsel Andrew Ianuzzi then rose and requested the opportunity to make submissions the following day, arguing that it is not feasible for Nuon Chea to both testify for a half-day and be present in the courtroom during the testimony of Duch on the same day during the afternoon.

The Chamber President responded by simply stating that the schedule cannot be changed according to Nuon Chea’s wishes and a witness or expert would be heard following Nuon Chea’s testimony the following Monday. He did note, however, that the Chamber would consider the defense’s submissions. This led to some confusion between the bench and the Nuon Chea defense, and the Chamber judges conferred briefly before the President stated that the Chamber had “made it clear” that the proceedings would follow the regular pattern and denied any additional requests. He then stated that it is up to Nuon Chea and the defense team to decide whether Nuon Chea should sit in the courtroom during the afternoon to challenge any specific witness directly, stating that audio-visual equipment had been installed in the courtroom holding cell in order to provide the maximum respect for the rights of all accused to participate in their defense.

At this point, Ieng Sary defense counsel Michael Karnavas rose and sought to clarify the issue because it could impact his client’s rights in the future. He stated that when a witness is scheduled to testify regarding a specific accused – here Duch being scheduled to testify regarding Nuon Chea specifically, it is not sufficient “participation” for the accused to simply watch from the holding cell while physically unable to remain in the courtroom.

This submission caused the Chamber President to pause and request clarification from the Nuon Chea defense regarding its request. Counsel Michiel Pestmen for Nuon Chea responded by stating that the defense preferred to make its submissions the following day, stating that if the submissions were made presently, everyone in the courtroom would miss the court shuttle bus

back to Phnom Penh. At this point, the President relented and adjourned the proceedings for the day, stating that the Chamber would address the issue further the following morning.

Proceedings will continue Thursday morning at 9 a.m. with defense replies to the responses of the prosecution and civil parties to their evidentiary objections. It is also likely that the Chamber will hear testimony from Khmer Rouge researcher and expert, Professor Ben Kiernan, following these submissions.