



Case 002 Evidentiary Hearing: Day 4

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On Thursday, January 19, 2012, the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) resumed its hearing on evidentiary issues. During the previous three days of the hearing, the defense had challenged numerous categories of documents, such as alleged Khmer Rouge telegrams and minutes of high-level meetings, along with books, articles, interviews and various other secondary sources. Thursday's proceedings continued in the same vein, with the completion of the prosecution's response and reiterations of many of the arguments that had already been submitted throughout the week's hearings.

Continuation of Prosecution's Response

The first submission of the day was a continuation of the prosecution's response to defense arguments from Wednesday's hearings.¹ The prosecution began by discussing the initial proposed evidence list it had submitted in April 2011. While it noted that this list did cite different reasons why the proffered evidence was considered reliable and relevant by the prosecution, the prosecution further pointed out that the defense had omitted the fact that the list was made prior to the Trial Chamber's division order and that the division order had necessitated a reassessment of relevance issues. However, the prosecution stated that the documents it was currently seeking to enter into evidence were all relevant to topics covered in the Case 002 first trial and that this was a large list because the first trial includes inquiry into the administrative and hierarchical structures of the Communist Party of Kampuchea (CPK). Moreover, the prosecution noted, the Trial Chamber had indicated that other topics may be explored if appropriate.

As for the documents challenged by the Nuon Chea defense as wholly irrelevant, such as certain telegrams, the prosecution argued that such documents are probative of the existence of structured methods of communication within Democratic Kampuchea (DK). Moreover, according to the prosecution, establishing this general flow of information is relevant to the alleged participation of the accused in a joint criminal enterprise (JCE) as it demonstrated their knowledge of the implementation and effects of the plan throughout Cambodia.

The prosecution then noted that several witnesses who will be called in the near future are former CPK telegram officers and decoders and that the testimony of such witnesses will erase any

¹ For an overview of these arguments, see the blog report available on the Cambodia Tribunal Monitor website (www.cambodiatribunal.org).

doubt as to the authenticity of the telegrams. Moreover, the prosecution argued that many of the names appearing on challenged telegrams that the Ieng Sary defense argued refer to unknown individuals in fact are discussed and explained in the Closing Order itself. For example, the tag “Brother Nhim” referred to DK Northwest Zone Secretary Ros Nhim, who was arrested and sent to S-21 prison and whose confession is also available on the case file. The prosecution summed up this argument by stating that a simple “due diligence” search of the case file would have made it readily apparent to the defense why such documents are relevant and who the relevant individuals named therein are.

The prosecution then argued that the Chamber should adopt an assumption of admissibility for documents that had been admitted into evidence in ECCC Case 001.

The prosecution also argued that, for many documents, they must be viewed together and in context, and this is why the prosecution is seeking to include such a large amount of documentary evidence. According to the prosecution, when viewed as a whole, many documents, such as telegrams, corroborate one another by illustrating a series of events and referring to other documents.

The prosecution then displayed several documents on the courtroom monitors, noting that the documents are copies of originals available at the Documentation Center of Cambodia (DC-Cam)² and that such documents can be verified by witness testimony if necessary. The prosecution noted that witnesses had already verified some documents and a later scheduled witness would further identify many documents and even identify specific handwriting and signatures.

To illustrate the mutually corroborating nature of many documents, the prosecution then provided an example of a telegram sent from Phnom Penh to Hong Kong by the CPK. This telegram instructed a woman named Phal Va to return to Phnom Penh from Hong Kong along with her husband, Oeng Sok. The prosecution then noted an S-21 prisoner sheet produced weeks thereafter that contained the names of both Phal Va and Oeng Sok. To further drive home its point, the prosecution then displayed a photograph of a smiling Phal Va at her desk in Hong Kong next to a photograph her in a prison uniform with a number pinned to her clothes at S-21.

At this point, the prosecution noted that it had many more examples of similar documents and could explain their relevance in the same manner, but the time for the prosecution’s submission had elapsed.

Civil Party Comments

At this point the floor was given to the civil parties to make submissions. Counsel for the civil parties argued that the various communication documents, such as telegrams and the like, demonstrate that there was a clear hierarchical command structure operating during the DK period and that this information is clearly relevant to the Case 002 trial.

² The Documentation Centre of Cambodia (DC-Cam) is an independent Cambodian research institute with a stated focus of documenting and researching the history of the Khmer Rouge period.

Disclosure: DC-Cam is a sponsor of the Cambodia Tribunal Monitor, and its director, Youk Chhang, serves as co-managing editor. The author of this blog post currently works with DC-Cam as a legal advisor.

As for the issue of collection and custody of the documents, the civil parties noted that DC-Cam had spent years collecting and verifying Khmer Rouge documents starting in 1995. Counsel noted that, in the period immediately following the end of the DK period in 1979, Cambodian people were far too busy finding enough food to eat to concern themselves with collecting Khmer Rouge documents, and therefore it would be improper and impossible to determine the full and precise chain of custody for all challenged documents.

The civil parties then argued that any doubt that messages were received by their intended recipient can be addressed by calling former CPK messengers to testify, noting that such messengers were typically quite loyal to their superiors.

Nuon Chea Defense

The Nuon Chea defense then provided some additional comments, mostly reiterations of points previously made. The defense reiterated its stance that DC-Cam director Youk Chhang must testify prior to the admission of any DC-Cam-sourced documents. The defense then commented on the prosecution's response to its argument that many communication documents submitted are irrelevant. The defense argued that the emphasis of evidentiary submissions should focus on the earliest period of the DK period related to the first wave of evacuations, which is the topic of the first Case 002 trial. The defense stated that it is concerned that the prosecution will attempt to use otherwise irrelevant documents as a backdoor means of addressing topics excluded from the first Case 002 trial, providing the example of evidence of alleged CPK internal purges in 1977 and 1978.

The defense then requested again that originals of certain documents be put "in [the defense's] hands" so the defense teams can compare them to the copies currently available. The defense next again "categorically" objected to the use of copied documents without a prior opportunity to inspect the originals. Counsel continued by stating that the prosecution was blindly accepting documents as true, when there had been more than sufficient time following the end of the DK period for individuals to manufacture false documents that incriminate Nuon Chea and others.

Ieng Sary Defense

Next up was the Ieng Sary defense, which used this opportunity to reiterate its objection to secondary materials, such as books and interviews, giving the example of an article by journalist Elizabeth Becker. The defense argued that such articles, especially those purporting to quote Ieng Sary or other accused, cannot be verified with any accuracy and must be excluded unless the authors are brought in to testify.

The defense further argued that, just because a piece of evidence is included in the case file or is referenced in the Closing Order, it does not automatically render such evidence admissible at trial itself, noting the difference between the pre-trial and trial phases of litigation at the ECCC. If this were the case, according to the defense, then holding any evidentiary hearing would be a complete waste of time.

Khieu Samphan Defense

The Khieu Samphan defense reiterated its objection to media reports and documents received from a Swedish collection of Khmer Rouge documents. The defense argued that the prosecution should have explained how and from whom the Swedish government received the documents prior to submitting them and that, without such information, the documents should be rejected.

Prosecution Responds

The prosecution was then given an opportunity to respond to objections against documents listed in Annex 5. These documents consist of CPK public statements, such as radio broadcasts, press releases, statements made to foreign media by DK leaders and other similar items.

The prosecution began by discussing reports of the Foreign Broadcast Information Service (FBIS), an agency of the United States government that monitors and translates current news and commentary from foreign political speeches, radio and television broadcasts and other sources. It stated that the the FBIS reports at issue in Case 002 were based on CPK radio broadcasts that are widely available on the internet and in university collections, including a collection at Harvard University.

The next category of documents outlined by the prosecution consists of statements and press releases allegedly issued by the DK Ministry of Foreign Affairs. The prosecution argued that such statements are important because they often contain exactly the same statements contained in FBIS reports, thus demonstrating the accuracy of both proposed sources of evidence. The prosecution then read from a purported DK Ministry of Foreign Affairs statement from December 1977 that officially severed diplomatic ties with Vietnam. The prosecution compared such statements to statements quoted in a FBIS report discussing the same press release's announcement over the radio. The prosecution argued that the two documents are "very consistent" and there is "no reason" to summon the author of FBIS documents because such reports are demonstrably accurate and reliable.

The prosecution then went on to describe the specifics of FBIS reporting techniques, pointing out that the reports consisted largely of transcripts of radio broadcasts emanating from areas of strategic concern to the United States (including Cambodia). The prosecution argued that FBIS reports provide an "invaluable snapshot of the past" and proceeded to read aloud a FBIS report from 1975 stating that the Khmer Rouge had announced that "it is absolutely necessary to kill" seven former Lon Nol regime leaders who had been labeled "super-traitors." The statement was purportedly signed by accused Khieu Samphan. Furthermore, various reports at the time confirmed that the seven individuals were indeed executed soon thereafter, the prosecution claimed, further corroborating the accuracy of FBIS reports.

Next the prosecution discussed similar radio reports produced by the British Broadcasting Corporation (BBC) and noted how such reports were similar to FBIS reports and other corroborating sources of information.

The prosecution then turned back to general evidentiary issues, noting that in April 2011 the prosecution had submitted twenty annexes of proposed evidence to the Chamber in which it had

described each proposed piece of evidence and provided an explanation of the relevance of each document by referencing the Closing Order. The prosecution again argued that all evidence providing insight into the CPK communication structures is directly relevant to the command structure and general policies of the CPK, which are topics specifically included in the first Case 002 trial. The prosecution further submitted that the detailed analysis it had previously provided to the Chamber made the proposed evidence *prima facie* admissible and the defense must do more than demand authentication to move the burden back to the prosecution.

As for the Nuon Chea defense's repeating demands for originals, the prosecution argued that the Chamber had already ruled that copies are admissible in lieu of originals and that, furthermore, it would be "ludicrous" and a waste of time for the prosecution to bring in each original and authenticate them one by one.

Regarding the various CPK documents the defense teams suggested may be fabrications, the prosecution argued that this was a simple hypothetical put forth without any corroborating evidence whatsoever. Furthermore, if a document is a fabrication or a false copy, the prosecution argued, the accused themselves would know and would be able to point this out, yet, aside from general demands for originals by Nuon Chea, this has not happened.

Furthermore, the prosecution argued that all of the CPK documents are reliable when viewed as a whole because they often corroborate one another. The prosecution also noted that the Chamber has already called as future witnesses a representative from DC-Cam, as well as former CPK telegram operators and a printing press worker, who can authenticate the telegrams and issues of *Revolutionary Flag* challenged by the defense.

Finally, the prosecution maintained that "every single document" it submitted can be corroborated and is therefore suitable for admission into evidence. As for the ongoing debate concerning the defense demands to question DC-Cam director Youk Chhang, the prosecution argued that the defense has no legal right to demand Youk Chhang's testimony specifically. Instead, the prosecution argued that the defense teams were only making this demand because "they would just like to talk to Youk Chhang in the courtroom."

As for the repeated demands for originals, the prosecution argued that there is no legal requirement whatsoever that privileges Nuon Chea, or any accused, as an arbiter of what documents are genuine and accurate but that he, like any other person, can offer his opinion on the documents in court. Furthermore, the prosecution argued that it would hijack the process for Nuon Chea himself to be allowed to inspect thousands of documents in court and then determine which ones were accurate.

The prosecution warned that, if the Chamber follows the suggestions of the defense teams, it will waste a massive amount of time and the Chamber will become mired in unnecessary legal hurdles for admissibility of routine evidence. Instead of this complicated process, the prosecution advised that the Chamber follow the practice of other international criminal courts and tribunals, where there is a "presumption of admissibility" under the doctrine of the free evaluation of the evidence. The prosecution elaborated that this presumption is necessary for international crimes,

because of the massiveness of such crimes, the organizational structures involved and the often physical remoteness of the accused from the crimes that they are accused of committing.

In sum, the prosecution noted that contemporaneous documentary evidence is particularly useful because it does not change over time. The prosecution contended that it is necessary to include all documents because cumulatively they show a “pattern of evidence” that consistently demonstrates that the accused are guilty. The prosecution argued that it is not hiding “needles” of key evidence in “haystacks” of irrelevant documents; rather, the case file is full of “needles” that all point to the guilt of the accused.

Civil Party Response

The civil parties then provided their comments on the defense objections and voiced their general support for the prosecution. Civil party counsel also observed that, on documents before the court, thumbprints are rarely used and telegrams are by their very nature always copied. Therefore, even using the most common ways of authenticating a document in Cambodia, counsel stated, it is not always possible to identify if a document is original. Counsel further argued that, if the defense suspected that any particular document is a fabrication, it should address such document individually.

The civil parties also took issue with the Ieng Sary defense’s “repetitive” objections to each Annex. Counsel argued that doing so was an abuse of discretion and a waste of time. Furthermore, counsel argued that the defense was “stubborn” in its attempts to reject evidence. This contention prompted an objection from the defense for Nuon Chea, who believed that the word used by the civil party counsel was “desperate argument,” which apparently translates into an impolite phrase in Khmer.³ Chamber President Nil Nonn identified the translation error and reminded parties not to use inappropriate words in court. This exchange prompted chuckles from the audience in the public gallery, which had appeared tired and disinterested throughout the morning’s session.

The civil parties then concluded by stating that the “repetitious” objections to Annexes one through five by the defense did have one benefit – that “little by little” the repetitive objections resulted in “absurd [and] shocking” arguments, such as the claim that all documents in the case file may be forgeries. According to the civil parties, these absurd claims only tend to reinforce the reliability of the documents.

Following this final submission by the civil parties, each defense was given an opportunity to make some concluding remarks on its objections to all documents in Annexes 1-5.

Nuon Chea Defense Final Reply Regarding Annexes 1-5

The Nuon Chea defense provided a brief summary of its arguments from the week’s hearing. First, the defense argued that its position was not to simply challenge all documents but rather to focus the Chamber solely on reliable evidence related strictly to the topics covered in the first Case 002 trial. Second, the counsel argued that what is not needed is “historical tour” of the DK

³ According to Khmer speakers present, the term used by the translator was “*ngor ngeut ngor ngul*” which roughly describes a person who makes arguments without understanding what they are challenging. In English the equivalent would roughly be to say to someone “you don’t know what you are talking about” in an insulting tone.

period. Extending the needle and haystack metaphor initially utilized by the Ieng Sary defense and subsequently adopted by the prosecution, the defense argued that what is needed in the case file is “less needles” and “more thread,” meaning only evidence precisely relevant to the issues of the first Case 002 trial.

The Nuon Chea defense then offered some final remarks on its demands that DC-Cam director Youk Chhang testify. The defense stated that it had previously argued that it would be unthinkable to hold a Khmer Rouge trial without the presence of King Norodom Sihanouk and that this sentiment is also true for Youk Chhang. Counsel argued that Youk Chhang’s testimony is absolutely critical because without his research efforts “there simply would never have been an ECCC.” Thus, counsel urged Youk Chhang to “grace us with his presence” as he is “simply the best man for the job.”

Nuon Chea’s national lawyer then added that Nuon Chea only wished to examine the originals of *Revolutionary Flag* and *Revolutionary Youth* booklets and not all of the thousands of documents in the case file. This request was not to delay but to “ascertain the truth and seek justice.”

Ieng Sary Defense Final Reply Regarding Annexes 1-5

The Ieng Sary defense began its summation by immediately challenging the statements made by the civil parties during the morning session, taking offense to the suggestion that it was putting forth “absurd” arguments and wasting time. Counsel reminded the Chamber and the parties that it was the prosecution that had suggested holding an evidentiary hearing in the first place. The defense then stated that its “main objection” is that the prosecution seeks to have all proposed evidence admitted immediately, rather than on an *ad hoc* basis throughout the trial process. The defense then reminded the Chamber and parties that it is not necessary to enter a document into evidence prior to using it during questioning. Counsel next cited an ECCC Pre-Trial Chamber decision that stated that the defense may object to evidence during the trial phase to challenge the allegations by the civil parties that the defense is making absurd arguments and wasting time.

The next topic discussed by the Ieng Sary defense was the International Criminal Tribunal for the former Yugoslavia (ICTY) *Prlic* case, which Ieng Sary counsel Michael Karnavas participated in as counsel. Mr. Karnavas noted that, in that case, which had been cited by the prosecution, the court rendered 60-100 separate decisions on admissibility of evidence issues. He submitted that this number of decisions is illustrative of the *ad hoc* approach to admitting evidence utilized by the ICTY. Mr. Karnavas further pointed to the ICTY’s process of requiring witness testimony to authenticate each document or a clear explanation of why this was not possible.

Mr. Karnavas summed up his discussion of *Prlic* by arguing that the general process used in that case was to screen evidence at the end, rather than the beginning, of the trial and also to reject thousands of documents in order to make the trial manageable. He did note that, despite these efforts, the case still took five years, instead of the scheduled two and a half.

The Ieng Sary summed up by stating, “We have maintained that, before admitting a piece of evidence, the prosecution has to provide some indicia” of authenticity, reliability and relevance and “we suggest that they be required to do so as the trial progresses.” The defense then

“dare[d]” the prosecution to come up with witnesses to authenticate every document it submitted as evidence. Finally, counsel noted that, although the doctrine of free evaluation of the evidence is applicable, “there is no automatic rule that all the evidence is admitted.”

Khieu Samphan Defense Final Reply Regarding Annexes 1-5

The Khieu Samphan defense then provided a summary of its position. Defense counsel first stated that he had not previously suggested that the documents must be found reliable “beyond a reasonable doubt” as a condition of admission. Instead, counsel stated that he was using that term when discussing indicia of reliability for specific documents, rather than as the actual test for admissibility. Counsel then argued that Khieu Samphan had not verified any documents in an interview as alleged by the prosecution. He stated that there was some “falsification” of documents, specifically documents from DC-Cam. While the Khieu Samphan defense denied that it had objected to all documents from DC-Cam, it clarified that the defense had only requested that the Chamber “examine thoroughly” the documents from DC-Cam.

Counsel further stated that it is the wish of Khieu Samphan to find the “truth”, and, to do so, all documents must be scrutinized before being admitted. “The task for the Chamber is to examine each document submitted or placed before the Chamber by the parties,” the defense maintained, regardless of whether there are any objections.

The defense suggested that ,if it is too burdensome for the prosecution to authenticate all documents it wished to enter into evidence, the prosecution should then pare down the list to a more manageable level.

Chamber Adjourns Until Monday and Responds to Nuon Chea Defense

Following the completion of remarks by the Khieu Samphan defense, the Chamber noted that the schedule for the next week’s hearing would be emailed to all parties, and it prepared to adjourn for the week.

However, before Chamber President Nil Nonn could announce the adjournment, international defence counsel for Nuon Chea Michiel Pestman rose and was recognized by the Chamber. Mr. Pestman then proceeded to reiterate the Nuon Chea defense’s request made earlier in the week for the Chamber to condemn the statements made by Cambodian Prime Minister Hun Sen that Nuon Chea is a “killer” and “perpetrator of genocide” and asked for an estimation of when a decision on the request would be issued.

After conferring briefly, the Chamber noted the remarks by the Nuon Chea defense but stated that they were a repetition of a previous request. The Chamber preferred to “not comment” on this remark and instructed the defense not to raise the issue again.

The Chamber then adjourned the hearing until Monday, January 23 at 9 a.m., when testimony of two witnesses, including a representative from DC-Cam, will be heard regarding evidentiary issues.