

Khieu Samphan's national counsel Kong Sam Onn delivers initial document objections during Tuesday's proceedings in the ECCC.

**Continued Documentary Debates:
Exploring the Proper Scope of Relevance to Case 002, Trial 1**

By: Randle DeFalco
J.D. Rutgers School of Law – Newark
Legal Advisor, Documentation Center of Cambodia

On Tuesday, March 13, 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 of debates from the previous day on the proper role and admissibility of certain pieces of documentary evidence proposed by the parties.

Chamber Clarifies Statement from Previous Day

The day's proceedings began with oral objections to documents submitted by the prosecution and civil parties by the Khieu Samphan defense. Before handing over the floor to the defense, however, Chamber President Nil Nonn handed the floor over to Judge Sylvia Cartwright to provide clear instructions to the parties in English on the Chamber's decision at the close of the previous day's hearing. Judge Cartwright clarified that the Trial Chamber had ruled the previous afternoon that it will not set aside time specifically to hear arguments on the probative value of documents but that such arguments can be made by parties during the course of the trial as necessary and during closing arguments. After this clarification, the floor was turned over to Khieu Samphan defense.

Khieu Samphan Defense Submissions on Documents

Counsel Kong Sam Onn delivered the Khieu Samphan defense team's initial set of objections to the documents in question. Echoing the arguments based on relevance to Case 002, Trial 1 made the previous day by the Nuon Chea and Ieng Sary defense teams, Kong Sam Onn stated that any document related to topics such as work sites, population transfers late in the Democratic Kampuchea (DK) period and genocide charges is simply irrelevant to the first trial and thus would not be discussed in the defense submissions.

Counsel then noted, in line with the submissions made by the Ieng Sary defense the previous day, that the Khieu Samphan defense would not discuss documents related solely to former Case 002 accused Ieng Thirith because this evidence has been rendered irrelevant by her severance from the case.¹

Kong Sam Onn then stated that the defense would refrain from commenting on more than 300 "new" documents placed in the case file and requested that, if necessary, the Chamber allow the parties to discuss the documents at a later stage.

Next, Kong Sam Onn continued to concur with the Ieng Sary defense team in requesting that any witness who gives testimony pertinent to the acts and conduct of the accused should be required to testify orally in open court, rather than be allowed to submit solely a written statement.



Newly admitted international counsel Anta Guisse presents additional document objection arguments for the Khieu Samphan defense.

Kong Sam Onn then gave the floor to his newly admitted colleague Anta Guisse to make additional submissions. Ms. Guisse noted that the Nuon Chea and Ieng Sary defense teams had already made "very compelling and brilliant" arguments and so she would endeavor to avoid

¹ Ieng Thirith was severed from Case 002 and found unfit to stand trial in late 2011. She suffers from dementia brought on by Alzheimer's disease.

undue repetition. She then discussed the topic of “biographies” submitted by the prosecution. First, Ms. Guisse revisited the issue of chain of custody for these documents which was discussed at length during previous hearings, arguing that for many of these purported contemporaneous DK period documents, their provenance remains unclear, rendering their reliability “wanting.”

Ms. Guisse also objected to analytical reports authored by Khmer Rouge researcher and ECCC employee Craig Etcheson. As for the so-called “commerce reports” from the DK period, she argued that the chain of custody for the documents as “dubious.” Ms. Guisse further reiterated the Khieu Samphan defense’s objection to documents collected by the Documentation Center of Cambodia (DC-Cam) generally. Ms. Guisse also noted that written annotations appearing on many commerce documents have not been sufficiently explained or identified as of yet.

Next, Ms. Guisse joined the objections of the other two defense teams to documents pertinent to the Tram Kak worksite. Specifically, she argued that the documents are not relevant to Case 002, Trial 1 and that some such documents are photocopies of originals that no longer can be found. Thus, she urged the Chamber to exclude such documents.

Ms. Guisse also added the Khieu Samphan defense’s support to objections to torture-tainted evidence, also arguing that many of these documents are simply irrelevant to Case 002, Trial 1. Additionally, she called for the exclusion of all trial transcripts from Case 001 that the prosecution may attempt to use to implicate Case 002 accused in crimes committed at S-21 *Tuol Sleng* prison.

Next, Ms. Guisse raised the “important point” that the Trial Chamber decided in its severance order that the topics of education centers, worksites and cooperatives are excluded from Case 002, Trial 1. Therefore, she argued that many documents must be excluded because they are pertinent solely to these and other matters falling well outside the scope of the first Case 002 trial.

Ms. Guisse next argued that Vietnamese-sourced documents were not collected via any scientific method and should thus be viewed with scrutiny. She also challenged the use of video evidence, echoing the arguments of the Ieng Sary defense from the previous day concerning the lack of information about the process of creating such videos and the motivations of some of the creators.

Throughout her submissions, Ms. Guisse returned regularly to the defense’s theme of the perceived lack of relevance for a high percentage of the documents proposed by the prosecution. This argument is clearly the main thrust of the challenges from all three defense teams, which have consistently argued that the prosecution is seeking to include evidence of crimes well outside the scope of the first trial.

Ms. Guisse next objected to purported interviews conducted by unnamed journalists and collected by DC-Cam and Professor Ben Kiernan, along with video footage shot by an East German film team in Cambodia in 1979 at the invitation of Vietnamese authorities. In doing so, Ms. Guisse again repeated many of the arguments made by the Ieng Sary defense yesterday

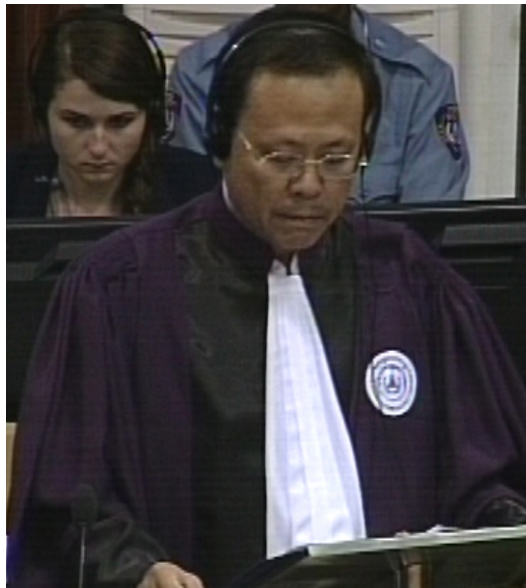
regarding the reliability of certain translated documents and international reports and summaries of Communist Party of Kampuchea (CPK) radio broadcasts during the DK period. She noted that, for many of such third-party authored documents, the identity of the author is unknown and the information contained in the articles remains unverified.

The Khieu Samphan defense also objected to scholarly articles and reports by researchers such as Craig Etcheson. Ms. Guisse sought to refer the Chamber to a point raised by the Ieng Thirith defense that Mr. Etcheson's report made many conclusions based on unverified individual statements and evidence likely obtained under torture. She stated that if the prosecution insists on using the report, that Mr. Etcheson should be called to testify regarding the many "difficulties" contained in his report.

Ms. Guisse concluded by making some observations concerning documents submitted by the Civil Parties. She argued that nine of the ten proposed documents are simply irrelevant to Case 002, Trial 1. As for the other document, an article authored by Professor Ben Kiernan when he was a twenty-one year old student, Ms. Guisse observed that student papers should not be used and that the paper's use should be considered in light of the fact that Mr. Kiernan is likely to testify.

Defense Concludes Submissions and Ieng Sary Retires to Holding Cell

This submission concluded the day's arguments for the Khieu Samphan defense and the Chamber prepared to adjourn for its regular morning break. Prior to the break, Chamber President Nil Nonn granted the request for Ieng Sary to retire to the courtroom holding cell to participate via audio-visual link for the remainder of the day's proceedings, contingent upon receipt of a signed waiver of Ieng Sary's right to be present in the courtroom.



National assistant co-prosecutor Veng Huot responds to the defense's objections.

Prosecution Response to Defense Objections

Following the morning break, time had been allotted for the prosecution and civil parties to object to documentary evidence submitted by the defense teams. However, both the prosecution and civil parties indicated that they would not object to any of the documents submitted by the defense teams. As such, the Chamber moved on by providing the prosecution with time to respond to the objections raised by the defense teams to documents during the previous day and the morning's session.

National prosecution counsel Veng Huot began the prosecution's response to the objections raised by the defense teams by citing the legal test contained in ECCC Internal Rule 87 for the admission of evidence, noting the presumption of admissibility contained therein. Veng Huot then argued that the list of reasons to exclude evidence contained in Rule 87(3) is exhaustive and in line with international jurisprudence. As such, he argued that only "minimum standards of reliability and relevance" are required. He then provided brief submissions regarding the *prima facie* requirements of demonstrating reliability and relevance necessary to admit evidence.

Next, Veng Huot argued that many of the challenges made to documents by the defense teams were central to questions of the weight that would be ultimately ascribed to such documents rather than simple admissibility questions. He also noted that the Trial Chamber had already ruled that copies of documents are admissible in lieu of originals. Regarding documents sourced from DC-Cam, Veng Huot noted that two DC-Cam representatives had already testified in order to establish the procedures in place at the Center when collecting Khmer Rouge documents. As such, he argued that the prosecution has demonstrated the *prima facie* reliability and relevance for all submitted documents. According to Veng Huot, this is especially true in light of the standard of "free evaluation of evidence" operative at the civil law-based ECCC system.

Following his general submissions regarding the admissibility regime at the ECCC, Veng Huot turned to specific types of evidence, including contemporaneous DK period documents sourced from various sites. During this portion of his submission, Veng Huot noted the processes by which documents had been collected by the ECCC, referring to rogatory investigation reports and the fact that, in many cases, original documents had been color-scanned at S-21 by Court investigators.

As for records from the Cambodian National Archives, Veng Huot noted that many of these documents consist of commerce records from DK. Repeating previous submissions and statements made by DC-Cam director Youk Chhang during his testimony, Veng Huot discussed the indicia suggesting the documents are indeed original contemporaneous DK period documents.

Prior to concluding his portion of the prosecution's response to defense objections, Veng Huot responded to statements made the previous day by Ieng Sary defense counsel Michael Karnavas to the effect that the prosecution was trying to "sneak in" evidence. He stated the prosecution's strong rejection of such suggestions and stated that the prosecution was not trying to "sneak" any evidence before the court but had instead proposed all documents through standard ECCC evidentiary channels.



International prosecution counsel Tarik Abdulhak responds directly to objections made the previous day by the Jeng Sary counsel Michael Karnavas.

Veng Huot then turned the floor over to international prosecution counsel Tarik Abdulhak, who made some addition comments on the statements made by Mr. Karnavas before continuing. Mr. Abdulhak characterized as improper Mr. Karnavas’ suggestion that the prosecution sought to try Case 002 with documents and thereby circumvent reliance on testimonial evidence, as well as Mr. Karnavas’ references to the professional ethics of prosecution counsel. He noted that the prosecution had already submitted a potential witness list to the Chamber with over three hundred names, and he further noted that the prosecution would seek to use both witness and documentary evidence to supplement one another during the trial.

Mr. Abdulhak then discussed the severance order of the Trial Chamber which divided Case 002 into a series of trials. He argued that in the order the judges had retained “contextual elements” related to structure of the CPK government and had also indicated that some other issues may be explored. According to the prosecution, retaining contextual elements in Case 002, Trial 1, opens the door for all parties to submit evidence relevant to such elements. Thus, Mr. Abdulhak argued, the defense teams, who have roundly lauded the severance order, rather than objecting to its terms, cannot now use the order as a tool to exclude documentary evidence submitted by the prosecution. He summed up by arguing that the first Case 002 trial was designed by the Trial Chamber to establish baseline facts relevant to all charges contained in the Closing Order and

therefore the prosecution should be permitted to adduce evidence relevant to the alleged “joint criminal enterprise” (JCE)² global to all charges in the Case 002 Closing Order.

Mr. Abdulhak argued that the prosecution had to adduce evidence relevant to the “overarching” JCE, linking all charged crimes, and he also noted that it is incumbent on the prosecution to prove that alleged specific crimes against humanity within the scope of Case 002, Trial 1, were committed as part of the requisite “widespread or systematic attack against a civilian population.” He noted that this task would be extremely difficult without the opportunity to delve into contextual evidence.

To illustrate his point, Mr. Abdulhak displayed a document purporting to be a speech made by Pol Pot that explained the reasons why the CPK had evacuated Phnom Penh in 1975. The speech reportedly stated that the decision to evacuate Phnom Penh was made in February 1975 and based on the need to “smash” and then disperse enemy groups into Cambodia’s countryside in order to prevent their resurgence.

Nuon Chea Retires to the Holding Cell at the Lunch Break

At this point, the Chamber prepared to adjourn for its regular lunch break, and the Nuon Chea defense made its customary request that Nuon Chea be excused from the afternoon session due to his fragile health. As usual, Chamber President Nil Nonn granted this request, contingent upon receipt of a signed waiver of Nuon Chea’s right to be present in the courtroom.

Prosecution Continues Response to Defense Objections to Documents

Following the lunch break, Mr. Abdulhak continued the prosecution’s response to the defense’s document objections. He began by stating that the repeated usage of the term “mini-trial” by the defense teams in reference to Case 002, Trial 1, is improper and offensive to the millions of victims, and he urged defense counsel to refrain from using the phrase moving forward.

Mr. Abdulhak then turned to the defense submissions related to evidence on the “acts and conduct” of the accused. He noted that at the ICTY there is a general presumption of admissibility, similar to the ECCC regime, but noted that the Tribunal is completely adversarial in nature and therefore parties conduct the investigation, unlike the ECCC’s civil law-based regime. This is why, he explained, the ICTY Appeals Chamber in *Prosecutor v. Galic* ruled that an applicable ICTY Rule specifically removed “witness statements” from the presumption of admissibility at the Tribunal. Moreover, he continued, the term “witness statement” was interpreted by the ICTY as solely encompassing statements taken in an official capacity by investigative authorities and that such statements were presumed inadmissible at the ICTY when going directly to the acts and conduct of the accused because live testimony was favored and investigating authorities partial. Mr. Abdulhak argued that books and analytical reports thus fall outside the scope of “witness statements” and therefore may be admitted even when going to the acts and conduct of the accused.

² JCE is an international mode of liability that is used to hold accused liable of “committing” crimes by joining a common plan with others that involves the commission of international crimes and thereafter making a significant contribution to the realization of the plan.

Next, Mr. Abdulhak discussed the issue of confessions and their admissibility in light of the prohibition on the use of torture evidence under customary international law. He proposed that the Chamber should proceed by ruling on each confession document on an *ad hoc* basis. He maintained that there is no general prohibition on “torture-tainted” evidence but rather a two-prong test under the Convention Against Torture (CAT) for admissibility of evidence when torture is alleged.

As for the documents labeled “new” by the Khieu Samphan defense, Mr. Abdulhak argued that these documents were put before the Chamber previous to the commencement of trial and are thus not subject to rules of admission specifically limited to evidence adduced during trial.

Next, Mr. Abdulhak turned to the allegations of bias against DC-Cam made by the Khieu Samphan defense team. He noted that the Nuon Chea defense team had largely abandoned its allegations of bias against the Center following the testimony of DC-Cam director Youk Chhang. He argued that it is self-evident that evidence from DC-Cam is not tainted in any way, stating that the Center provides its archives to all parties and the public. He maintained that the Center’s mandate to seek justice and accountability for Khmer Rouge period abuses does not taint evidence provided by it.

Regarding the issue of chain of custody for certain documents, especially DK “commerce” documents, Mr. Abdulhak asserted that it is not necessary for a party submitting documentary evidence to establish the full chain of custody. He also noted that ECCC investigators scanned many original copies of documents at S-21 prison. Regarding the information contained in the commerce category, Mr. Abdulhak showed one such document to demonstrate their probative value as sources of information on CPK central control over agricultural production, especially rice, and the fact that accused Khieu Samphan regularly received such reports. The document purportedly accounted for the production and transportation of paddy rice within DK and was addressed to the CPK central authorities.

Mr. Abdulhak then argued that documents such as photos, maps and other reports are all relevant and should be admitted by the Chamber, noting that the judges can properly assess the weight of such evidence. Regarding books, the prosecution submitted that it is not a prerequisite to admission that authors testify, as the books are not “primary evidence of any criminal activity as such.”



International assistant co-prosecutor Vincent De Wilde d'Estmael continues the prosecution's submission.

Following the afternoon break, Mr. Abdulhak turned the floor over to international prosecution counsel Vincent De Wilde d'Estmael to continue the prosecution's submissions. Mr. De Wilde d'Estmael first observed that the Nuon Chea defense team had, again used the name of a witness during the morning session, rather than referring to the individual by his or her court-assigned pseudonym. He then requested that the Chamber instruct the Nuon Chea defense to refrain from continuing this practice.

Mr. De Wilde d'Estmael then turned to a report produced at the request of the Ieng Thirith defense team in 2009 regarding the sources of information for locating certain buildings. He argued that the report is objective and its topic – the location of key CPK offices – is clearly relevant to the topic of the administrative structures within DK. These locations include such places as office “K1”, the Phnom Penh railway station, and the Olympic Stadium in Phnom Penh.

Next, Mr. De Wilde d'Estmael discussed additional reports and argued that all of them are relevant to the administrative structures in DK. For example, he argued that a report outlining a specific work camp authored by a survivor of the camp who lived there for nearly three years as a child should not be considered partial or inaccurate simply because the author was a child at the time.

He maintained that the defense teams had not actually argued that the reports to which it objected are somehow unreliable or inauthentic, and thus they should be admitted. Mr. De Wilde d'Estmael also noted that defense counsel had used such a report during the questioning of a previous witness.

Mr. De Wilde d'Estmael next requested that rogatory letters and reports created by ECCC investigators be allowed into evidence in order to provide information about certain civil parties and potential witnesses. He noted that the Chamber has the complete discretion to admit or reject such reports but requested that they be admitted, as they can provide important information. He also requested that such documents relating to individuals not on the witness list be admitted as forms of additional, contextual evidence.

As for international communications, Mr. De Wilde d'Estmael argued that the documents should be admitted, claiming that some defense objections to such documents are not true objections but rather complaints about mis-categorizing documents. As an example, he cited the autobiography of Ke Pauk, which was apparently misclassified as an international report or communication. He then explained the sources of various types of international communications, such as French government telegrams and United States (US) communications. He argued that all such documents should be admitted because there exist no reasonable grounds to contest their authenticity.

Regarding the content of certain telegrams, Mr. De Wilde d'Estmael noted that some proposed telegram documents demonstrate how the CPK leadership was provided with regular updates on the evolving situation when foreign nationals gathered at the French Embassy in Phnom Penh following the Khmer Rouge victory of April 17, 1975. He also noted that the Khieu Samphan defense, despite objecting to such documents, also proposed the use of certain telegrams, demonstrating their usefulness.

Mr. De Wilde d'Estmael then provided examples of several telegrams and explained how the contents of such documents can be corroborated. He also gave an overview of the types of information they provide. One example was a telegram documenting the travel from Peking, China, of a group of Khmer Rouge diplomats, including Ieng Sary and Ieng Thirith, to meet with authorities from several friendly states, including seven African countries. He explained how witness testimony and other records corroborate that this trip did indeed occur. Another such telegram discussed the arrest of Cambodian Prince Sirik Matak outside the French Embassy on April 20, 1975. Again, Mr. De Wilde d'Estmael explained how the contents of this telegram are corroborated by other pieces of evidence discussing the same event.

After discussing the French government documents, Mr. De Wilde d'Estmael turned to US communications, which range from field office communiqués to declassified minutes of meetings at the White House itself. He then explained how the ECCC obtained the documents and argued that because all the US documents are now declassified and publicly available, their authenticity should be presumed established, absent specific evidence to the contrary. As for the topics covered in the documents, Mr. De Wilde d'Estmael noted that the US documents refer to key events, such as the evacuation of Phnom Penh, and also help to elucidate administrative structures within DK at the time. He then explained that the structure and format of the documents also suggest their authenticity.

At this point, Mr. De Wilde d'Estmael halted his submission for the day due to the late hours and informed the Chamber that he planned to conclude his statement during the following morning session.

Prior to the day's adjournment, however, Nuon Chea defense counsel Andrew Ianuzzi rose and observed that no time had been allotted to the defense teams for replies to the prosecution and civil party responses to documentary evidence challenges. He then formally requested an opportunity to reply to the prosecution and civil party submissions and an indication of when this

might occur, so as to prepare properly. This request was then joined by the Ieng Sary and Khieu Samphan defense teams.

Mr. De Wilde d'Estmael responded for the prosecution, stating that it was his understanding that defense teams would be given an opportunity to reply on Monday (March 19). He also asked whether the future schedule would be impacted by the faster than expected pace of proceedings for the week thus far.

The Chamber judges conferred briefly before President Nil Nonn stated that the three defense teams would be provided a combined allocation of one hour to reply to the responses by the prosecution and civil parties. He stated that replies would take place after the civil parties concluded their response to defense documentary challenges. Regarding the subsequent proceedings, the President stated that the Chamber will adhere to its previously established schedule but would move certain matters up one day. He explained that as a result, the testimony of both Nuon Chea and Kaing Guek Eav alias Duch would be moved from Tuesday, March 20, to Monday, March 19.

Proceedings will resume the following morning at 9 a.m. with the conclusion of the prosecution's response to defense challenges to documents.