



Trial Chamber Case 002 Evidentiary Hearing: Day 1

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On Monday January 16, 2012, the Trial Chamber of the Extraordinary Chamber in the Courts of Cambodia (ECCC) resumed its Case 002 proceedings concerning accused persons Nuon Chea, Ieng Sary and Khieu Samphan. The period of January 16-19 was set aside to conduct a hearing on evidentiary issues. This hearing commenced following uncertainty regarding precisely how documents, such as contemporary Khmer Rouge publications *Revolutionary Flag* and *Red Flag*, could be utilized. Most notably, Nuon Chea has consistently refused to accept any copies or digitized versions of documents during questioning.

ECCC Rule 87 and Evidentiary Issues

ECCC Internal Rule 87 mandates the evidentiary regime of the Court and states as follows:

1. Unless provided otherwise in these IRs, all evidence is admissible. The onus is on the Co-Prosecutors to prove the guilt of the accused. In order to convict the accused, the Chamber must be convinced of the guilt of the accused beyond reasonable doubt.
2. Any decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination.
3. The Chamber bases its decision on evidence from the case file provided it has been put before it by a party or if the Chamber itself has put it before the parties. Evidence from the case file is considered put before the Chamber or the parties if its content has been summarized, read out, or appropriately identified in court. The Chamber may reject a request for evidence where it finds that it is:
 - a. irrelevant or repetitious;
 - b. impossible to obtain within a reasonable time;
 - c. unsuitable to prove the facts it purports to prove;
 - d. not allowed under the law; or
 - e. intended to prolong proceedings or is frivolous.¹

¹ ECCC Internal Rules (rev.8), Art. 87.

Nuon Chea's Waives Right to be Present

The hearing began with Chamber President Nil Nonn reminding the parties to stay within the parameters of the scheduling order. As soon as President Nil Nonn finished this outline, Nuon Chea's counsel rose and informed the Chamber that Nuon Chea wished to waive his right to be present for the entire week of hearings and further requested that he be allowed to return to the ECCC detention center (rather than the audio-visual link-equipped courtroom holding cell) in order to "be fit" for the resumption of substantive trial proceedings the following week.

President Nil Nonn granted Nuon Chea's request to exit the courtroom for the entire week, but remanded him to the holding cell, rather than the detention center. The President further instructed Nuon Chea's defense team to provide the court with a "detailed" document wherein Nuon Chea waived his right to be present.

Prosecution's General Submissions on Evidentiary Issues

The prosecution then provided the Chamber with its general view on the admissibility of documents before the ECCC, covering four topics briefly, including:

1. The Importance of Documentary Evidence Generally
2. The Legal Test to be Applied Regarding Admissibility of Documents
3. The Indicia of Reliability Identified by the Prosecution Related to Challenged Documents
4. Comments on the Legal Distinction between Admissibility and Weight.

The Importance of Documentary Evidence Generally

The prosecution began by outlining the special usefulness of contemporaneous documents, stating that such documents provide special insights, due to their immediacy to the relevant events and immutability over time. The prosecution noted that such documents are not susceptible to the same problems of forgetfulness and shifting motives that may compromise witness testimony.

The prosecution also argued that non-contemporaneous documents can also be useful in a variety of ways, noting the massive amounts of documents admitted at other internationalized criminal courts, such as the International Tribunal for the former Yugoslavia (ICTY). The prosecution added that because the accused in Case 002 all held positions near the top of the Khmer Rouge hierarchical structure and that the regime observed a strict policy of secrecy at the time, internal documents are especially important sources of information.

The Legal Test for Admissibility of Evidence

The prosecution then went on to argue that the permissive language of Rule 87 contemplates the application of the international law doctrine of "free evaluation of evidence" at the ECCC. The

prosecution argued that this doctrine is flexible and qualified only by Rule 87(3), quoted above, which forbids the use of specific categories of evidence only.

The prosecution next argued that according to international jurisprudence, to be admissible, evidence must only be *prima facie* relevant and reliable. According to the prosecution, the term *prima facie* in this context, simply means “based upon first impressions” of the judges. The prosecution did note that defense teams have a right to challenge the authenticity of documents, but argued that the prosecution must only respond by doing nothing more than demonstrating that the document is what the prosecution purports it to be. Thus, “authenticating” documents involves only this basic requirement, rather than satisfying the more demanding technical requirements of many national jurisdictions.

Indicia of Reliability

The ECCC does not provide a set of indicia of reliability factors, but international jurisprudence does speak to the issue. The prosecution argued that this jurisprudence clearly establishes that the Chamber must consider two types of characteristics when deciding whether to admit a challenged document:

1. Internal Characteristics (source, author, markings, signatures, form, layout, dates, etc.)
2. External Characteristics (witness testimony regarding the document, similar documents, etc.).

Internal characteristics, according to the prosecution, should be examined to determine whether a document appears to be from the source it is purported to be from, while external characteristics, such as a witness testifying that a document is genuine, are also properly considered.

The prosecution then noted that the Chamber can look to where a document was sourced from, rather than examining each document submitted to it in a vacuum. If a document was found in a particular place, or received from a significant person for example, then the prosecution argued such source information would suggest that a document is more or less likely to be genuine.

Distinction between Admissibility and Weight

The prosecution then discussed the difference between admissibility and assessments of probative value at international courts. The prosecution argued that judges must consider the probative value of each piece of evidence in a separate, later inquiry and thus, only basic admissibility was currently at issue. The prosecution further noted that these judges, who are professionals unlike lay juries, are expected to have the ability to dispassionately and thoroughly assess the weight of all evidence.

The prosecution summed up its arguments regarding the applicable admissibility test, by arguing that the defense teams in Case 002 had proposed an unduly restrictive test for admissibility of documents. This concluded the prosecution's submissions for the day.

Civil Party Observations on Evidentiary Issues

Before the floor was turned over to the defense teams, counsel for the civil parties interjected and requested an opportunity to make two "general observations" pertaining to evidentiary issues. The first observation was an expression of "astonishment" at the objections of some of the defense teams against certain documents which had already been well-established according to the civil parties. Counsel for the civil parties accused the defense teams of attempting to "ride rough-shod" over the ECCC Internal Rules with their objections, frustrating the goal of expeditious proceedings.

The second observation argued that issues of admissibility cannot be challenged repeatedly, but must be accepted once ruled upon. Counsel also reiterated the limited grounds upon which evidence can be challenged under Rule 87 and reminded the Chamber that the civil parties have the right to a fair trial, led by impartial judges, just as the accused do. The counsel continued that the procedures followed by the ECCC Co-Investigating judges and their mandate to find both inculpatory and exculpatory evidence provides further assurances of the authenticity of the evidence placed in the case file. The civil parties argued that the proper time for challenges to admissibility decisions of the Co-Investigating judges was during the appeal process relative to the Closing Order, which is designed to cure all defects therein.

For these reasons, the civil parties argued that all challenged pieces of evidence have already been established as reliable and relevant and should therefore be admitted.

Following these observations, the Chamber turned the floor over to the defense teams for general submissions on evidentiary issues, beginning with the Nuon Chea defense.

General Submissions of Nuon Chea Defense

Nuon Chea's counsel began by stating that the Trial Chamber is in the "unique position" of having wide latitude to decide what types of evidence and documents it may consider. Although Nuon Chea's counsel stated Nuon Chea's acceptance of the Chamber's decision to utilize an international approach to admissibility issues, counsel argued that the Chamber should nonetheless adopt the "best evidence rule" contained in Cambodian law and frequently cited by international courts. The defense counsel argued that this doctrine, which demands inspection of originals when available, dictates that "at least some" of the thousands of documents in the case file, be authenticated through the provision of originals.

Counsel then argued that providing such assurances was not an overly burdensome process, citing statements by Documentation Center of Cambodia (DC-Cam) Director Youk Chhang

asserting that many, if not all, of the documents cited by the prosecution are available in their original form at the Center.

While the defense agreed with the prosecution that it would be time-consuming and cumbersome to produce originals of every document relied upon, counsel argued that such practical considerations cannot “trump” Nuon Chea’s fair trial rights and that any document used to establish specific acts of Nuon Chea, must be produced and verified as to its authenticity.

Counsel then further argued that the Chamber must critically assess the sources and authenticity of every document placed before it, arguing that the Chamber cannot delegate its role as the final “arbiter of the truth” to other entities.

The defense also argued that if an accused challenges a specific document, the onus shifts to the prosecution to authenticate such document.

The defense next “categorically” rejected the submission of the civil parties suggesting that the issue of authenticity of documents is somehow foreclosed by the issuance of the Closing Order and the decision on appeal thereof by the Pre-Trial Chamber. The defense argued that the question of authenticity remains open until the close of trial proceedings and also noted that each accused has the right to submit evidence up to the end of the trial.

Finally, the Nuon Chea defense noted its objection to the Chamber’s ruling during the previous week’s hearings that any refusal to answer questions based on challenged documents by Nuon Chea would be interpreted as exercise of the right to remain silent.² The defense reiterated its position that such refusals were instead simple challenges to the authenticity of copied documents and should not be interpreted as anything else.

Ieng Sary Retires to the Holding Cell for the Day

At this point, just prior to the regular morning break at 10:30 a.m., Ieng Sary’s counsel rose and informed the Chamber that Ieng Sary wished to waive his right to be present in the courtroom and move to the ECCC holding cell to participate remotely via audio-visual link. The Chamber granted the request but requested Ieng Sary’s submission of a written waiver. Thus, as has become the norm, Khieu Samphan remained the only accused present in the courtroom following the waiver of the right to be present by Ieng Sary and Nuon Chea.

Ieng Sary Defense General Comments

² Nuon Chea repeatedly demanded original documents during questioning throughout the preceding week’s testimony and persisted with such demands even after the Chamber ruled on the issue. His insistence appeared to frustrate Chamber President Nil Nonn, who was forced to reiterate the Chamber’s ruling numerous times. President Nil Nonn also repeatedly referred to Khieu Samphan as “Nuon Chea” in the afternoon portion of the January 12, 2012 hearing following Nuon Chea’s protestations during the morning session. *See* Cambodia Tribunal Monitor Blog Reports of January 11-13, 2012, available at www.cambodiatribunal.org.

Following the morning break, the Ieng Sary defense team took the floor to deliver its submissions. The defense team first addressed the arguments of the civil parties, “remind[ing]” them that the Ieng Sary defense had already objected to the admissibility of torture-tainted evidence and other pieces of evidence and that the Pre-Trial Chamber’s decision on such objections itself had even noted that Ieng Sary has the right to raise the issue again before the Trial Chamber under Rule 87. Counsel also noted that the defense teams are not one, single “monolithic” entity, but are three distinct teams and should not be lumped together by other parties when making submissions.

Counsel continued by noting its previous requests made to the Co-Investigating judges to explore the circumstances under which DC-Cam gathered and stored documentary evidence, stating that such requests were simply ignored at the time.

The Ieng Sary team then went on to state that it shared in some of the submissions of the prosecution. Specifically, the Ieng Sary defense agreed with the fact that the ECCC will, and should, follow international jurisprudence related to admissibility, that the current evidentiary hearing is necessary, and notably that all torture-tainted evidence must be excluded. Finally, the defense agreed that only at the close of evidentiary hearings would the Trial Chamber judges determine what weight, if any, to give to each piece of evidence.

The Ieng Sary defense then provided its proposed sequence of inquiry for the Chamber to determine the admissibility of each document, as follows:

1. Whether the Document is Authentic
2. Assessing Reliability of the Document
3. Assessing Relevance of the Document

The defense argued that the issue of authenticity is separate from that of reliability, giving the example of a murder weapon that is authentic, but was tampered with, rendering it inadmissible to illustrate its position.

The defense also argued that “some screening” of documents will be needed and that the Chamber should apply the doctrine of *in dubio pro reo*, which dictates that in cases of doubt, judges should adopt whatever position is most favorable to the accused.

The defense then cited several statements made previously by the Trial Chamber and submitted that it was clear from these statements, that reliability is key to the admissibility of each document and also that *in dubio pro reo* does apply to such decisions. In support, the defense also cited the ECCC Supreme Court Chamber, which had previously “stressed” that *in dubio pro reo* applies where doubts exist.

As for the specific requirements of authenticity, reliability and relevance, the Ieng Sary defense submitted some additional comments.

The defense argued that any document found inauthentic should be excluded as improper and unreliable. The defense noted that some statements were excluded in Case 001, where the accused had no ability to challenge the statements contained therein.

As for authenticity, the defense stated that the first, crucial inquiries require satisfaction that each document be authentic and reliable and cited the factors considered regarding authenticity at the ICTY. The defense noted that there is no finite list of indicia of reliability and as such, each document must be examined individually, arguing that in the case of documents received from DC-Cam, the Center cannot be considered neutral, but is a “party of interest” with “inherent prejudice against the accused” and thus, documents from DC-Cam must be viewed with special skepticism by the Chamber.

Although the Ieng Sary defense recognized that some flexibility was required in application of the best evidence rule principle favoring originals, the defense argued that for key documents if the original is available it must be used. The defense further submitted that whenever there are some reasons to suspect that challenged documents are inaccurate, the best evidence rule then “kicks in” requiring production of the original. He further stated that this is the case for some of the contemporaneous documents in the Case 002 file, as Nuon Chea himself had already argued that some copies of Khmer Rouge publications may vary and be inaccurate, due to improper copying and other issues.

The defense then noted that at the ad hoc Tribunals some evidence was excluded because its prejudicial effect outweighed its probative value, providing as an example an inflammatory newspaper article about the Omarska prison camp in the former Yugoslavia that was excluded at the ICTY.

The defense finally noted that even when documents are found authentic and reliable, the Chamber must still determine whether such document is relevant to a specific issue covered in the Closing Order, comparing this process to reigning in witnesses who go off on a tangent during testimony.

Khieu Samphan Defense General Comments

The final defense team to put their submissions before the Court was that of Khieu Samphan, which first drew the Court’s attention to Rule 87(1), arguing that Rule was being misinterpreted because documents must be submitted and then debated prior to being fully admissible before the Chamber.

The defense further seemed to argue that the standard of reasonable doubt should be applied to the admissibility of documents, arguing that if there is “any doubt” regarding a challenged document, the onus is on the prosecution to prove the propriety of the document beyond a reasonable doubt. He further argued that if Rule 87 is truly so inclusive of potential evidence,

then there would be no reason for even convening the current hearing, as all suggested evidence would be summarily included in the case file.

The Khieu Samphan defense also took issue with the civil party comments that the defense was prolonging the proceedings by challenging evidence. He stated that the real source of wasted time was the prosecution putting forth improper documents and that the defense has every right to issue challenges to evidence. He noted that to “avoid time-wasting” the prosecution should have to explain why each document should be admitted and then the defense can respond appropriately.

The defense also noted its objection to the inclusion of documents referenced in footnotes within the Case 002 Closing Order, arguing that the Closing Order is a “mere summary” of the charges against the accused. Moreover, according to the Khieu Samphan defense, challenged documents may even conflict on key points they are cited in support of because these documents were produced “by human beings” and so the source can and must be tracked for each document.

The Khieu Samphan defense summed up by arguing that debating the documents is crucial to determining which ones are accurate and should be found admissible. Counsel also further reiterated his belief that there had been a “shift” in the burden of proof for establishing admissibility of documents from the prosecution to the defense and that this is improper.

The defense urged the Chamber not to admit any evidence not placed before it for examination, because in such a case, authenticity cannot be verified.

Following the close of the Khieu Samphan defense presentation, President Nil Nonn thanked the parties for their submissions and for staying within the time allotted. The President then reminded the Khieu Samphan defense that Rule 87(2) itself required that all evidence placed before it be examined prior to being placed in the case file, stating that this examination was, moreover, the subject of the present hearing. The Chamber then allowed Khieu Samphan himself to make some remarks regarding the evidence.

Khieu Samphan’s Personal Comments

After Khieu Samphan took the stand, President Nil Nonn asked him whether he planned on testifying or exercising his right to remain silent during the next portion of the first Case 002 trial on the topic of the administrative structures of the Khmer Rouge’s Democratic Kampuchea (DK) government. Khieu Samphan stated that even after his previous statements, some parties did not understand his position. He then “reiterated” his position to clarify it, stating that he had requested to “participate actively” in his defense, however he “will not forget that this is his trial” and that he “categorically reject[s]” the allegations made against him by the prosecution.

Khieu Samphan went on to state that he plans to hold the prosecution to its burden and as such, he must observe the prosecution’s presentation of evidence before he can respond to it. As such,

he reserved the right to comment on the topics raised in each hearing, but cannot predict when he will exercise his right to remain silent. He did claim however, that he will eventually respond to “every question” placed to him by the parties, but could not do so until sufficient evidence, in the forms of documents and witnesses, was placed before the Chamber on each topic.

During his statement, which he read out from a prepared document, Khieu Samphan appeared fully engaged in the proceedings and evinced a strong understanding. He also seamlessly switched from speaking Khmer to French, in order to ensure that his points were clearly made to the internationals at the Court. Indeed, the switch from Khmer to French was so fluid that it caused some problems with the Court translation.

The Nuon Chea defense team then rose and reminded the Chamber that Nuon Chea desired to retire to the ECCC detention facility and not the holding cell and that this request was for the entire week’s proceedings. The prosecution objected to this request, as it deems participation, even remotely, critical to the proceedings.

The Chamber rejected Nuon Chea’s request to be transferred to the detention facility, noting that accused who wish to be excused, must remain in the holding cell where the audio-visual link is available. The Chamber then adjourned for lunch.

Nuon Chea’s Challenges to “E3” (DC-Cam) Category Documents

The afternoon session began with the Nuon Chea’s defense team providing its objections to specific documents. Prior to beginning its submission, the Nuon Chea defense informed the Chamber that it planned on referring to two witnesses by name and asked for guidance before continuing. The Chamber granted this request, which had previously been communicated to the Chamber, but noted that as a general rule witnesses must be referred to by pseudonym only.

The defense then asserted its position that DC-Cam director Youk Chhang must testify in order for any DC-Cam documents to be admissible.³ The defense argued that Youk Chhang is the only person who has knowledge of all DC-Cam documents and that his “intensive and long-running” collection of evidence necessitates his testimony.

The defense noted that another DC-Cam representative was scheduled to testify, but argued that anyone other than Youk Chhang would not sufficiently validate all DC-Cam-sourced documents, though testimony from such individuals was still welcome. The defense further observed that Youk Chhang has been interviewed by the prosecution and Co-Investigating Judges, but never by the defense teams. Counsel also specifically noted that Youk Chhang has previously stated that to differentiate between different types of annotations on documents collected from *Tuol Sleng*, he has relied on his wealth of experience and expertise in researching Khmer Rouge issues, arguing that such special individual expertise is unique to Youk Chhang himself.

³ For more information on DC-Cam and its work, see www.dccam.org.

The defense then noted an article co-authored by Youk Chang and John Ciorciari, entitled *Documenting the Crimes of the Khmer Rouge*,⁴ which, according to the defense, argued that certain documents needed additional authentication for verification. The defense then argued that Youk Chhang is not a neutral researcher, but has been working for years with the goal of prosecuting the accused, including Nuon Chea. The defense stated that it did not wish to “blame or criticize” Youk Chhang for taking this “prosecutorial” approach, but argued that DC-Cam as an institution cannot claim to be a “neutral research enterprise.” The defense summed up this argument by reiterating that it will not be satisfied as to the authenticity of DC-Cam documents unless Youk Chhang himself testifies.

The Nuon Chea defense then added some comments on specific documents objected to, including copies of the Khmer Rouge’s *Revolutionary Flag*, *Red Flag* and *Revolutionary Youth* booklets, along with the notes of Khim Ngoun, who interviewed Nuon Chea and has been referred to by Nuon Chea as “Hun Sen’s Spy #9.” In support, the defense reminded the Chamber that Nuon Chea had already provided specific objections including, *inter alia*, the facts that *Revolutionary Flag* booklets were originally handwritten and that *Red Flag* booklets replaced *Revolutionary Flag* in 1975.

The defense then observed that the challenged documents are especially important because they speak directly to Nuon Chea’s actions during DK period (1975-1979). Therefore, according to the defense, the bar for admissibility should be set high, rather than low, for such key documents.

The Nuon Chea defense then summed up by reiterating its argument that Youk Chhang’s testimony is absolutely necessary for the numerous DC-Cam-sourced documents to be admitted and that Khim Ngoun must be cross-examined in Court regarding the “little chit chat” he had with Nuon Chea.

Ieng Sary Defense Objections to Specific Categories of Documents

The Ieng Sary defense began by supporting Nuon Chea’s request that Youk Chhang testify, arguing that Youk Chhang himself is “the best evidence” regarding authentication of documents. Defense counsel noted that he is “a little bit dismayed” that the prosecution “relied on the legwork” done by DC-Cam to such a large extent without obtaining “sufficient evidence” to lay a foundation for the documents already.

CIA Reports

The defense continued by arguing that reports produced by the United States Central Intelligence Agency (CIA) cannot be relied upon because the CIA had a vested interest at the time in the politics of Southeast Asia, including Vietnam and Cambodia. Moreover, the defense noted that

⁴ This is a chapter in a book on Khmer Rouge legal accountability edited by Beth Van Schaack and Jaya Ramji, and entitled *Delivering Justice for the Crimes of the Khmer Rouge* (London: Mellen Press, 2005).

the authors of these documents are well-known, but that Ieng Sary has no realistic opportunity of gaining testimony from such authors. Counsel then stated that if such documents are admitted without such verification, they must be treated as hearsay⁵ and that the Chamber must be mindful to discount the value of such evidence.

Books and Articles

Next, the Ieng Sary defense “fundamentally” rejected the use of books and articles on the Khmer Rouge history as evidence before the Chamber. The defense argued that to have a book simply admitted, without the author’s experiences being probed in Court, would be improper and violate Ieng Sary’s rights to confrontation. As such, Ieng Sary’s defense counsel argued that such documents should be rejected and once again, if accepted, should be considered to consist of strictly hearsay evidence that must be independently substantiated or deeply discounted.

Moreover, counsel argued that the Chamber cannot use books to authenticate one another as this would involve improperly bootstrapping the books into evidence without any independent verification.

Authentication of Contemporaneous Khmer Rouge Documents

The Ieng Sary defense then argued that some Communist Party of Kampuchea (CPK) documents must be tested before being admitted. Counsel argued that such requests are not an undue burden, but are instead, the “minimum” scrutiny necessary. Furthermore, the defense requested that key information, such as who specifically authored each document, be probed, rather than automatically imputing authorship to the CPK generally for the entire class of documents. Without such information being verified, the defense again argued that the Chamber must minimize the probative value of such documents.

Minutes of CPK Meetings

The Ieng Sary defense argued that the surviving minutes of CPK meetings must be tested before being admitted. The defense argued that such minutes should be explored regarding who authored them, who was present at such meetings and how the notes were taken. The defense argued that the prosecution should call witnesses who can lay a foundation for such documents and provide the defense with information about which witnesses will verify each document.

CPK Telegrams

The defense next submitted that the prosecution must present evidence to show authenticity and reliability of each CPK telegram it submits. Defense counsel argued specifically that the prosecution should present witnesses who can explain how telegram information was shared and disseminated throughout the CPK government during the DK period.

⁵ An out of court statement offered for the truth of the matter asserted therein.

Prior Statements by the Accused

Ieng Sary's defense then turned to previous statements of the accused and noted that these statements were not given to investigators or any official authority, making the use of the term "statement" misleading from a legal perspective. Specifically, the defense argued that researchers and authors such as Elizabeth Becker and Steve Heder should testify before their works are admitted into evidence and that all notes and recordings they still retain should be examined in open court.

The defense noted that researchers routinely ask leading or other types of questions that would be objectionable in court and often take quotations out of context or impute statements to the accused that are otherwise not "true, accurate, or complete."

The Ieng Sary defense then provided the example of a theoretical "so-called historian" who made a statement that cannot be supported by any other evidence, stating that the Chamber must take this lack of corroboration into account when assessing such a work.

Documents from the ECCC Office of the Co-Investigating Judges (OCIJ)

The Ieng Sary defense then objected to various documents consisting of the work-product of the OCIJ, stating in support of this objection that transcripts and/or translations of certain witness interviews have already been demonstrated as inaccurate or incomplete. Counsel further noted that recordings are now made of interviews, obviating the need to rely heavily on summaries created by the OCIJ. Therefore, counsel argued that the Chamber's preference should be to utilize actual recorded interviews in favor of summaries thereof for especially important witnesses.

Evidence from Deceased Witnesses

The defense next claimed that all statements from deceased individuals should be excluded as none of the accused would have an opportunity to cross-examine such individuals. Again, counsel argued in the alternative, that if admitted, the probative value of such statements should be discounted by the Chamber.

ECCC Filings

The defense further objected to any evidentiary use of documents submitted by the parties themselves to the OCIJ during the investigative phase, arguing that such filings are not evidence, but solely requests limited to pretrial issues.

BBC Video of Nuon Chea Interview

The defense then objected to the admission of a specific interview of Nuon Chea conducted by the British Broadcasting Corporation (BBC). Defense counsel argued that the entire interview is

not available and furthermore only the translated English version is still available (not the original Khmer). As such, according to the defense, there is no way to know whether this interview is accurate or whether the interview consists of a collage of snippets used to fabricate a specific narrative, chosen by the BBC.

Ieng Sary Document

The Ieng Sary defense next objected again to a specific document, this one described as a biography of Ieng Sary.⁶ The defense stated that currently, there is no way to verify the authenticity or veracity of this document.

New Documents

The Ieng Sary defense concluded by objected to the use of any new documents, not already provided to the defense teams. Specifically, counsel objected provisionally to any use of the book *The Young Nuon Chea in Bangkok*, which was recently published. Counsel noted that as far as he was aware, the defense teams did not yet have any access to the document and therefore could not comment on the book specifically, but submitted that the book presumably falls within the “books” category of evidence previously objected to.

Nuon Chea Asleep Again

Following the afternoon break, Nuon Chea’s defense team informed the Chamber that Nuon Chea had fallen asleep in the holding cell and requested that he be allowed to return to the detention facility, arguing that he was not viewing the audio-visual link and thus, there would be no difference in degree of participation if he was moved.⁷ The prosecution objected, arguing that it is the ongoing “opportunity” to participate by Nuon Chea that is critical and this opportunity cannot be effectuated in the detention center.

The Chamber then reiterated its previous ruling that the accused “shall” participate in the proceedings according to the Internal Rules and did not elaborate further, denying the request for transfer. The Chamber then denied Nuon Chea’s defense the opportunity to respond and turned the floor over to the Khieu Samphan defense team to provide its objections to specific evidentiary submissions.

Khieu Samphan Defense Team Second Submission

⁶ It was unclear to the author precisely what document was being discussed. There is a document, a translated copy of which has been viewed by the author, which has been labeled Ieng Sary’s “diary” or “notebook” as well as possibly, his “biography.” This document purports to be a notebook of observations and meeting notations kept by Ieng Sary or one of his personal aids. It is alleged that this document was found at a house hastily vacated by Ieng Sary shortly following the fall of the Khmer Rouge.

⁷ Nuon Chea fell asleep in the holding cell during the previous week’s proceedings as well.

Khieu Samphan's defense team then reiterated its objection to any and all documents which are not authenticated, especially "E3" documents (i.e. documents derived from DC-Cam). The defense then turned to documents cited in the footnotes of the Closing Order, including certain documents allegedly not included in the investigation and voiced its objection again to the admission of these documents. Moreover, the Khieu Samphan defense argued that other documents cited in the Closing Order footnotes are not reliable and even conflict with one another on certain key points. The lawyer also pointed out several documents that supposedly differ in substance in each official ECCC translation (Khmer, English and French).

Defense counsel largely reiterated his previous arguments from the morning session, but did argue that certain documents written originally in Khmer were placed in the case file in the form of their English translations and that subsequently, the English version was re-translated back into Khmer once the document was in the case file and that this process resulted in mistakes.

The defense also commented on DC-Cam's public website (www.dccam.org), stating that while some sources of documents hosted on the site are provided, this remains insufficient for such documents to be admitted as evidence at the ECCC and further corroboration must be obtained prior to the admission of such documents.

Finally, following a series of objections to specific documents, Khieu Samphan's counsel apparently departed from the stances of Nuon Chea and Ieng Sary, stating that it was acceptable for any DC-Cam staff member who has sufficient knowledge of the Center's documents and policies, to testify in lieu of Youk Chhang.

At the close of the day's proceedings the Trial Chamber announced that the prosecution would be given one hour to respond to the arguments put forth by the defense teams the following morning. President Nil Nonn also ordered the Court's security personnel to bring Nuon Chea and Ieng Sary to the Court's holding cell, rather than the courtroom each day for the duration of the week's hearing, which will continue through January 19, 2012.

END