

Summary of Parties' Requests to Put Evidence before the Chamber and Submit New Evidence

The afternoon session of the 16 September 2009 hearing and the half-day session on 17 September 2009 were devoted to the presentation of requests by the Parties for submission of additional evidence to be put before the Chamber. Apart from allowing the Parties to propose evidence which they believe would help the Chambers reach its judgment, this process likewise gave each of the Parties the opportunity to comment on the requests made by the other Parties.

The Prosecution

The Prosecution, through Deputy International Co-Prosecutor Anees Ahmed, sought to put before the Chamber the following 4 categories of documents: (a) a map of S21 and its vicinity;ⁱ (b) documents purportedly establishing the existence of an international armed conflict between Cambodia and Vietnam;ⁱⁱ (c) testimonies given before the OCIJ and statements recorded during the February 2008 reenactments at Choeung Eak and S21, and confessions from S21 purportedly annotated by the Accused; and (d) *The Lost Executioner*, a book written by Nic Dunlop.ⁱⁱⁱ

Justifications for the Prosecution's Submission. Mr. Ahmed assured the Chamber that the putting of the foregoing additional documents before it was crucial to the discharge of the Prosecution's duty to prove the Accused's guilt beyond reasonable doubt, in accordance with the Internal Rules.^{iv} When the Defense protested that the documents were unnecessary given that Duch had already admitted responsibility, Mr. Ahmed responded by stating that in international law, no conviction could be made if based solely on an accused's plea of guilt.

The nature and relevance of the above documents were described as follows:

- (a) Map of S21: This provides a complete pictorial representation of the S21 prison and its vicinity.
- (b) Documents tending to establish the existence of an armed conflict between Cambodia and Vietnam: These consist of over 200 press articles from domestic and international sources, and seek to establish that there was protracted armed violence amounting to an international armed conflict between Cambodia and Vietnam during the temporal jurisdiction of the Chambers.^v
- (c) Testimonial statements and annotated S21 confessions: These documents are expected to assist in giving the Trial Chamber a complete picture of what occurred in S21, in view of the lack of witnesses who could testify on the matter. Mr. Ahmed stressed that these documents comprise best evidence that is crucial, contemporaneous, and directly relevant to the case at hand.
- (d) *The Lost Executioner* by Nic Dunlop: This book was used as a basis for questioning during the judicial investigation and the trial. It is purportedly the most comprehensive account of Duch's activities after the fall of the Khmer Rouge regime. The book is available in two official languages of the Chambers, English and Khmer.

The Defense's Response. Only the submission of the map was spared from objection by the Defense. With regard to the documents tending to establish the existence of an international armed conflict between Cambodia and Vietnam, International Defence Counsel François Roux

protested that the over 200 news articles were redundant and had the effect of overwhelming the Trial Chambers with “useless” information. He stressed that he had asked for a one-page summary of these articles in French, an official language of the Chambers, but this had yet to be provided by the Co-Prosecutors. The Co-Prosecutors undertook to comply with Mr. Roux’s request at the soonest possible opportunity. In addition, National Defense Counsel Kar Savuth objected to these documents insofar as they comprised inter-governmental level communiqués and minutes of governmental-level meetings, opining that these documents would be more appropriately used in Case 002 as they did not involve Duch but higher ranking officials of the Khmer Rouge such as Ieng Sary.

With regard to the annotated S21 confessions, the Defense expressed its strong objections on the basis that the Accused had not been afforded the opportunity to have them examined by means of an adversarial debate before the Chambers. Adversarial debate was of especial necessity given that numerous errors in the translation of such S21 documents had previously been discovered. Mr. Roux also contended that although the Prosecution had adequate time to subject the documents in question to adversarial debate, it had chosen not to do so.

Finally, the Defense stated that the Accused had expressed reservations to a number of passages in Mr. Dunlop’s book.

Civil Parties

Civil Parties Seek to Submit New Evidence. Requests to submit new evidence pursuant to Internal Rule 87.4 were made on behalf of Civil Parties from Group 1 and 2.^{vi} The new evidence sought to be submitted by Civil Party Group 1 (“CP1”) was a compilation of newly-discovered 18 one-page daily lists of S21 prisoners and their activities. This submission was argued to be justified on the basis that the daily lists contain names of S21 detainees that were absent from the Prosecution’s consolidated S21 prisoners list. While the Prosecution’s consolidated prisoners list was of S21 prisoners who had been ‘smashed’, the daily lists indicated that prisoners had died at S21 due to causes other than ‘smashing’, such as torture, blood-drawing, illness and suicide. According to lawyer for CP1 Alain Werner, these lists support his team’s position that the absence from the Prosecution’s consolidated prisoners list of the names of four of his clients’ relatives was insufficient to prove that they were not in fact detained at S21, and that it was probable that these persons had died from means other than ‘smashing’.

As this request comes at the end of trial, Judges Nil Nonn and Sylvia Cartwright were led to inquire into the reasons for the submission’s timing. Counsel for CP1 explained that they had unearthed the lists fairly recently and had received the translated document on 26 August 2009. Resource constraints were cited as reason for this late discovery (see “Victim Participation And Witness And Victim Protection And Support”). Further, the evidence had not been submitted immediately upon discovery because of internal discussions on its relevance and discussions with the Prosecution to ensure they had not deliberately refrained from submitting it. Also of concern to CP1 lawyers was the absence of an appropriate opportunity for the Civil Party lawyers to intervene during the previous week of hearings.

The Defense expressed vigorous objection to the inclusion of these documents. One of the grounds raised was that the lists did not contain the names of any of the Civil Parties from CP1, and hence was an unwarranted attempt by the Civil Parties to play prosecutor. Another was that admission of these lists would necessitate the reopening of the trial in order to allow the Accused to examine and comment on these documents. During the course of the

proceedings, however, the Accused confirmed that all 18 documents originated from S21.^{vii} Notwithstanding this development, the Defense adamantly maintained that the lists should not be admitted before the Chambers this late in the proceedings. Despite initially adopting a neutral position on the issue, the Prosecution was prompted by Duch's authentication of these documents to strongly urge its admission by the Chamber.

The new evidence sought to be submitted on behalf of Civil Party E-32 from Group 2 was an affidavit stating that this Civil Party, a medic, had been raped by a guard at S21. National Defense Counsel Kar Savuth objected to this request on the ground that that it alleges a newly discovered fact not alleged in the Indictment.

Civil Party Group 1 Requests to Put Documents Before the Chamber. CP1 also sought to put before the Chamber the confession of one Meng Sar, also known as "Yar", purportedly annotated by the Accused. Again, the Defense objected to this on the ground that the confession did not relate to any of the CP1 Civil Parties and hence was not for them to adduce as evidence.

The Defense

The Defense sought to put the following evidence before the Chamber:

- (a) A number of books, namely, *Pol Pot: Anatomy of a Nightmare* by Philip Short, *The Gate* by François Bizot, *A History of Cambodia* by David Chandler, *Les Cles du Cambodge* by Raoul Marc Jennar, and *God Has a Dream: A Vision of Hope for Our Time* by Desmond Tutu;
- (b) Materials from the ICTY *Obrenović* case,^{viii} such as transcripts, video footage of the hearings and the judgment;
- (c) Several maps from DC-Cam, including illustrations of mass graves;
- (d) A letter-affidavit executed by Mr. Henry King, a witness for the Accused who passed away prior to giving testimony; and
- (e) An interview of Mr. Chum Mei featured in French magazine *Paris Match*, which the Defense deliberately released only after presentation of the video of the re-enactment in S21.

Justifications for the Defense's Submissions. The Defense explained in relation to the books, *Obrenović* case materials and Mr. Henry King's letter-affidavit that they would be referred to by the Defense in its closing submissions. The Defense had indicated on Wednesday that it wished only to inform the parties of its intention to do so as a matter of courtesy. The Defense's request in relation to the *Obrenović* case materials proved particularly controversial. In response to Judge Lavergne's request for clarification on the purpose of these materials, Mr. Roux explained that he would be relying on them in his closing submissions for illustrative rather than evidentiary purposes.

The Parties' Responses. With regard to the books enumerated above, the Prosecution raised objections only in respect of *The Gate* by François Bizot, on the basis that it was repetitious,^{ix} and *Pol Pot: Anatomy of a Nightmare* by Philip Short, as the author had not been called as a witness. With regard to the *Obrenović* case materials, Mr. Ahmed expressed opposition by

distinguishing evidence which the Chamber may use as basis for deciding the case and the authority which any of the parties may use to bolster their claims. According to Mr. Ahmed, the request for the inclusion of the materials on *Obrenović* case should be denied since they are not evidence but authority to which the Defense may refer.

The Prosecution agreed to the submission of Mr. Henry King's letter-affidavit, provided that it is limited to the page which refers to Mr. Albert Speer and that, for purposes of completing the records of the Chamber, the letter by the Defense to which Mr. King responded be likewise included.

Finally, the Prosecution insisted on the exclusion of the interview of Mr. Chum Mei featured in *Paris Match* on the ground that it was merely a journalistic version of Mr. Chum Mei's testimony. Civil Party lawyer Mr. Hong Kimsoun objected to the submission of the article, which he characterized as "tricky." Furthermore, Civil Party lawyer Mr. Werner maintained that as an elementary precaution, Mr. Chun Met should be recalled in order to give the latter an opportunity to verify what he may or may not have said during the interview. While ostensibly conceding to the exclusion of the materials on the *Obrenović* case and the interview of Mr. Chum Mei, the Defense expressed that it will leave the matter to the discretion of the Chamber.

ⁱ This document is attached as Annex "A" to the OCIJ's Indictment.

ⁱⁱ These documents are attached as Annex "A" to the document filed by the Deputy Co-Prosecutors on 29 April 2009.

ⁱⁱⁱ Nic Dunlop is the British photographer who tracked down and revealed the whereabouts of Duch in 1999.

^{iv} Internal Rule 87.1 provides that "... 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."

^v Mr. Ahmed explained that since the Accused is indicted for grave breaches of the Geneva Conventions of 1949, it is necessary to prove the elements thereof, which are the existence of an international armed conflict and a nexus between such international armed conflict and the crimes committed by the Accused.

^{vi} Internal Rule 87.4 reads, "During the trial, either on its own initiative or at the request of a party, the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth. Any party making such request shall do so by a reasoned submission. The Chamber will determine the merit of any such request in accordance with the criteria set out in Rule 87(3) above. The requesting party must also satisfy the Chamber that the requested testimony or evidence was not available before the opening of the trial."

^{vii} Duch verified these matters during the morning session of the 17 September 2009 hearing.

^{viii} Dragan Obrenović (Srebrenica Case No. IT-02-60/2) available at http://www.icty.org/x/cases/obrenovic/cis/en/cis_obrenovic.pdf. Obrenović was found guilty of committing the crime against humanity of persecution based on political, religious and racial grounds and was sentenced to 17 years of imprisonment on 10 December 2003.

^{ix} In this regard, the Prosecution cited Internal Rule 87.3, which authorizes the Chamber to reject a request for evidence where it finds that it is repetitious.