



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
 Extraordinary Chambers in the Courts of Cambodia
 Chambres Extraordinaires au sein des Tribunaux Cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
 Nation Religion King
 Royaume du Cambodge
 Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
 Trial Chamber
 Chambre de première instance

ឯកសារដើម
ORIGINAL/ORIGINAL
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TRANSCRIPT OF TRIAL PROCEEDINGS
PUBLIC
 Case File N° 002/19-09-2007-ECCC/TC

16 January 2012
 Trial Day 15

Before the Judges: NIL Nonn, Presiding
 Claudia FENZ
 YA Sokhan
 Jean-Marc LAVERGNE
 YOU Ottara
 THOU Mony (Reserve)
 CARTWRIGHT (Absent)

The Accused: NUON Chea
 IENG Sary
 KHIEU Samphan

Lawyers for the Accused:

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 Michiel PESTMAN
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 Philippine SUTZ

For Court Management Section:

UCH Arun

List of Speakers:

Language used unless specified otherwise in the transcript

Speaker	Language
MR. ANG UDOM	Khmer
MR. IANUZZI	English
MR. KARNAVAS	English
MR. KHIEU SAMPHAN	Khmer
MR. KONG SAM ONN	Khmer English
THE PRESIDENT (NIL NONN, Presiding)	Khmer
MR. PAUW	English
MR. PESTMAN	English
MS. SIMONNEAU-FORT	French
MR. SMITH	Khmer

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1 P R O C E E D I N G S

2 (Court opens at 0902H)

3 MR. PRESIDENT:

4 Please be seated. The Court is now in session.

5 Counsel, you may proceed.

6 MR. KONG SAM ONN:

7 Thank you, Mr. President. I would like to seek your permission
8 for my client, Mr. Khieu Samphan, to state his position in
9 relation to his answering of the questions to be put by the
10 Judges and/or other parties -- that is, a relation to his
11 position that he stated on last Thursday. It may only take five
12 minutes and I seek your permission on that.

13 [09.04.06]

14 MR. PRESIDENT:

15 Thank you for your request.

16 When the time is appropriate, it will be granted and you just
17 cannot take the floor to speak, as the Chamber has notified the
18 parties and the public on the scheduling of the hearing in
19 relation to documents that is to be commenced from today until
20 the 19 of January 2012.

21 Today, we will not be hearing any testimony of witnesses or the
22 Accused. As indicated in our Memorandum E159, this week is
23 devoted to the hearing of objections to be raised by the parties
24 concerning specific documents or the category of documents to be
25 put before the Chamber.

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1 [09.05.29]

2 Documents are an important part of the evidence in Case 002. The
3 Chamber has been briefed by the parties on many objections
4 through certain documents.

5 According to our direction in Memo E159, we will hear the
6 objections concerning documents that have been already granted an
7 E3 classification on 5 December 2011, in accordance with
8 Memorandum E141, are documents referred to in the footnotes of
9 the paragraphs relevant to historical background of the Closing
10 Order, the provided an E3 classification and thus considered by
11 the Chamber to have been placed before it.

12 That is paragraph 5 of the Memorandum. We will now proceed to
13 hear the oral objections. Each party has 30 minutes to set forth
14 their general evidentiary issues raised by the documents relevant
15 to this hearing. The Defence will then be allocated 90 minutes to
16 present objections to those documents already provided with an E3
17 classification by the Trial Chamber.

18 [09.07.11]

19 With 30 minutes granted to each defence team, unless a contrary
20 agreement is reached by all teams. The Co-Prosecutors shall then
21 have one hour and the Lead Co-Lawyers 15 minutes in response. A
22 brief right of reply of 15 minutes for all Defence Teams will
23 then be granted.

24 This is the plan for today's hearing and for this week -- that is
25 only in discussing the documents to be put before the Chamber by

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1 parties. I therefore hand over to the Co-Prosecutor. You have 30
2 minutes for your presentation on the general evidentiary issues
3 raised by the documents relevant to this hearing. You may now
4 proceed.

5 [09.08.25]

6 The Co-Prosecutor, you may be seated. The defence counsel, you
7 may proceed.

8 MR. PESTMAN:

9 I'm sorry to interrupt. My client would like to ask for
10 permission to follow the hearing from the holding cell
11 downstairs.

12 MR. PRESIDENT:

13 Defence Counsel for Nuon Chea, could you repeat your request?
14 And when would you like the request to be commenced? Is it for
15 this morning's session or for the entire sessions on the
16 discussion of documents, that is from today until the 19?

17 MR. PESTMAN:

18 I said, sir, my client would like to go to the holding cell but
19 my client would actually like to go the detention centre and it's
20 not only for today, this morning's session, but it's for the
21 entire week. He would like to be fit for when he is giving
22 testimony again.

23 (Judges deliberate)

24 [09.10.28]

25 MR. PRESIDENT:

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1 After hearing the request by the Defense Counsel for Nuon Chea --
2 for his client -- that is Mr. Nuon Chea to leave the courtroom
3 and to continue following the proceedings through the remote
4 means in the holding cell downstairs, the Chamber grants the
5 permission to the Accused through his defence counsel.
6 For that reason, the Accused is now instructed to follow the
7 proceeding in the holding cell downstairs, which has been
8 equipped with the audiovisual communication. The permission is
9 for the entire week, that is starting from today until the 19.
10 The defence counsel, however, is requested to immediately deliver
11 the handwritten signature with the thumb print of the Accused to
12 the Chamber. And also, for Nuon Chea's defence team, you are
13 instructed to provide a detailed waiver and not just a single
14 line of phrase.

15 Security guards you are instructed to take the Accused, Nuon
16 Chea, to the holding cell downstairs so that he can follow the
17 proceeding.

18 [09.12.25]

19 Also, the technicians are instructed to link the holding cell
20 downstairs to the proceeding in the main courtroom from today
21 until the 19th of this week.

22 Co-Prosecutor, you may now take the floor.

23 MR. SMITH:

24 Good morning, Your Honours. Good morning, Counsels. Good morning,
25 civil parties, venerable monks, the audience here today, and the

1 general public.

2 Your Honours, firstly, I would like to thank this Chamber for
3 allowing time to discuss the issue of documents early in the
4 Trial. The Prosecution believes the issue of presenting documents
5 to this Chamber is critically important in to being able to
6 determine the truth of the facts and the allegations in the
7 indictment.

8 And we also appreciate the opportunity to say a few words about
9 what the parties believe the test of admissibility should be for
10 documents. Of course, documents should only be admitted in this
11 case if they meet the legal standard.

12 [09.13.46]

13 Your Honours, I will outline the legal test for the Prosecution
14 this morning. This afternoon my colleague, Mr. Dararasmey Chan,
15 and I will respond to the Defence objections, particularly in
16 relation to the historical sections of the Closing Order and the
17 pre-1975 paragraphs in relating, relating to, the three Accused.
18 Your Honours, I have four main points I would like to convey this
19 morning, and that is: firstly, the importance of documentary
20 evidence in cases of this size; secondly, the legal test to be
21 applied; thirdly, the indicia of reliability we would suggest
22 would be useful in determining whether or not documents are
23 reliable; and fifthly (sic), a few words on the distinction
24 between the admissibility of documents and the weight of
25 documents to be attached to them.

6

1 [09.14.41]

2 Your Honours, it's widely accepted that documentary evidence is
3 an important way for courts dealing with large criminal
4 allegations to determine the truth of them. The sum matters of
5 proof -- oral testimony can be a less effective way to determine
6 the truth compared to the admission of documents. This is due to
7 few factors such as the different opportunities individuals have
8 to be able to perceive events at the time, the different
9 abilities people have to be able to remember events at the time,
10 and particularly, in light of the case, where testimony has been
11 taken 30 to 40 years later.

12 Also, the role of the witness or an accused in the events and
13 their current living circumstances and his or her relationship
14 with an accused or with other witnesses and the pressure of
15 giving evidence in a public trial, can cause, at times, an
16 individual either to minimize their evidence or perhaps to
17 overstate it or to exaggerate it, or, at sometimes, even not to
18 be completely truthful about the facts.

19 [09.15.55]

20 These, of course are issues Your Honours will be taking into
21 account when you hear oral testimony on a case-by-case basis when
22 you give weight to that testimony at the end of the case.

23 Your Honours, in contrast to oral testimony, documents produced
24 at the time of the alleged criminal events are able to capture
25 important information about those events permanently. Like a

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1 photograph that does not fade like the memory. Later, when the
2 document is presented at trial, information captured at the time
3 in a document cannot be understated or overstated, as it has been
4 permanently recorded. This of course will assist Your Honours in
5 ascertaining the truth. In cases of this size, the admission of
6 non-contemporaneous documents are also deemed to be important to
7 assist the truth-finding process.

8 [09.16.51]

9 Documents prepared by experts who have studied events in details
10 -- in detail, over years, and the statements of many witnesses
11 who are victims of crimes in the Closing Order, enable the Trial
12 Chamber to understand the context and the overall factual
13 situation -- the subject of the indictment.

14 Particularly when dealing with massive country-wide grave human
15 rights violations committed over a long period of time pursuant
16 to government policies, admission of such material to provide an
17 accurate context to the assessment of the core allegations of
18 trial is extremely useful. It allows the Trial Chamber hope to
19 have a complete and accurate overview. It allows you to see a
20 more complete picture of their events in their context in this
21 trial.

22 [09.17.47]

23 International tribunals have adopted this practice, subject to
24 certain conditions, so that judges in trials relating to crimes
25 against humanity cases can comprehensively and accurately

1 determine the relevant facts without having to examine every
2 victim that has suffered.

3 This would be a process that would cause a trial to never end if
4 that happened. In doing so, however, the courts have been able to
5 find a balance between preserving the rights of an accused to a
6 fair trial and the right of an accused to an expeditious one. The
7 importance placed on documentary evidence at the other
8 international tribunals can be seen in the number of documents
9 admitted by Trial Chambers. For example, in the case of Prlic,
10 Case Number IT0474, where there were six accused, the Trial
11 Chamber accepted just under 10,000 exhibits, approximately half
12 tended by the Prosecution and half by the Defence.

13 [09.18.57]

14 In the Gotovina and Markac Case, IT0690, which entailed three
15 accused, the Trial Chamber admitted over 4,800 exhibits from the
16 -- and half from the Prosecution and just under half from the
17 Defence.

18 And Your Honours have admitted about 1,000 documents in the case
19 of Duch, a far smaller case than this, dealing with one security
20 centre as opposed to the large scale allegations and widespread
21 allegations and the number of accused as well as the position
22 that these Accused have taken, perhaps comparatively to that of
23 Duch.

24 In this case we're dealing with the allegations of the forcible
25 movement of the Cambodian population across the country and other

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1 related crimes. That's the current situation.

2 [09.19.53]

3 Allegations that the Accused were on top of the administrative,
4 political and military structures, which were kept secret, in
5 large part, from the public. Your Honours, the allegations in the
6 indictment are, in many cases, more extensive than the trials
7 held in other international tribunals. Consequently, the
8 necessity to consider a comprehensive body of documentary
9 evidence in addition to oral testimony to determine the truth
10 will be critical.

11 What then is the legal standard required to have these documents
12 admitted at the ECCC? The legal test for admission of documents
13 is contained in Rule 87. Rule 87.1 provides the general rule that
14 all evidence is admissible, subject to Rule 87.3 which I will
15 discuss shortly. The rule is derived, as you know, from the
16 principle of the free evaluation of evidence in the French civil
17 law system which forms the basis of the Criminal Justice System
18 of Cambodia.

19 A consequence of this principle is that the judge in the hearing
20 must have an intimate conviction of the guilt of the Accused. And
21 that's contained in the French version of Rule 87.1 and the rules
22 of the ECCC-- before a conviction can be entered.

23 [09.21.18]

24 This fundamental principle that judges can freely evaluate
25 evidence, and not in a restrictive manner, is also supported by

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1 international jurisprudence. Trial Chambers at the ICTY, in cases
2 involving multiple accused, have adopted guidelines on the
3 standards governing the admission of evidence. In cases such as
4 Brdjanin and Talic, in 2002, Stakic, 2002 and Martić, in 2006.
5 The Ieng Sary defence in their submission earlier of this year,
6 have argued that guidance can be taken by the Trial Chamber from
7 these guidelines; and that's in E59 in his motion relating to the
8 use of all material on the 24th of February 2011.

9 [09.22.10]

10 The guidelines, Your Honours, which are uniform in context,
11 established the following practice on the admissibility of
12 documents;

13 "Parties should always bear in mind the basic distinction that
14 exists between the admissibility of documentary evidence and the
15 weight that that documentary evidence is given under the
16 principle of the free evaluation of evidence. The practice will
17 be, therefore, in favour of admissibility."

18 Your Honours, that's the guidelines that Trial Chambers at the
19 Yugoslavia Tribunal have used and, bearing in mind that system
20 was built on more of a common law system, they still adopt this
21 broad principle that Trial Chamber Judges should see all the
22 evidence subject to some certain restrictions.

23 So, Your Honours, Rule 87.1 creates a presumption of
24 admissibility in keeping with the civil law principle and
25 international standards that evidence should be freely evaluated

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1 to assist Judges to arrive at their intimate conviction in the
2 case as to whether or not the guilt of the Accused is proved.

3 [9.23.33]

4 That said, Your Honours, 87.1 is limited by 87.3. And 87.3, as
5 you know, sets out the grounds in which some evidence can be
6 excluded, where the evidence is irrelevant or repetitious,
7 impossible to obtain within a reasonable period of time,
8 unsuitable to prove the facts it purports to prove, and not
9 allowed under the law, or intended to prolong proceedings, or is
10 frivolous.

11 In the Duch Case, in decisions E188, E434 and E176, Your Honours
12 have interpreted the effect of Rule 87.3 as requiring evidence to
13 satisfy -- and I quote -- "certain conditions of relevance and
14 probative value" and "minimum standards of relevance and
15 reliability to be admitted".

16 We submit this approach is in line with the approach take at
17 International Criminal Tribunals dealing with similar types of
18 cases. In the ICC Case of Lubanga, in his 20th of January
19 decision 2011, at paragraph 27, that Chamber held that, "for
20 evidence to be considered relevant, the evidence must be
21 prima facie material to the issues and tend to establish the
22 parties' position. Should this first criteria be satisfied, the
23 inquiry then turns to the reliability of the evidence."

24 [09.25.12]

25 In the ICTY of Delalic, the Appeals Chamber decision of the 4th

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1 of March 1998, at paragraph 20, they held "for evidence to be
2 considered reliable, the evidence profit must be prima facie
3 credible, the criteria for such assessment depending on the
4 particular circumstances of each case".

5 That's also in the Lubanga decision just mentioned at paragraph
6 29.

7 So, as a document is required to be prima facie relevant and
8 credible -- What does the term "prima facie" mean? A latin term,
9 it means, "at first sight" or is further described by Black's Law
10 Dictionary: "On first appearance, at subject to further evidence
11 or information." Or by the Oxford Dictionary, "prima facie" is
12 stated as: "At first sight, on the face of it, as it appears
13 without investigation, based or founded on the first impression."
14 [09.26.21]

15 Thus, Your Honours, in its proper use in the context of assessing
16 the relevance or credibility of a document, prima facie would
17 refer to the first impression of the relevance and reliability
18 gathered when seeing and holding the document but subject to
19 countervailing considerations that may warrant further
20 investigation.

21 Therefore, we submit that the interpretation of prima facie is
22 most -- that is most consistent with the principle of the free
23 evaluation of evidence is that when it is said that a document is
24 prima facie relevant and reliable, this means that based on first
25 impressions, a judge may presume the document to be relevant and

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1 reliable unless rebutted by evidence to the contrary.

2 [09.27.19]

3 At the ad hoc International Criminal Tribunals, the rules of
4 procedure and evidence provide for the Trial Chamber to -- if
5 they wish -- to request verification of the authenticity of
6 evidence obtained out of court. And that's ICTY Rule 89(e) and
7 ICTR Rule 89(d).

8 Your Honours, this rule is permissive rather than mandatory and
9 certainly does not amount to a requirement of proof of
10 authenticity beyond reasonable doubt. One leading commentator
11 drawing on the case law of the International Criminal Tribunals
12 summarized the position as to authenticity as follows -- and this
13 is Christopher Gosnell "Admissibility of Evidence in the
14 Principles of Evidence in the International Criminal Justice",
15 2010, at page 387 to 388. I quote:

16 "The tendering party, as part of showing reliability, is expected
17 to provide some indication as to what the document is and that
18 it's genuine. This requirement is often referred to as
19 'authentication' but the concept bears no relation to the
20 technical concept of authentication in some domestic legal
21 systems. Authentication in International Courts means no more
22 than that the document is actually what the moving party purports
23 it to be based on the available indicia of reliability.

24 [09.28.58]

25 "The author or custodian of a document need not, for example,

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1 testify in court for a document to be authenticated nor need it
2 be recognized or commented upon by any witness whatsoever. No
3 chain of custody need be established, and submissions about the
4 provenance of a document by the parties themselves are often
5 accepted in lieu of direct testimony or submissions by an
6 investigator."

7 [09.29.30]

8 A document's authenticity, in other words, Your Honours -- namely
9 that the document is what it purports to be -- is related to its
10 reliability. That authenticity itself need not be proven prior to
11 the admission of the document and is not a separate requirement
12 for admission. There's no requirement for authenticity of a
13 document to be definitively established, as suggested by the
14 Defence in this case.

15 Rather, the evidence must have a sufficient indicia of
16 reliability, considered as a whole to be admissible. Proof as to
17 the origin of the document and the chain of custody of a
18 document, of course, is a relevant factor in considering whether
19 a document has sufficient indicia of reliability, but it's not a
20 pre-requisite for admission.

21 Your Honour, the ECCC Law do not provide a set of reliability
22 indicators for documents. However, through the practice of
23 international criminal courts, with cases of similar magnitude,
24 by reviewing those decisions, some indicators can adduced by
25 trial chambers like yourselves, commenting on what they believe

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1 are factors to assist in proving reliability.

2 [09.31.00]

3 Looking at all those cases together, and those different factors,
4 the Prosecution has put forward a number of indicators that we
5 would ask Your Honours to look at when determining reliability of
6 documents, and if those minimum characteristics are met. The
7 Courts look at two factors when examining the reliability of a
8 document. Its internal characteristics and external
9 characteristics. Looking at its internal characteristics, if the
10 document has a source or an author, that's an indicator of
11 reliability. Was the document created by an official or a public
12 source, or is the source or author otherwise identifiable? That
13 adds to its reliability. Does the document have markings on it?
14 Does it have a signature? A stamp? A seal? A fingerprint? A
15 reference or a code? Does it have a postmark, or other similar
16 markings?

17 [09.32.04]

18 They look at the form of the document. Is the handwriting or the
19 typeface of the document consistent with other documents of that
20 type or consistent with documents of that source or from that
21 author? Is the layout and format of the document consistent with
22 other documents of that type or from that source or from that
23 author? The date of creation -- was the document created
24 contemporaneously with the events that the document purports to
25 record? The contents of the document -- does the document use

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1 distinctive syntax or distinctive expressions commonly used by
2 the source or author, or the document -- does it contain
3 information about persons, places, and events that could be only
4 within the knowledge of the source, the organization, or the
5 author?

6 The purpose of the document -- is the purpose of the document
7 identifiable and is it consistent with the known policies of the
8 source, of the organization, or the author. Does the document
9 have internal consistency? Is the information in the document
10 internally consistent, or is it consistent with information in a
11 related document? They are some of the internal factors that
12 other trial chambers have looked at to determine whether it has
13 sufficient indicia of reliability.

14 [09.33.41]

15 Looking at the external characteristics of the document, other
16 factors have included -- to determine reliability -- whether the
17 document has been authenticated. Has the document or documents of
18 a similar nature, been confirmed to be an authentic document by
19 the author, or by a witness with knowledge or by an expert
20 witness?

21 Identification -- has the document or similar documents been
22 reviewed by an author or a witness with knowledge, or by an
23 expert, and that person did not raise any challenge to its
24 authenticity, giving rise to a presumption of authenticity? Is
25 the document corroborated by other information? The persons,

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1 places, and events -- is that consistent with what corresponds to
2 other documents and other testimony as to the truth of its
3 contents. Do we know where the document was discovered? Is the
4 place of discovery known? Is the place of discovery readily
5 explicable?

6 [09.34.52]

7 For example, where the documents were actually found -- is that
8 consistent -- that place consistent where you would expect
9 documents of that type to be found. Or having -- where they were
10 found -- does that have a link to the source or the author or the
11 recipient of the document?

12 And lastly, custody -- are the circumstances of the provision of
13 the document -- how the parties, or the Investigative Judges,
14 obtained the document -- are they -- do we know them? As opposed
15 to a party just producing documents to the Chamber and saying
16 they landed on my front doorstep.

17 Your Honour, this, therefore - there are a broad consideration of
18 factors, some of which are very obvious, and are often
19 overlooked, rather than a technical narrow focus on one or two
20 single criteria that should be applied in determining
21 authenticity. Your Honours have already ruled on the fact that
22 originals of documents are not required in order to be admitted
23 before this case.

24 [09.36.02]

25 Your Honours, this is in line with the jurisprudence of other

1 tribunals, where copies are regularly relied upon. Just turning
2 now to that distinction between admissibility versus weight, or
3 the probative value of the evidence. The probative value or
4 weight of evidence has been described in international
5 jurisprudence and academic commentary as a component of relevant
6 reliability or both. As such, the requirement for evidence to
7 have a probative value at the admissibility stage can be
8 satisfied by showing that indicia of relevance -- that prima
9 facie relevance -- and that indicia or prima facie reliability.
10 [09.36.51]

11 On the other hand, Your Honours, the Special Court for Sierra
12 Leone -- the Trial Chamber in the case of Charles Taylor, in its
13 contemporaneous document decision of the 22nd of September 2010,
14 held that the actual probative value or weight to be afforded to
15 the evidence is assessed by the Trial Chamber once all the
16 evidence has been heard. The burden is on the party seeking to
17 introduce the evidence to demonstrate minimum levels, or prima
18 facie levels, of relevance and reliability. There is no
19 requirement for the proffering party, or the tendering party, to
20 establish that the evidence is of a high probative value.
21 As has been noted by this Trial Chamber, and by other
22 international criminal tribunals, the assessment of the actual
23 probative value of the evidence or weight to be assigned to it is
24 a separate inquiry, and ultimately that weight can only be fully
25 given once the evidence has been heard. As Your Honours held in

1 the Duch Judgement, E188 at paragraph 42,
2 "this inquiry takes place once the evidence has been admitted,
3 with the purpose of determining whether it tends to prove or
4 disprove the allegations in the case. It is submitted that this
5 minimum standard for admissibility is appropriate in proceedings
6 before the ECC, where the evidence is collected or reviewed by an
7 impartial and independent investigative judge, and the trials
8 affect our experienced professional judges, and not a jury of
9 laypersons."

10 [09.38.35]

11 This distinction between trials conducted by judges --
12 professional judges -- and juries is regularly made in
13 international criminal courts. Your Honours, to briefly conclude,
14 the Defence seeks to set the threshold for admissibility unduly
15 high, in requiring the Prosecution -- or any party, for that
16 matter -- to positively establish the authenticity of the
17 documents, when the international jurisprudence has established
18 that there is in fact no such burden upon any of the parties.

19 [09.39.11]

20 Rather, it is for the judges who are able, by virtue of your
21 training and experience, to assess the evidence in light of the
22 established criteria, and to make a decision as to authenticity,
23 and therefore, admissibility. The mere fact that evidence is
24 admitted does not presuppose the weight that will be given to
25 that particular document. The Judges will hear the evidence in

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1 the context in which it was obtained, and accord it appropriate
2 weight at a later stage in the proceedings. In many cases, an
3 original of the document may not be available, or the provenance
4 of a document may not be proved. Yet, as we've seen under
5 international criminal law, the absence of these features do not
6 necessarily make the document unreliable, and preclude its
7 admissibility.

8 At all time, it's open to the Defence, and any other party, to
9 challenge the authenticity of a document. However, it would be
10 entirely impractical, and incorrect in law, to establish a
11 blanket requirement that all evidence be admitted on to the case
12 file meet -- or, admitted at trial -- meet a higher threshold
13 than the criteria that is established by international
14 jurisprudence in these types of cases.

15 [09.40.33]

16 That's the end of our submissions, Your Honours. Thank you.

17 MR. PRESIDENT:

18 Thank you, the International Prosecutor, for your submission.

19 Next, we would like to hand over the floor to the Lead

20 co-lawyers. And please, be reminded that the Lead Co-Lawyers have
21 30 minutes to present the overall, general evidentiary documents
22 concerning this part of the hearing. Thank you.

23 MS. SIMONNEAU-FORT:

24 Good morning, Mr. President, Your Honours, venerable monks. Good
25 morning to everyone in the courtroom.

1 We wish to seize this opportunity that has been granted to us to
2 make a few very general observations as civil party lawyers.

3 [09.41.44]

4 These observations pertain to the exhibits indicated in the
5 footnotes as well as some of the exhibits identified by the
6 parties. We believe that our observations are entirely
7 complementary to those that have just been made by the
8 International Co-Prosecutor. Allow me to make two main points.
9 The first is as follows. It is relative to the admissibility of
10 exhibits concerning the role of co-investigating Judges at the
11 ECCC, as well as observations regarding ECCC jurisprudence.
12 First and foremost, and as a preliminary remark, allow us to
13 express our astonishment at some of the objections that have been
14 raised by some of the defence teams. Many of them have already
15 been decided upon. Either these objections have been ruled upon
16 through ECCC jurisprudence, or international jurisprudence
17 emanating from other international tribunals. To raise such
18 objections once again is not stemming from poor knowledge of the
19 applicable law but a will to bypass the Internal Rules and an
20 intention to run roughshod over them. This infringes upon the
21 rights of all parties, particularly those of civil parties, in
22 the attention of justice within a reasonable time.

23 [09.43.33]

24 We are working in a Romano-Germanic legal system, upon which the
25 Cambodian law system is based. Obviously, this system does not

1 satisfy all, but this is the system that is in force. As Mr.
2 Co-Prosecutor has indicated, there is a principle of the free
3 evaluation of evidence that applies and judges must have intimate
4 conviction. I refer, obviously, to Judges of the Trial Chamber,
5 but I also refer to the Co-Investigating Judges and, if the case
6 were, Judges of the Pre-Trial Chamber.

7 [09.44.29]

8 Exhibits that have been put in the case file are the results of
9 investigations that have been conducted by the Co-Investigating
10 Judges or the parties. As the Co-Prosecutor has indicated, the
11 probative weight -- the probative value of such evidence will be
12 determined by your Bench, by Your Honours, based on your intimate
13 conviction at the end of this trial, upon rendering judgement. It
14 is Your Honours who shall decide whether these exhibits, their
15 content, the manner by which they were adduced, are sufficient,
16 and if they have satisfied all indicators in order for you to
17 come to a ruling beyond all reasonable doubt. This is your duty,
18 and this was reminded by Your Honours in your decisions in which
19 you indicated that the Chamber shall bear the duty of determining
20 the probative value of evidence.

21 The question of admissibility has not been raised for the first
22 time. In fact, this issue was raised from the very beginning,
23 since the start of the investigative -- the judicial
24 investigation. The issue of admissibility cannot be brought up ad
25 nauseam when it has already been ruled based on the Internal

1 Rules and when it has already been ruled through your decisions.
2 These issues cannot be raised repetitiously, specifically because
3 we are working within a civil law system and, as such, the
4 jurisdictional value of these decisions cannot be constantly
5 challenged unless they are put at the appeal stage before the
6 Pre-Trial Chamber.

7 [09.46.42]

8 To our mind, the issue of admissibility that is being raised
9 today can only be discussed within very defined constraints, as
10 provided for under Internal Rule 87. As such, it is incumbent
11 upon those who raise such objections to specify those grounds.
12 Once again, the Co-Prosecutor has highlighted the following point
13 which I wish to reiterate -- a clear distinction must be made
14 between admissibility and the probative value that will be
15 determined by Your Honours.

16 [09.47.20]

17 My final preliminary remark is as follows. In raising these
18 objections, the Defence has invoked their rights to a fair trial.
19 Upon examination of these objections, however, it is important
20 for us to recall that the rights to a fair trial are not the
21 exclusive purview of the Defence, but they must also be enjoyed
22 by civil parties. For that reason, the Defence often talks about
23 impartiality, which undermines their statements. But once again,
24 impartiality -- or partiality -- is not just a concern of the
25 civil parties but of all parties, including the Defence and the

1 Co-Prosecutors.
2 Judges, all members of the Bench, at all stages of this trial,
3 are impartial. And this leads me to my first series of
4 observations with respect to the role of the Co-Investigating
5 Judges. I do not believe that the Defence truly believes that the
6 Co-Investigating Judges have failed to exercise their
7 jurisdictionary power. The decisions and the actions of the
8 Co-Investigating Judges bear weight, as do the decisions of the
9 Trial Chamber. The presence of the Greffier, the presence of the
10 clerks who work with the Co-Investigating Judges, serve to
11 authenticate the investigative acts, just as the role of the
12 Greffiers in this Chamber serve the corresponding role. They are
13 to determine inculpatory and exculpatory evidence. I think this
14 is worth bearing a mention once again.

15 [09.49.40]

16 The role of the Co-Investigating Judges within the Extraordinary
17 Chambers during the investigative judicial phase is precisely to
18 bring before the Chamber sufficient material and a substantive
19 body of evidence, so that your Chamber does not bear the burden
20 of adducing new evidence. In paragraphs 1300 and 1304, the
21 Co-Investigating Judges in the Closing Order went to great
22 lengths to state that all material put on the case file, and all
23 material that was identified in the footnotes, must corroborate
24 the charges in order to bear sufficient probative value and
25 support the principle.

1 [09.50.42]

2 To support the indictment, the Co-Investigating Judges therefore
3 proceeded in the verification of probative value, and what the
4 Defence is asking, Your Honours, to do today is to exercise, once
5 again, what the Co-Investigating Judges have already exercised as
6 part of their jurisdictional and discretionary power. It is also
7 necessary to recall that, under Rules 55 to 62, the Judges are to
8 make sure that all indicia of reliability and other internal and
9 external characteristics are satisfied. They may do so through
10 examinations with respect to written documents, and make sure
11 that they are authenticated by the author or the Greffier.

12 It is also necessary to recall that acts and exhibits can be
13 discussed --challenged -- and this is permissible throughout the
14 entire duration of the trial. By not challenging a certain piece
15 is tantamount to the acceptance of the exhibit in question. It is
16 also necessary to recall that, at the conclusion of the
17 investigative phase, the Co-Investigating Judges had submitted
18 conclusions that were based on evidence that were compliant with
19 procedures, which again is also open to appeal and challenges
20 within a very specific deadline, during which parties may raise
21 their objections or challenges.

22 [09.52.51]

23 It is also necessary to recall that the Closing Order is
24 reasoned. It is grounded, and it is based on inculpatory evidence
25 that is also subject to appeal.

1 Lastly, the Closing Order, which is based on the documents
2 indicated in the footnotes, are indeed reliable, authentic, and
3 relevant, as was the case in Case 001. Challenges to
4 admissibility should only be made based on grounds -- and
5 exceptionally -- within the confines of Internal Rule 87.
6 Moreover, in application of Internal Rule 76.7, any documents and
7 the Closing Order -- subject to any appeal -- shall cure any
8 procedural defects in the judicial investigation. Today, there is
9 no justification to invoke this rule. This rule stems from the
10 discretionary and jurisdictional power of the Co-Investigating
11 Judges.

12 [09.55.09]

13 I wish to highlight a point to be raised with respect to
14 admissibility. The discretionary jurisdictional power of the
15 Co-Investigating Judges is also the result of the admissibility
16 of certain civil parties. Once the Co-Investigating Judges have
17 admitted certain civil parties, the initial examinations as well
18 as lodging of complaints are admitted. Their decisions are
19 supported by those documents, and as a result, their relevance,
20 reliability and authenticity of these statements -- statements
21 made by civil parties -- are implicitly and necessarily deemed
22 relevant by the judges.

23 If such a level of reliability and authenticity and relevance are
24 not automatically considered, then how can they be considered as
25 civil parties. And yet, those civil parties -- some 3,900 civil

1 parties -- have been admitted, which confirms, once again, the
2 jurisdictional and discretionary power of the Co-Investigating
3 Judges.

4 As we are all aware, the admissibility of civil parties is
5 decided upon solely by the Co-Investigating Judges, based on the
6 evidence that is admitted, stemming, once again from their
7 jurisdictional and discretionary power. Therefore, today, I
8 believe that some of the objections raised by the Defence on
9 admissibility must be considered in light of the decisions that
10 have already been previously taken by the Co-Investigating Judges
11 -- decisions which carry a definitive weight and which have
12 already made a determination on the relevance, reliability, and
13 authenticity of documents.

14 [09.57.59]

15 Furthermore, objections cannot be raised, and the Bench can
16 certainly not consider such objections, without entertaining this
17 previous decisions that were taken by the ECCC in Case File 001
18 and in the preliminary stages of Case File 002. I believe that it
19 is critical to remember that some of the objections raised by the
20 Defence have already been ruled upon, and that it is
21 inappropriate to raise them once again if only for the purpose of
22 employing delay tactics.

23 [09.58.49]

24 I do not wish to go into detail on some of the discussions on the
25 content of the evidence, but I would call upon each and every one

1 to go over decisions E43/4 of the 26th of April 2009 in Case 001.

2 That leaves out exactly how some documents have been analysed.

3 The decision contains a discussion on documents pertaining to the

4 behaviour of the Accused or documents pertaining to the

5 historical context of this case.

6 [09.59.38]

7 In that same decision, the Trial Chamber also specified what I

8 had recalled before Your Honours and all parties, that is the

9 decisions -- all procedural defects are cured by the Closing

10 Order.

11 In their Closing Order for Case 002, the Co-Investigating Judges

12 in paragraphs 1320 to 23 specified exactly how they were able to

13 proffer evidence and what they based their charges on. Decisions

14 E73 or E176, the Trial Chamber lays out the circumstances in

15 which certain evidence can be challenged and whether or not

16 certain exhibits may be used or may not be contested.

17 In Decision E188, the Trial Chamber highlighted, once again, the

18 principle of intimate conviction and how a judgement must be

19 determined beyond a reasonable doubt. In that same decision, in

20 that same judgement, the Chamber once again highlights the

21 probative value of the testimony of a civil party and makes a

22 statement as a full-fledged party to these proceedings and not

23 just as a witness.

24 This is what constitutes the jurisprudence of the ECCC which we

25 must not neglect today; they must be considered.

1 As I have said, my list of observations has not been
2 comprehensive nor have they been thoroughly analytical. We are
3 imploring you to base yourselves upon decisions which have been
4 previously taken.

5 [10.02.10]

6 I also wish to make a general remark on why the civil parties
7 have decided to submit all civil party forms and supporting
8 documents. I don't wish to dwell on the details and the
9 procedures that led us to this action but, as I said earlier,
10 these documents serve as the basis of admissibility which are no
11 longer up for discussion and can no longer be challenged.

12 [10.02.52]

13 They are critical. They also contain factual information, and
14 through their sheer volume they converge to corroborate the same
15 description of the context and the suffering that is before
16 question. They carry a very high value of relevance and
17 authenticity which justifies their admission in order to
18 determine the guilt of the Accused.

19 Those, Your Honours, are some of the remarks that the civil
20 parties wish to convey at the start of this proceeding.

21 I thank you, Your Honours.

22 MR. PRESIDENT:

23 Thank you, Madam Lead Co-Lawyer.

24 The Chamber would like now to hand over the floor to Nuon Chea's
25 defence. You have 30 minutes for your presentation on the general

30

1 evidentiary issues raised by the documents relevant to this
2 hearing.

3 You may now proceed.

4 [10.04.07]

5 MR. IANUZZI:

6 Thank you, Your Honour. Good morning, everyone.

7 I'll be presenting the general issues and observations this
8 morning. I have 10 very brief points; it shouldn't take more than
9 half an hour.

10 First of all, as to the applicable law, we'd like to note at the
11 outset that given the nature of the ECCC and the limited number
12 of divisions relating to the admission of documents contained in
13 the Cambodian Code of Criminal Procedure which is, as we have
14 submitted many times, the primary and controlling body of
15 procedural law at this Tribunal, the Chamber has a great deal of
16 flexibility in how to proceed with respect to documents.

17 [10.04.49]

18 Having reviewed the comprehensive submissions of the parties on
19 the admission of documentary evidence and with the benefit of
20 reference to the various jurisprudence cited by the parties, you
21 are now in a unique position to craft a policy on the admission
22 and ultimate evaluation of documents that, among other things,
23 respects the applicable Cambodian procedure, reflects the best
24 aspects of international criminal practice and, perhaps most
25 importantly, robustly protects the rights of Nuon Chea and the

1 other Accused.

2 There is no need -- there is no need to slavishly follow the
3 jurisprudence of other international tribunals. Rather, this
4 Chamber can and should think for itself in determining how best
5 to move forward.

6 At the ECCC, the starting point for any policy on the admission
7 and use of documentary evidence must -- must be referenced to the
8 Cambodian Criminal Procedure Code, in particular, Article 334.
9 Elegant in its simplicity, that Code provides no significant
10 hurdles with the respect to the right to present material
11 documentary evidence at trial. Rather, quite simply states; until
12 the end of the trial hearing the Accused may submit all documents
13 in evidence that he thinks will be conducive to ascertaining the
14 truth.

15 [10.06.12]

16 As to the admission of documents -- the admission of documents,
17 the Chamber has already made it quite clear that it intends to
18 follow the international practice, this two-pronged approach,
19 with respect to the initial assessment of prima facie relevance,
20 a reliability test governs the admissibility. Following that, a
21 more thorough and comprehensive assessment as to the weight and
22 probative value is conducted by the Chamber.

23 That, as we said, is the international approach; that is clearly
24 the position the Chamber is going to apply.

25 We accept that. However, as it does not in any way offend the

1 applicable Cambodian procedure, we will not object to it, as
2 such.

3 [10.06.54]

4 As a general approach, we feel it's reasonable, flexible and
5 capable of protecting Nuon Chea's rights.

6 My third point goes to the preference for the original documents
7 under Cambodian law and practice.

8 So the international approach that clearly will be applied here
9 can and must -- and must be harmonized with the standard
10 Cambodian practices. As Major Son Arun informed the Chamber last
11 week, based on his nearly 20 years of experience in the Cambodian
12 courts, copies of documents are not accepted -- are not accepted
13 unless the original versions have been produced in court and
14 their authenticity verified.

15 I'm sure the experienced Cambodian jurists on the Bench are
16 well-aware of this practice. In fact, it is in line with the
17 so-called best evidence rule which is cited frequently in the
18 international jurisprudence, which does make a point of stating a
19 preference for the production of original documents.

20 [10.07.53]

21 The Prosecution has submitted that it cannot be reasonably tasked
22 with presenting the original versions of the tens of thousands of
23 documents on which it would like the Chamber to rely, however, we
24 submit that the OCP is certainly -- it's certainly in a position
25 to provide at least some of those documents.

1 We know, for example, that many of these documents are available
2 to the OCP in their original form, and we take the position that
3 those documents which relate to the acts and conduct of the
4 Accused and pivotal issues in the case, especially -- especially
5 the ones presented to Nuon Chea in court, those documents should
6 be presented in their original format.

7 [10.08.38]

8 And we saw last week that that amounted to no more than 10
9 documents if my numbers are correct and, as I said, there's no
10 practical impediment to producing these documents. We have the
11 testimony of Mr. Youk Chhang of the Documentary Centre of
12 Cambodia. He's on record as saying that many, if not all, of the
13 documents, the original documents that the OCP has tendered, are
14 available in Cambodia, they are available in Cambodia in their
15 original format.

16 And while we do acknowledge the International Co-Prosecutors
17 concern that the presentation of every single original document
18 would considerably slow down the trial, such a pragmatic argument
19 cannot be used to trump the rights of the Accused to sufficiently
20 challenge the evidence presented against him.

21 We think, in fairness, that a reasonable balance can be struck
22 and we think that it should be struck, the proper point at which
23 it should be struck is on the question of acts and conducts of
24 the Accused and pivotal issues in the case. Where such documents
25 go to those issues, the originals should be presented in court

1 for the Accused's comment and assessment.

2 Major Son Arun is telling me to slow down. I'll try and do that,
3 thank you.

4 [10.09.51]

5 Again -- and this is the flip side of what we would call the acts
6 and conducts of the Accused evidence -- as we have stated that --
7 I mean, the Prosecution has stated and we agree with them, where
8 statements relate to the acts and conducts of the accused person,
9 "the accused has a right -- and this is quote from one of the
10 Prosecution submissions -- has a right to confront the maker of
11 that statement".

12 [10.10.15]

13 So we would stand by that, we would support our colleagues on the
14 other side of the stage, and we would say that the flip side of
15 that is that perhaps a lower standard -- a lower standard of
16 admissibility, relevance, reliability, could be applied to
17 contextual evidence, to background evidence, to documentary
18 material that does not go to the acts and conduct of the Accused.
19 But we do state -- we do state and we do believe that that
20 standard, which the Prosecution has said, as to acts and conduct
21 of the Accused should apply, it should apply to all documents on
22 the case file not just, for example, the witness statements taken
23 by the OCIJ or witness statements taken by the Prosecution in its
24 original investigation; any document -- any document which goes
25 to the acts and conduct of the Accused should be presented in

1 court in original format and its author should be called for
2 cross-examination.

3 Onto my fifth point. While the international criminal practice on
4 the admission of documents has been criticized as being far too
5 lenient at times and presenting too high a risk of contamination
6 or unreliable evidence, we take the position that this Chamber
7 must be mindful of those criticisms; must take them into account
8 in ensuring that the relevance and reliability of any material it
9 seeks to rely on, is established.

10 [10.11.38]

11 As civil law judges, you have a positive obligation to satisfy
12 yourselves that any document you rely upon for any reason, among
13 other things, is authentic. Yet, to date, there has been a
14 seeming willingness to shift this burden to the parties somehow,
15 but there is indeed, as the International Co-Prosecutor has
16 stated, a prima facie onus on the tendering party.

17 [10.11.59]

18 We take the position that this limited responsibility cannot --
19 cannot absolve you, the Judges, of your positive obligation to
20 ensure that all the evidence you rely upon, all of it, ultimately
21 relies -- ultimately is what it purports to be.

22 The burden is not on the Defence to show that documents are
23 inauthentic. And while the parties should be encouraged to make
24 challenges and submissions throughout, with respect to a
25 potential documentary evidence, the Chamber's important role as

1 the arbiter of the truth cannot be delegated. Again, this is
2 after all a civil law jurisdiction.

3 We do acknowledge a reasonable approach; the OCP's initial
4 submission on indicia of reliance and relevance and reliability
5 of its tendered documents. We read that document, we've reviewed
6 it.

7 We think it was a -- that was a very, very reasonable initiative,
8 we're happy they did that. However, once the Accused, especially
9 in court, on being presented with a document, once the Accused
10 challenges the authenticity of that document, we submit -- we
11 submit that the onus then reasonably shifts to the Prosecution to
12 provide a further indication of that document's legitimacy,
13 specially - specially when no original has been provided.
14 Simply, unauthenticated or inauthentic material must be excluded
15 from the process, and it may not support any finding of fact
16 against any accused person.

17 There has been a suggestion by the President, and again today
18 quite vehemently by my colleague across the stage for the civil
19 parties, that challenges to authenticity are somehow foreclosed
20 because the initial investigation is finished.

21 [10.13.46]

22 We categorically reject that position. It has no basis in law.
23 Clearly -- clearly, authenticity is an open question until the
24 close of trial.

25 [10.14.11]

1 I thought there was an objection -- slow down, slow down -- thank
2 you, thank you.

3 Getting back to -- yes, we categorically reject that position; we
4 categorically reject it.

5 Clearly -- clearly, authenticity is an open question, a question
6 that remains open until the close of the case. It can only be
7 determined upon consideration of all the evidence presented in
8 the case and all the challenges presented by the parties up and
9 until final day in court.

10 As noted, we do accept -- we do accept the provisional admission
11 of documents at this stage provided the threshold requirements,
12 the prima facie requirements, are met, but we do reject any
13 suggestion that these admitted documents can be presumed
14 authentic.

15 Accordingly, we hereby seek from the Chamber an unequivocal
16 indication that questions of authenticity remain open, subject to
17 debate and continued submission until the very end of the case.

18 A brief word on chain of custody. We certainly -- certainly
19 welcome the Chamber's initiative to call a representative from
20 the Documentation Centre of Cambodia, next week I believe, to
21 provide information regarding the chain of custody of some of
22 those DC-Cam documents.

23 My brother at the New York Bar, Jasper Pauw, will make
24 submissions later today on this point, so I will not comment
25 further, except to say that we trust this decision will serve as

1 a precedent -- as a precedent for the calling of additional
2 document custodians in the future including, for example, Mr.
3 Khieu Kanharith.

4 [10.15.58]

5 My ninth point goes to the reliance on the case file and new
6 documents. We've made extensive written submissions on this point
7 already so I won't take up too much time, but as we've argued
8 already and as we've argued since the beginning of the case and
9 as I said earlier today, we do say -- we do say that Article 334
10 of the Cambodian Code of Criminal Procedure permits the admission
11 of all documents -- all documents until the end of the trial
12 hearing. We are not foreclosed at any stage from presenting
13 documentary evidence.

14 [10.16.33]

15 We have previously announced that we would strive to notify the
16 Chamber and the parties of those documents that we intend to rely
17 upon, and we will do that and we'll do that by the end of this
18 week. We will present documents, a document list, in particular
19 in regard to those documents that we intend to put through,
20 TCE-38 who, we understand, will be testifying probably at some
21 point during this session.

22 Regarding the Chamber's position with respect to the admission of
23 new documents, we find -- we find it's unsettling that judges in
24 a civil law trial should wish to articulate such an exclusionary
25 approach to potential evidence.

1 The primary role of this Chamber, rather than simply mediating
2 evidentiary disputes between the parties is, as already noted,
3 it's to affirmatively ascertain the truth. Yet somehow the judges
4 appear to pre-empted the admission of as yet unseen documentary
5 material through the imposition of an unnecessarily strict
6 standard.

7 We take issue with this, as we have in our filings. We suggest
8 that the Chamber should adopt a broad approach, an approach
9 consistent with Cambodian law, in particular, Article 334.

10 [10.17.48]

11 While the Chamber clearly has the inherent power to implement
12 measures designed to effectuate a smooth and efficient trial, it
13 cannot -- it cannot deny fundamental, substantive rights which
14 are afforded to the accused persons under the applicable
15 Cambodian law.

16 My tenth and final point on Nuon Chea's right to remain silent.
17 This was taken up by the Judges last week several times, by the
18 President in fact. The Chamber announced that when Nuon Chea
19 sought to obtain the original version of documents put to him
20 that he was, in fact, somehow exercising his right to remain
21 silent in response to those questions.

22 [10.18.26]

23 For the record, we object to this constructive invocation of one
24 of his most important and fundamental rights. Clearly -- clearly,
25 challenging the authenticity of a copy of a document does not

1 amount to anything more than that.

2 As Mr. Pestman noted last week, what my client is, in fact, doing
3 is not exercising his right to remain silent, he's challenging
4 the authenticity of the copy; that's what he's done.

5 As we've noted, as Nuon Chea himself has noted in this regard, he
6 is more than willing -- he is more than willing to give evidence
7 on documents and he has suggested that an advance copy, or
8 advance copies, of those documents be presented to him for his
9 review so that he may assist the Chamber.

10 This Chamber has not ruled on that yet, however, we're expecting
11 a decision soon. We think it's a reasonable request, and we do
12 think that the expectation that he is somehow to be immediately
13 familiar -- immediately familiar with documents presented to him
14 is unreasonable under the circumstances. The case file is large,
15 it's complex; I don't think any one of us in this room would be
16 immediately familiar with a document presented to us without any
17 advance warning.

18 So I think just as we are required to give some advance notice of
19 the documents we intend to rely upon, just as the parties have
20 done that, we think that's a reasonable practice to adopt with
21 respect to the Accused, and he stands by that request that was
22 made last week.

23 [10.20.02]

24 And, finally, just let me say that we have no intention -- we
25 have no intention of running roughshod over the rights of any

41

1 party, let alone the civil parties, we simply seek to protect the
2 rights of Nuon Chea.

3 [10.20.15]

4 And one last point which I feel I have to make. The
5 Co-Investigating Judges do, indeed -- do indeed enjoy a
6 presumption of impartiality, however, we do not accept and we
7 have never accepted that that presumption in any way coincides
8 with reality.

9 Thank you, Your Honours, that's all I have for today.

10 MR. PRESIDENT:

11 Thank you, Defence Counsel for Nuon Chea.

12 The time is now appropriate for a break. We shall have a
13 20-minute break and we will resume after that.

14 Ang Udom, you may proceed.

15 MR. ANG UDOM:

16 Mr. President, I'd like to seek your permission for my client,
17 Ieng Sary, to follow the proceedings in the holding cells
18 downstairs on the discussion of the documents starting from today
19 until the 19 of this week.

20 MR. PRESIDENT:

21 The Chamber grants you the request, so that Mr. Ieng Sary can
22 follow the proceedings from the holding cell downstairs as the
23 hearing is mainly dealt with the discussions on the documents. So
24 he can follow the proceedings in the holding cell with the
25 audio/visual connection.

42

1 [10.22.01]

2 However, you are required to deliver to us the waiver with a
3 signature or thumbprint of your client, Ieng Sary.

4 Security guard, you are also instructed to escort Ieng Sary to
5 the holding cell downstairs.

6 Also, for the accused Nuon Chea -- Ieng Sary, they can follow the
7 proceedings from the holding cell downstairs for this entire
8 week.

9 The technicians, you are also instructed to facilitate with the
10 audio/visual communication.

11 Thank you.

12 (Court recesses from 1022H to 1043H)

13 MR. PRESIDENT:

14 Please be seated.

15 I now hand over to Ieng Sary defence.

16 You have 30 minutes for your presentation on the general
17 evidentiary issues raised by the documents relevant to the
18 hearing.

19 [10.44.00]

20 You may now proceed.

21 MR. KARNAVAS:

22 Good morning, Mr. President. Good morning, Your Honours, and good
23 morning to everyone in and around the courtroom.

24 Why are we here today? The civil parties would have us believe
25 that we're here today because the Defence is trying to delay the

1 process; that the Defence, in some sort of a monolithic group, is
2 obstructing by raising objections.

3 We're here today because the Prosecution, as I recall, had asked
4 prior to the break for a hearing on these matters. Their request,
5 however, was not the first request made. We had made such a
6 request on at least a half a dozen times prior to the
7 commencement of the trial proceedings. We did so because we knew
8 that once the documentary evidence was going to be brought into
9 Court that it would be challenged and that, normally, in these
10 sorts of cases, all those challenges or at least most of them
11 happen prior to trial; not during the trial. Motions are filed;
12 hearings are held; decisions are made and the parties are
13 expected to abide by them with the occasional exception where
14 something may crop up during the presentation of the evidence.

15 [10.45.41]

16 So that's why we are here today and let me remind my learned
17 friends from the civil parties that in a decision on admission of
18 Ieng Sary's appeal against the OCIJ's constructive denial of Mr.
19 Ieng Sary's request concerning the OCIJ's identification and
20 reliance on evidence obtained through torture -- this was just
21 one of the objections that we had raised -- on paragraph 34 --
22 and this is document 130/7/3/315 (sic).

23 On paragraph 34, the Pre-Trial Chamber noted: "The Pre-Trial
24 Chamber further observes that Internal Rule 87 also gives the
25 charged person the possibility to object to the admissibility of

1 evidence during the trial stages."

2 [10.46.44]

3 So it is not as if we're trying to obstruct; it is because a lots
4 of issues have not been resolved and let me give you one example
5 before I go into my presentation. And I raise this example
6 because somehow the civil parties would have us believe that
7 everything that the Co-Investigative Judges did is sacrosanct; it
8 is without -- it cannot be objected to and that it must be
9 accepted.

10 We had argued or we had asked the Co-Investigative Judges to look
11 into documents that were coming from DC-Cam. We raised this
12 objection because -- or we made this request for them to look
13 into and to provide us with detailed information as to how DC-Cam
14 evidence -- documents -- were gathered, by whom, when, where were
15 they found, how were they kept, who had access to them. There is
16 a reason for that.

17 [10.48.04]

18 Of course, as was the fashion with most of the requests to the
19 OCIJ, no answer was received and I invite Your Honours to look at
20 our third investigative request where we actually asked for the
21 modalities on the investigation itself. So like the Nuon Chea
22 team, we do take exception as to the manner in which the OCIJ
23 carried its investigation and provided the parties with answers
24 to questions sought concerning documentary evidence.
25 Now, before I go into the -- or what we believe are the criteria

1 for the admission of evidence, let me begin by laying out what we
2 believe is the common ground between us and the Prosecution; what
3 we believe we agree and I dare say that we're not that far apart
4 on most of the issues. I think where we certainly agree in is
5 that this hearing is necessary and that the parties need some
6 certainty. And given that certainty, the trial proceedings will
7 be much smoother.

8 First, we agree that the ECCC Rules of Admissibility are
9 consistent with international standards. We also agree that Rule
10 87.3 requires that evidence must meet minimum standards of
11 relevance and reliability.

12 [10.49.53]

13 Three, relevant evidence must have prima facie material to the
14 issues and tend to establish the party's position. That Rule
15 87.3(c) encompasses the principle of the best evidence rule.

16 Next, that Rule 87.3 also provides for the exclusion of evidence
17 on the basis that -- what -- that it is not allowed under the
18 law.

19 Also, we agree that statements made under torture fall under the
20 broad category of not allowed under the law under Rule 21.3 in
21 Article 38 of the Cambodian Constitution.

22 And finally, we agree that the assessment of weight to be
23 assigned to the evidence is a separate inquiry from
24 admissibility. And we also agree, I should say, based on what I
25 heard today, that normally that inquiry is done towards the end.

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1 Once you have all of the evidence and you've heard the testimony,
2 it is only at that point in time, once you've decided what
3 evidence is relevant, that you will make the determination in
4 your findings of facts and conclusions of law as to what weight
5 to give to the evidence, if any. So, in other words, the evidence
6 could be relevant but it may have little value, in and of itself,
7 even when you assess it with other evidence. But that is
8 something that is left up to you.

9 [10.51.41]

10 And, incidentally, when I noted that this is the -- that these
11 are the areas where we agree upon with the Prosecution, this is
12 based on their response to our objections on admissibility of
13 certain categories of documents, which was filed on 16 September;
14 it's E114, paragraph 7, 8, 9, 11, 13, 14, and 15. So, I don't
15 think that we're that far apart.

16 [10.52.17]

17 I may be somewhat repetitious, but I want to make sure that the
18 record reflects our position, separate and distinct from the
19 position that the Prosecution has taken and any other party, lest
20 there be a question down the road that we were less than due
21 diligent in our obligations in defending Mr. Ieng Sary.
22 Broadly speaking, we believe there are three major steps in
23 considering the admission of evidence. First, the Trial Chamber
24 should determine whether the document is authentic. We -- that's
25 our starting point; not relevance, but whether it is authentic.

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1 If the OCP were to proffer, for instance, a Standing Committee
2 meeting minutes, unless and until these minutes are
3 authenticated, they have no value and they should not be used or
4 admitted. So they have to make some sort of showing, and I will
5 speak more specifically with respect to what is required for a
6 document to be deemed authentic. But authenticity is very
7 different from reliability. A document can be authentic but if it
8 has been tampered with, it is not reliable. If we were dealing
9 with physical evidence, for instance, as an analogy for example,
10 you may have the knife that actually was the instrument that
11 caused the injury to the victim. That's the authentic knife, but
12 if the knife was tampered with, evidence derived from that knife
13 may not necessarily be reliable.

14 [10.54.08]

15 So, that's why you have to do the next step. You must determine
16 whether the document is reliable.

17 And then the third step, of course; once you've determined that
18 it is authentic and reliable, then you go to the issue of
19 relevance.

20 So those are the three fundamental steps that we believe the
21 Trial Chamber needs to take. Once the document, of course, is in,
22 a great deal of how relevant and how much weight to afford this
23 particular document or set of evidence will be determined once
24 you have heard the testimony of the witnesses and you will be in
25 a better position to make that assessment.

1 [10.54.57]

2 And we totally agree with the fact that we are in, what I would
3 call, the civil law land as opposed to the common law land. And
4 we do realize that we're dealing with professional judges, but
5 that doesn't mean that simply because the Prosecution proffers
6 evidence that it automatically comes in. And I believe they --
7 they agree with us on that point. If I understood their position
8 today, they acknowledge that they must make at least some effort
9 to show that the document or the documents are authentic and
10 reliable and, of course, relevant to the issue at hand. Because a
11 document may be authentic and reliable, it may be fascinating to
12 read, but it may not be relevant to the issues at hand. And the
13 whole reason why I believe, and we submit, that you do need to
14 screen the evidence for -- to make sure that only relevant
15 evidence comes in is so that you're not left at the end of the
16 trial with all sorts of documents that are not relevant, that
17 make it more difficult for Your Honours to render a decision.
18 So as the trial progresses, some screening will be needed and, of
19 course, we fully believe in certain -- in the principle of the --
20 of in dubio pro reo, so when there is a doubt as to the
21 authenticity and reliability, as I will speak to in a second, the
22 doubt should go to the Defence.

23 [10.56.45]

24 Now let me speak briefly about the standard for the admission of
25 documents. Rule 84.1, which deals with the appearance of

1 witnesses and experts, and Rule 87 of the Rules of Evidence
2 together govern the admissibility of testimony -- of testimonial
3 evidence. Other documentary evidence is admissible subject to the
4 requirements of Rule 87.3. And, as you well know, Your Honours,
5 the Chamber may reject evidence where it finds, as the
6 Prosecution noted, is irrelevant or repetitious, impossible to be
7 obtained within a reasonable time, unsuitable to prove the facts
8 it purports to prove, not allowed under the law, or that it's
9 intended to prolong the proceedings or is frivolous.

10 [10.57.55]

11 Rule 87.1 states that -- and I quote: "Unless provided otherwise
12 in -- in these Internal Rules, all evidence is admissible -- all
13 evidence is admissible unless provided otherwise in the Internal
14 Rules."

15 This incorporates, we submit -- and I believe as our colleagues
16 acknowledge -- this incorporates the civil law principles of the
17 free evaluation of the evidence into the ECCC Internal Rules
18 under which the Court evaluates the evidence, according to the
19 free conviction obtained from the entire trial, subject to the
20 understanding, as I noted, that in case of doubt the evidence
21 should be evaluated in the light most favourable to the Accused.
22 So, again, as you can see we agree on many facets on the
23 admissibility of evidence.

24 At the ECCC, the principle of the free evaluation of evidence is,
25 however, subject to the qualifications enumerated in Rule 87.3

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1 which confer discretion on the Trial Chamber to reject a request
2 for evidence where it finds, where it finds, that it is
3 irrelevant or repetitious, impermissible, impossible to be
4 obtained within a reasonable time, unsuitable to prove the facts
5 it purports to prove, not allowed under the law, or where it is
6 intended to prolong the proceedings. So there are some
7 qualifications.

8 Now, in Case 001, in your Judgement -- and I'm referring to, in
9 particular, paragraph 41 -- you consider these qualifications as
10 held, and I quote, "to be used as evidence, material of the case
11 file must satisfy certain conditions of relevance and probative
12 value".

13 The Chamber may reject any material put before it, based on the
14 criteria listed in Internal Rule 73 -- 87-3, and then you go on
15 to list it. So I'm not saying anything that you, Your Honours,
16 have already -- have not already concluded.

17 [11.00.23]

18 On another occasion on Case 001, in this case, you held that the
19 effect of Rule 87-3 was that, "in order to be used as evidence,
20 material on the case file must satisfy minimum standards of
21 relevance and reliability necessary for it to be produced before
22 the Chamber. Once produced before the Chamber, the probative
23 value of the evidence and, hence the weight to be accorded to it,
24 will be then assessed." And this was in your decision under the
25 Admissibility of Evidence dated 26 May 2009, paragraph 7, and the

1 document is E43/4. When determining whether to admit fill
2 material in Case 001, Your Honours held that admissible -- that
3 the material was admissible, subject, subject to review of its
4 relevance and authenticity during the substantive hearing. And
5 this is in E/5/10/2, paragraph 16.4 on your decision on
6 admissibility of new materials and directions to the parties 10
7 March 2009. And you will note, Your Honours, if you go through
8 the jurisprudence, sometimes you have relevance and then
9 authenticity but the concepts are there, as we will -- and we
10 maintain that when you look at the rules and you look at your own
11 jurisprudence that you have from -- generated from Case 001, your
12 own decisions, it becomes clear to us that for evidence to be
13 admissible the document must meet the minimum threshold of
14 authenticity, reliability, and relevance. And as I've noted, that
15 the principle of in dubio pro reo is controlling so when
16 determining whether each of these criteria had been fulfilled, we
17 must highlight that the principle of in dubio pro reo applies.
18 This principle requires the Chamber to resolve any uncertainties
19 in favour of the Accused and, in fact, the Supreme Court Chamber
20 in its decision on immediate appeal in the Duch case -- in
21 immediate appeal by Khieu Samphan on application for release,
22 that's 6 June 2011, E50/3/1/4 paragraph 31, stated:
23 "The Supreme Court Chamber must stress that the in dubio pro reo
24 rule, which results from the presumption of innocence, is
25 guaranteed by the Constitution of Cambodia and has, as its

1 primary function -- as its primary function, to denote a default
2 finding in the event where factual doubts are not removed by the
3 evidence."

4 [11.03.51]

5 And, of course, we have cited in the past, and we are happy to
6 cite again ICTY jurisprudence, Delalic and Limaj cases where
7 again the principle of in dubio pro reo has been applied in
8 international context, although I shouldn't make one
9 qualification, in these cases it was not in relation to facts,
10 lest there be any arguments that I'm misquoting the law.

11 Now let me go into a little bit of the specifics, and I apologize
12 again if I am being somewhat repetitive from the arguments that
13 you heard earlier today, but let me discuss a little bit, more
14 specifically, the requirements of authenticity, reliability, and
15 relevance.

16 [11.04.46]

17 Authenticity: It must be determined, we submit, prior to the
18 admission of evidence and the parties must at least make a prima
19 facie showing of authenticity in order for documents to be
20 admissible under Rule 87.3(c). And we submit, Your Honours that,
21 thus far, no such showing has actually been made. We also submit
22 that pointing to the OCIJ and saying well they assess the
23 evidence, this was all done at that stage, don't worry, be happy,
24 just accept it and rely upon it is not sufficient ,and it
25 certainly is not consistent with the law that you must apply

1 before this particular tribunal. We submit that an inauthentic
2 document is unsuitable to prove the facts it purports to prove
3 and that it should be ruled inadmissible, pursuant to 87.3(c).
4 Now in Case 001, the Trial Chamber excluded the statements of two
5 deceased witnesses tendered by the OCP. And you stated -- the
6 Trial Chamber stated, "The Chamber excludes these statements due
7 to their origin -- origins, content, their contested character
8 and the inability -- the inability of the Accused to challenge
9 the veracity. These factors render these statements unsuitable to
10 prove the facts they purport to prove, in accordance with Rule
11 87(c). And this is your decision on admissibility of material in
12 the case file, paragraphs 16 of E43/4.

13 [11.06.52]

14 We can also look at jurisprudence from the ICTY and the ICTR;
15 there the rule is, I believe, 89(e) and it states that a chamber
16 may request verification of the authenticity of evidence obtained
17 out of court. Of course, we note that it says, "may". Although
18 this is not a rule, per se, we submit the tendering party, as
19 part of a showing of reliability, is expected to provide some
20 indication as to what the document is and what -- and that it is
21 genuine before it is admitted as evidence.

22 And, if you can look at, Your Honours, the Bagosora Case at ICTR
23 98-41 Decision on Admission of Certain Evidence, and it's
24 September 13, 2004, paragraph 8.

25 There's also a Popovic decision from the ICTY concerning this --

1 this matter, the decision on admissibility of intercepted
2 communications 7 December 2007 at paragraph 35.
3 I should note, Your Honours, also for the record, that much of
4 the authority cited here today has been cited in our numerous --
5 in our numerous submissions over the course of the last few
6 years. Material which lack authenticity must, by its very nature,
7 we submit, lack probative value. So you don't even get to
8 probative value if you can't get past that hurdle of
9 authenticity. And while we acknowledge that the Prosecution is
10 correct in saying that the hurdle that they have to overcome in
11 establishing that a document is authentic may be slightly low,
12 and it certainly doesn't meet the standard of proof beyond a
13 reasonable doubt, nonetheless, you cannot even begin to be
14 thinking about the weight to be given to this document unless you
15 are satisfied -- unless you are satisfied -- that the document is
16 authentic and I daresay, as I've indicated earlier, reliable as
17 well.

18 [11.09.35]

19 The ICTR Musema Trial Chamber stated when assessing the
20 authenticity of documentary evidence that it considered the form,
21 content, and the purported use of the document as well as whether
22 the document is an original or a copy. If it is a copy, whether
23 it is registered or filed with an institutional authority;
24 whether it is signed, sealed, stamped or certified in any other
25 way and whether it was duly executed; that is, written, produced

1 or authorized by the person or party purporting to be its author.
2 This is the ICTR Musema Case, Judgment and Sentence; it's the
3 96-13-T Judgment and Sentence 27 January 2000 in paragraphs 66
4 and 67.

5 So when we look at the ICTR and ICTY jurisprudence, they are not
6 far apart from the expectations that are required before this
7 particular tribunal when it comes to the admission of documentary
8 evidence.

9 [11.11.03]

10 A document's reliability -- and now I'm switching to reliability
11 -- must be determined prior to the admission of evidence as well.
12 An unreliable document would be unsuitable to prove the facts it
13 -- it purports to prove and may be ruled inadmissible, we submit,
14 under Rule 87.3(c) and we direct your attention to the Duch
15 decision on admissibility of material on the case file dated 26
16 May 2009 E43/4 paragraphs 7 and 16.

17 Now, we acknowledge that almost any aspect or form, content or
18 origin of the information can be an indicium of reliability and I
19 want to take the time to commend the Co-Prosecutor for listing
20 the indicia; I thought that was an excellent presentation and --
21 and very comprehensive and a guide to all of us so -- and I point
22 that out because I -- I do agree -- we agree that you have to
23 look at some indicia of reliability.

24 [11.12.27]

25 There is no finite list of possible criteria or automatic

1 reasons, however, to either admit or exclude a piece of evidence;
2 that's why you have to probe, as the Prosecution was suggested.
3 And as -- one of the reasons we were asking for hearings, Your
4 Honour, was we wanted such a probing. We wanted the Prosecution
5 to, for instance, lay out the indicia; not simply to say well, I
6 -- this document came from the DC-Cam and, therefore, that's an
7 indicia of reliability. We submit that is not; if anything, it's
8 the opposite because let's face it; DC-Cam is an advocate. DC-Cam
9 is not objective. DC-Cam has in no point in time indicated,
10 clearly, how it has received the documents, what sort of criteria
11 it has used, how it's been obtained, and, certainly, when it
12 comes to any statements that they may have taken -- keeping in
13 mind that they are a party of interest and because of their
14 inherent prejudice towards the Accused -- that anything that has
15 DC-Cam on it must be suspect to begin with. It doesn't
16 necessarily mean that it's not authentic or reliable, but it does
17 mean something -- some indicia of reliability and authenticity
18 should be presented from whoever is the proponent of that piece
19 of evidence.

20 [11.14.00]

21 Factors that have been taken into account at ad hoc tribunals do
22 include the appearance of documents including any signatures,
23 stamps, fact stamps, sequential number, designations or any other
24 markings and there's lots of jurisprudence on that; I won't go on
25 because, as I noted, we agree in principle with the Prosecution.

1 Before a document is deemed admissible, there must be sufficient
2 indicia that make it -- that make a prima facie case for its
3 admission and I think here's, again, where we agree with and I
4 don't know if they cited it, but it's the Delalic case in the
5 ICTY that established this rule; a rule that, basically, has gone
6 unchallenged and is fixed and you may look at the decision on the
7 application of Delalic for leave to appeal against the decision
8 of the Trial Chamber of 16 January 1998 paragraph 20.

9 [11.15.15]

10 Connected to a document's reliability, of course, is its
11 probative value and according to the jurisprudence of the ad hoc
12 tribunal, a document must meet some threshold of reliability to
13 be considered probative. Just like with authenticity, a document
14 must meet some threshold of reliability to be considered
15 probative.

16 In the Hadzihasanovic and Kubura Case at the ICTY, they noted --
17 the Trial Chamber noted that the document must have "some
18 relevance and some probative value." This means that the
19 evidence, to be declared admissible, the Chamber need not
20 determine its precise value since this -- this will be done at a
21 later stage. So we're not asking -- we're not suggesting that you
22 need to resolve this issue, but the probative value, itself, is a
23 quality of necessary -- for which is necessarily -- it varies
24 depending on the circumstances and the facts.

25 [11.16.38]

1 Connected to all of this, of course, is the best evidence rule
2 and it was mentioned briefly by one of our colleagues; I don't
3 recall right now whether the Prosecution touched upon it, but the
4 best evidence rule generally requires primary evidence for the
5 purpose of proving the content of the document. In other words,
6 if you have the actual original, why would you not want to use
7 the original; keeping in mind, however, that we are in this
8 international setting where -- and not in a domestic setting
9 where you may have 5 or 10 or maybe 100 documents; here we're
10 dealing with hundreds of thousands of documents which make it, in
11 many instances, very difficult to use the original documents and,
12 therefore, you must look at the best evidence rule and apply it
13 with some flexibility and we recognize that and we urge you to
14 take that approach. But the best evidence rule is a guiding
15 evidentiary principle also that has been used before the ad hoc
16 tribunals and I -- just as an example, you may look at the
17 Perisic Case, IT 0481, order for guidelines on the admission and
18 presentation of Evidence and conduct of counsel in court; that's
19 29 October 2008 paragraph 36.

20 [11.18.20]

21 Now, the underlying assumption of the best evidence rule is that
22 secondary evidence of a document's content is not as reliable as
23 a document itself, and I think we had that interplay last week
24 where Mr. Nuon Chea is saying well, show me the original; how do
25 I know that this is reliable or even authentic. This rule comes

1 into play in cases in which there is a reason to suspect that the
2 original or one of several counterpart's originals is different
3 in some material way from other counterparts or copies or from
4 the recollection of witnesses, so in other words, if there's a
5 reason to suspect.

6 Now, let me just pause here for a second. Since we've never had a
7 hearing of any sorts where the Prosecution could show the indicia
8 of reliability and authenticity of the documents, where a party
9 raises an issue, there's a reason to suspect that the original is
10 not sufficient. Of course, we believe that now that we're having
11 this hearing, the Prosecution will provide what it believes are
12 the indicia of authenticity and reliability and upon doing so,
13 those documents would be able to be used -- the copies, that is
14 -- but where there is reason then and where the originals exist,
15 that's when we believe the best evidence rule does, in fact, kick
16 in because there may be a suggestion that there was a forgery ex
17 post facto; that the document, itself, was tampered with, in
18 other words; that it's a montage and it's not something that is
19 unheard of, so we believe the best evidence rule does play a role
20 before this tribunal.

21 [11.20.44]

22 The Trial Chamber may also request for evidence to be rejected
23 where it's more prejudicial -- the effect of it would be more
24 prejudicial than probative -- more prejudicial than probative.
25 Now, I understand that earlier I indicated that first you have to

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1 let -- if it's -- if it's authentic and reliable, you get to the
2 probative -- the weighing of it -- at some other point, but some
3 evidence may, on its face, be so prejudicial and have so little
4 value that it may be evident that, at some point, you may be
5 required to make a determination, at that point, even though we
6 do realize that we are dealing with professional judges who are
7 not expected to be swayed by passion or prejudice and that are
8 perfectly capable of setting aside anything that may be more
9 prejudicial than probative.

10 [11.21.52]

11 At the IC -- at the ad hoc tribunals, a document is
12 insufficiently reliable when its prejudicial effect on the
13 fairness of the proceedings outweighs its probative value. And
14 you can find a good example in the Kvo?ka case where the Trial
15 Chamber decided to exclude, in the interest of a fair trial, an
16 extract of a -- from a newspaper article from the Omarska camp as
17 its probative value was low in that it contained unsupported
18 allegations regarding the camp and "the inflammatory nature of
19 these allegations was so prejudicial to the Defence that this
20 outweighed any probative value it may have" and this is
21 Prosecution versus Kvo?ka, decision on exhibit, 19 July 2001 page
22 2.

23 Now, this is a good example, in our case, because there are many
24 instances where the Prosecution or the civil parties may wish to
25 rely on newspaper articles and what may be contained in those

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1 articles may be prejudicial, but not necessarily probative,
2 especially when you consider that the -- whatever is being cited
3 inside the document, itself, cannot be challenged; in other
4 words, there would also be a problem with the right of
5 confrontation.

6 [11.23.38]

7 So at the ICTY, this principle that a document may be rejected
8 when its prejudicial effect outweighs the probative value is
9 expressly codified in Rule 89(d). Now, that's not the case at the
10 ICTR, the Rwandan tribunal, or the special court for Sierra
11 Leone; however, they have, nonetheless, applied this broad --
12 their broad discretion to exclude evidence when the Trial
13 Chambers believed that it was more prejudicial than probative and
14 you can see that in the -- for instance, the Karemera Case
15 Decision on the Prosecution Motion for Admission into Evidence of
16 Post-Arrest Interviews with Joseph Nzirorera and Ngirumpatse,
17 that's 2 November 2007, paragraph 3, and in the Norman case of
18 the Special Court of Sierra Leone; this is a decision on the
19 Prosecution's request to -- to admit evidence -- into evidence
20 certain documents pertaining to Rule 92 bis and 89(c), 14 July
21 2005.

22 [11.25.07]

23 So you can see that this principle is a principle that is widely
24 used at the international tribunals and while we maintain that
25 the Trial Chamber here must first and foremost always apply

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1 Cambodian law and the Cambodian rules of procedure in your
2 Internal Rules -- that's your starting point -- because those are
3 grounded within the context and the framework of this particular
4 institution which is also grounded within the framework of the
5 Cambodian Constitution, you can, for guidance, look to these
6 other courts and when appropriate, keeping in mind that they are
7 more hybrid as opposed to a Romano-Germanic system as we have
8 here today.

9 [11.26.06]

10 Lastly, I want to talk about the inadmissibility of statements
11 made pursuant to inducement or coercion or threat. Rule 21.3
12 states:

13 "No form of inducement, physical coercion or threats thereof,
14 whether directed against the interviewee or others, may be used
15 in any interview. If such inducements, coercions or threats are
16 used, the statements recorded [shall be] shall not be admissible
17 as evidence before the Court."

18 And of course, in Case 001, both the pre-Trial Chamber and the
19 Trial Chamber and -- the Trial Chamber, I should say in 001, but
20 in 002 -- this case -- the pre-Trial Chamber and Trial Chamber
21 have found that pursuant to Rule 21.3 quote the facts that a
22 confession has been made and that it has -- was made under
23 torture is -- is an admissible fact, however, the contents of the
24 confession made under torture cannot be acceptable -- accepted as
25 a truthful statement.

1 And we -- we will go into the specifics of the sort of documents
2 that we believe are not acceptable, but lastly, because I see my
3 time is running out, let me talk a little bit about relevance;
4 just 30 seconds.

5 [11.27.36]

6 A document's relevance must be determined prior to the admission
7 of evidence, as I've indicated earlier, to avoid the admission of
8 countless of documents which cannot be shown to have any -- to be
9 relevant or linked to any relevant issues. And, of course, it is
10 the party who is proposing to use the document that must explain
11 away the relevance; why a particular document has any relevance
12 and -- and how so.

13 Relevance has been defined as evidence that tends to prove or
14 disprove a material issue. In other words, evidence is relevant
15 if its effect is to make more or less probable the existence of a
16 fact which is an issue. So we believe, Your Honour, that having
17 determined that a document is authentic, having determined that
18 it is reliable then, rather than just admitting it wholesale, you
19 take that other extra step to determine why the evidence -- the
20 documentary evidence is also relevant and how so, just as you
21 would, for instance, if a party were to be questioning a witness
22 and they're going off on a tangent, it might be interesting; it
23 might be prejudicial to the person being questioned; it might be
24 fascinating to hear, but if it is not relevant, the Trial Chamber
25 is expected to step in and cut off the party or at the very

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1 minimum, ask the party to explain why this line of questioning is
2 relevant; to what part of the indictment, what charge, what
3 paragraph in the Closing Order.

4 [11.29.35]

5 So just as you would expect the parties to do nothing -- to ask
6 nothing but relevant questions, we submit you should not, even at
7 the admissibility stage, accept documents that are not relevant.

8 And with that, Your Honours, I conclude. And again I wish to
9 thank the Trial Chamber for giving us this opportunity to make
10 our -- our submissions on this issue. Thank you.

11 MR. PRESIDENT:

12 Thank you, Defence Counsel for Ieng Sary.

13 [11.30.19]

14 I now hand over to Khieu Samphan's defence. You have 30 minutes
15 for your presentation on the general evidentiary issues raised by
16 the documents relevant to this hearing. You may now proceed.

17 MR. KONG SAM ONN:

18 Thank you, Mr. President. Good morning, Your Honours. Good
19 morning, everyone.

20 For today's hearing, I'd like to make some brief remarks. As our
21 colleagues already indicated relevant points regarding the
22 documents, I have also heard the statement made by the prosecutor
23 which we agree in many points so that it is up to the discretion
24 of the Chamber to decide on the issue.

25 [11.31.39]

1 First of all, I'd like to draw Your Honours attention to Rule
2 87.1 regarding rules of evidence. That is the main focus of our
3 hearing today. I believe there is a misunderstanding regarding
4 the content of this rule.

5 The rule, of course, is applicable before the Chamber. The
6 misunderstanding is that the word "admissible" and I'd like to
7 put an entire quote for Rule 87.1, which is: "Unless provided
8 otherwise in these Internal Rules, all the evident is
9 admissible."

10 The word "admissible" is used in the English language. That is,
11 the Chamber shall accept the document submitted by the parties;
12 however, it means, although the Chamber accepts those documents
13 submitted by the parties, it doesn't mean the documents are all
14 admissible. That is, the Chamber shall accept the document for
15 debate -- for discussion -- and that is the distinction which
16 also links to below subrules.

17 [11.33.30]

18 So I think there is a misunderstanding of the word "admissible"
19 in Rule 87.1. In order for documents to be admissible, it has to
20 be first accepted and then debated by concerned parties in order
21 to verify if the evidence is appropriate or otherwise.

22 If the document is admitted without a debate, how could a judge
23 know for sure the weight or the probative value of such a
24 document? For that reason, it requires a debate -- a discussion
25 -- from all the concerned parties to find whether it is relevant

1 and I believe the point has also been raised by the Co-Prosecutor
2 that the documents shall be credible through debate and this is a
3 core distinction in this rule and that's for the decision of the
4 Chamber.

5 The issue of what type of evidence shall be admissible and
6 considered in regards to its probative virtue, of course, it is
7 at the discretion of the Chamber on its credibility and relevance
8 and, I repeat, this is the discretion of the Chamber; however, it
9 also means the Chamber can just not accept any document. Your
10 Honours, of course, adhere to the principle of credibility or
11 relevance of those documents before you decides to admit them as
12 whether they are inculpatory or exculpatory.

13 [11.35.46]

14 Another point that we shall consider is that why there shall be a
15 debate on the evidence. I believe the Chamber as well as the
16 Co-Prosecutors are aware of the onus of presenting the evidence
17 on the Co-Prosecutor.

18 So in order for the evidence to be presented before the Chamber,
19 what are the standards or the rules that we need to adhere to,
20 especially for the prosecutor to present them? We have a
21 principle that if the document shall -- the probative value of
22 the document shall be beyond reasonable doubt, as also stated by
23 defence counsel Michael Karnavas. So the best rule of evidence is
24 a norm to be adhered to and applied by the Co-Prosecutors and if
25 the Co-Prosecutors fail to carry out this task, that is, to apply

1 the best rules of evidence, it means if there is any doubt, the
2 doubt shall benefit the Accused.

3 [11.37.34]

4 It means the Chamber shall favour the Accused if there is any
5 doubt in the document presented by the Prosecution. So it
6 requires that the Prosecution presents the proof beyond
7 reasonable doubt so if -- in this present context, if you refer
8 to Rule 87.1, we opine that -- and all evidence is admissible
9 then it -- there is no need to have this oral argument at all.
10 And without the oral argument, we have no way in order to find
11 out or establish the reliability of the evidence.

12 Responding to what the representative of the civil party, which
13 argues that the argument by the Defence is meant to prolong the
14 proceeding; I think this is seriously misleading.

15 [11.39.33]

16 Because, of course, the hearing of the case of this magnitude
17 must involve examinations of thousands of documents and I'm sure
18 that require a lot of times to debate on that and it is not a
19 waste of times.

20 So how do we do it? In order to save times, what is the best way
21 forwards? Of course, there will be certain requirements of the
22 times to move forward, however, I believe in the Trial Chamber
23 with their discretion to find ways in order to save time.

24 So in order to ensure that we save time, what should be the
25 important contribution by the Prosecution? First, we will examine

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1 on the evidence or documents proffered by the Prosecution, and if
2 we refer to Rule 87.1, parties may submit documents and all
3 evidence is admissible unless it is provided otherwise in these
4 IRs and other subsequent subrules in Rule 87.

5 [11.41.19]

6 So if all document is admissible, then I believe that all the
7 evidence will be voluminous. So in order to make sure that all of
8 those documents are relevant to the case, particularly to
9 implicate the Accused, and it is the onus of -- the onus is on
10 the Co-Prosecutor to prove the guilt of the Accused so the
11 prosecutor should prove and establish the standard of proof in
12 order to ensure that those evidence are admissible and they have
13 to link it with the criminal intent of the Accused, for example,
14 that those document is necessary.

15 So, if by admitting all the documents, I believe that certain
16 documents are irrelevant, other documents might be not reliable,
17 and certain document are not authenticated at all. If they are
18 not original, sometimes they take the statement that cannot be
19 taken into consideration so if we simply admit every document
20 submitted by the Prosecution, I believe that is the source of the
21 waste of times so in order to determine the credible evidence
22 that -- to be submitted before the Chambers, we suggest that the
23 Prosecution will have to be mindful of that.

24 [11.42.59]

25 I would like to bring to your attention an extract of the

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1 jurisprudence of the Third Trial Chamber of the ICTY in case of
2 Prlic; Prlic - P-R-L-I-C. In this excerpt, I would like to read
3 out in English, because it is an excerpt, so I want to read it
4 out verbatim to avoid any mis-translation.

5 (Intervention in English:) "The admission of several thousand
6 documents without prior discussion over them in court may unduly
7 delay the proceeding, to extent that the Chamber would not have
8 the benefit of explanation from a witness who would help to put
9 these documents in their context and establish their relevance
10 and probability -- I'm sorry -- probative value. The Chamber
11 would, therefore, be required to spend much of its resources
12 examine and assessing thousands of documents, which could take
13 several months and would delay the pronouncement of Judgement."

14 (End of intervention in English)

15 [11.45.10]

16 This Court also concludes that -- and I would like to once again
17 read it out in English --(Intervention in English:) "The
18 Prosecution, therefore, has the duty to make a choice and
19 identify those documents which are strictly necessary for the
20 determination of points in issue, and present those documents to
21 a witness who is able to provide the Chamber information in Court
22 about authenticity, relevance, and probative value of such
23 documents." (End of intervention in English)

24 Thank you.

25 So based on this jurisprudence, the -- the prosecutor has the

1 responsibility to prove the relevance of the documents to be put
2 before the Chamber. And if they simply supply the document as
3 provided for in Internal Rule 87.1, I believe that the document
4 will be voluminous and, in order to determine the specific
5 document that is relevant, I think that its -- it requires a lot
6 of time. So in order to avoid time wasting, I think that the
7 Prosecution -- the inculpatory evidence proffered by the
8 Prosecution shall be specific and shall be proof with the
9 established standard. So long as there is a reliable evidence, we
10 would be able to debate based on the basis of reliable evidence
11 and there is -- there is -- it is not meant that the Defence
12 intends to delay the proceeding.

13 [11.47.53]

14 Relating to the establishment of the general principle on the
15 admissibility of evidence, how do we establish the principle? I
16 listen attentively to Mr. Michael Karnavas. He pointed to three
17 important points; one on the authenticity, second on the
18 reliability of the evidence, and the third one on the relevance
19 of the evidence. These are the three principle which the criteria
20 for the Chamber to listen to the overall arguments on these three
21 principle and, as the Defence, we do not deny the fact that
22 certain evidence submitted by the Prosecution are admissible or
23 useful to ascertaining the truth in the case. However, there must
24 be an examination -- a thorough examination on the reliability,
25 its authenticity and its relevance, as well, to the present case

1 at hand. We cannot assume that evidence submitted is admissible.

2 [11.49.17]

3 In addition, the observation by the Chamber which may, in any
4 way, amounts to the presumption of admission of the evidence,
5 particularly the documents in the footnote of the closing orders
6 are admissible; on this particular point, I think that these may
7 be a cause of misleading as well as to how much do we determine
8 that those evidence are admissible. They are admissible for
9 certain information contained in the footnotes of the Closing
10 Order.

11 When the Co-Investigating Judges issued a Closing Order, they had
12 footnotes in the Closing Order in support of the statement or
13 arguments or decision of the Co-Investigating Judges, themselves,
14 and it is the summary determination, for example, the
15 Co-Investigating Judges simply pointed to certain documents or
16 titles of the documentary evidence or books or so. So it is a
17 mere summary of the text; it is not the overall content in those
18 texts or books or evidence.

19 [11.51.13]

20 So what poses a question here is that the content in each
21 document may not be consistent or may not corroborate one another
22 so it is important that the Chamber consider that because in one
23 text there might be some contradiction or there might be certain
24 areas which remain questionable.

25 So my question is if we simply admit those documents as

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1 acceptable by the Chamber, how reliable it is, because in one
2 particular document there might be certain areas which are
3 contradictory as well? So I think it is important that we have to
4 debate or examine those evidence before the Court so that they
5 become officially admissible. We have to make sure that those
6 documents are the original document that has been proved by the
7 author, themselves, and we know that documents were produced by
8 human beings so there must be a source that we can track and, of
9 course, if it is made by human beings, human beings are subject
10 to making errors as well so it should be subject to examination.

11 [11.52.50]

12 I would also like to, once again, stress on the onus of proof of
13 the Prosecution. If he assumes that all evidence is admissible
14 before this Court, without any examination, I think this
15 seriously prejudice the mission to find the truth. Why? Because
16 by examining evidence, we cannot be sure that all of those
17 evidence constitute the real evidence that reflects the truth.
18 So examination is indispensable because parties will have the
19 opportunity to further object against what is in those evidence
20 or they accept that and they will be able to provide supporting
21 arguments.

22 [11.54.07]

23 And, once again, once the documents are, for example, authentic
24 or so, it does not necessarily mean that it can be always
25 admissible. So I think that by putting those document before the

1 Chamber, it's easier for the Chamber to hear the argument by all
2 parties and if the -- if one party believe that those evidence
3 are reliable evidence, but the other parties think otherwise so
4 the decision will lies upon the decision of the Chamber.

5 And, again, on this same subrule 87.1, if the onus is on the
6 Defence for the evidence submitted by the Prosecution, it seems
7 that there is a shift in the responsibility to proof the
8 reliability of the evidence beyond reasonable doubt and that
9 should be the onus of proof of the Prosecution.

10 However, once the prosecutor submit certain documents and if the
11 responsibility falls on the Defence regarding our objection and
12 -- and there is a requirement that we have to prove, for example,
13 the authenticity or relevance of such documents so that onus of
14 proof will be shifted to the Defence rather than the Prosecution.

15 [11.56.16]

16 So it seems to me that the prosecutors knows for sure that the
17 onus of proof is on the Prosecution, but when it comes to whether
18 or not we want to indicate the probative values or the relevance
19 or authenticity of the document, the Defence who wish to
20 challenge those document will have to approve them. But that is
21 not a correct assumption because once the prosecutor has the onus
22 of proof then all the documents submitted by the prosecutor, they
23 have to prove its relevance, its reliability because there is one
24 overall principle which requires that the prosecutor prove the
25 evidence before -- beyond reasonable doubt because there is one

1 universal principle which the Accused are presumed innocent
2 unless proved guilty otherwise by the Court.

3 So now, the Accused is being presumed innocent because there has
4 not been any final decision rendered against the Accused. So if
5 he is presumed innocent, then, the prosecutors will have to prove
6 his guilt beyond reasonable doubt. That is the overall principle
7 which give the responsibility to the prosecutor. It does not
8 necessarily means that the prosecutors merely present an evidence
9 and they do not have to elaborate on the substance of the
10 evidence; they have to prove the authenticity, the reliability,
11 and the relevance of those evidence in order to prove the other
12 -- prove the guilt of the Accused.

13 [11.58.39]

14 So to recap what I have presented, Rule 87.1, the admissibility
15 of evidence does not means that those evidence are submitted --
16 or are accepted by the Chamber. The evidence that are considered
17 admitted must undergo examination by all parties in order to
18 ensure its authenticity, its relevance, and its reliability in
19 this case.

20 As the defence for my client, I reaffirm my position that we
21 would object to any evidence that do not go through examination
22 and any presumption of admissibility is not correct in any
23 proceedings.

24 Finally, we would like to urge the Trial Chamber not to admit any
25 piece of evidence that is not placed before the Chamber for

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1 examination because those evidence might not be authentic or
2 might not be reliable or relevant to this case so the Trial
3 Chamber should not consider those evidence for the basis of its
4 decision.

5 [12.00.51]

6 Thank you.

7 MR. PRESIDENT:

8 Thank you, Defence Counsel, for your general observation on this
9 and I think that the Defence has been repetitious in terms of the
10 Chamber's decision to admit the evidence.

11 I think that the Defence might overlook the subrule 87.2 of the
12 Rules of Evidence so the Chamber would like to read out Rule 87.2
13 for you.

14 Internal Rule 87.2 provides that any decision of the Chamber
15 shall be based only on evidence that has been put before the
16 Chamber and subjected to examination. So the rule -- Rule 87.2 --
17 which you may have overlook is likely to clarify your concern,
18 particularly the decision to admit evidence.

19 [12.02.28]

20 There was one issue this morning, the defence for Khieu Samphan
21 requested that Khieu Samphan be granted an opportunity to make an
22 oral submission to the Chamber in relation to his right to remain
23 silent or his right to respond to certain argument in Court. And
24 regarding this issue, the Chamber ask Mr. Khieu Samphan last week
25 and Mr. Khieu Samphan said he would reserve his time to consult

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1 with this lawyer first. So I think if we leave this issue, then
2 we may have forgotten it or it may impact on the schedule of the
3 Chamber.

4 So the security guards are now instructed to bring Mr. Khieu
5 Samphan to the dock so that he can ascertain his position whether
6 or not he want to exercise his right to remain silence or he
7 wants to make any submission for himself.

8 (The accused Khieu Samphan is taken to the dock)

9 [12.04.00]

10 Counsel?

11 MR. KONG SAM ONN:

12 Thank you, Mr. President. I would like to put it on record and it
13 should be clear on the record as well of what I quoted from the
14 jurisprudent of International Tribunal, the title of that
15 jurisprudence is "The Decision on Admission of Evidence" handed
16 down by Chamber-- Trial Chamber 3, dated the 13 of July 2006,
17 page 6 and page 7. Thank you.

18 MR. PRESIDENT:

19 Mr. Khieu Samphan, late last week, the International
20 Co-Prosecutor requested the Chamber that you be asked as to
21 whether you maintain your position to remain silent or you wish
22 to exercise your right to respond to the questions asked by the
23 Chamber and parties. And the question relevant to the facts in
24 trial segment 2 in relation to the structure-- administrative
25 structure of the Democratic Kampuchea. So what is your opposition

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1 (sic) after your consultation with your defence counsel?

2 [12.06.07]

3 MR. KHIEU SAMPHAN:

4 Mr. President, Your Honours, everyone in and -- in and around the
5 courtroom, venerable Monks and beloved compatriots. I thank you,
6 Mr. President, for granting me the opportunity to speak. I would
7 like to add to my position I demonstrated on Thursday last week.
8 I observed that there are individuals who still do not understand
9 my position and they raise questions and they do not understand
10 my position regarding the question asked by the Chamber and the
11 parties.

12 [12.07.27]

13 In the hearing on the 13 of December, I stated, expressly, my
14 position and I am of the opinion that my position remains that
15 clear. However, I see the necessity to clarify it again in order
16 to avoid any confusion or misunderstanding. I stated clearly and
17 I would like to repeat now that I have a request to participate
18 actively in my case. However, I won't forget that this is my
19 trial and the prosecutors claims that I have committed notorious
20 crimes and I categorically reject it. It is the prosecutors who
21 have to prove the evidence to support their prosecution against
22 me so that I can defence myself appropriately. Therefore, I will
23 have to wait until when I am presented with the evidence so that
24 I can examine it before I can respond to all the questions. And I
25 would like to earnestly request the Chamber that I be given the

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1 opportunity to comment or express my opinions on the facts raised
2 in the various paragraph in the Closing Order, which the Trial
3 Chamber will read out or indicate in the coming hearings, as the
4 Chamber has granted me such opportunity so far, particularly on
5 the 13 of December. In response, I will eventually respond to
6 every question concerning the facts raised by parties, and I
7 would answer questions regarding the documents as well. But once
8 again it must -- I would response until and unless those document
9 has been fully provided.

10 [12.10.33]

11 For example, when there was an oral argument, relating to the
12 historical background of the Communist Party Kampuchea, it was
13 almost coming to a conclusion already; but there was no -- not
14 sufficient document presented to me, and there was no -- any
15 mentioning that those document would be raised again in the
16 subsequent hearings. And witnesses and expert witnesses who will
17 appear to testify before this Court will be questioned in the --
18 relating to the historical backgrounds of the Democratic
19 Kampuchea or not.

20 [12.11.25]

21 In my understanding now, more documents will be provided on the
22 subsequent occasions, and those documents will be subject to oral
23 examination and cross examination.

24 Why would I wish, if I am authorized to do so, to make possible
25 comments on paragraphs in the Closing Order as the trial goes

1 along? I, on the other hand, will not answer any kind of question
2 before the end of the presentation of all of the evidence; in
3 other words, at the end of the trial.

4 I strongly hope that each and everyone in this courtroom
5 understand my position. I thank you, Mr. President, Your Honours,
6 members of the Bench, for your attention. Thank you.

7 MR. PRESIDENT:

8 Thank you, Mr. Khieu Samphan, for reiterating your position and
9 participating in the hearings, particularly hearings on the facts
10 relating to your case in Case File 002/1 and this will be, of
11 course, transcribed in the transcription and parties will take
12 your position into consideration. It is now appropriate for an
13 adjournment for lunch, so we will break for lunch and we will
14 resume at 1.30.

15 Counsel may now be seated.

16 MR. IANUZZI:

17 Thank you, Your Honour. Thank you.

18 If I may just a brief word on Nuon Chea's presence, we are
19 informed that Nuon Chea would like to waive his rights to be
20 present to participate in the proceedings, meaning that he would
21 like to return to the detention centre for the duration of the
22 week.

23 We're informed also that he is still in the holding cell. We did
24 make that request earlier this morning, so we would like to
25 reiterate it now; he would like to remain in the detention centre

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1 for the rest of the week, waiving his right to participate. Thank
2 you.

3 [12.14.26]

4 (Judges deliberate)

5 [12.15.02]

6 MR. PRESIDENT:

7 Yes, Prosecutor, you may now proceed.

8 MR. SMITH:

9 Your Honours, the Prosecution, I think, has made their position
10 clear, I think so has the Trial Chamber that the Accused has an
11 obligation to be present at this trial, either in the courtroom
12 or in the holding cell, and we would ask that this application be
13 rejected.

14 (Judges deliberate)

15 [12.16.52]

16 MR. PRESIDENT:

17 The accused Nuon Chea, through his defence counsel, decides to
18 waive his right to participate in the hearing, both in the
19 courtroom, as well as in the holding cell where audio-visual
20 connection is prepared for him, and he requests that he be
21 transferred to his detention facility. The Chamber rejects this
22 request, and the Chamber also oppose the ruling of the Chamber
23 made this morning. The Accused shall remain in the holding cell
24 where the audio-visual equipment was prepared for him so that he
25 can follow the proceedings by remote means, and we have already

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1 ordered the technician to connect the audio-video link for him so
2 that he can participate in this proceeding for the rest of the
3 week by remote mean.

4 So the security guard does not -- do not have to bring the two
5 Accused to the courtroom. They may remain in the holding cell,
6 and you simply report the situation to the Greffier. So security
7 guards are now instructed to bring Mr. Khieu Samphan to the
8 holding cell and bring him back to this courtroom before 1.30.

9 (Court recesses 1218H to 1334H)

10 MR. PRESIDENT:

11 The Court is now back in session.

12 We will now hear the Defence objections regarding documents E3.

13 The Defence has 30 minutes to present their objections, however,
14 the Defence has at liberty to allocate the 90 minutes time freely
15 between themselves.

16 Can the defence counsel indicate how you divided the time between
17 yourself? First, Nuon Chea's defence team.

18 [13.34.47]

19 MR. PESTMAN:

20 I estimate we will need approximately 25 minutes for our
21 presentation and the five remaining minutes we will donate to
22 whoever would like to have them.

23 MR. PRESIDENT:

24 Thank you. And the defence team for Ieng Sary?

25 MR. KARNAVAS:

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1 Good afternoon, Mr. President. Good afternoon, Your Honours and
2 to everyone in and around the courtroom.

3 We believe we can handle our content within the 30 minutes, but
4 if we need the additional five that was just donated, we'll
5 gladly take it. Thank you.

6 MR. PRESIDENT:

7 Thank you. Then the rest of the time shall be allocated to the
8 Khieu Samphan's defence team. We now give the floor to Nuon
9 Chea's defence in order to present their objections to the E3
10 documents. You may now proceed.

11 [13.36.04]

12 MR. PAUW:

13 Thank you, Your Honour and members of this court and everyone --
14 that is present here.

15 Today I will be speaking about the admissibility of the E3
16 documents but, in order to do so, I will need to mention several
17 witnesses or potential witnesses by name; and I've communicated
18 on this topic with the senior legal officer of the Trial Chamber,
19 and I would request leave to mention two specific names and I
20 believe your court is aware of the names that I will be
21 mentioning.

22 [13.36.44]

23 So, before I proceed, I would like to receive instructions from
24 your court.

25 (Judges deliberate)

1 [13.38.18]

2 MR. PRESIDENT:

3 After having heard the request by Nuon Chea's defence and after
4 the discussions of the -- by the Judges of the Bench, the Chamber
5 would like to inform the defence team that, as a general rule,
6 the names of witnesses or civil parties shall not be mentioned.
7 Instead, pseudonyms shall be used. However, this is a special
8 circumstance in relation through the documents to be debated in
9 regards to its authenticity and, for that reason, you are allowed
10 to mention the names. You may now proceed.

11 MR. PAUW:

12 Thank you, Your Honour, for that clarification.

13 Today, we will have rather limited comments on the admissibility
14 of documents in the E3 category, but we feel that, in order to
15 satisfy minimum standards of relevance and, especially,
16 reliability, it needs -- it's imperative that we hear a certain
17 witness, and that witness would be Mr. Youk Chhang, the director
18 of DC-Cam.

19 [13.39.43]

20 The Defence is aware that another witness has been scheduled to
21 testify on issues that relate to authenticity of DC-Cam
22 documents, but it's the Defence position that it needs to be Youk
23 Chhang himself that comes in to testify. And if Mr. Youk Chhang
24 does not come in to testify before this Court, it's the Defence's
25 position that all evidence and all documents that come from

1 DC-Cam must not be admitted as evidence before this Court.

2 As you know, Mr. Youk Chhang has managed the field work of

3 DC-Cam's Mass Grave Mapping Project since July 1995, and he's

4 been director of DC-Cam since 1997. He simply is the most

5 informed person, when it comes to DC-Cam and its activities, and

6 especially its efforts to collect evidence. Mr. Youk Chhang has

7 stated on multiple occasions that only he has authenticated the

8 documents that arrived at DC-Cam and he, again, did so

9 personally.

10 [13.40.50]

11 In document D150, on page 3, he states: "When documents come in I

12 inspect them personally".

13 And in document D204/2, he states on page 3: "What question did

14 you ask the people that donated the documents?" And the answer

15 is: "I personally asked the questions without making any written

16 records."

17 As Mr. Youk Chhang has stated: "I have seen and handled all of

18 the documents in the DC-Cam archives, and have an intimate

19 knowledge of them."

20 Again, this is the reason to interview only Mr. Youk Chhang, and

21 not anyone else involved with DC-Cam -- or, those people could be

22 questioned as witnesses as well, but, Youk Chhang himself must

23 appear before this Court.

24 [13.41.39]

25 Because of his intensive personal and long-running involvement

1 with the collection of evidence, Youk Chhang's testimony is
2 crucial when one is considering the issue of authenticity and
3 reliability, and, therefore, of admissibility of evidence before
4 this Chamber. The Defence needs to be allowed to cross-examine
5 Youk Chhang as to his methodology, his strategy in the collection
6 of evidence, and we need to be allowed to ask him about any
7 training he may have had in authentication.

8 Also, for example, we need to be able to ask him what his
9 approach has been to not collecting or accepting certain
10 evidence. It is true that Mr. Youk Chhang has been interviewed
11 several times already, both by the OCP and the OCIJ. But the
12 Defence has never been able to question this important witness --
13 and, simply, it's a Defence right to question an important -- a
14 witness that's important like Youk Chhang.

15 Moreover, in those statements with the OCP and the Investigating
16 Judges, rather than providing a full clarification of his
17 approach towards collecting information, those statements have
18 raised additional evidentiary issues, and the Defence needs to be
19 allowed to further explore those issues in open court when
20 questioning Youk Chhang.

21 [13.43.13]

22 And time does not allow me to go into detail as to what issues
23 have been raised by those statements by Youk Chhang -- and I'm --
24 I've been told to slow down, so I will be slowing down my
25 questioning -- or my speech. But one issue that has come up in

1 the questioning of Youk Chhang, and I'm referring to document
2 D204/3, in it, Mr. Youk Chhang speaks about the annotations that
3 have been made on some documents that come from the Tuol Sleng
4 prison, and he clarifies -- and I quote:

5 "I would like to clarify that the small annotations on some of
6 Tuol Sleng documents were not written by Khmer Rouge. They were
7 written by the Tuol Sleng staff to confirm or make a note on
8 photographs."

9 Question: "Are there are notes indicating which annotations were
10 written by Khmer Rouge and the Tuol Sleng Staff?"

11 Answer by Mr. Youk Chhang: "No, there are not."

12 Question: "How did you do it to find out if the annotations were
13 written by Khmer Rouge or the Tuol Sleng staff?"

14 Answer by Mr. Youk Chhang: "I have read a lot, so I know, and the
15 staff working at Tuol Sleng told me."

16 [13.44.44]

17 It is obvious that this is an incredibly important issue to the
18 Defence. As you know, for example, Duch has testified that Nuon
19 Chea has made certain annotations on certain Tuol Sleng
20 confessions, and here we have Mr. Youk Chhang explaining that it
21 has not only been the Khmer Rouge that has been writing on the
22 documents. There have also been Tuol Sleng staffers -- and I
23 understand it to mean people that have worked at the Tuol Sleng
24 museum after the Vietnamese took over the Tuol Sleng compound.
25 Also, people after the Khmer Rouge era have written on those

1 confessions. It is evident that, considering that Youk Chhang has
2 intimate knowledge of these proceedings, it is imperative that
3 the Defence gets to question Mr. Youk Chhang on these documents.

4 [13.45.44]

5 It's also important to note that Mr. Youk Chhang himself has
6 already indicated that additional measures may be needed to
7 properly authenticate the DC-Cam documents. In article that Mr.
8 Youk Chhang wrote in 2005, which is titled "Documenting the Crime
9 of Democratic Kampuchea" -- and that is placed in the case file
10 with number D155.3 -- it is Mr. Youk Chhang himself that suggests
11 that a handwriting analysis of certain DC-Cam documents must be
12 done in order to authenticate them.

13 [13.46.20]

14 Also, it's Mr. Youk Chhang himself that suggests that forensic
15 testing of certain documents must be done in order to properly
16 authenticate them. In other words, where the OCP does not see the
17 need to further authenticate documents that have come from
18 DC-Cam, it is the president of DC-Cam himself that seems to hold
19 a different opinion. And the Defence should at least be allowed
20 to question Youk Chhang on these statements, which might very
21 well undermine parts of the Prosecution's case.

22 And this article that I just mentioned provides even more reasons
23 to hear Mr. Youk Chhang as a witness, because it demonstrates
24 that Youk Chhang is not a neutral historian, but has been working
25 with an actual goal to have our client and other DK leaders --

1 Democratic Kampuchea leaders -- prosecuted. Accordingly, his work
2 product must be presumed to be biased towards the Prosecution,
3 and we therefore need to be able to verify how Youk Chhang and
4 the organization he leads went about its work in collecting and
5 distributing DK documents and interviews.

6 Let me be clear from the outset that we do not blame or criticise
7 Youk Chhang for this prosecutorial approach, as such. Of course,
8 Mr. Youk Chhang is entitled to encourage the prosecution of the
9 DK leaders if he so desires. But, it does mean that his work
10 product, and, therefore, DC-Cam's work, should be considered with
11 a very critical eye.

12 [13.47.58]

13 And DC-Cam's work can certainly not be awarded a presumption of
14 reliability simply because DC-Cam claims to be a neutral
15 historical research enterprise. It is not, and I will quote a few
16 lines from this article to underline this issue and to
17 demonstrate the prosecutorial approach that Mr. Youk Chhang has
18 taken. This article was written before this Court was
19 established, and it provides a clear blueprint for a prosecution
20 of Nuon Chea based on the available evidence. Indeed, the article
21 states, on page 223, that it is imperative that those most
22 responsible for the crimes during the DK regime, including Nuon
23 Chea, be held accountable, and that their crimes be proved to a
24 legal standard.

25 [13.48.49]

1 Also, on page 224, the authors explain that they will demonstrate
2 how duly admitted evidence -- documentary evidence -- can be used
3 to prove specific crime by, among others, Nuon Chea. And, they
4 also stated certain documents can -- and I quote -- "help to
5 prove the occurrence of specific crimes, and demonstrate the
6 knowledge and complicity of DK leaders, including Nuon Chea".
7 Again, Nuon Chea is mentioned repeatedly in this article, and it
8 essentially suggests an approach for a successful prosecution of
9 Nuon Chea for a variety of crimes. And, indeed, the article
10 concludes, after reviewing the documentary evidence, that, taken
11 together, documentary evidence can prove that he -- and the
12 author means Nuon Chea -- that he exercised the highest level of
13 command authority during the DK regime. His de facto and possible
14 de jure authority extended to almost every subordinate member of
15 the CPK ranks.

16 The article then speaks of powerful evidence that the top CPK
17 leaders possessed the requisite mens rea for torture and states
18 that, and I quote; "proof against Nuon Chea is particularly
19 strong."

20 [13.50.05]

21 Again, we do not criticize Youk Chhang for this prosecutorial
22 approach, but it must be considered for what it is -- it is a
23 prosecutorial approach. Youk Chhang is not a neutral observer in
24 search for the truth. He is a partisan researcher that has been
25 working with the goal of having, among others, Nuon Chea

1 prosecuted. And this means that there must exist a presumption of
2 bias when considering the work of DC-Cam.
3 Accordingly -- and I am coming to the end -- Mr. Youk Chhang must
4 be heard in order to properly establish the chain of custody of
5 the documents that come from DC-Cam, as well as their
6 authenticity and reliability. I mentioned that Youk Chhang would
7 also be in a position to provide more information about the other
8 custodians that have been in possession of certain documents over
9 the years. So, when Mr. Youk Chhang comes in for questioning, all
10 parties will be in a position to question Youk Chhang on this
11 important topic.

12 [13.51.10]

13 And if Youk Chhang is not heard by your Trial Chamber, then our
14 position is that all evidence stemming from DC-Cam cannot be
15 considered to be authentic and reliable, and must therefore be
16 called inadmissible. This concludes my portion of the day. I give
17 the floor to my colleague, Michiel Pestman.

18 MR. PESTMAN:

19 Thank you very much. I will just make - I would like to make some
20 short comments, with regard to the documents which were discussed
21 in court last week, and which were shown at a particular stage
22 during the interrogation by the Prosecution to our client.
23 We still assume that we have the right to object to the
24 admissibility of those documents, although at the beginning of
25 last week, the President of this Court read out a decision which

1 seems to suggest that the documents were already admitted.

2 [13.52.22]

3 We assume that we are still allowed to object to this admission.

4 If I'm wrong, then my comments and the comments made by my

5 colleague should be seen as a challenge to the authenticity of

6 those documents, and therefore as a challenge as to the weight of

7 -- the evidentiary weight which will have to be attributed

8 eventually to those documents.

9 We object especially -- and you will not be surprised to hear so

10 -- to admission of the copies -- your next copies of the

11 "Revolutionary Flags", which were presented or shown by the

12 Prosecution to our client. And I remember also a copy of the

13 "Revolutionary Youth" -- an alleged copy of that magazine --

14 which was presented to our client, and the notes taken by Khem

15 Ngun -- I'm not sure I'm pronouncing the name correctly, I

16 followed the advice given by the President and I've practiced the

17 pronunciation, but I'm told I'm unable to pronounce the name

18 correctly -- but it is the person my client referred to as Hun

19 Sen's spy number 9, who had a chit-chat with my client after 1979

20 and took some notes -- or made some notes -- following that

21 chit-chat.

22 [13.53.52]

23 My client challenged the authenticity of those documents

24 presented to him, and therefore also the reliability of those

25 documents -- the reliability mentioned in Rule 87, section 3, as

1 a necessary condition for the admission of those documents. And
2 he also gave reasons for this challenge. He said, among other
3 things, that the "Revolutionary Flags" he remembers were
4 handwritten and not typed. He said they were printed in red, not
5 in black. And he also said, very importantly, that the
6 "Revolutionary Flag" was replaced by another magazine called --
7 if I remember correctly -- the "Red Flag", not "Revolutionary
8 Flag", but the "Red Flag", which replaced the "Revolutionary
9 Flag" after 1975.

10 [13.54.52]

11 And he also mentioned the special format of the "Revolutionary
12 Flag". He said it was published as a booklet, and it did not look
13 like the documents presented to him in Court last week. And with
14 regard to the interview -- or the notes taken by spy -- Hun Sen
15 spy number 9 -- he said that he challenged the authenticity
16 because this person could not be trusted to give an accurate
17 statement of the interview they had had together. This person was
18 a spy, my client did not know that at the time. He learned so
19 later, and therefore this person had a different agenda and
20 cannot be trusted to have given an accurate account of what was
21 discussed during this chit-chat.

22 These documents are important, not only because the prosecutor
23 has presented them to our client, but they're also important, we
24 maintain, as they give evidence -- or are supposed to do so -- as
25 to the role of the Accused -- of our client -- the role our

1 client played in the period relevant for this mini-trial: the
2 1975-1976 period. He is accused of having co-authored the
3 "Revolutionary Flag". If not so, at least he's accused of having
4 contributed toward the formulation of the policies mentioned in
5 those documents.

6 [13.56.37]

7 This is evidence that goes directly to the role played by our
8 client in the facts mentioned in the mini- indictment. And for
9 that reason, we maintain that the threshold for admission of
10 those documents should be high, and not low -- or lower. As we
11 have argued this morning, a lower threshold can be applied to
12 those documents which are only relevant to the context of the
13 facts our client -- or the crimes our client allegedly committed.
14 So, for these reasons, I support the request made by my colleague
15 to hear Youk Chhang, the director of DC-Cam, to authenticate --
16 to establish the reliability of the documents presented to my
17 client. I understand all "Revolutionary Flags" presented to my
18 client, admitted in Court, came from DC-Cam, and therefore must
19 have been seen, evaluated, and maybe also authenticated by Youk
20 Chhang.

21 [13.57.56]

22 And, in addition to that, we think it is absolutely necessary to
23 also hear Khem Ngun, Hun Sen spy number 9, to be questioned on
24 those notes. We think that those notes cannot be admitted as
25 evidence, and in any case no value can be attributed to those

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1 notes as long as this spy, Khem Ngun, is not -- has not been able
2 -- or, has not been heard in Court, and we have not been able to
3 question him or cross-examine him about those notes and the
4 little chit-chat he had with our client. Thank you very much.

5 MR. PRESIDENT:

6 Thank you, Defence Counsel.

7 Ieng Sary's defence team now has the floor. You may proceed.

8 MR. KARNAVAS:

9 Good afternoon again, Mr. President, Your Honours, and to
10 everyone in and around the courtroom.

11 [13.59.14]

12 Let me begin by first supporting the request made by the Nuon
13 Chea team that Youk Chhang come here and give evidence. I guess
14 you could say that he's the closest thing to a custodian of the
15 documents that have come from DC-Cam, and based on the admissions
16 that he has made, he is the best evidence, we would say. Only he
17 can provide certain answers, and he shouldn't be sending someone
18 in his stead. If the other person wishes to come as well, that's
19 fine, but we believe that the best evidence can only come from
20 Youk Chhang himself.

21 In fact, let me depart a little bit and say that I, for one, am
22 rather dismayed why the Prosecution, who so heavily relied on
23 DC-Cam material and has been reliant upon DC-Cam to do some of
24 its legwork -- or at least has relied on the legwork done by
25 DC-Cam and has accepted DC-Cam documents -- why they did not, --

1 in preparation for their case -- why they did not get sufficient
2 evidence from Mr. Youk Chhang -- in other words, why they didn't
3 lay a foundation from Mr. Youk Chhang with respect to what DC-Cam
4 does, how it collects evidence, where the evidence came from, how
5 it has been stored, who analyses and synthesizes where statements
6 are made, what is the game plan -- if any -- are there any
7 modalities in place to ensure that a true, accurate, and complete
8 statement is taken in an objective manner, as opposed to leading?
9 Whether statements are memorialized properly -- are being tape
10 recorded -- thus in the event the individual providing the
11 statement is unavailable, at the very minimum we have an accurate
12 recording of the statement itself, and so on and so forth.

13 [14.01.39]

14 Had the Prosecution done this, and had the OCIJ done this -- and
15 we daresay they have not, though they were requested to do so --
16 perhaps we would be in a better position. Be that as it may, not
17 that we are here, because there are going to be recurring
18 problems with respect to documents coming exclusively from
19 DC-Cam, the best is to have a comprehensive hearing, where at
20 least we are able to glean, from the custodian himself, how the
21 documents were actually collected from where, how they have been
22 stored.

23 And perhaps after listening to Mr. Youk Chhang, all of us will
24 have a certain degree of confidence that the documents are what
25 they purport to be, and are reliable enough to be used in Court.

1 Having said that, Your Honours, as you well know, last -- I
2 believe it was last week or two weeks ago, we filed -- it might
3 have been right before we came back -- we filed a comprehensive
4 objection, by way of annex, to some 4,000 or 5,000 documents.
5 They were categorized according to the categories of the
6 documents, and we provided detailed explanations as to all of the
7 documents that are in -- within the first phase of the trial.

8 [14.03.25]

9 Be that as it may, briefly I want touch upon some of these
10 categories. First, media and public statements -- and this would
11 also include -- such as -- the famous, or infamous, Black Paper
12 and FBIS reports. The FBIS reports, you may recall, Your Honours,
13 I objected to last week, when a characterization was being made
14 as to what was in the report and how comprehensive it was. It
15 was, I believe, a speech by Pol Pot that purportedly was the
16 entire speech, accurately recorded in their particular report.
17 It bears recalling that FBIS is the work-product of the Central
18 Intelligence Agency of the United States, which played a vital
19 role during the temporal period -- well, before '75-'79, not just
20 here but also in Vietnam, and I know -- I don't want to turn this
21 into a political trial but it is well aware that President Nixon,
22 along with Mr. Kissinger, were lying to Congress and the American
23 people when they were saying nothing was happening in Cambodia --
24 that there were no bombings, that they weren't inside. And we
25 know from Operation Menu that that certainly is false.

1 [14.04.58]

2 The CIA was heavily involved, not only here, in Vietnam, but also
3 Laos. So, without casting any aspersions on the Agency itself,
4 because it does provide a vital service, one has to recognize
5 that the Central Intelligence Agency is also in the business of
6 disinformation, and therefore, rather than just simply relying on
7 the document, because it was generated by the Central
8 Intelligence Agency, some indicia of its authenticity and
9 reliability, not to mention the content itself -- whether it is
10 true, accurate, and complete -- is necessary.

11 And, of course, fundamental -- one of the fundamental rights that
12 is enjoyed by Mr. Ieng Sary and the others, and it's a right that
13 perhaps I will touch upon on many of the other aspects of other
14 categories, is the right to confront whoever it is that produced
15 this document. And so he must be afforded that opportunity to
16 confront the author. And I daresay, the authors are known, and
17 the possibilities of us actually getting somebody from the
18 Central Intelligence Agency to lay a foundation as to how they
19 went about in recording, transcribing, producing, and what have
20 you, these FBIS reports is zero. So--

21 [14.06.42]

22 Now, in the event Your Honours see fit that these documents may
23 have some value, nonetheless -- in other words, you treat it, as
24 in the civil law system like hearsay evidence is treated. Hearsay
25 evidence being evidence of an out of court statement offered for

1 the truth therein. If you treat it as such, obviously we would
2 ask Your Honours to be very mindful that it has to -- you have to
3 have independent indicia of reliability of the content itself.
4 And so, if there's other evidence that is being presented by the
5 Prosecution or others that would validate the substance of the
6 FBIS report, then we would say, it being hearsay evidence, you
7 could decide what, if any, weight you would give to it. Keeping
8 in mind, of course, the principle of in dubio pro reo.

9 [14.07.46]

10 Books and articles. This is another one of those broad categories
11 that we fundamentally object to. To have someone who simply came
12 here -- to have a book simply admitted without the author
13 actually coming and explaining the research, the methodology,
14 without us probing the actual experience of the author, and
15 testing the content of the book, again violates our client's
16 right to confrontation. And we would say that, in order to fully
17 ascertain the truth pursuant to Rule 84.1, Mr. Ieng Sary must be
18 afforded his absolute right to confront the witness. So simply
19 introducing a book or an article, even if that author is someone
20 of notoriety, someone that perhaps, upon looking at the name, you
21 would say yes -- I -- we could say he's a credible person. That,
22 in and of itself, is insufficient. The author would need to come
23 in.

24 [14.08.58]

25 And again, because I want to be balanced in my remarks and not

1 say "don't include anything", if you treat it again, you think of
2 it as hearsay evidence. You have to be very careful to see
3 whether the substance of the book or the article can be
4 independently substantiated through independent indicia --
5 others.

6 [14.09.24]

7 That's not to say -- that's not say that, if something is in
8 three or four different books, that we automatically give way to
9 it, because we need to look at who originated the thought, what
10 was the substance, how did they rely -- how do they come up with
11 the particular point, and is there any evidence that would give
12 it support; because it is not uncommon and we would -- we'll
13 probably see this during the trial, that you have something being
14 mentioned over and over and over again in books, when the first
15 author got it wrong in the first place. And it's just merely
16 being repeated with no attribution as to where the original
17 sources was. And keeping in mind that, inherently, authors are
18 subjective.

19 The third category are CPK publications and directives, and this
20 would include, the "Revolutionary Flag".

21 [14.10.34]

22 Again, we object to the admission of these sorts of publications
23 -- the "Flag", the directives -- unless -- and we qualify this,
24 so it's not a blanket objection -- unless the Prosecution can
25 sufficiently demonstrate the authenticity, reliability and

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1 relevance to each document by demonstrating who is responsible
2 for the content of the document.

3 We submit that we are not asking the impossible, but what we are
4 asking is the minimum. Simply because something has a logo on it
5 doesn't necessarily mean that it is authentic. We also submit
6 that the substance itself should not be accepted without some
7 probing as to whether the individual writing that substance
8 actually was in a position of knowing what exactly was being put
9 into that document.

10 To simply say: Well, this is what the "Revolutionary Flag" says,
11 without laying a foundation as to how it was drafted, by whom,
12 who would have been responsible for it, is not enough.

13 So we're asking for some minimum threshold test to be put to
14 these sorts of evidence.

15 [14.12.06]

16 Now, in the event the CPK publications and directives are
17 admitted and if we are not afforded the opportunity to confront
18 the author of those documents, then we would submit that you give
19 it little weight, unless the content of the document can be
20 verified or supported through independent indicia.

21 I want to be very clear on our position, because there seems to
22 be some concern from at least that part of the courtroom that
23 we're here to exclude all of the evidence and obstruct the
24 process. What we're merely saying is: There needs to be some
25 guidelines in place, and in the event such evidence does come in,

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1 that you have to be terribly careful in deciding how much weight,
2 if anything, to give to it.

3 Meeting minutes, CPK meeting minutes, we object to, just as we
4 object to the other sorts of documents, unless the Prosecution
5 can sufficiently demonstrate the authenticity, reliability and
6 relevance of each of these documents by demonstrating who's
7 responsible for the content of the documents.

8 We understand it is -- once these documents come in, are
9 admitted, then it is up to us to demonstrate to the Trial
10 Chamber, if that is our position, that is, to show that they're
11 unreliable, for us to question the content of it. But if, for
12 instance, we are not afforded the opportunity to confront whoever
13 it is who produced them, then obviously how is it possible to
14 confront the content?

15 [14.14.16]

16 Were the minutes written contemporaneous to the meetings? Were
17 they written thereafter? Who was actually present? What were the
18 actual -- what was the actual content of the conversations or
19 discussions taking place?

20 Of course, the Prosecution is not going to be in a position to
21 produce witnesses to answer all of those questions, but they
22 should be able to produce some witnesses at some point, and, we
23 would submit, the earlier, the better, keeping in mind that Your
24 Honours are, in effect, deciding the order of the witnesses. But
25 the Prosecution should be, at least, urging the Trial Chamber to

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1 hear certain witnesses that would lay a foundation. And this is,
2 I believe, the problem, the core problem that the Defence has
3 with certain documents being used: a foundation hasn't been laid.
4 It is not fault of the Prosecution, because the witnesses are
5 coming in the order in which, perhaps, they had not anticipated.
6 So now is the time for the Prosecution hired to step up to the
7 plate, and hopefully we will hear how they intend to lay this
8 foundation, through which witnesses.

9 [14.15.36]

10 And so if, for instance, Your Honours do -- as you do already,
11 provide a list of witnesses that do not necessarily provide for
12 the laying of the foundation at this point in time, the
13 Prosecution would be able to tell all of us that certain
14 witnesses that may appear in the future are -- will lay the
15 foundation. So, subject to a connection with the testimony of
16 other witnesses, where they will be able to lay the foundation,
17 they should be entitled to ask certain questions. And we can say
18 with a certain degree of confidence -- that is, the Ieng Sary
19 defence -- that were this to happen, were the Prosecution to list
20 the names of witnesses it believes would lay the foundation, and
21 if they were to announce at any particular point that the - that
22 it is subject to a connection -- in other words, that showing a
23 document, the foundation hasn't been laid, but the foundation
24 would be laid down the road - we, for one, would not be objecting
25 to that procedure. But we would welcome, as soon as possible,

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1 because only the Prosecution knows its case-- And presumably,
2 after so many years of preparing their case, they would in fact
3 have anticipated this problem. Especially since they come from --
4 at least the ones at the very top come from an Anglo-Saxon
5 system, so they know that this is, sort of, one of the primary
6 objections being made to documentary evidence -- the lack of a
7 foundation.

8 [14.17.26]

9 And we submit that, whether it's Anglo-Saxon or Romano-Germanic,
10 it matters not. You still have to go through authenticity,
11 reliability and relevance. And you simply can't say: Well, Your
12 Honours, you're entitled to think about all of this at the end,
13 freely evaluate it, and so let's throw everything in, including
14 the kitchen sink, and then we'll figure it out at the end. It
15 doesn't work that way. I think a certain amount of screening has
16 to be done here, because, if you're going to be putting documents
17 to witnesses, especially an accused, the Accused has certain
18 rights that he's entitled to, one of which is a document that is
19 being presented to the witness at least has already been
20 demonstrated to the Court, and the Court has already ruled upon
21 it that it is authentic and reliable.

22 Telegrams. Again, same objection, Your Honours. In other words,
23 this is a repeating theme that I will have concerning CPK
24 material. Again, the telegrams, we submit, should not be
25 admitted, unless the Prosecution can sufficiently demonstrate the

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1 authenticity, reliability, and relevance to each of these
2 documents.

3 [14.18.49]

4 Presumably, when we get to those -- that area where documents of
5 this nature will be presented, the Prosecution, through a
6 particular witness, is going to demonstrate to the Trial Chamber
7 how telegrams were generated, how information flowed from the top
8 to the bottom and from the bottom to the top. And based on that,
9 Your Honours will make a determination, and again, in the event
10 you admit it -- and we suspect you probably will be admitting it
11 -- that when it comes to the weight, you consider certain factors
12 as I've indicated earlier. And to save time I won't repeat
13 myself.

14 [14.19.40]

15 Suspect statements.

16 I'm pausing a little bit because I want it to sink in. One would
17 have the impression that, oh, the suspects gave statements. And
18 perhaps it's because of my own training, when I think of
19 statement, I'm thinking of something that was given to an
20 investigator.

21 And so what is coined as a statement may be a remark that was
22 made or picked up in the press, or it may be some sort of an
23 interview done by a reporter or a journalist who then writes a
24 book.

25 We would submit that this broad category be excluded as well,

1 unless the -- it's in accordance with Rule 87.3(c), and Mr. Ieng
2 Sary's afforded the right to confront the author the document.
3 So, to give you an example, if you have, for instance, Mr. Heder,
4 who, with Elizabeth Becker, has an interview with Mr. Ieng Sary,
5 the statement, before being used -- Heder and/or Becker should
6 come in and give evidence. Prior to giving evidence, they should
7 -- the Defence and all the parties as well should have a copy of
8 any recordings that were made because, unless the statement was a
9 verbatim statement of question and answer, question and answer,
10 it calls into question the reliability of the statement itself.

11 [14.21.35]

12 Just to give you an example, was the question that was posed
13 leading or was it an open ended question: Tell us what happened?
14 In one particular statement, if you look at Mr. Heder's approach,
15 he starts by giving an explanation of what he believes, and then
16 requests a comment, in other words, feeding his opinion, which
17 may or may not necessarily be shared by the individual, and then
18 asking for a comment.

19 We submit that, if we were going to have these sorts of
20 statements coming in, then the authors should be here. If
21 something was picked up on the media, it is not a statement,
22 because -- What was left out? In what context? Was it accurate?
23 So, simply because you have a newspaper article doesn't
24 necessarily mean that it automatically is true, accurate and
25 complete. And we submit that the author should come in and be

1 cross-examined.

2 [14.22.47]

3 This goes for quotes -- quotes and speeches. So anything that
4 they claim is a -- comes under the broad category of statements
5 should be excluded unless some indicia of reliability -- And we
6 submit, in this instance, the author himself needs to come in.
7 And we need to have certain material from the author. And if the
8 author did not take -- did not record it, fine. If they don't
9 have their handwritten notes, that's fine. That doesn't mean that
10 they cannot give evidence, but it means that you, Your Honours,
11 have the right, after hearing from the parties, after the
12 cross-examination of the witness -- you are then in a position to
13 determine how much weight, if any, to give to those statements
14 that supposedly are attributed to the witness or to the Accused.
15 Because you have to factor in the ability, especially when it
16 comes to the Accused, the ability to actually confront.

17 [14.23.58]

18 So if, for instance, a journalist or a so-called historian comes
19 in and says: X told me Y, but I have no notes, I have no
20 recording, take me at my word, you should be able to then factor
21 in, at the end of the day, at the end of the trial, how much
22 weight you wish to give that piece of evidence. And of course,
23 going back to what I said earlier, if there are other independent
24 indicia that would support someone or somehow that statement,
25 then of course you may give that statement, unverifiable as it

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1 may be, more weight than you would if there's nothing else there
2 to support it, other than a witnesses' mouth.

3 [14.24.45]

4 Written records of OCIJ interviews and confrontations. Again, we
5 submit that those cannot come in, unless we have a right to
6 actually cross-examine those individuals. So simply because the
7 OCIJ took a statement doesn't mean that it comes in
8 automatically.

9 Which brings me to Duch. Anything associated with Duch should not
10 come in unless Duch himself comes in to give evidence under oath
11 -- under oath. At this point, he's not being tried. He entered
12 his plea of guilty after giving all of that evidence, and even
13 before that. Now he's coming in as a witness. He needs to be put
14 under oath. He needs to realize that, if he's less than - less
15 than candid, that he will be subject to perjury. And since he is
16 available -- he's readily available -- whether these are
17 statements to the OCIJ, whether they are written answers to OCIJ
18 questions or whether it is his testimony itself, Duch has to come
19 in. And we would submit, Your Honours, we would submit that the
20 best evidence is Duch's mouth.

21 [14.26.10]

22 So rather than bringing in -- the evidence in and saying: Well,
23 do you agree with this, we are of the position that Duch needs to
24 come in and give a narrative. And anything that he has said in
25 the past can be used in order to impeach - in order to impeach

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1 him or, if he is impeached or his credibility is called into
2 question, to use that material to validate his testimony in
3 chief.

4 But that's our position, Your Honours. Duch has to come here, and
5 we cannot simply rely on his statements.

6 The same thing would go with witness statements and these OCIJ
7 written records of witness interviews.

8 Now we've touched upon this before. I'll say this again, Your
9 Honours: we believe that a summary that's made by the OCIJ
10 investigator -- And keeping in mind that we're not in a country
11 like France, where you have highly trained judges with highly
12 trained judicial police, with -- have a particular modus
13 operandi, they have modalities in place. Here we're dealing with
14 investigators from all sorts of different jurisdictions and
15 different approaches.

16 [14.27.33]

17 And how one approaches an interview versus another are two
18 different matters. But we have seen already, this far, the value
19 of actually having the transcription of the interview itself,
20 because the summary doesn't always reflect the transcription.

21 Now, I understand that we are in the civil law system but I do
22 think that we have to be careful not to use that as an excuse.
23 Every time some Anglo-Saxon lawyer stands up to say, well, he
24 just doesn't understand, we're in the civil law land -- no.

25 Think back. You have Co-Investigating Judges summarizing what the

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1 statement is, and in fact, as I understand it, it is what --
2 their summary that's controlling over the actual verbatim
3 question-answer-question-answer that might be -- that you may
4 have a transcript of.

5 Well, that may have been the case before we had recordings, where
6 it was necessary for the Investigative Judge, when interviewing
7 someone who may not be articulate, to sort of put the narrative
8 of the witnesses' testimony -- or witnesses' statement in some
9 kind of a coherent fashion that more or less summarize with
10 precision the witnesses' statement. That's only natural. But now
11 that we have tape recording, that's the best evidence.

12 [14.29.05]

13 Now, we're not submitting that we can just simply bring in all of
14 those recordings on each and every occasion, but we do feel that
15 Your Honours should have that available in all three languages so
16 that no Judge has an advantage or disadvantage over the other.

17 And we believe that, rather than the summary, that more reliance
18 be placed on the actual interview. But if we're not going to rely
19 on this - on the interview, we will certainly say the evidence is
20 from the witness himself, or herself. And if the witness is not
21 available, but nonetheless, for whatever reason, if you feel that
22 it is in the interest of justice that that witness's statement
23 comes in -- we would submit that the statement is the actual
24 recording, not the summary.

25 [14.30.08]

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1 I believe I've made this point earlier. Perhaps not all of you
2 may agree with me, but nonetheless that is our position.
3 Statements, biographies by witnesses who are deceased. So
4 statements or biographies by witnesses that are deceased,
5 obviously, we fundamentally object to any of those biographies or
6 statements coming in, because we are not, in a position, on
7 behalf of Mr. Ieng Sary, to cross-examine those individuals. And
8 I believe this issue did come up, Your Honours, in Case 001. And
9 I alluded to that earlier this morning, and so I won't go into
10 the details of that.

11 ECCC filings and records of proceedings. And by this, I mean
12 written records of adversarial hearings, written records of
13 initial appearance, requests for investigative action by the
14 parties. We submit that these categories of documents are
15 immaterial. To suggest that because I -- we, on behalf of Mr.
16 Ieng Sary, filed an investigative request, and in that request we
17 put in the context under which the request should be made, why
18 it's made, and perhaps even had a historical aspect to it, that,
19 in and of itself, is not evidence; that is our position. And
20 based on our position, we're making a request for investigation.

21 To now turn around and for the prosecutors to say: Ah-ha, this is
22 evidence -- keeping in mind we're at the - at the investigative
23 stage, where we're asking for action to be taken by the
24 Investigative Judges because we, the Defence, were not permitted
25 to do any investigation. But we submit that, no -- absolutely no

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1 weight, zero weight can be given, and none of those documents
2 should be admitted.

3 [14.42.34]

4 What happened at the investigative stage happened. Now, the
5 Prosecution must rely on credible evidence. And we submit that
6 the categories, these sorts of categories, the ECCC filings, do
7 not fit within Rule 87.3(a) requirement.

8 There is a BBC video -- and I believe its D299.1.46R, and this
9 allegedly is a video of Mr. Nuon Chea being interview, where
10 apparently we don't have the entire interview, we don't have the
11 original Khmer version of what exactly he said, as opposed to
12 what was translated. And so we would - we would submit that such
13 evidence as this particular video is not -- should not be
14 accepted, because we cannot ascertain, contextually, how accurate
15 this interview is. At the very minimum, one should be able to
16 hear Mr. Nuon Chea in his own language, and perhaps, from there,
17 we might be in a better position to see whether it's the entire
18 interview or just snippets of an interview, where you have, in a
19 sense, a montage to create a narrative that was desired by the
20 individual who was making the video.

21 Mr. Ieng Sary's biography, which is D199/26.2.128, again, the
22 Prosecution would need to come in -- would need to bring forward
23 some evidence as to how this biography was created, when, under
24 what circumstances, where was it found, how reliable it is, and
25 so on and so forth.

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1 [14.34.53]

2 So simply because it has some sort of a title doesn't necessarily
3 mean that it has any particular -- not just weight, but that it's
4 - that it should be admitted.

5 Finally, Your Honours -- and I appreciate your attendance to my
6 presentation, because I don't -- I believe I'm just about time --
7 out of time -- new documents. One particular, for instance, just
8 by way of example, is this Eiji Murashima, "The Young Nuon Chea
9 in Bangkok". Now, we object to this new document cited by - It
10 was cited by the OCIJ in the Historical Background section of the
11 Closing Order.

12 [14.35.41]

13 This document, we submit, is new. It is not available in ZyLAB,
14 or at least, if it is, we have not been able to locate it -- and
15 it has no ER number -- ERN number. Now, if we are incorrect, then
16 we apologize for wasting your time in bringing this matter up.

17 But as far as we are - we are aware of, it is not available in
18 ZyLAB. We cannot comment specifically on this document, and we do
19 not have access to it. So, therefore, we are somewhat at a loss.
20 But we would submit that this sort document fits well within one
21 of our earlier objections: the author himself would need to come
22 in to be cross-examined on this matter before it can just simply
23 come in.

24 Your Honours, as you well know we have filed numerous submissions
25 concerning the admissibility of evidence.

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1 Because of time limitations, obviously, I wasn't going to go into
2 -- on all of them. Suffice it to say, through my comments I
3 incorporate, by reference, all of the legal and factual arguments
4 we have made concerning the admissibility of evidence.

5 [14.37.04]

6 And again we wish to thank you for the time given to us to
7 discuss these issues. Thank you very much.

8 MR. PRESIDENT:

9 Thank you, Defence Counsel.

10 It is now appropriate time for a break. We will have a 20-minute
11 break, and we shall resume.

12 (Court recesses from 1437H to 1505H)

13 MR. PRESIDENT:

14 Please be seated.

15 The Defence, you may now proceed.

16 MR. IANUZZI:

17 Thank you. I'd just like to inform the Chamber that we are
18 informed that Nuon Chea is sleeping in the holding cell, so I'm
19 not sure how that fits in with remote participation. He's
20 sleeping, he's not participating, he's waived his right to
21 participate.

22 So could he please go back to the detention centre?

23 MR. PRESIDENT:

24 Prosecutor, you may proceed.

25 MR. SMITH:

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1 Thank you, Your Honours. As Your Honours are aware, the detention
2 centre doesn't have the videos -- video facilities for any of the
3 Accused to participate in the proceedings through the telephone
4 and through the screen.

5 Whether Mr. Nuon Chea decides to sleep or nod off, that's a
6 question for him, but it is important that, at this trial, that
7 these Accused are present for these proceedings, unless there is
8 a significant reason as sickness or something like that.

9 So we would object to the Defence application that he be taken
10 back to the cells, because then he doesn't have the opportunity
11 to participate and perhaps wake up when he wants to listen to the
12 proceedings. Thank you.

13 [15.07.33]

14 MR. PRESIDENT:

15 Thank you, the prosecutor.

16 The Chamber observes that what was raised by the defence for Nuon
17 Chea was repetitious. And the Chamber, once again, reiterates our
18 ruling.

19 [15.07.59]

20 It is the procedural measure that the Accused shall participate
21 in the proceeding, in accordance with the Internal Rules.

22 Defence, you are not - you're not given the floor.

23 We would like to give over -- hand over the floor to Khieu
24 Samphan defence.

25 MR. KONG SAM ONN:

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1 Thank you, Mr. President, Your Honours. Good afternoon.

2 I would like to make a few observations on the -- our objections
3 on documents.

4 This morning, we insisted that there be a confrontation on the --
5 or examination on the documents intended to put before the
6 Chamber, and we reiterate our position that we would object
7 against any assumption of admissibility, particularly on the
8 document classified as E3 document.

9 This afternoon, we have been requested to make our observation on
10 the footnotes in the Closing Order and various corresponding
11 paragraphs relating to the historical background of the
12 Democratic Kampuchea. So the hearing this afternoon gives me an
13 opportunity to reiterate that our arguments are grounded with
14 reasonable points.

15 I would like to point out my argument by pointing you to the
16 various documents which we have reviewed, particularly documents
17 in -- identified in the footnotes of the Closing Order. And we
18 also note the various documents relating to the historical
19 background of the Democratic Kampuchea.

20 [15.10.39]

21 First, certain documents were not even incorporated in the
22 investigation, for example footnote number 36/55, 41/20, and
23 portions of footnote 33.

24 Second, we observe that, for the existing documents in the case
25 file, we find that it does not have the reliable basis. For

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1 example, it is not consistent, or it fails to collaborate with
2 one another. So, what was in the footnote differs from what was
3 extracted, for example document B288/4.23.1, footnote number
4 36/58, and footnote 36/59.

5 The document in French occasionally corresponds to the English
6 version. However, they differ from the Khmer version. So the same
7 documents contain different substance in the various language
8 versions. Document 288/4.25/1, footnote number 36/59, and
9 footnote 36/63.

10 In addition, a number of documents does not have a specific date
11 indication. And there is no indication of a document from the
12 Democratic Kampuchea regime. The original language of these
13 documents were in Khmer, but they were translated into English
14 language. And these documents may have been translated by the
15 translation pool in the court or by other translators from the
16 other sources. For example, document D366/7.1.559, footnote 25.
17 [15.14.12]

18 I would like to reiterate that the documents whose original
19 language is in Khmer, and as a matter of fact, the Khmer version,
20 which is the original, was not kept in the case file, but instead
21 the English version was kept in the case file, and consequently
22 it was translated from the already translated English version
23 back into the source language that was Khmer language.

24 Furthermore, certain documents are completely irrelevant and they
25 cannot be considered as evidence, for example document D160 and

1 D160/2, footnote 26, and document D84/1, footnote 46/32 – 37

2 [correction, interpreter] -- 37.

3 [15.15.34]

4 As for the endnote concerning the general historical background
5 of the Democratic Kampuchea, there are various -- different kinds
6 of documents, and I would like to classify them into three
7 different categories.

8 The first category, relating to the reason – the updating
9 information of the Democratic Kampuchea, starting from 1970 to
10 1979, these documents belong to the Communist Party of Kampuchea
11 or for the GRUNK or FUNK, that were collected after the demise of
12 the Democratic Kampuchea.

13 The second category of the documents are classified as public
14 documents. These include the interviews, newspaper articles
15 before and after the Democratic Kampuchea, and there are various
16 articles written by authors from various universities and other
17 places.

18 The third category of documents are judicial documents: the
19 written statements of witnesses in the course of the
20 investigation, the transcription of the interviews, as well as
21 the testimony provided by witnesses in court, particularly in
22 Case 001.

23 [15.17.42]

24 Next, I would like to explain the distinct natures of the three
25 different categories of documents.

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1 Documents concerning the contemporaneous DK documents.

2 (A) The lack of the proper custody of documents.

3 The contemporaneous DK documents was discovered and was indexed

4 in the footnotes in the Closing Order, and those documents was

5 mainly retrieved from the Documentation Centre of Cambodia. And

6 certain of such documents do not - we do not have idea as to how

7 the DC-Cam gathered such documents in the first place. For

8 example, document D313/1.2.258, document D366/7/1 - sorry --

9 .1.59, document OI20/31, document D366/7.1.7.

10 Oftentimes; those documents do not have a specified date on them.

11 For example, document D366/7.1.59.

12 For other documents, for instance the interview by the

13 Documentation Centre of Mr. Chhang Youk and other witness

14 interview, indicate loosely the source of information. However,

15 there was still a lot of grey areas in that. For example,

16 documents received from the Swedish collection, the documents

17 provided by the Swedish Government. We have three bulletins from

18 FUNK.

19 [15.21.20]

20 So the question is: How were this Swedish collection be compiled

21 and guarded? Were those documents guarded by any individuals? And

22 what - or when were they collected? And how the chain of custody

23 be maintained before it was sent to the DC-Cam?

24 Documents received from the Tuol Sleng archive, we have the

25 "Revolutionary Flags", five volumes, and the "Directives of the

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1 Communist Party of Kampuchea" dated the 20th of May 1976.
2 The five volumes of these "Revolutionary Flags", I do not want to
3 dwell on its content.
4 And one copy of the "Directive of the Communist Party of
5 Kampuchea", document D366/7.1.61, the Defence would like to seek
6 additional information regarding this document, and as well as
7 documents received from Tuol Sleng archive. We would like to know
8 whether or not those documents was kept in the archive from 1979
9 until the date when the Documentation Centre of Cambodia
10 collected it and transferred into its custody.
11 However, if those -- So we would also like to question the very
12 reason why the Tuol Sleng archive has in its custody the
13 documents, and where did they get those documents from, and when
14 were those documents transferred to the Documentation Centre of
15 Cambodia, and who were responsible for transferring those
16 documents to the DC-Cam.
17 [15.24.38]
18 As for the documents received from the Ministry of Interior, Mr.
19 Chhang Youk informed the Co-Investigating Judges that a large
20 volume of documents were collected by the Vietnamese authority
21 and kept in Ministry of Interior.
22 Do they know as to what kinds of documents were kept there? And
23 who knows where did the Vietnamese authority collect those
24 documents? Mr. Chhang Youk indicated that Khmer people assisted
25 the Vietnamese authority at that time to keep those documents,

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1 and he suggested that those documents be titled in Khmer. The
2 Defence, however, have not received any information of the
3 subsequent custody of those documents. So the Defence are of the
4 opinion that summoning those people to come and testify before
5 the Court to explain the chain of custody of such documents is
6 very crucial.

7 Another category of documents are documents generously donated by
8 different sources to the Khmer Rouge Tribunal. We have seen one
9 copy of the "Directive of the Communist Party of Kampuchea" and a
10 "Decision of the central committee of the Communist Party of
11 Kampuchea", which was also sent to the DC-Cam for its custody as
12 well.

13 [15.26.59]

14 As for the directive of the Communist Party of Kampuchea, Mr.
15 Chhang Youk informed the Co-Investigating Judges that Mr. Ben
16 Kiernan had given this document to the DC-Cam sometime in 1995.
17 However, the Defence did not have any information or knowledge as
18 to how Mr. Ben Kiernan himself had guarded such documents or
19 information.

20 The decision of the Central Committee, we found that there was
21 some contradictory information there.

22 (B) The Defence observed that there has been a lot of
23 inconsistency or discrepancy among documents.

24 For example, some directives are dated March 1976 in document
25 OI6.3. These documents may have been provided to Mr. Ben Kiernan

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1 by His Excellency Khieu Kanharith. Mr. Ben Kiernan informed the
2 Co-Investigating Judges that, sometime in 1980 or 1981, Mr. Khieu
3 Kanharith gave him the original copy of that, and he made copies,
4 and after that he returned the original. According to a letter
5 dated on the 30th of March 2010, Mr. Ben Kiernan informed the
6 Co-Investigating Judges that he found this document
7 contemporaneously when he found the minutes of the Standing
8 Committee meeting of the Democratic Kampuchea, in the home of one
9 of the former Khmer Rouge cadres along Kampuchea Krom Boulevard.
10 In an article written by Mr. John D. Ciorciari and Mr. Chhang
11 Youk, entitled "Documenting the Crimes of Democratic Kampuchea",
12 the co-authors indicated that those documents were sent to Mr.
13 Khieu Kanharith through a representative of the Office of the
14 Friend -- that is, the Friends of the People's Republic of
15 Kampuchea following the People's Revolutionary Tribunal handed
16 down the judgement -- it's judgement.
17 As for the archive for the original documents, Mr. Khieu
18 Kanharith clarified in the letter dated 26 April 2010 that he
19 could not guarantee the maintenance of those documents, but all
20 the documents that were sent to Mr. Ben Kiernan were copied from
21 the original copies.
22 Seeing the importance of those documents in Case 002, the Defence
23 believe that it is important to examine those documents, and in
24 this respect it is imperative that we summon those involved to
25 come to testify in Court. And this would enlighten the Defence as

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1 to, one, how they discovered those documents and, second, why
2 certain documents were lost in the chain of custody of those
3 documents.

4 Regarding the possession of the most confidential documents, it
5 is the right of the Defence team to request for such documents in
6 order to examine them. That means the documents with this
7 category as the most confidential by this Court.

8 [15.31.59]

9 The Co-Investigating Judges had conducted investigation into
10 certain documents through the various correspondence, in
11 particular the correspondence with Ben Kiernan, were considered
12 most confidential, including document D269/4, which is
13 correspondence with Ben Kiernan.

14 In September and October 2011, the Defence raised the issues of
15 having access to the most confidential documents in the case
16 file, and on the 28 November 2011, the Chamber, through a
17 memorandum, issued its decision that the documents are being
18 reviewed by the Chamber, and parties shall be notified later once
19 it is decided by the Chamber.

20 [15.33.31]

21 The second type of documents that is the public documents, they
22 include:

23 (A) Books and articles written by researchers of various
24 institutions.

25 I'd like to state our position that it is not possible to accept

1 any document in any circumstance, only certain pages or certain
2 extracts from the books can be admitted. We shall be reminded
3 that, in Case 001, it states that books are not evidence as
4 stipulated in Rule 87.2; so books are not considered evidence.

5 In addition, and as I stated earlier, new documents after the DK
6 period, including books, cannot be accepted at this stage for the
7 following reasons: those books mainly relied on the documents
8 which we cannot verify.

9 Also, for -- articles written by researchers by other various
10 institutions cannot be accepted. We reject the admissibility of
11 those documents unless the authors appear before the Chamber.

12 What we do want is for those authors to indicate to us the
13 sources of those documents when they conduct their research and
14 writing those articles or books.

15 We submit that, in order for a document to be admitted, the
16 Chamber and parties need to have all the sufficient background
17 information in order to determine its identification, that is for
18 each identification, and for the authenticity of the supported
19 documents, either through additional material or testimony, and
20 for the content of a document, when the document is relied on
21 various other documents. In this instance, the Defence would urge
22 to seek similar request that we just mentioned earlier in points
23 1 and 2.

24 [15.36.49]

25 For the aforementioned reasons, we object the acceptance of books

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1 or articles written by researchers by various universities or
2 institutions, which were mentioned in the footnote of the closing
3 orders.

4 [15.37.18]

5 We need to request for the appearance before this Chamber in
6 order to verify those documents. If they do not appear in -- But
7 they do not appear in person. And if they are not summoned to
8 appear before Chamber in relation to the documents stating the
9 role of my client, then my client has the right to confront the
10 author of that document, pursuant to Rule 87.4.

11 (B) In relation to the media, we object to accepting any media
12 reports or articles mentioned in the footnote of the closing
13 orders, as the authors of those articles have not been summoned
14 to appear before the Chamber; namely, document D366/7.1.278.

15 [15.38.46]

16 Also in relation to the media report, that is the Foreign
17 Broadcast Information Service, FBIS, as mentioned by Michael
18 Karnavas, the Prosecution also stated that these documents were
19 created CIA for the purpose of the US Government and they were
20 collected by the various special stations of the CIA who
21 monitored the general broadcastings throughout the world. The
22 documents attached to the annexes were those believed or alleged
23 to be in relation to the events in Cambodia, and also from
24 January 1975 through 31st January 1979, the duration in which the
25 CIA gathered that information. It includes the translations of

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1 the official communiqué broadcast by the DK radio -- that is by
2 the Royal United Government of Cambodia.

3 [15.40.48]

4 The Prosecution classified those documents into two groups: that
5 is, for example, the writers, the AFP, as one group, and we
6 object to that for the same reasons that we raised earlier for
7 the media reports; and, number two, (inaudible) the monthly
8 report that was broadcast by the -- on the radio by the Royal
9 Government of -- National Union of Kampuchea, we also object to
10 this type of document as we do not have it in our possession or
11 access to the original taped or written document made by the CIA.

12 One witness who provided a statement during the investigative
13 stage states that he listened to the broadcast by the DK radio
14 and he did not understand anything because the wording was
15 completely changed -- that is, the wording used during the DK
16 period was different from the word used by the local people, as
17 they incorporated mostly the revolutionary vocabulary, and only
18 if we have access to the tape we would be able to ascertain the
19 truth.

20 [15.42.36]

21 For the FBIS documents, we do not have any original in the Khmer
22 language, and the Chamber does not have any intention to summon
23 the translator or any CIA agent to verify to that effect.

24 C) In relation to the interviews, I object to the acceptance of
25 any interviews with the Accused without the provision of the

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1 recorded tape. There is no single document was transcribed in
2 full during the interview. Mainly, they are a summary of the
3 interview by a third person, and sometimes that third person was
4 not even present during the interview.

5 [15.43.47]

6 There is no single document determining when the interview was
7 taken place and who was attending the interview, how long did it
8 take, and for how many days, and under what circumstances, or
9 even the identification of the interviewer was missing.

10 When we do not know the identity of the interviewer, the document
11 should be rejected.

12 And we also urge for the summons -- summoning of those
13 interviewers to appear before the Chamber.

14 For the third category of documents, that is the judicial
15 documents, including the witness interviews during the
16 investigative stage, the transcript in Case 001, just to name a
17 few, in the footnote of the Closing Order for the portion
18 relation to the historical background, there are witness
19 interviews who were summoned to appear before the Chamber as well
20 as the transcripts of the witnesses in Case 001 and the interview
21 and the -- and the interviews of those witnesses who were not
22 summoned to appear before the Chamber.

23 We object to the witness interviews mentioned in the footnote of
24 the Closing Order and for those documents who were summoned to
25 appear before the Chamber and failed to do so. We also object to

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1 the testimonies of witnesses in Case 001 and the interviews of
2 the witnesses who were not summoned to appear before the Chamber.
3 [15.46.06]

4 I would like to remind the Chamber that we cannot use a piece of
5 document by relying on Rule 87.3(d) of the Internal Rules if my
6 client does not have the guarantee of his right, mentioned in
7 Rule 84 of the Internal Rules -- that is a rule to an adversarial
8 confrontation with the person who made the testimony or who were
9 interviewed.

10 We also would like to remind the Chamber that we raised the
11 issues already on the 22nd of July 2011 in document E96/4, that
12 sometime it is possible to accept the previous statements without
13 having the person interviewed or appear, but that should only
14 happen in special circumstances and that also should fall under
15 the strictest circumstance.

16 At that time, we also state that it should only come on a
17 case-by-case basis. And of course we have various examples of
18 those documents, for example E91/10, D107/3, D107/2, and D91/3,
19 D91/25, D167, D147, D201/8, D91/4, D91/9, D125/160, D200/3,
20 D200/9, D200/5, D141/1, D199/20, etc. These documents prove the
21 lacking that we cannot accept.

22 [15.49.48]

23 I'd like to reiterate that it is important to have a debate on
24 documents, and based on a case-by-case basis for each document,
25 and that should be done through the entire proceedings, or

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1 through all the stages of the proceedings.

2 For the documents mentioned in the footnote of the Closing Order
3 and for all the documents listed in an attachment or submitted by
4 any party, no document shall be admitted or has the weight or
5 probity value without having it debated.

6 And as also stated by the president, pursuant to Rule 88 -
7 rather, 78.2, that other documents shall be placed before the
8 Chamber for discussion -- I apologize, it's Rule 87.2, that the
9 document shall be placed before the Chamber and subjected to
10 examination.

11 I'd like to recap that for a witness or any individual in
12 relation to the documents shall be summoned to appear so that he
13 or she can verify the sources of the documents, and in
14 particular, in this case, Mr. Chhang Youk, the Director of the
15 DC-Cam, he shall appear to provide clarification to the parties
16 so that we can ascertain the relevance and credibility of those
17 documents.

18 [15.52.36]

19 We also can assert that Mr. Chhang Youk is not the only one who
20 is dealing with those documents. His other employees also be
21 requested to appear to provide the clarification on the
22 credibility of those documents.

23 I'm grateful, Your Honour.

24 [15.53.00]

25 MR. PRESIDENT:

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1 Thank you, Defence Counsel, for presenting your objections.

2 The time is now appropriate for the adjournment.

3 Before we adjourn, the Chamber would like to inform the

4 Prosecution that they have one hour to respond to the objections

5 raised by the three defence teams.

6 As for the civil -- as for the Lead Co-Lawyers for the civil

7 party, they have 15 minutes to respond.

8 However, today's time has run out, so it will be adjourned to

9 tomorrow morning, and it will commence from that point onward

10 before we touch upon the scheduling for the 17.

11 As the time is now appropriate, the Chamber will adjourn for

12 today's hearing, and we shall resume tomorrow morning, starting

13 from 9 a.m.

14 (Judges deliberate)

15 [15.54.55]

16 Security guards, you're instructed to bring the three Accused to

17 the detention centre and bring them back here tomorrow morning,

18 before 9 a.m. And Mr. Nuon Chea and Mr. Ieng Sary shall be

19 brought to the holding cells, downstairs, so they can follow the

20 proceedings. Mr. Khieu Samphan shall be brought to the courtroom.

21 The Court is now adjourned.

22 (Court adjourns at 1555H)

23

24

25