



Case 002 Evidentiary Hearing: Days 2 and 3

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On Tuesday and Wednesday, January 17-18, 2012, the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) resumed its week-long hearing on evidentiary issues. This hearing provides the parties with an opportunity to debate admissibility issues for proposed sources of evidence.

Summary of January 17 Hearing Proceedings

On Tuesday, January 17, the parties continued to discuss documentary evidence and especially the role of the Documentation Center of Cambodia (DC-Cam).¹ Throughout the day, the defense teams, particularly that of Nuon Chea, reiterated their demands that DC-Cam director Youk Chhang be summoned to testify as an absolute prerequisite to the admission of any DC-Cam-sourced documents.

The prosecution, on the other hand, argued that DC-Cam is a neutral, truth-seeking organization and that it does not matter who from the Center authenticates the documents through testimony, so long as that individual has knowledge of the documents in question. Furthermore, the prosecution argued that there is no need under prevailing international evidentiary jurisprudence for the prosecution to establish the full chain of custody for each document it enters into evidence and that this would be effectively impossible as most of these documents are well over thirty years old.

Later in the day, the prosecution argued that certain documents attributed to the Communist Party of Kampuchea (CPK), and often to Ieng Sary specifically, that discuss the CPK's purported justification for the evacuation of Cambodia's cities in 1975 are all reliable because they often contain similar language and are corroborated by other external factors. Furthermore, the prosecution noted that articles describing killing and starvation derived from interviews of Cambodian refugees in Thailand should be admitted because they provide important contextual evidence relevant to the joint criminal enterprise of which the accused are alleged to have been members. The prosecution noted that Ieng Sary had dismissed such articles at the time, stating

¹ The Documentation Centre of Cambodia (DC-Cam) is an independent Cambodian research institute with a stated focus of documenting and researching the history of the Khmer Rouge period.

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

that only untrustworthy criminals had fled Democratic Kampuchea (DK).² The prosecution noted that these articles are relevant because they establish that the accused were provided clear notice of starvation and killings but failed to take any measures to address these problems.

The defense for Ieng Sary also continued to oppose the admission of articles quoting the accused, such as an article provided to DC-Cam via email and an article authored by journalist Elizabeth Becker. Ieng Sary's defense counsel argued that such documents often mischaracterized or misquoted the accused, due to editorial biases of publications such as the *Washington Post* and *New York Times* and should be excluded based on such unreliability. Counsel for Khieu Samphan added to this opposition by citing a newspaper article that had listed an incorrect date of an interview with Khieu Samphan.

The prosecution responded to the defense's claims of misquotation by citing international jurisprudence wherein similar statements by accused were made, noting that in such cases the judges take into account the circumstances under which the statements were made when they determine the probative value of the statement.

January 18 Hearing

Prosecution Submissions

The prosecution began its submissions for the day by pointing out the importance of contemporaneous documents created by the CPK, which provide insights into the inner workings of the party during the DK period.

The prosecution first discussed the *Revolutionary Flag* and *Revolutionary Youth* booklets. The prosecution outlined some of the physical characteristics of the booklets, pointing out that the cover of the booklets was red and that the number of flags on the cover changed in 1977. These statements were in response to Nuon Chea's claims during testimony that copies of the booklets were not accurate or authentic because the format was changed. The prosecution stated that Nuon Chea was mistaken when he had claimed that after 1975 the name of the periodical *Revolutionary Flag* was changed to *Red Flag*, noting that the title *Revolutionary Flag* appears on the cover of every booklet. The prosecution noted that the flags on the cover of each booklet were indeed red as Nuon Chea had stated but the title remained *Revolutionary Flag*.

The prosecution then discussed some of the content of these periodicals. First, the prosecution noted that the issue number of each booklet corresponded to its date of publication in chronological order. Also, most booklets contained a series of articles, but some issues consisted of a single, long article, usually the transcript of a speech given by a CPK leader. The booklets were also labeled as the "official" publication of the CPK and were published monthly.

The prosecution then went on to display copies of *Revolutionary Flag* on the courtroom monitors, pointing out the various indicia of authenticity contained in the documents. During this process, the prosecution noted that many of the characteristics of the booklets have been

² The DK period refers to the period when the Khmer Rouge CPK government controlled Cambodia from 1975-1979. This period also constitutes the temporal jurisdiction of the ECCC.

corroborated by Nuon Chea himself during his frequent objections to copied versions throughout his testimony.

The prosecution then went through the same process with the publication *Revolutionary Youth*. The prosecution pointed out that only party members received official CPK publications. The prosecution also observed that witness Long Norin testified in December 2011 that he had personally seen the *Revolutionary Youth* publication during the DK period.

The prosecution then noted that both publications were produced by the CPK Ministry of Propaganda and quoted from witness statements provided to the Co-Investigating Judges wherein individuals who worked at the Ministry confirmed the process of publication. The prosecution noted that Nuon Chea himself had previously stated that he and Pol Pot were in overall charge of publishing *Revolutionary Flag*, responsibility for which was officially entrusted to the Standing Committee. The prosecution also noted that the Trial Chamber admitted issues of the periodicals in Case 001, although the accused in that case, Kaing Guek Eav alias Duch, did not object to their admission.

The prosecution further pointed out specific characteristics of CPK publications and noted that the documents submitted by the prosecution allegedly corroborate one another or are validated by known events from the DK period, providing several examples of these documents and events.

The prosecution summed up by arguing that it is “abundantly clear” that primary Khmer Rouge documents contain sufficient indicia of reliability to be admitted into evidence.

Civil Party Commentary on Defense Arguments

The floor was then given to the civil parties to comment on evidentiary objections. Counsel for the civil parties expressed full support for the arguments of the prosecution and added some additional comments on CPK publications. The civil parties noted that many of these publications contain important information and were distributed to party members throughout the DK period. These periodicals provided instruction to local Khmer Rouge cadres on CPK directives, making them quasi-legislative in their effect. The civil parties then provided some additional commentary outlining reasons why CPK publications should be admitted.

Immediately following the close of the civil party submission, a second civil party lawyer rose and requested permission from the Chamber to display a color image of the cover page of a *Revolutionary Flag* booklet the civil parties had recently discovered on the UNESCO website. The Chamber denied this request, noting that each party must stay within the time allotted to them and that it was unnecessary to display the image on the courtroom monitors.

Chamber Comments on DC-Cam Witness Issue

Following the morning break, the Chamber offered some comments on the defense’s demands that DC-Cam director Youk Chhang testify. Chamber President Nil Nonn stated that the Chamber was currently satisfied that a representative from DC-Cam’s management team was scheduled to testify and that, if the Chamber desired to hear the testimony of Youk Chhang specifically, it would call him as a witness at that point.

Nuon Chea Defense Submissions

Nuon Chea's defense then rose and argued that it wished to call a witness from DC-Cam who could testify about the different notations on some CPK documents. Defense counsel stated that this would not inconvenience DC-Cam's management staff and further noted that Youk Chhang had indicated his willingness to abide by the orders of the judges in an article published in the *Phnom Penh Post* newspaper the previous day.

The defense then moved onto arguments about the legibility of certain documents, which it placed on the courtroom viewing monitor. Counsel argued that certain documents in the case file are illegible and should therefore be ruled inadmissible.

Nuon Chea's international counsel then provided further submissions related to documentary evidence. Counsel noted that, although many of the documents submitted for inclusion by the prosecution are "very interesting," most were published more than four months after the liberation of Phnom Penh on April 17, 1975. He further noted that in the prosecution's initial submissions on evidence the previous year (prior to the division of Case 002 into multiple trials), the prosecution submitted that many documents currently at issue are relevant to topics that are unrelated to subjects being addressed in the first Case 002 trial. Following this submission the defense counsel gave the floor to the Ieng Sary defense.

Ieng Sary Defense Submissions

Ieng Sary's international defense counsel began by repeating the argument that the prosecution has been "testifying" regarding the authenticity of challenged documents. The defense then further argued that the prosecution must make an "offer of proof" consisting of an explanation of how each document will be authenticated, such as through the testimony of a proper expert.

The defense next noted that in Case 001 the Trial Chamber itself authenticated certain documents during the deliberative process and argued that this had robbed the defense of the opportunity to challenge such documents.

The defense then argued that adjudicated facts in Case 001 cannot be imported into Case 002 wholesale without independent verification. The defense noted that at the International Criminal Tribunal for the former Yugoslavia (ICTY), in the *Prlic* case, the Trial Chamber required re-authentication of tape-recorded evidence that had already been used in previous ICTY cases.

Next, the defense argued that the prosecution had "pernicious[ly]" sought the inclusion of all documents related to all Case 002 trials because the prosecution is skeptical that additional Case 002 trials will actually occur. According to the Ieng Sary defense, this creates the danger of a trial that is over-reliant on suspect documentary evidence, while marginalizing the use of *viva voce* (live witness) testimony.

As for the authentication process, the defense argued that, if a document has a certain logo or name on it, this fact alone does nothing to authenticate the document. Moreover, for alleged surviving minutes of CPK Standing Committee meetings, the defense argued that, unless the prosecution can demonstrate through a witness how these documents were created, such documents should be excluded.

The defense then argued that the prosecution must provide a more tailored list of evidence related specifically to the Case 002 first trial and that the defense cannot be expected to sift through a mass of documents to find the relevant ones, exhorting that the prosecution “cannot give us the haystack [but must] give us the needle.”

The floor was then given to the Khieu Samphan defense.

Khieu Samphan Defense Submissions

The Khieu Samphan defense first argued that, without sufficient supportive testimony, documents could not be verified and should be excluded. As for the alleged minutes of Standing Committee meetings, the defense argued that these documents were found after the end of the DK period and cannot be authenticated.

Next, the defense argued that, simply because Cambodian Prime Minister Hun Sen gave DC-Cam a document in 1995 that purports to be the minutes of a meeting between the CPK and a foreign delegation, this does little to authenticate the document. Instead, the defense argued that each document’s origins must be more deeply probed, including how the document was originally found and whether it is a copy and, if so, whether it is a copy of a copy.

The defense then argued that the chain of custody for archived documents extends beyond whatever organization currently holds each document, and authentication requires examination of both the documents current and past custodians.

As for another challenged purported CPK document, the Khieu Samphan defense argued that simply because the phrase “American imperialist” appears in the document, this does nothing to suggest that the document is authentic, as the phrase was used widely at the time.

The defense concluded by submitting that the indicia of reliability vis-à-vis the challenged documents proffered by the prosecution are insufficient to authenticate them, and therefore further inquiries must be conducted prior to their admission.

Chamber Observations on Nuon Chea Submissions

The Chamber began the afternoon session by observing that there should be no confusion about the requirements of ECCC Internal Rule 87(3), which covers how evidence is officially placed before the Chamber and reasons to exclude proffered evidence. President Nil Nonn then turned the floor over to Judge Fenz, who clarified some translation issues from the morning session, stating that the Chamber would take up the prosecution’s offers of proof for certain documents as it sees fit moving forward and would satisfy itself of the admissibility of all evidence.

Prosecution Response to Evidentiary Issues

The prosecution was then provided an opportunity to respond to the defense objections from the morning session. The prosecution noted that it is not incumbent on the Chamber, as suggested by the defense teams, to individually authenticate each document in the case file. Furthermore, the

prosecution argued that it had not been “testifying” when discussing documents earlier but rather simply providing the Chamber with an overview of the internal and external characteristics that bolster the credibility of the documents.

As for the documents that the defense argued are illegible, the prosecution noted that such documents are much clearer when viewed on Zylab (the Court’s case file computer program) when compared to the courtroom’s viewing screen. Moreover, these documents have been translated to both French and English, demonstrating their legibility and, if certain lines are illegible, this does not affect the admissibility of the rest of the document.

Regarding the challenged minutes of CPK meetings, the prosecution argued that these documents are critical to understanding the command structure and policies of the Khmer Rouge, which are important considerations to be taken into account for the first Case 002 trial. The prosecution then provided examples of certain documents and explained how such documents contribute to understanding information relevant to the first Case 002 trial. During this portion of its submission, the prosecution noted that Khieu Samphan himself had previously argued that he was not a member of the Standing Committee and used the challenged minutes of Standing Committee meetings as proof of this fact. The prosecution argued that, by doing so, Khieu Samphan had effectively authenticated the documents.

The prosecution next argued that, based on the subjects discussed in the Standing Committee meeting minutes and the lists of attendees provided therein, which often included Case 002 accused, the minutes are presumptively authentic documents. According to the prosecution, these minutes can also be corroborated by the testimony of several witnesses and noted that a scheduled, though unnamed, expert witness will authenticate many of the alleged Standing Committee minutes.

The prosecution then argued that the Standing Committee minutes should also be considered authentic because many of the decisions made at such meetings were effectuated soon thereafter, such as the planned construction of a new airport in Kampong Chhnang. Construction of this airport commenced soon after the relevant meeting allegedly took place, which, the prosecution alleged, can be confirmed by witnesses who worked at the airport construction site.

The prosecution then turned to additional information that it claims will corroborate the accuracy of the Standing Committee minutes and also provided an overview of the topics covered during the meetings. During this portion of its submission, the prosecution noted that, while initially agricultural production was a “prevailing theme,” later in the DK period the meetings became focused on the elimination of perceived traitors and enemies.

The prosecution concluded by arguing that the indicia of reliability for these challenged documents meet the threshold necessary for the Chamber to admit them into evidence.

Civil Party Response to Defense Submissions

The civil parties were then provided with an opportunity to respond to the objections of the defense teams. Counsel for the civil parties noted that, in the view of the civil parties, it is not their role to make extensive submissions on technical legal issues, such as admissibility issues, and thus the civil parties would make only some “general remarks” on the defense objections.

The civil parties argued that, throughout their submissions, the defense teams had attempted to enter into a debate on the probative value of various types of evidence, rather than solely discussing their admissibility, observing that such a debate is premature. The civil parties then concluded its submission by reminding the Chamber of the inclusive evidentiary regime of the ECCC which presumes admissibility.

Additional Arguments by Nuon Chea

Following the afternoon break, the floor was given to the Nuon Chea defense, which turned back to the topic of original document. The defense requested that the DC-Cam representative who is scheduled to testify be instructed to allow the Chamber to inspect originals of all documents.

Following this initial argument, international counsel for Nuon Chea rose and informed the Chamber that, yet again, Nuon Chea had fallen asleep in the courtroom holding cell. The defense informed the Chamber that Nuon Chea was feeling weak and had already waived his right to be present, but counsel wished to simply inform the Chamber that Nuon Chea had slept through large portions of the day’s hearing.

The defense then reiterated its position that all DC-Cam-sourced documents should be excluded unless DC-Cam director Youk Chhang testifies. The defense also repeated its request for the prosecution to indicate which documents it sought to place into evidence had been sourced from DC-Cam.

The defense then repeated its objection to many documents it considers completely irrelevant to the first Case 002 trial. To illustrate this point, counsel provided several examples of documents the defense believes have no relevance whatsoever.³

Following these examples, counsel summed up by arguing that, if the Chamber allows this glut of allegedly irrelevant documents into evidence, the Court is in real danger of “drowning in a lake of irrelevant documents.”

³ One such example was a telegram from Ke Pauk to Office 870 from 1977 outlining the situation along the Thai border.

Additional Arguments by Ieng Sary

The Ieng Sary defense then made additional submissions, first noting its agreement with the Nuon Chea defense concerning perceived over-inclusion of irrelevant documents into evidence. Next, the Ieng Sary defense again alleged that the motive of the prosecution in attempting to bring in such documents is a desire to have all evidence available so it can argue the full panoply of charges contained in the Closing Order due to skepticism that additional trials will take place for Case 002.

The Ieng Sary defense then clarified its objections, stating that it does not categorically object to all evidence but objects to documents the prosecution seeks to use without submitting specific indicia of reliability.

The next category of evidence commented on by the Ieng Sary defense was what it termed “torture-tainted” evidence, arguing that all evidence obtained through torture must be excluded.

Regarding CPK telegrams, the defense then argued that some independent proof beyond the appearance of an individual’s name on a telegram is necessary to establish that such person actually received the document. The defense noted that, although numerous telegrams name Ieng Sary as a recipient, this does not conclusively establish that Ieng Sary actually received such telegrams.

The defense then provided examples of telegrams that named authors such as “Brother Nhim” and “Chan” and objected to the admission of such documents unless some foundation as to the identity of the senders can be laid, preferably in the form of testimony.

Additional Arguments by Khieu Samphan Defense

The Khieu Samphan defense then took the floor and made some additional submissions. Counsel again challenged the sources of documents from DC-Cam. The defense argued that the chain of custody of such documents and relevant dates relating thereto have not been established by the prosecution. Counsel stated that it is not incumbent on the defense teams to challenge specific documents but argued that the prosecution has simply failed to demonstrate the authenticity and reliability of certain documents before placing them before the Chamber.

The defense then argued that, if an organization is considered to be neutral, then documents received from such organization can be assumed to be reliable. However, he argued, documents from an organization with an apparent bias must be scrutinized more closely, apparently alluding to documents from DC-Cam.

Response by the Prosecution

The prosecution was then given an opportunity to respond to the latest arguments of the defense. The prosecution did so by providing a general outline of the evidentiary rules of the ECCC and noting the inclusive nature of Internal Rule 87.

Regarding statements obtained through torture, the prosecution agreed with the Ieng Sary defense that the law forbids the use of such evidence generally; however, the prosecution argued, such evidence can be used to prove that the statement was made under torture. The prosecution further argued that, under the Convention Against Torture (CAT), only statements taken directly under torture, but not all “torture-tainted” evidence, must be excluded as the defense had suggested. Therefore, according to the prosecution, the CAT does not forbid the use of annotations on torture-induced confessions made by Khmer Rouge cadres.

The prosecution further argued that the weight of evidence, such as challenged telegrams, is not an issue currently under consideration by the Trial Chamber. Instead, the prosecution argued that such a consideration properly takes place at the conclusion of the trial, after all evidence is heard.

At this point President Nil Nonn inquired how much more time the prosecution intended to take for its response. As the prosecution planned to take a full additional half hour, the President announced that the Chamber would adjourn for the day and continue the following morning.

As the Chamber announced adjournment of the day’s proceedings, international defense counsel for Nuon Chea Andrew Ianuzzi stood and was recognized by the Chamber. Mr. Ianuzzi stated that the Nuon Chea defense team wished to state for the record that its members are “very pleased” that Judge Fenz was able to transition from reserve judge to sitting judge without any “political interference by the Royal Government of Cambodia.”⁴ Mr. Ianuzzi continued by stating that this “situation, of course, is in sharp contrast to the situation prevailing in other quarters of this Tribunal” and voiced the defense’s support for the incumbent International Co-Investigating Judge, who, he stated, has been prevented from officially taking office by the Supreme Council of Magistrates of Cambodia.

In response to this statement by the Nuon Chea defense, Chamber President Nil Nonn simply stated that Judge Fenz will be substituting for Judge Cartwright during her absence.

The proceedings were then adjourned for the day to resume the following morning at 9 a.m.

⁴ During the week-long evidentiary hearing, Judge Fenz, who is normally a Trial Chamber reserve judge has replaced Judge Cartwright, who will be absent for the entire week.