

KRT TRIAL MONITOR

Case 002 ■ Issue No. 9 ■ Hearing on Evidence Week 4 ■ 16-19 January 2012



Case of Ieng Thirith, Nuon Chea, Khieu Samphan and Ieng Sary

Asian International Justice Initiative (AIJI), a project of East-West Center and UC Berkeley War Crimes Studies Center

And by applying fair process or fair trial rights, protecting the interest of the Accused, making sure civil parties' interests are protected, and also making sure that Your Honours get to see all of the evidence, you can adopt those principle that are the same at the National Courts, and so it can be very instructive for the National Courts as to how trials should progress.

- International Co-Prosecutor William Smith

I. OVERVIEW

From the 16th to 20th of January 2012, the Trial Chamber allowed the Parties to argue their positions on the admissibility of documents in the Case File. The Parties discussed three main legal issues pertaining to the admissibility of evidence: (i) the legal standard for admitting evidence; (ii) the process for putting documents before the Chamber; and (iii) specific objections to documents or categories of documents.

The hearing further focused on two discrete categories of documents: those referenced in the footnotes of the historical background portion of the Closing Order (**E3 documents**), and documents in Annex 1 through 5 of the Prosecution's document list (**A1-5 documents**). The Chamber considered E3 documents to have been put before it. The OCP submitted A1-5 documents for admission.

The Chamber did not make any ruling on the admissibility of specific documents, the guidelines for admitting documents, or the process for admitting documents. In its Scheduling Order, the Chamber indicated that, "it will not make final determinations on the majority of individual documents." Instead, it will rule upon the objections raised by the Defense after it has considered the whole body of evidence at the end of the trial. In addition, the Chamber called two witnesses to testify next week about the process for authenticating the documents in question.

II. LEGAL AND PROCEDURAL ISSUES

Since the start of the substantive hearings, one major issue has persistently recurred in the courtroom: admissibility of evidence. After weeks of confusion and unresolved objections in the proceedings, the Chamber finally took the opportunity this week to hear arguments from the parties on this highly important issue. The Parties presented legal arguments on the minimum requirement for admissibility, the criteria for admitting evidence, and the burden of proof for establishing whether a certain type of evidence is admissible. In addition, the Parties presented their objections to specific documents. They also raised questions about admitting certain new evidence.

Unfortunately, this week did not afford any immediate clarity on these procedural matters, because the Trial Chamber deferred ruling on any of the issues raised during this week's proceedings.

A. Admissibility of Evidence¹

As a general matter, all evidence is admissible under the ECCC's Rules of Evidence.² Some exceptions do apply, however. The Chamber may reject a request for evidence where it finds that the evidence is:

- a. irrelevant or repetitious;
- b. impossible to obtain within a reasonable time;
- c. unsuitable to prove the facts it purports to prove;
- d. not allowed under the law; or
- e. intended to prolong proceedings or is frivolous.³

Any factual determination by the Chamber shall only be based on evidence that has been put before the Court, and subjected to examination. This means that, although all pieces of evidence in the Case File may possibly be admissible, only those that have been put before the Chamber by the Parties, or put before the Parties by the Chamber, and subjected to examination, shall be considered by the Chamber in making its final judgment. Moreover, IR 87(3) provides that "[e]vidence from the Case File is considered put before the Chamber or the parties if its content has been summarized, read out, or appropriately identified in court." While seemingly straightforward, the practical application of the Rules was the subject of a great deal of debate throughout the week.

1. Criteria for Admitting Evidence

International counsel for Ieng Sary, Mr. Michael Karnavas, submitted that there are three major criteria for considering evidence: authenticity, reliability, and relevance. According to Karnavas, the Chamber must determine the authenticity of evidence prior to its admission. Prosecution must make a *prima facie* showing that the document is authentic and that it is the document that it claims to be; otherwise, the material, by its nature, lacks probative value. He further argued that inauthentic documents are not suited to prove the facts they purport to prove and should not be allowed under IR 87(3).

Apart from proving authenticity, Karnavas also highlighted the importance of establishing reliability prior to admission of evidence. As a rule, he argued, the tendering party must present the original, because a copy thereof is not as reliable as the original. Unreliable documents, like inauthentic ones, are not suited to prove the facts they purport to prove, according to Karnavas' submissions. The final criterion the party introducing evidence must show, according to Karnavas, is relevance of the evidence to the facts of the case. For the Ieng Sary Defense, the requirements of authenticity, reliability and relevance are concurrent. As such, once the Chamber has determined that a piece of evidence is authentic and reliable, it must make an extra step to check if the evidence is relevant.

Furthermore, Karnavas and the Nuon Chea Defense Counsel, Mr. Andrew Iannuzzi, advocated the application of the "best evidence rule" in all cases. They explained that this rule of evidence prescribes that, as much as possible, the original document, photograph, or recording must be used as evidence. They further argued that the Chamber must use original documents since these are *prima facie* authentic and reliable.

In response, the OCP countered that IR 87 has established a presumption of admissibility in favor of evidence being proffered. As such, the OCP only needs to make a *prima facie*, or "at its face," showing of authenticity and reliability for any of the documents it is requesting the Chamber to admit. International Co-Prosecutor Mr. William Smith argued that admissibility of documents based on this *prima facie* standard is consistent with the principle of free evaluation of evidence: judges may presume evidence to be reliable and relevant until proven otherwise. The documents the OCP submitted, he explained, met the *prima facie* standard for reliability, based on their consistent appearance and content. According to Smith, since this analysis is sufficient for a *prima facie* showing of reliability, there is no need to show the original documents or call the author or the source these documents to testify.

Smith further argued that authenticity is related to reliability; to be admitted, evidence must have sufficient indicia of reliability. However, while authenticity is a relevant factor in considering a document's compliance with this requirement, a definitive finding on a document's authenticity – proof of the document's origin and chain of command – is not a pre-requisite for admission. Since the ECCC Law does not provide indicators of reliability, Smith suggested that the Chamber consider the factors other international tribunals rely on: the internal and external characteristics of documents. Examples of a document's "internal characteristics", according to Smith, include the document's stated source or author, and whether it has a signature or other distinct markings. Other factors tribunals look at, according to Smith, are the form, layout and format of the document, including its handwriting or typeface and its consistency with other documents of that kind. The document's content, its syntax and distinctive expressions commonly used by the author or source, and its purpose may likewise be indicative of a document's reliability. As regards external characteristics that may be considered by the Chamber, Smith mentioned authentication or identification of the document by the author, "a witness with knowledge" or an expert witness, as well as the circumstances under which it was obtained and the chain of custody since then.

In light of these arguments, Smith urged the Chamber to apply the *prima facie* standard to all documents under discussion this week. Otherwise, the threshold for admissibility of the documents would be unduly high. According to the Prosecution, it would be impractical and legally unfounded to require all evidence before the ECCC to meet a higher threshold than evidence used for the same type of cases in other tribunals. Smith called the Court's attention to Rule 89(e) of the ICTY and Rule 89(d) of the ICTR, which both provide that, "[a] Chamber may request verification of the authenticity of evidence obtained out of court." Smith emphasized that the word "may" in these rules indicates that verification of authenticity of documents is permissive rather than mandatory.

While the Defense claimed to agree with the application of a *prima facie* standard, they advocated for a more exacting definition of this standard. Karnavas argued that a *prima facie* showing of authenticity and reliability must be stricter than the Prosecution's definition: the tendering party must show evidence corroborating the document's content to demonstrate reliability. He propounded that, so far, the OCP's documents do not satisfy even the basic requirements of *prima facie* authenticity and reliability. Additionally, Ianuzzi submitted that the *prima facie* standard did not mean that a presumption of authenticity attaches to documents that have already been admitted.

Interestingly, Smith and international Civil Party lawyer, Mr. Barnabe Nekui, both cited the case of *Prosecutor v. Prlić* to support their arguments. Karnavas was counsel for one of the accused persons, Jadranko Prlić, in this case. In an appeal to the ICTY Appeal Chamber, Prlić, through his counsel, contended that the ICTY Trial Chamber was overly stringent in assessing the indicia of reliability of certain defense documents. He also argued that while some rejected documents indeed lacked references to dates or sources, they nevertheless possessed other indicia of reliability sufficient for establishing *prima facie* reliability.⁴ He further asserted that "[u]nlike reliability, authenticity is not a separate requirement that must be proven before a document can be considered admissible."⁵

The Appeals Chamber in the case of *Prlić et al.* ruled:

In order to assess whether proposed evidence satisfies both prerequisites, consideration is given to an item of evidence's *prima facie* reliability. *Prima facie* reliability does not however constitute a separate and additional prerequisite under Rule 89(C) of the Rules, but is an underlying factor relevant in determining whether the prerequisites of relevance and probative value have been met. Thus, *prima facie* reliability "is a factor in the assessment of its relevance and probative value". Also, definitive proof of reliability is not required at the admissibility stage. Rather, it is an issue to be assessed at a later stage in the course of determining the weight to be attached to the evidence after its admission.⁶

In response, Karnavas explained that the process the ICTY followed was adversarial, and the prosecution in the *Prlić*, case had to present a custodian who testified as to how the documents were generated, as well as some witnesses. He contended that it is important for the Trial Chamber to adopt a methodology for considering evidence because it is insufficient to rely on representations that a document is from a particular institution to determine authenticity, reliability and relevance.

2. Who has the Onus of Proving Admissibility of Documents

Under the IR 87(1), the Prosecution has the burden of proving the guilt of the accused beyond reasonable doubt. The rule is, however, silent on who has the onus of showing that evidence being proffered is authentic, reliable and relevant, *prima facie* or otherwise.

This ambiguity in the Rules has prompted a lengthy debate between the Parties over who bears the burden of showing whether or not a document is admissible as evidence. Mr. Kong Sam Onn, Khieu Samphan's national counsel, argued that the Prosecution should be able to demonstrate the authenticity, reliability and relevance of documents it proffers in compliance with the appropriate standard (*prima facie* or higher). The Prosecution claimed however, that they had already indicated the *prima facie* compliance of their documents with the criteria for admissibility in their previous submissions. Consequently, the Prosecution contended, Defense needed to raise specific objections to the documents. Ianuzzi countered that, once the Accused has challenged the authenticity of a document, the burden to further demonstrate the document's legitimacy, particularly when no original document has been presented.

While the Trial Chamber did not rule on the matter of who has the onus of arguing admissibility of documents, it did instruct the Defense "to identify with greater particularity those documents or categories of documents in AI-A5 to which they have objected, and the basis of these objections."⁷ This action by the Trial Chamber would seem to indicate that documents proffered in evidence at the ECCC effectively enjoy a presumption of admissibility, and the Defense is required to raise specific challenges to particular documents, instead of merely making blanket objections to entire categories of documents.

3. Admissibility v. Probative Value of Evidence

During Kong Sam Onn's discussion of the OCP's obligations vis-a-vis admissibility of documents, defense counsel repeatedly stressed that the burden of proving the guilt of the Accused beyond reasonable doubt lies with the OCP. It was unclear whether he meant these comments to imply that the OCP must, likewise, satisfy the same standard of proof when they tender documents to the Chamber. In some instances, this seemed to be what the Kong Sam Onn was suggesting:

Once the prosecutor has the onus of proof then all the documents submitted by the prosecutor, they have to prove its relevance, its reliability because there is one overall principle which requires that the prosecutor prove the evidence before -- beyond reasonable doubt because there is one universal principle which the Accused are presumed innocent unless proved guilty otherwise by the Court.⁸

Responding for the OCP, Smith sought to differentiate the standard of proof required for proving the case, and that used for admission of documents. He emphasized that the OCP will not shy away from its responsibility of proving the case beyond reasonable doubt. However, he took exception to what he understood as Kong Sam Onn's averment that it is also incumbent on the OCP to prove admissibility of their documents without reasonable doubt. He explained that the application of the

standard of proof of beyond reasonable doubt during the admissibility stage is unnecessary because all that is required is a *prima facie* showing of the document's relevance and reliability. Using such a high standard of proof for admissibility of documents would be too onerous and time consuming.

The international Co-Prosecutor further countered that while it is true that the burden is on the party seeking to introduce the evidence to demonstrate its *prima facie* reliability and relevance, there is no need to establish that it is of high probative value. Smith explained that the assessment of admissibility of evidence and determining its probative value are separate and distinct processes.

Karnavas and Nekui both expressed agreement with Smith's discussion that assessment of weight is a separate inquiry from admissibility. Karnavas maintained however, that the OCP must be able to demonstrate the authenticity, reliability and relevance of documents they want to introduce as evidence.

B. Specific Objections to Evidence

During the week, the Trial Chamber allowed the Defense Teams to discuss their specific objections to the admission of E3 and A1-5 documents. Among the most pressing challenges the Defense posed were those against the OCP's use of copies in lieu of original documents. Related to this objection were the Defense Teams' insistence that they be permitted to examine the author or source of the documents, and that the Court require establishment of a chain of custody, in general, for large collections of documents in the case file. In particular, the Defense sought to have officials from the Documentation Center of Cambodia (**DC-Cam**) appear in court to help establish the authenticity of the many documents that came to the Court from this organization. The other categories of documents the Defense specifically challenged included statements obtained under torture, and certain new documents the admissibility of which the Defense challenged.

1. Presentation of Original Documents

Beginning Monday morning, the Nuon Chea Defense argued that, pursuant to the best evidence rule (which demands presentation of originals unless unavailable), the OCP must present as many original documents from the Case File as possible. Ianuzzi emphasized the need of this client to examine the original *Revolutionary Flag* and *Revolutionary Youth* magazine. He reminded the Chamber that providing these documents was not an overly burdensome process; first, because they were asking for the original of less than 10 documents, and second, DC-Cam's Director Youk Chhang had asserted that many of the original documents are available. Even if producing the original documents would be a time-consuming exercise, Counsel for Nuon Chea argued that the Chamber must nevertheless proceed accordingly, because the right of the Accused to sufficiently challenge the evidence against him cannot be compromised. Ianuzzi emphasized that this is especially true since the documents in question are used to establish specific acts allegedly committed by Nuon Chea and not just background or general historical information. Further, it is crucial for his client to examine the original magazines because these might have been fabricated as an attempt to incriminate Nuon Chea.

Karnavas raised similar arguments: although he admitted that a certain degree of flexibility was required when applying the best evidence rule, he argued that for key documents, the original must be used, if available. Furthermore, he pointed out that the best evidence rule also requires that the original be provided if a party challenges the accuracy of the documents.

The Prosecution countered that producing all the originals would be an unduly costly and lengthy exercise. Moreover, they averred that the documents they proffered, particularly the copies of the magazines, possess the indicia of authenticity reliability required for admissibility by virtue of their internal and external characteristics, including their standardized format, dates, seals, and decals.

Karnavas objected to the nature of the Prosecution's response on the ground that the latter was not presenting arguments but giving testimony. The Prosecution took exception, and stated that they were not testifying but simply providing the Chamber with an overview of the documents' internal and external characteristics that bolster the credibility of the documents.

2. Examination of Author or Source of Documents

Related to the demand for original documents, the Defense asserted that the Accused cannot effectively confront evidence against unless the authors, sources or custodians of documentary evidence appear in court and submit to examination. While all the Teams discussed this issue, the Ieng Sary Defense offered the most extensive arguments on this particular matter. Karnavas insisted that the Chamber should summon authors such as Elizabeth Becker and Steve Heder to testify prior to the admission of their work into evidence. He argued that Becker and Heder's notes and recordings – if they still exist – should also be examined in open court. As regards CIA reports, Karnavas argued that the authors of these reports must be called and questioned; otherwise these materials must be treated as hearsay. He claimed that the reports were unreliable and argued that the only appropriate verification process would be to question the authors themselves. Karnavas further sought exclusion of all statements made by persons who are now deceased, on the grounds that these are also hearsay, which his client cannot adequately confront and examine. If these statements were to be admitted, notwithstanding Defense objections, Karnavas argued that each must be independently substantiated or else assigned zero weight for being unreliable hearsay.

The OCP did not contest that the Accused has the right to confront witnesses against him. However, Smith qualified that this right only relates to witnesses who made statements before the OCIJ, and not to authors and journalists who were not interviewed by the OCIJ, but whose work was included in the Case File. He argued that, as has been common practice in other international courts, the Trial Chamber should allow hearsay evidence (out-of-court statements, media reports contemporaneous with the events, books, academic articles, analytical reports, submitted as evidence to support the truth of the matters they assert) in order to provide guidance on the context and background of the allegations in the Indictment. Smith emphasized that the Prosecution was not relying on hearsay evidence to prove its case but rather, they were using them to corroborate other pieces of evidence. Furthermore, he pointed out that documentary evidence such as books and reports

are often more reliable than witness statements because the former remain consistent over time. Reports, he stated, are also easily verifiable.

Nekui supported the OCP's arguments and cited the Appeals Chamber of the *Prlić* case, which declared that right of the Accused to a fair trial is not absolute and must be understood in the context of, and balanced against, other rights. He moreover urged the Chamber to consider the conflicting position of the Khieu Samphan and Ieng Sary when they argued against the admission materials which they had relied upon themselves. For example, Khieu Samphan used other authors' work, as well as documents from DC-Cam in writing his book. Additionally, Ieng Sary, in a memorandum dated 1st of April 2011, indicated that he intends to refer to all documents that have been collected by the OCIJ. Nekuie asserted that these acts show that both Khieu Samphan and Ieng Sary have attributed sufficient reliability to the exhibits in dispute.

Notably, neither the Cambodian Code of Criminal Procedure nor the ECCC Internal Rules provides for the absolute right of the Accused to confront witnesses. Article 133 of the CPC states that "a charged person *may* request confrontation" (italics provided). Moreover, Rule 87(4) of the ECCC Internal Rules states that:

During the trial, either on its own initiative or at the request of a party, the Chamber *may* summon or hear any person as a witness... which it deems conducive to ascertaining the truth. Any party making such request shall do so by a reasoned submission. The Chamber *will determine* the merit of any such request in accordance with the criteria set out in Rule 87(3) above... (italics provided)

3. Chain of Custody

All three Defense Teams claimed that there was insufficient information on how the documents listed in the Annexes were obtained, particularly, which institution or individual obtained them, when and under which circumstances they were obtained, and the manner by which they were stored. As will be discussed in greater detail below, they took particular issue with DC-Cam-sourced documents

The Prosecution, on the other hand, argued that it was unnecessary for them to establish the full chain of custody for each document they seek to present as evidence. Smith averred that many documents are acceptable if they are corroborated by other documents or by witness testimony. He stressed that they can offer many witnesses who can provide information about the source and content of documents, such as telegraphers and persons who worked in printing houses. To further buttress its arguments, the Prosecution cited the age of the documents and explained that it would be quite difficult to provide the full chain of custody for each of them. Finally, the Prosecution noted prevailing international evidentiary jurisprudence that supports this reasoning.

The Civil Party co-lawyers agreed in full with the OCP's arguments, and added that, after 1979, Cambodians were occupied with finding enough food to eat rather than being concerned about collecting Khmer Rouge documents. This reality makes it very difficult, if not impossible, to establish the full chain of custody for most documents in the Case File.

4. Documents from DC-Cam

All three Defense Teams requested the Chamber to summon DC-Cam's Director, Mr. Youk Chhang, to testify about the origin and chain of custody of documents, how they were found, who delivered them to DC-Cam, and other details pertinent to the chain of custody of documents since they entered into DC-Cam custody. The Nuon Chea Defense argued that, in order for any DC-Cam documents to be admissible, DC-Cam Director, Youk Chhang, must testify, because he is the most knowledgeable person about DC-Cam documents. They highlighted Youk Chhang's unique expertise and the fact that he reportedly personally handles each document that goes through DC-Cam.

Defense counsels all took issue with the fact that the Trial Chamber seems willing to afford DC-Cam documents a presumption of authenticity, simply because they come from DC-Cam. The presumption is unwarranted, according to Defense arguments. This is not the first time Defense has raised concerns about the reliability and professionalism of DC-Cam practices. Karnavas submitted that the OCIJ ignored his request for further investigation of the circumstances under which DC-Cam gathered and stored documentary evidence. He also argued that DC-Cam is not neutral and should be seen by the Court as an interested party. Karnavas requested that the Chamber carefully scrutinize documents from DC-Cam accordingly. Mr. Jasper Pauw, Nuon Chea's international lawyer, similarly asserted that DC-Cam's work cannot be presumed reliable simply because it claims to be a neutral historical research enterprise. Pauw alleged that DC-Cam is not the neutral institution it claims to be, and referred to the "prosecutorial approach"⁹ Youk Chhang assumed in an article that was written before the establishment of the ECCC. According to Pauw, the article states that, "it is imperative that those most responsible for the crimes during the DK regime, including Nuon Chea, be held accountable, and that their crimes proved to a legal standard."¹⁰

The Prosecution countered by arguing that DC-Cam is a neutral, truth-seeking organization. Further, counsel for the OCP submitted that, as long as the person testifying about the background of the documents has sufficient knowledge, it does not matter who exactly it is that testifies in court. In other words, it does not necessarily have to be Youk Chhang who authenticates the DC-Cam documents. The Prosecution argued that the Defense has no legal right to demand Youk Chhang's testimony specifically. Moreover, they argued that summoning Youk Chhang would exceed the Chamber's legal duty and take more time that was warranted. The Prosecution stated that a witness who has been an employee of DC-Cam for 15 years is anticipated to testify next week to provide ample information on the chain of custody of the documents.

The Prosecution argued that the question of admissibility relates to documents, not to the organization. They posited that the Defense's bias arguments are illogical and tantamount to saying that any piece of evidence presented by the Defense should be inadmissible for being biased. According to the Prosecution, the argument of the Defense proves that a document may be deemed inadmissible only when its authenticity and reliability is questionable. International CPLCL Ms. Elizabeth Simmoneau-Fort supported the Prosecution's arguments, however, for the sake of efficiency, she suggested that the Chamber simply summon Youk Chhang to testify, rather than repeatedly discussing this matter.

After hearing the arguments of the Parties, President Nil Nonn declared that the Chamber was satisfied that a representative from DC-Cam's management should testify next week. He pointed out, nevertheless, that the Chamber might still decide to summon Youk Chhang if necessary.

5. Case 001 Documents

The leng Sary Defense took issue with the Trial Chamber's reported automatic admission of evidence that had been used in Case 001. Karnavas asserted that Case 002 is different from Case 001, and the fact that Duch's lawyers did not challenge the admission of these documents should not affect the right of Accused to object to the admission of these documents in Case 002. To support his contentions, Karnavas cited the case of *Prlić*, in which the Trial Chamber required re-authentication of tape-recorded evidence that had already been used in previous ICTY cases. The Khieu Samphan Defense supported this argument and asserted that each document must be subject to re-examination.

In response, the OCP explained that the Chamber had given no indication that documents in Case 001 were deemed automatically admitted in Case 002. As regards the right of the Accused to seek re-examination of documents, International Co-Prosecutor Mr. Dale Lysak agreed that the Accused may indeed exercise this right, and that it was precisely for this reason that this week's hearings were being conducted. Lysak also expressed that all the Accused are being afforded every possible opportunity to challenge evidence and as such, it was incorrect to suggest that documents admitted in Case 001 have been automatically admitted in the present case.

6. Statements Obtained under Torture

A number of documents in the Case File that the OCP seeks to introduce as evidence are confessions made under torture by S-21 inmates. Karnavas objected to the inclusion of these documents on the ground that, under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**), all evidence obtained under torture must be excluded from subsequent judicial proceedings. The Prosecution agreed with Karnavas but with a qualification. While the Chamber acknowledged that the CAT proscribes the use of evidence obtained under torture, such evidence may nonetheless be used to prove that the statements contained therein were indeed made under torture. In other words, the statements may not be used for the substantive truth of what they assert, but they may be used as proof that torture took place. The OCP further argued that the Convention prohibits the use of statements taken under torture but not other information relating to these statements. Consequently, it does not forbid the use of annotations made by the Khmer Rouge on confessions given by the individuals they tortured. Moreover, the OCP emphasized that the purpose for the inclusion in the Case File should be considered as well: confessions can establish facts, prove the identity of prisoners and demonstrate that the Khmer Rouge used the information contained in them as grounds to arrest of other people. This, however, does not mean that the content of the confessions is considered true.

Article 15 of the CAT clearly prohibits the use of evidence obtained under torture. What is in issue before the Trial Chamber, however, is the admissibility of evidence obtained under torture, not as proof against persons subjected to torture but against those implicated for torture, and to show that the Khmer Rouge used these statements to effect arrests. This very same issue figured prominently in Case 001 because part of the materials in Duch's Case File constitute confessions executed by prisoners in S-21 under conditions of torture. Confronted with this question previously, the same Trial Chamber ruled that parties may use content of documents tainted by torture only when it may be ascertained that there was no violation of the CAT.¹¹ When the OCP sought to admit S-21 victims' confessions that contained annotations by Duch, the Trial Chamber ruled that "[t]he relevance of these documents is limited to the fact that they were made under torture. They are not admitted for the truth of their contents."

In the present case, the OCIJ ruled that the prohibition under the CAT applies only to information in the confessions obtained by torture and not to annotations on the confessions made by the torturers themselves, by S-21 personnel, or by the Accused.¹² Moreover, the limited exception to the proscription is that "the evidence obtained by torture can be used only '*against the person accused of torture as evidence that the statement was made.*'"¹³ Khieu Samphan and Ieng Thirith appealed the OCIJ's Decision to the Pre-Trial Chamber, which ruled that it did not have the jurisdiction to review matters related to the admissibility of evidence, and declared the appeal inadmissible.¹⁴ The task of evaluating the admissibility of evidence, therefore, lies with the Trial Chamber, and the Pre-Trial Chamber found that the established procedure in the ECCC for this purpose complies with international legal standards and fair trial rights.¹⁵

Since the Trial Chamber has the competence to decide admissibility of evidence, resolution of the issue of admissibility of evidence obtained under conditions of torture lies within its jurisdiction. It is hoped that the Trial Chamber timely resolves this important issue and provides a reasoned decision that will guide the Parties.

7. Additional Documents

At the end of their general arguments on Monday afternoon, the Ieng Sary Defense objected to the use of any documents that have not been included in the Case File. One of these documents is the recently published book, *The Young Nuon Chea in Bangkok*. Karnavas pointed out that they have not had access to this material and were therefore unable to comment on it. Lysak took exception to Karnavas' assertion and explained that the Defense Teams were provided with information on this publication as early as April 2011.

The Nuon Chea Defense, however, argued in favor of admission of additional documents, notwithstanding their non-submission of a modified document list within the prescribed periods. Ianuzzi claimed that under Article 334 of the CPC and IR 87(4), the Trial Chamber may admit new evidence until the end of the trial if it deems that such evidence is conducive to ascertaining the truth.

C. Defining the Right of the Accused to Remain Silent

The Khieu Samphan and Nuon Chea Defense Teams took issue with the Chamber's interpretation of the right of the Accused to remain silent, particularly the way the Chamber has elected to characterize of their clients' actions as exercising their right to remain silent.

During the previous hearings, Khieu Samphan had refused to answer questions or give comments to statements proffered by the Chamber. The Chamber interpreted this as Khieu Samphan exercising of his right to remain silent. Khieu Samphan, however, clarified that he will “eventually respond to every question concerning the facts raised by the parties”¹⁶ and also answer queries relating to documents but only after “those documents have been fully provided.”¹⁷ He further explained: “I, on the other hand, will not answer any kind of question before the end of the presentation of all of the evidence; in other words, at the end of the trial.”¹⁸

As regards the Nuon Chea Defense's objections, Ianuzzi claimed that the Trial Chamber erred when it found that Nuon Chea had exercised his right to remain silent, after he refused to answer questions until presented with original documents. Ianuzzi emphasized that the Trial Chamber should not have interpreted Nuon Chea's request for original documents as anything more than challenging the authenticity of the documents being used in court.

IV. Trial Management

Overall, proceedings were conducted in accordance with the amended schedule, notwithstanding some delays on the 16 January. The Chamber commenced sessions punctually and closely adhered to the adjournment time. Other welcome developments relating to scheduling were the Chamber's announcement that two witnesses, TCW766 and TCW542 would be heard on 23-26 of January and its consultation with the Parties regarding the amount of time they needed to examine these witnesses.

The Chamber likewise resolved requests by Nuon Chea and Ieng Sary to be excused from the proceedings consistently by ruling that the two Accused may retire to the holding cells where they could follow the proceedings via audio-visual facilities, instead of the detention center where there are no means of participating remotely. Only Khieu Samphan was present in the courtroom the entire week.

A. Public Attendance

On Monday, at least 300 students from the Royal University of Law and Economics attended the whole day's session. On Tuesday, about 100 people from Kampot province attended the morning session, but left after lunch. Some 300 high school students from Chumpouvoin High School in Phnom Penh attended the afternoon sessions in their stead. On Wednesday, approximately 300 students from Pannasastra University of Cambodia and the National University of Management attended. On the last hearing day of the week, there were about 300 people from Kampong Cham province present in the morning session. In the afternoon session, there were about 200 students from Chba Ampouv High School in Phnom Penh present at the hearing.

At least twice this week, the Judges declared inaccuracies in translation. On Wednesday, while President Nil Nonn commented on the scheduling of hearings of experts and examination of evidence, Judge Claudia Fenz took the floor and announced that there had been an interpretation problem, and made necessary clarifications. On Thursday, the Nuon Chea's national counsel, Mr. Son Arun, objected to the use by Simmoneau-Fort's use of the word "desperate" to describe the Defense's strategy of insisting to be presented with original documents. Simmoneau-Fort denied that she used the word "desperate" and clarified that the word she used – "stubborn" – may have been mistranslated into "desperate."

C. Time Management

[illegible]

Unless specified otherwise,

- the documents cited in this report pertain to *The Case of Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan* (Case No. 002/19-09-2007-ECCC) before the Extraordinary Chambers in the Courts of Cambodia;
- the quotes are based on the personal notes of the trial monitors during the proceedings;
- photos are courtesy of the ECCC.

Glossary of Terms

Case 001	<i>The Case of Kaing Guek Eav alias “Duch”</i> (Case No. 001/18-07-2007-ECCC)
Case 002	<i>The Case of Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan</i> (Case No. 002/19-09-2007-ECCC)
CIA	Central Intelligence Agency
CPC	Code of Criminal Procedure of the Kingdom of Cambodia (2007)
CPK	Communist Party of Kampuchea
CPLCL	Civil Party Lead Co-Lawyer
DK	Democratic Kampuchea
ECCC	Extraordinary Chambers in the Courts of Cambodia (also referred to as the Khmer Rouge Tribunal or “KRT”)
ECCC Law	Law on the Establishment of the ECCC, as amended (2004)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IR	Internal Rules of the ECCC Rev. 8 (2011)
KR	Khmer Rouge
OCIJ	Office of the Co-Investigating Judges
OCP	Office of the Co-Prosecutors of the ECCC
RAK	Revolutionary Army of Kampuchea
VSS	Victims Support Section
WESU	Witness and Expert Support Unit



* This issue of KRT Trial Monitor was authored by Mary Kristerie A. Baleva, Samuel Gilg, Princess Principe, Noyel Ry, Kimsan Soy, Penelope Van Tuyl and Flavia Widmer as part of AIJI's KRT Trial Monitoring and Community Outreach Program. KRT Trial Monitor reports on Case 002 are available at <www.krtmonitor.org>, <<http://forum.eastwestcenter.org/Khmer-Rouge-Trials/>> and <<http://socrates.berkeley.edu/~warcrime/>>. AIJI is a collaborative project between the East-West Center, in Honolulu, and the University of California, Berkeley War Crimes Studies Center. Since 2003, the two Centers have been collaborating on projects relating to the establishment of justice initiatives and capacity-building programs in the human rights sector in South-East Asia.

¹ The issue of admissibility vis-à-vis probative value of evidence remains to be a subject of debate. See for instance, Murphy, Peter. "Excluding justice or facilitating justice? International Criminal Law would benefit from rules of evidence." 12 International Journal of Evidence and Proof 1 (2008); Boas, Gideon, Bischoff, James L. and Rei, Natalie L. "International Criminal Law Practitioner Library: International Criminal Procedure." Vol 3. Cambridge University Press (2011).

² IR 87.

³ *Ibid.*

⁴ *Prosecutor v. Prlić*. IT-04-74. Appeals Chamber. "Decision on Jadranko Prlić's Interlocutory Appeal against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence." (3 November 2009). 9-10. Par. 23.

⁵ *Ibid.*, at 10. Par. 24.

⁶ *Ibid.* At 13. Par. 33.

⁷ Trial Chamber. "Memorandum: Scheduling of oral hearing on documents (16-19 January 2012)" (11 January 2012). E159. 3. Par. 8.

⁸ Transcript of Trial Proceedings. E1/27.1 (16 January 2012) [hereinafter, "TRANSCRIPT (16 JANUARY 2012)"].

73-74. Lines 21-25; 1-2.

⁹ TRANSCRIPT (16 JANUARY 2012). 88. Line 17.

¹⁰ Ibid., at lines 21-24.

¹¹ AIJI. *Case 001 KRT Trial Monitor Report No. 7* (week ending 31 May 2009). See also, AIJI. *Lessons Learned from the "Duch" Trial* (December 2009). 24-25.

¹² OCIJ. "Order on Use of Statements Which Were or May Have Been Obtained by Torture" (28 July 2009). D130/8. 5. Par. 19.

¹³ Ibid., at 6. Par. 20

¹⁴ Pre-Trial Chamber. "Decision on Admissibility of the Appeal Against the Co-Investigating Judges' Order on Use of Statements Which Were or May Have Been Obtained by Torture" (27 January 2010). D130/10/12. 7. Par. 18.

¹⁵ Ibid., at 8. Par. 25.

¹⁶ TRANSCRIPT (16 JANUARY 2012). 78. Lines 5-6.

¹⁷ Ibid., at lines 8-9.

¹⁸ Ibid., at 79. Lines 1-3.