

KRT TRIAL MONITOR

Case 002 ■ Issue No. 15 ■ Hearing on Evidence Week 10 ■ 19-21 March 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

*The people never use rotten wood
to carve it into Buddha sculptures for people to pay homage to.*
- Nuon Chea, referring to Duch

I. OVERVIEW

This week marked the beginning of reception of testimonial evidence on the administrative structure (central and national) and the communication structure in the DK regime, as well as the roles of the Accused.

Nuon Chea was scheduled to provide testimony relevant to the second segment of the trial. On his request, the Trial Chamber allowed him to read an initial statement before proceeding with his examination. President Nil Nonn interrupted the Accused when it became clear that the latter's statements pertained to the first, rather than the second segment of the trial but Nuon Chea's international lawyer, Mr. Michiel Pestman, managed to persuade the Trial Chamber to allow his client to continue. Nuon Chea concluded his statement by requesting that the Chamber, among other things, continue hearings on the DK's historical background; otherwise, Nuon Chea would exercise his right to remain silent. The Bench did not deny this request outright, but indicated that it would proceed to ask Nuon Chea about matters relevant to the trial segment at bar. This prompted Nuon Chea to invoke his right to remain silent. Having no other witness to call to the stand that morning, the Chamber adjourned the morning session early and called Kaing Guek Eav, alias "Duch," the former Head of the notorious S-21 Security Center, to the witness stand for the afternoon – half a day earlier than scheduled.

The OCP, through national counsel, Mr. Seng Bunkheang, and international counsel, Mr. William Smith, examined Duch on the latter's membership to the CPK, his roles and duties within the party and his continued affiliation with it after 1979. Duch also testified on Party ideology and policies. The Defense Teams continuously challenged his testimony by arguing that the OCP was treating the witness as an expert and asking questions outside the scope of the first trial of Case 002 .

II. STATEMENT OF THE ACCUSED AND WITNESS TESTIMONY

Based on the Bench's announcement the previous week, Nuon Chea was scheduled to testify on Monday and Wednesday morning, while Duch was to follow with testimony on Tuesday and Thursday. Instead of testifying, however, Nuon Chea unexpectedly invoked his

right to remain silent. This led the Bench to summon Duch earlier than anticipated. This section of the report provides a summary of Nuon Chea's statement and Duch's testimony during the week.

A. Nuon Chea's Statement

In the morning of 19 March, Nuon Chea read a prepared statement that he assured the Chamber was related to the second trial segment. However, instead of providing information relevant to the trial, he proceeded to express his dissatisfaction with the Trial Chamber's conduct of the trial, and he reiterated matters that he and his lawyers have already raised before the Chamber. Nuon Chea complained that the Chamber does not endeavor to unearth the complete history of Cambodia under the CPK, and he reiterated his observation that the Chamber is concerned only with the body but not the "head and the tail" of the DK regime. To him, the root cause and consequences of events before 1975 need to be taken into account if the Chamber and the people are to understand the historical milieu of the period: (i) the American bombardment of Cambodia from 1965 to 1973, which not only caused the death of thousands but also destroyed infrastructure and agricultural productivity; (ii) the widespread hunger, poverty, disease, death, destruction, corruption, chaos and violence precipitated by these events; (iii) the dwindling food supply; (iv) the lack of medical services and humanitarian aid; and (v) the tense relationship between Vietnam and Cambodia, which worsened because of Vietnam's policy to wipe out the Cambodian race.

Nuon Chea also criticized the OCIJ, alleging that this office only sought inculpatory evidence, thereby prejudicing the entire court proceeding. He concluded his statement by requesting that the Trial Chamber continue the discussion on the DK's historical background, and to hear more witnesses, including people who were in Phnom Penh before the fall of DK and American officers who would shed light on the destruction caused by the US bombing of Cambodia. He also asked the Bench to allow him to present additional documents until the conclusion of the proceedings. Nuon Chea warned that if the Chamber did not grant his requests, he would exercise his right to remain silent.

The Chamber reminded Nuon Chea that it had already addressed some of his submissions. Others are still under consideration. It became clear that discussions on the DK's historical background would not be reopened when President Nil Nonn asked Nuon Chea if he was ready to answer questions relevant to the second segment of the trial. At that point, Nuon Chea invoked his right to remain silent, and declared that he should have been given the opportunity to explain circumstances surrounding the evacuation to the Cambodian people.

Once again, the Trial Chamber found itself unprepared to immediately call a backup witness, despite the fact that this is not the first time an Accused person has chosen to exercise his right to remain silent during this trial. Based on experience from prior weeks of trial, the Chamber must have been well aware of the potential for delay. Nevertheless, the Court was left with no option but to adjourn the morning session early. They announced the commencement of Duch's testimony for the afternoon session, instead of Tuesday as originally scheduled.

B. Summary of Kaing Guek Eav's Testimony

Duch was the Secretary of the notorious S-21 security center, an interrogation and execution machinery for the DK regime. For his acts, he was tried, convicted, and sentenced to life imprisonment for war crimes and crimes against humanity. For Case 002, he has returned to court, not as an accused, but as a witness who is in a unique position to shed light on what took place during this dark time in Cambodia's history. The OCP questioned Duch on (i) his recruitment and affiliation to the CPK (ii) his work as a party member, (iii) his arrest in 1999; and (iv) CPK ideology; and (v) CPK policies. True to his meticulous nature, Duch provided

detailed answers to all questions, and substantiated his assertions by giving examples, just as he did during his own trial before the ECCC.

Throughout the week, Duch repeatedly stated that, during his time as chief of S-21, he took orders from and reported directly to Nuon Chea. He also confirmed prior evidence indicating that during Pol Pot's sickness, there was a public announcement appointing Nuon Chea acting Prime Minister of DK.

1. CPK Membership and Responsibilities

Seng Bunkheang commenced the OCP's examination of Duch with some introductory questions concerning the background of the Witness, his education at Sisowath School and his work as a mathematics teacher. The national Co-Prosecutor then focused on Duch's introduction to the CPK. In 1964, he joined the revolutionary movement, and secretly studied progressive books and communist ideology. Six years later, he became a CPK activist in the liberated zone. Duch began to study the CPK's ideology, as expressed in its statute, strategic¹ and tactical lines² (militia war), and party documents on class struggle. He claimed that he had heard of Khieu Samphan and Ieng Sary during this period, but he had never met them in person. At that point, he had never heard of Pol Pot.

Appointment and Work at Police Office M-13. After a few questions about Duch's work in the liberated zone, the OCP proceeded to inquire about Duch's engagement in the security centers of the regime. Duch explained that, in 1971, he was appointed as chief of Police Office 13 (also known as M-13) by Vorn Vet, a member of the CPK's Central Committee. Being a party member, Duch testified that he did not have a choice other than to accept. M-13 was the detention site for soldiers and people identified by the party as spies.

According to Duch, Vorn Vet instructed Duch on how to interrogate detainees, and Duch trained his subordinates on these techniques. Under Vorn Vet's direct supervision, Duch and his subordinates tortured M-13 prisoners by beating, electrocution, water boarding and suffocation by use of a plastic bag. These techniques, Duch explained, originated from the Issarak movement, and they were common practice. He later applied these methods in S-21 and S-24. The Witness asserted that he received orders from Vorn Vet to smash detainees

Son Sen replaced Vorn Vet in early 1974. Duch said he met with his new superior at monthly study meetings and other discussions convened for special purposes. In January 1975, the CPK closed down M-13. Duch estimated that 200 of the 300 prisoners were killed in M-13 but he did not elaborate when or under whose supervision the victims were executed. Duch claimed he spared a number from being smashed because he believed they were innocent. Only 50 to 100 prisoners were reportedly released during and after the operations of M-13.

Establishment of S-21 and Duch's Duties as its Head. According to Duch, Son Sen instructed him to attend training in Phnom Penh in June 1975, and to meet Nat, Lon Nol's former Chief of Staff. Nat was tasked to establish S-21 (also, **Tuol Sleng**), an office for the KR security force. Son Sen appointed Duch as the Deputy Chief of S-21 and directed him to bring his subordinates from M-13 to the new security office. According to Duch, S-21's purpose was to obtain confessions from detainees through the use of torture. He said party policy dictated the smashing of all the detainees.

In his testimony, Duch recounted how, in March 1976, Duch replaced Nat as Chief of S-21 at Son Sen's behest. As Tuol Sleng's new Chief, Duch said he reported regularly to Son Sen. Significantly, since S-21 was established as an independent regiment, Duch was authorized to report directly to his superior, a member of the Central Committee, without any need of intermediaries. This was an unusual arrangement for the highly secretive Khmer Rouge regime. As the Chief of S-21, Duch reportedly read and summarized the confessions

extracted from prisoners through torture. He then briefed Son Sen about these confessions. He also attended annual training sessions on the party's policies. Duch claimed that stopped his work only when the Vietnamese troops entered Phnom Penh in January 1979.

Life after 1979. Duch remained a member of the CPK even after he left S-21 in 1979. In 1986, he went to China to teach Khmer to students. After two years, he returned to Cambodia and wrote a textbook for primary education under the supervision of Comrade Yun Yat, Son Sen's wife. Subsequently, Pol Pot reportedly assigned him to work in the economic section in the rural area. He was appointed as a teacher at the District Education Department in Samlaut until his arrest in 1999.

2. CPK Ideology and Policies

After Duch testified on his experiences with the CPK, the OCP proceeded to question him about the party's ideology, proliferation of party ideas, and the specific policies alleged as part of the crimes charged in the Closing Order.

CPK ideology. When asked about the main ideology and purpose of DK, Duch explained that before 1970, the CPK leadership believed that the people should liberate themselves and fight against capitalists and "reactionary" elements in society. They further believed that the peasants should have paddy fields to farm their rice. After 1970, he recounted that the CPK focused instead on defending and building the country.

The Witness also indicated that the CPK was not unique in resorting to violence to obtain its objectives, as this is a "common tendency" that applied elsewhere in the world. He said that that the use of force was prohibited even after the party's 20th general assembly but those who were Marxists and Leninist nevertheless resorted to force.

Earlier in his testimony, Duch said the party never mentioned Buddhism or Khmer culture. He indicated that the party's main thrust was to ensure solidarity and the country's unity and that "they did everything to serve workers and social classes." Party members were duty-bound to always serve, respect and love the people. Everyone had to learn how to live together in the spirit of equality. Later in the hearing however, Duch testified that the CPK abolished religion and gratitude to parents. Furthermore, they had to bear vengeance against the enemy and follow what the party's decisions regardless of their personal convictions.

Dissemination of party policy and ideology. The dissemination of the party ideology and policy happened through a system of study sessions. According to Duch, every superior was assigned a role to educate his or her subordinates about the party's policies and ideology. Zone secretaries attended annual study sessions with Pol Pot to discuss the situation in the battlefields and how they could prepare themselves mentally and physically. Moral and organizational issues like conduct and "livelihood meetings" were also addressed during study sessions. Study materials included the party statute, strategic and tactical lines, as well as the *Revolutionary Flag* and other party documents.

Livelihood meetings and self-criticism. As a way of controlling the morality of the people, and their obedience to the party, Duch explained that everybody was expected to practice "criticism and self-criticism." As a daily routine, everyone was ordered to criticize his or her fellow comrades directly or in secret when they would discover a mistake or misbehavior. The CPK conducted a mandatory self-criticism session, called "livelihood meeting," and membership was revoked if a member did not participate. Duch explained that the meetings aimed to educate one's self, eradicate faults, and ultimately help to build the party. Members raised minor offenses publicly at these meeting but discussed serious transgressions privately with the persons concerned. Duch said he talked to Nat privately (presumably about the latter's supposed major infractions) before the former S-21 Chief was arrested and smashed. Heavier faults may also be reported, and if a member was found guilty of

misconduct, he or she was removed from the party. If the action was criminal, it was up to the people to decide, Duch said. This concept of criticism was reportedly an important principle expressed in the CPK Statute.

Policy of Forced Transfers. The CPK adopted the war tactic of “seizing the people”, which meant that people were removed from the enemy’s control in order to weaken it. On 17 April 1975, Duch said he was in the “Special Zone” (he did not specify which Zone this was) and it was only through the *Revolutionary Flag* that he learned of the policy to evacuate the cities. He was, however, unaware of the rationale behind this policy or its implementation. At study sessions, it was only said that evacuation was necessary to achieve victory. Duch testified that his brother-in-law told him that the plan for evacuation was already in place: people taken by cars were to be smashed, while people who walked were to be spared. During the evacuation, families were separated and sent to different communes.

Policy on Cooperatives and Forced Labor. Duch explained that the regime aimed to be self-reliant through the creation of cooperatives. In 1972, Son Sen established a cooperative in Prey Sar for the re-education of party members and the military as an experiment. After 17 April 1975, a party document stated that cooperatives had to be implemented all over Cambodia because of class objectives. A secretary and a commune committee supervised each cooperative. According to Duch, there was no written management plan for the production of food. In 1976, the Party announced over radio that rice production must reach three tons for every hectare each season. As regards the availability of medical treatment in the cooperatives, Duch stated that after 17 April 1975, all medical personnel were evacuated and dispersed in the countryside. Only basic “traditional medicine” was allowed and available.

CPK Policy on Enemies. On the first two days of his testimony, Duch gave a general account of the different types of people who were deemed enemies during his time at M-13 and S-21, including: people who infiltrated the liberated zone and entered the base, policemen and soldiers of the Lon Nol regime, intellectuals, factory workers, Thai fishermen, an unspecified Muslim group, individuals arrested for specific reasons (such as a shooting incident at a pagoda) monks or educated Buddhists, and people educated in Vietnam. When internal purges became more prevalent beginning 1977, people from various divisions and zones, and even members from the upper echelon were arrested, accused of being spies, interrogated under torture, and eventually smashed. When asked about the reason for smashing the enemy, Duch declined to elaborate. He testified that, “it was a party policy. Everyone who was arrested had to be smashed.” He added that there was no way to contest this. According to Duch, he received information on targeted groups from Son Sen, and later from Nuon Chea. This policy was followed in everywhere in Cambodia, especially in all 196 of the security centers throughout the country.

Policy on Forced Marriages. Seng Bunkheang inquired about allegations of forced marriage during the DK regime and about Duch’s own marriage. Duch answered that he was free to choose his own wife, but he needed Ta Mok’s permission to “organize” his wedding. Although he did not elaborate further regarding his own marriage, he explained that generally, couples were allowed to marry, and those who were married were expected to have children. However, marriages between new people (evacuees from the cities) and base people were prohibited, because the former “could not be trusted.”

3. Specific CPK Statute Principles

International Deputy Prosecutor Mr. William Smith focused his questions on the CPK Statutes. To gain a better understanding of how the CPK functioned, he asked Duch to explain the terminologies contained in the Principles in the 1976 Statute.

National Democratic Revolution to Socialist Revolution. Duch stated that after 17 April 1975, the CPK achieved “national democratic revolution,” which he explained as the expulsion of imperialists and assisting farmer to cultivate the land. The Witness said that soon after, the movement became a “socialist revolution” where people were used for production and the distribution of produce to achieve socialism. He described the CPK as an absolute monopoly that controlled the police, the economy, and politics. Duch explained that Principle No. 4 of the Statute indicates that Marxism and Leninism were held as the foundation of CPK ideology. Pol Pot had integrated these theories in the party’s political and strategic lines within the Cambodian context.

Classes of Enemies. Duch provided definitions for the five classes of enemies under Principle No. 4, namely: (i) the “petty bourgeoisie,” who make use of their intelligence to earn a living, such as doctors and teachers; (ii) the “capitalists,” who invest their capital to make money or profit; (iii) “feudalists,” who used their rank to earn money and those who own land, such as the royal family; (iv) “imperialists,” who refer to the Americans; and (v) “reactionaries,” who oppose the revolution, and includes reactionary religions such as Protestantism.

Clinging to the Popular Masses. According to Duch, Principle No. 5 of the CPK Statute stated that the CPK absolutely clung to the views and lines of the popular masses. Each chief had to understand and be concerned about the well-being of his subordinates. In his testimony, however, Duch surmised that the DK regime did not put this principle into practice.

Democratic Centralism. According to the Witness, the principle of “democratic centralism”³ pertained to the minority respecting the majority. In practice, this also referred to subordinates respecting superiors, and everyone respecting the secretary, who represented the collective. Decisions were made collectively and everyone discussed the matter to arrive at a decision. The final decision, however, still depended on the secretaries.

Duch’s testimony on the CPK Principles, communication lines, and the specific roles of the Accused will continue next week with more questions from the Prosecution. Thereafter, the Civil Party lawyers, the Bench, and the Defense will examine Duch.

III. LEGAL AND PROCEDURAL ISSUES

A number of the legal and procedural issues that arose this week were reiterations of concerns Parties raised in previous hearings, including the consequences of the exercise by an Accused of his right to remain silent. Once again, this fundamental fair trial right became the subject of debate when Nuon Chea indicated that he would choose to remain silent if the Chamber did not grant his submissions. Further, the Parties contested the interpretation of the right of the accused to communicate with counsel in two instances: first, when Nuon Chea insisted that he speak with his counsel while he was on the dock, and second, when Pestman attempted to accompany his client to the examination room. Other issues also came up at this week’s hearings, including the interpretation of “substantial delay” in proceedings under the Internal Rules, as well as the distinction between an ordinary witness and an expert witness.

A. Right of an accused to remain silent

At the start of this week’s session, Nuon Chea, invoked his right to remain silent three times. Until this week, he had been the only Accused person testifying and actively answering questions in Case 002. He first he invoked the right to silence right when the Chamber refused to allow his counsel to confer with him on Monday morning as he read a prepared statement in court. His counsel, Pestman, advised the Court that his client would not answer anymore questions if he was not allowed to continue reading his statement. The Trial Chamber acquiesced to both of Nuon Chea’s requests. In substance, his statement

amounted to a request that the Chamber reopen the hearing on the first segment of the trial, which covered the historical background of DK. When the Court refused to do so, Nuon Chea invoked the right to remain silent for the third time that morning.

This turn of events elicited strong reactions from the OCP and the Civil Party lawyers. CPLCL Ms. Elizabeth Simonneau-Fort called Nuon Chea's tactic as "bribery," especially since the Civil Parties have been demanding that the Accused speak up and explain the events surrounding the DK regime. In a submission to the Trial Chamber dated 17 February 2012, the OCP averred that Khieu Samphan's refusal to answer questions after providing statements would have two effects: (i) it is unlikely for the Chamber to attach significant evidentiary weight to Khieu Samphan's statements; and (ii) citing trial chamber proceedings in the ICC and the ICTY,⁴ the Chamber may draw negative inferences from the refusal in assessing evidence on the issue of his involvement in and responsibility for the crimes alleged. International Co-Prosecutor Mr. Dale Lysak argued that this submission now applies to Nuon Chea, as well, because the latter actively answered questions in court throughout the first segment of this trial. In response, the Khieu Samphan Defense argued that there is no parallel between the ECCC and the ICTY and the ICC, because these three tribunals operate under different rules.⁵

It is interesting to note that all three Accused have invoked the right to remain silent at different points of the trial and under various conditions. Ieng Sary has expressed that he is exercising his right to remain silent during the entirety of the proceedings, and, as such, he will not answer questions or give any comments. Khieu Samphan, on the other hand, invoked this right with the qualification that he may decide to speak after the Prosecution has presents its evidence. The third Accused, Nuon Chea, invoked his right to remain silent when the Chamber proceeded with the second segment of the trial despite his request for continuance of hearings on the DK's historical background. All the Accused were allowed to read their prepared statements during the Opening Statements. Khieu Samphan and Nuon Chea presented their additional statements in the course of the proceedings.⁶

Article 35 new of the ECCC Law (which refers to Article 14 of the ICCPR) provides for the protection of the rights of the Parties in general. Article 14.3 (g) of the ICCPR affords the accused the right not to testify against himself or to confess guilt. Additionally, Internal Rule 21.1 (d) specifically protects the right of the Accused to remain silent by requiring that the Accused be informed of this right at every stage of the proceedings. It is not clear whether the timing of the invocation this right, as well as the circumstances surrounding it will result in negative inferences by the Chamber and affect the evidentiary weight of Khieu Samphan and Nuon Chea's statements. The CPLCL's comment that Nuon Chea's exercise of his right to remain silent amounted to "bribery," because as Simonneau-Fort said, "Mr. Nuon Chea is effectively saying if you do not proceed as I suggest, I will refuse to speak."

It is important to remember that that the right to remain silent is intertwined with a cluster of rights and minimum guarantees, including the right to be presumed innocent, all of which stem from the protection of human dignity.

B. Right of Accused to Communicate with Counsel

This week's hearing also highlighted Rule 35 new of the ECCC Law, as amended, which provides for the right of an accused "to communicate with counsel of their own choosing." After the Bench interrupted Nuon Chea from reading his statement, Pestman requested five minutes to confer his client. The President summarily denied this request, and gave the floor to Judge Cartwright to question Nuon Chea on the second segment of the trial. Nuon Chea refused to answer questions until he conferred with his counsel. After a short discussion among the Judges, the Trial Chamber allowed Pestman to approach the dock to speak with his client.

Another incident that may test the ECCC's interpretation of the right of the accused to communicate with counsel occurred on Tuesday afternoon, when the President allowed Nuon Chea to participate remotely from the holding cell because the Accused was unwell. Nuon Chea's counsel clarified that they were asking for an early adjournment to allow his client to rest and be present when Duch testifies. To determine the state of Nuon Chea's health, the Chamber ordered the ECCC physicians to conduct a medical examination. Without the Chamber's permission, Pestman followed his client to the examination room, prompting the President to instruct court personnel to call back Pestman, and say that the latter "will be in trouble" if his interference tainted the results of Nuon Chea's medical examination. Once Pestman was back in the courtroom, the Chamber noted that counsel interfered with Nuon Chea's examination and adjourned the session. It is unclear, however, why it was necessary to adjourn session early.

Pestman took issue with this ruling the next morning, and denied any interference. He asserted that, as counsel, it is his duty to be present during his client's medical examination. He argued that his presence was in fact instructive, because he noticed deficiencies in the examination: no test was conducted to assess Nuon Chea's cognitive function, fatigue, concentration and ability to participate in the hearing. The Trial Chamber ruled that while lawyers have the right to challenge the medical examination conducted, they do not have the right to be present during their client's medical examination. Subsequently, Pestman requested a medical examination for Nuon Chea during the lunch break, and sought the Chamber's permission for him to be present in the examination. The Chamber denied this request, and instructed the physician to examine the Accused only when there is a health concern. After the break, the President clarified that counsel is not allowed to make a direct request to the doctor to examine his client, but should make a request through the greffier. Judge Lavergne added that any request by counsel to be present in the medical examination of their clients will be denied, indicating that the Accused is not entitled to have his counsel observe his medical examination.

This issue certainly highlights the necessity of reviewing the ECCC's rules and the Cambodian Code of Criminal Procedure (or lack thereof) on the presence of counsel during his client's medical examination. Further, after Pestman's observation that the physician's assessment was limited to basic tests such as checking his client's blood pressure, it is worth inquiring into the quality and extent of medical care the Accused receive, particularly because of their advanced age and health conditions.

C. Interpretation of "substantial delay" in proceedings

On Wednesday, Civil Party Lawyer Ms. Lyma Nguyen raised concerns about the early adjournment of the hearing the day before. Citing IR 81.5, she argued that the health issues of the Accused might result in the substantial delay in proceedings. Nguyen suggested that instead of early adjournment, the hearing could proceed via video-link, as there is a need to balance the rights of the Accused with those of the victims. Ieng Sary's international counsel Mr. Michael Karnavas responded that the Accused in the case at bar are far from being physically or mentally incapable of participating in the proceedings. Pestman assured the Chamber and the other Parties that Nuon Chea "was not comatose yet." He insisted that they had not any "substantial delay" in the proceedings, as suggested by the Civil Party lawyers. Citing the case of *Stanišić*, he argued that even a delay of the three to six months cannot necessarily be considered substantial.

The Trial Chamber did not rule on this matter, perhaps seeing no necessity for the moment as there has been no substantial delay in the proceedings caused by the health condition of any of the Accused. Notably, Nuon Chea requested to be taken to the holding cell on Wednesday only after he said felt tired and continued to participate in the proceedings via video-link.

D. The role of factual witness compared to expert witness

Since his appearance as a witness, Duch he has been providing information on various aspects of the regime, from the interpretation of the CPK Statute to the Party's communication structure. However, it has been extremely challenging to distinguish what Duch actually experienced and knew during the regime from what he had read and learned from materials from Case 001, as well as books, movies and other resources on the KR to which he has been exposed since the fall of the regime. At some point in his testimony, he revealed that he was testifying based on his "research" and that, "If you only want me to tell what I know back then, I don't have anything to tell because I was confined to S-21." This prompted Karnavas and Pestman to object on the ground that OCP was effectively using Duch as an expert witness, relating things that he studied and drew conclusions about after DK regime, rather than testifying from firsthand experience and independent memory. In defense of the OCP's strategy, Smith repeatedly countered that Duch is a unique witness, who would be able to testify on not only S-21, but also CPK policies and other matters relevant to this segment of the trial. He reminded the Parties that each is responsible for determining the source and basis of Duch's testimony during their respective turns to examine the Witness.

The Trial Chamber, speaking through Judge Cartwright, adopted a permissive stance in this matter, stating that emphasis should be placed on Duch's knowledge of events and documents at the time of the regime. The Bench will evaluate the Witness' testimony by taking into account all the examinations of the Parties. That said, the President nevertheless instructed Duch to refrain from giving a subjective analysis of events, and limit his answers based on his personal knowledge and experience.

E. Scope of Questions

In September 2011, the Trial Chamber issued a Severance Order to divide Case 002 into different trial parts and broadly delineates the matters covered by the first trial. The current proceedings are often referred to as "Case 002/1." As the trial progresses, however, practical difficulties in limiting questions to the parameters of the Severance Order continue to recur. This manifested this week with the Chamber reminding the OCP a number of times to focus questions to the subject matters covered by Case 002/1. Pestman objected that the OCP's questions on matters such as S-21 and internal purges were outside the first trial's scope. The Prosecution, on the other hand, argued that its line of questions reflects CPK policies, which are included in the Severance Order, and, further, could help establish the alleged joint criminal enterprise mode of liability. Despite its own reminders, the Trial Chamber has taken a more lenient approach, and has so far overruled most objections based on irrelevance to the coverage of the trial, allowing the OCP to continue its questions.

F. Putting Documents Before the Witness to Refresh His Memory and to Authenticate Documents

This week, the Prosecution asked the Witness about several documents related to S-21 and the CPK. While Duch was able to recognize most documents, he admitted that he was not familiar with at least two documents. When Seng Bunkheang asked for leave to present Duch with the first of these documents to refresh the Witness's memory, Karnavas commented that the OCP should state the number of the document before giving the document to the Witness to enable the Chamber to determine if it can, indeed, be presented to the Witness. According to Karnavas, this is necessary to ensure that the Witness is merely refreshing his memory, and was not seeing a document for the first time. Smith argued that the Witness is shown the document to see if he recognizes it, and even if he does not, Duch can nevertheless authenticate it by indicating if its content is consistent with the policies in place during the DK regime. Karnavas countered that he had no objection to

the use of a document to refresh the memory of a witness, if his memory is faulty. However, Karnavas emphasized, authentication is a different matter, so it was wrong to argue that a witness authenticates a document when he looks at it to refresh his memory.

The Trial Chamber allowed the OCP to present the document to Duch, who stated that he had never seen it before. Seng Bunkheang proceeded to refer to the documents and asked Duch regarding CPK policies contained in the document. Nuon Chea's national counsel, Mr. Son Arun objected on the ground that it is improper to ask Duch to comment on a document that he has never seen before. Similarly, this happened relative to another document, prompting Karnavas to object that the OCP was leading the Witness. He argued that the OCP may only ask Duch about the document if he knows about it. In response, Smith emphasized the unique experience of the Witness, and entreated the Chamber to allow the OCP to question him on content of the document that may coincide with his memory to help the Bench understand how the documents relate to each other.

After considering the arguments of the Parties, the Trial Chamber held that, if a witness is unfamiliar with a document placed before him or her, the document will be retrieved from the witness and removed from the screen. In such a case, the Chamber ruled, the Parties may not refer to the document in their questions, but they may still ask the witness regarding the subject matter of the document. This ruling effectively blocked the Prosecution's submission that a witness can still comment on a document he is not familiar with, in order to authenticate its contents.

IV. TRIAL MANAGEMENT

Managing the hearings this week proved to be a challenge because of concerns relating to courtroom etiquette and the sudden change in the schedule. The Chamber responded reasonably well to exigencies of the proceedings in a case of this size and complexity.

A. Accused Attendance

All the three Accused were present at the start of the three days of hearing this week but only Khieu Samphan remained in the courtroom throughout the proceedings. As has been the usual case, at the end of each first session, Ieng Sary requested to participate in the proceedings remotely from the holding cell as he was suffering from lumbago and back pain.

On Tuesday, Nuon Chea stated that he was not feeling well and asked to be excused from the proceedings. While he said he was asking to be taken to the holding cell, Pestman clarified that his client wanted to be present for Duch's questioning and they were requesting an adjournment. On Wednesday, Nuon Chea asked for leave to participate in the proceedings from the holding cell and signed the required waiver.

B. Courtroom Etiquette

Last week, Pestman submitted that, since testifying makes Nuon Chea tired, his client would be unable to participate in court during Duch's testimony in the afternoon. He asked the Bench to adjust the schedule to allow Nuon Chea to be present in court (rather than merely participating remotely from the holding cell) when Duch appears. The Chamber granted the request, and adjusted the schedule so that Nuon Chea would testify on Monday and Wednesday morning (adjourning in the afternoon) and Duch would testify on all matters covered by Case 002/01 Tuesday and Thursday.

The Court was not pleased when Nuon Chea chose to remain silent, after the Chamber had taken care to arrange the week's schedule around his participation. Judge Lavergne spoke on behalf of the Chamber when he opined that Nuon Chea's counsel, Michiel Pestman, exhibited a lack of candor that amounted to an attempt to mislead the Court. Moreover,

Judge Lavergne indicated that Nuon Chea's conditions – that he would testify if the subject was about DK's historical background and remain silent if the Chamber decided to cover the second segment – was an attempt to manipulate the Chamber. This, the Bench found, raised "serious ethical issues," and the Court pledged to take this into consideration in any actions it may take in the future. Pestman was unshaken by the rebuke, expressing a clear belief in the propriety of his actions. He told the Judges that he welcomes any steps the Chamber may take, and even volunteered the contact details of the Cambodian and Dutch Bar Associations, saying he would like to have an expert opinion on this matter. Compounding matters was Pestman's attempt to observe his client's medical examination without leave from the Chamber. This again earned a rebuke for behavior the Chamber considered as interference to Nuon Chea's medical examination. Pestman, however, did not acknowledge that his actions may have constituted lapses in deportment expected of counsel.

On the one hand, Pestman has certainly shown determination to safeguard the rights of his client. On the other, however, such commitment does not excuse counsel from not being forthright to the Chamber and other Parties, and observing basic courtroom etiquette, such as seeking permission from the Bench before leaving the proceedings.

The Accused himself had challenges on the proper decorum in the courtroom. On Tuesday before lunch break, Nuon Chea interrupted the questioning of Seng Bunkheang by his statement that, "the people never use rotten wood to carve it into Buddha sculpture for people to pay homage to." This seemed to compare rotten wood to the witness Duch, insinuating that the latter is an unreliable person who cannot be believed. This inappropriate outburst earned rebuke from Civil Party Lead Co-Lawyer, Pich Ang, who reminded that Duch "is recognized as a witness, there should not be any remarks attacking the witness in any way." The Chamber rightfully advised Nuon Chea to exercise utmost restraint and listen to the testimony of the witness.

C. Time Management

Nuon Chea's unexpected exercise of his right to remain silent resulted in an abrupt change in the schedule, which has brought out the Chamber's flexibility. The Bench quickly decided to call Duch to the stand on Monday afternoon (instead of Tuesday, as initially scheduled) and opted to schedule its meeting to discuss pending issues on Thursday (instead of Monday and Wednesday afternoon had Nuon Chea testified).

D. Public attendance

Proceedings this week were well attended due to the continuing efforts of the Public Affairs Section of the ECCC. On Monday, approximately 400 persons from Kampong Chhnang Province and 20 Civil Parties observed the hearing. The number of attendees significantly dropped in the afternoon since no hearing was supposed to take place under the original schedule the Chamber issued.

On Tuesday, over 400 participants from Kampong Speu Province including monks, nuns, villagers, and students from different high schools traveled to the ECCC. There were also around 100 national and international visitors and observers from different organizations and media channels in court that day. More than a hundred students from Chumpoo Vorn High School took the place of students from Kampong Speu in the afternoon.

On Wednesday, about 300 students from two universities, 100 people from Kandal Province and 30 Civil Parties were in attendance. ECCC personnel handled the influx of people quite well, especially on Tuesday when there was the largest number of attendees.

E. Time Table

DATE	START	BREAK	LUNCH	BREAK	RECESS	TOTAL HOURS IN SESSION
Monday 19/03/12	9.01	10.08-11.01	11.13-14.06	14.58-15.21	16.16	3 hours and 6 minutes
Tuesday 20/03/12	9.05	10.31-10.50	12.01-13.33	14.40-15.00	15.20	4 hours and 4 minutes
Wednesday 21/03/11	9.08	10.41-11.08	12.03-13.33	14.40-14.58	16.02	4 hours and 39 minutes
Average number of hours in session: 3 hours and 56 minutes						
Total number of hours this week: 11 hours and 49 minutes						
Total number of hours, days, and weeks at trial: 168 hours 9 minutes						
39 TRIAL DAYS OVER 11 WEEKS						

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, Nora Fuchs, Princess Principe, Vidjia Phun and Noyel Ry, Penelope Van Tuyl 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. The Program is funded by the Open Society Foundation, the Foreign Commonwealth Office of the British Embassy in Phnom Penh, and the Embassy of Switzerland in Bangkok.

¹ According to Duch, the "strategic lines" suggested that mankind has to transform from slavery and feudalism of a capitalist regime to a socialist regime and finally to a communist regime. It is linked to the principle of dialectical materialism. These texts help people to transform from one regime to the next and to adapt to the change. According to the document, the party is supposed to struggle until the completion of the mission.

² The aim of the "tactical lines" was to gather forces to win over the enemies. There were three tactics: one to convince them to be their forces, the second to neutralize the forces which were not sure which side they should take on, and third was to isolate the enemies and have them smashed. Duch, however, questioned the applicability of these theories.

³ Nuon Chea also explained the principle of "democratic centralism" during the Opening Statements on 13-15 December 2011. See KRT Trial Monitor Issue No. 7. 3.

⁴ Co-Prosecutors. "Co-Prosecutor's Request for Notice to be Given to Khieu Samphan on the Consequences of a Refusal to Respond to Questions at Trial" (17 February 2012). E174. 9-10. Para. 21-23; 26, citing *Prosecutor v. Katanga and Chui*. ICC-01/04-01/07. "Decision on the Request of the Defence for Mathieu Ngudjolo to obtain assurances with respect to self-incrimination of the accused" (13 September 2011). Para. 7,8; *Prosecutor v. Gotovina et al.* "Decision on the Joint Defence Motion to Prohibit Use of Defense Documents by the Prosecution" (5 December 2008). Para. 9.

⁵ See Khieu Samphan Defense. Response to the "Co-Prosecutors' Request for Notice to be Given to Khieu Samphan on the Consequences of a Refusal to Respond to Questions at Trial". Re E174/1/Corr-2. 2 March 2012. pars. 12-21.

⁶ See KRT Trial Monitor Issue No. 5 (21-23 November 2011), 6-8. See also Issue No. 7 (13-15 December 2011), 7-9.