

KRT TRIAL MONITOR

Case 002 ■ Issue No. 6 ■ Hearing on Evidence Week 1 ■ 5-9 December 2011



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

*Nothing was bigger than Angkar. We could not escape.
Even living with the fish in the pond, we could not escape.
Even flying like birds in the sky, we could never escape.
So we had just to obey orders.*

– Civil Party Klan Fit

I. OVERVIEW

This week's proceedings marked the beginning of the reception of evidence for Case 002. Pursuant to the Trial Chamber's Severance Order dated 22 September 2011, the first segment of Case 002 is limited to the reception of evidence on the history of Democratic Kampuchea, the roles of the Accused prior to and during DK, the first and second phase of forced movement as alleged in the Indictment and the crimes related thereto,¹ unless there exists "exceptional circumstances" when the Chamber will allow questioning on all aspects of Case 002.²

The proceedings started with the two greffiers reading the paragraphs of the Closing Order relating to the history of the Communist Party of Kampuchea and DK, and the personal background of the Accused persons. This was followed by testimonies from the Accused, two civil parties and a witness in a week peppered with questions on procedural issues in connection with the reception of evidence and the rights of the civil parties in trial.

II. SUMMARY OF TESTIMONIES BEFORE THE CHAMBER

Nuon Chea took the stand and testified for most of the first day of hearing before asking to be excused at around 3:20 pm. On the second day, Nuon Chea continued his testimony during the first quarter of the hearing, but thereafter adamantly maintained that he would not be able to continue giving precise answers because he was too tired. Weighing the validity of his health concerns and his cooperation in answering questions, the Trial Chamber acceded to Nuon Chea's request.

Thereafter, two Civil Parties gave similar testimonies on their experiences as members of the Khmer Rouge in the 1970s. Both were not native Khmer speakers. In the absence of a professional interpreter in their language, staff from WESU

repeated and explained the questions to them. This, together with their advanced age, apparent poor health, the 40-year temporal gap, and perhaps their illiteracy, led to some difficulties during their examination by the Parties. At times, their answers were unresponsive to the questions.

A. Nuon Chea's Testimony

The Trial Chamber heralded the start of the substantive hearings with the questioning of the Accused Noun Chea. After a brief reminder of his fundamental rights and the charges against him by President Nil Nonn, Nuon Chea related the history of his revolutionary struggle. Subsequently, Judge Silvia Cartwright began questioning him on his activities with the communist movement. Consistent with his position in the Opening Statements, Nuon Chea maintained that Vietnam was responsible for the killings and that it intends to annex Cambodian territory up to this date.

a. Personal Background

Nuon Chea confirmed that his name at birth was Lao Kim Lorn and his revolutionary name is Nuon Chea. He was born on 7 July 1926 in Voat Kor Village, Voat Kor Subdistrict, Sangke District, Battambang Province. He is the third of nine children. His father was Chinese-Cambodian, but he clarified that his mother was purely Cambodian, contrary to the information in the Closing Order that his mother was part Chinese.³ He is married to Ly Kimseng. Before his arrest, he lived in Pailin District.

After completing primary school in Cambodia, Nuon Chea attended secondary school in Battambang, which was occupied by Thailand in 1941. He then studied at Thamassat University (University for Moral and Political Science) in Thailand and worked as a part-time clerk in the Thai Ministry of Finance. Later, he worked in the Thai Ministry of Foreign Affairs. He moved back to Cambodia to join the revolution after he heard reports of the shooting of Khmers by the French.

b. Nuon Chea's Political Beliefs

According to Nuon Chea, his motivation to join the resistance stemmed from the oppression of the Cambodian people by the French and rich landowners, which he personally witnessed. He studied in Thailand because he wanted to experience life in an independent country, but he soon discovered that injustice was everywhere. He narrated that even in Thailand, powerful people oppressed the weak. His search for an answer led him to communist literature and soon after, he was convinced that communism was the key to liberate the people from colonialism and oppression.

Nuon Chea further explained that initially, he did not fully understand what communism is but he gradually learned more with the help of progressive professors in his university. He joined the Democratic Youth Organization of Thailand and the Thai Communist Party in 1950. He then returned to Cambodia and worked in propaganda to stimulate the people against injustice in Cambodia. At that time, the Issarak independence movement was already active, but this movement was created and controlled by Vietnam.

Nuon Chea also recounted that he studied in North Vietnam, where he saw a report that after independence from the French, Cambodia and Laos will be part of the Indochinese Federation under Vietnam's control. This disappointed Nuon Chea as his aim was Cambodia's independence. He also claimed that after the Geneva Accords in 1954, he witnessed how Vietnam began implementing its ill intentions by infiltrating the Issarak, a Khmer anti-French nationalist movement. Cambodians were allowed to be cooks and soldiers, but the commanders were Vietnamese.

Subsequently, Nuon Chea explained that the Khmer Communist Party did not originate from the Khmer resistance, as everything was under Hanoi's control. He further maintained that the Cambodian people are not responsible for genocide and the crimes against humanity. Rather, it was Vietnam who killed Cambodians. Nuon Chea stressed that he "does not want the next generation to misunderstand history, that the Khmer Rouge are criminals, bad people." He then proceeded to repeat his warning that Vietnam still persists in its plan to this day and if the people do not try to protect the country, Cambodia will be swallowed up by Vietnam.

c. Nuon Chea's Early Involvement in the CPK

In response to Judge Cartwright's questions, Nuon Chea admitted that when he arrived in Cambodia from his studies in Thailand, he first joined the Indo-Chinese Communist Party because a Vietnamese told him that he had to join this party in order to conduct activities in the country. He also reiterated that the Indo-Chinese Communist Party was divided into three parties, including the Khmer People's Revolutionary Party in Cambodia, none of the three parties were independent from Vietnam. Nuon Chea then related how he, together with Tou Samouth and Pol Pot, created an independent political party, the Khmer Workers Party without the approval of Vietnam. Tou Samouth became the party's Secretary with Nuon Chea as Deputy Secretary. This party was later renamed as Communist Party of Kampuchea to avoid confusion with other parties. After Tou Samouth's disappearance, Pol Pot succeeded him as party Secretary and Nuon Chea remained as Deputy Secretary.

Nuon Chea emphasized that he never received military training in Vietnam as alleged in the Indictment. He also denied that he was part of the Military Committee. He asserted instead that he was in charge of propaganda and education for all levels of the CPK. After staying in Vietnam from 1951-53, Nuon Chea returned to Phnom Penh and he described his hardships in conducting revolutionary activities. He further explained the strategic and tactical lines of the communist party, which he created together with Pol Pot. The core policy was to rescue the poor and the peasants from upper-class oppression and to eliminate the system of mid-feudalism and mid-colonialism. He further said China supported their party line but Vietnam opposed it and tried to derail the course of their revolution.

B. Klan Fit's Testimony

The first Civil Party to testify, Mr. Klan Fit, is a 65 year-old member of the Kachok hill tribe minority from Ratanakiri Province.⁴ In accented Khmer, he related how a simple man was bound by the turmoil of his time and compelled to join a revolution he did not fully understand. He recalled that Laotians persuaded him to join. They warned that if he did not join, they "will not survive," and that "the revolution was needed to

liberate the country from enemies and feudalists". In retrospect, he declared that the Khmer Rouge took advantage of people from ethnic minorities who are ignorant and uneducated.

At the start, he worked as a messenger, mail courier and as a liaison. He recalled that he attended meetings presided by Ieng Sary twice. Before 1970, he and other villagers built bunker houses for Pol Pot and Ieng Sary, whom he later identified as the main leaders of the revolution. These houses were in a camp named K-5 located in a secure place in the jungle. Subsequently, he was appointed as village chief and was in charge of implementing the farming production quota set by the Khmer Rouge in their village. Soon after, he was appointed as commune chief of Talao commune, Bokeo District, Andong Meas.

After the "liberation" of Phnom Penh, he twice attended political trainings presided by Nuon Chea in the city. In 1976, he was appointed as deputy secretary of his district. He disclosed that he suffered a lot of difficulty in this position as people were relocated, gathered in one place for farming and had to look for land to till. He lamented thus, "I was intimidated, threatened, but I had to obey orders: leave no piece of land unused." Fearful, they also obeyed the ban against practicing their religion.

At the end of Klan Fit's testimony, a Civil Party Co-Lawyer asked him to talk about the harm or suffering he experienced under the Khmer Rouge, presumably in reference to his claim for reparations. Ostensibly misunderstanding the question, Klan Fit gave a general answer, saying that he underwent many difficulties and a number of people he knew were killed. The next day, Klan Fit became ill and was unable to continue his testimony, which was deferred by the Chamber to January 2012.

C. Romam Yun's Testimony

Mr. Roman Yun, the second Civil Party to testify, gave a similar account of his experience during the Khmer Rouge regime. He is a 70-year old Kachok from Andong Meas District, Ratanakiri. At the start of his testimony, Civil Party Co-Lawyer, Mr. Kim Mengkhy, advised other parties to keep their questions short and simple. According to Kim Mengkhy, Romam Yun is illiterate, has failing health and experiences problems with his memory. This became apparent when Romam Yun began to testify, as he was unable to remember dates or time periods relating to the events in his testimony. He likewise supplied answers that were not responsive to the questions asked.

Romam Yun declared that he did not remember when the Khmer Rouge arrived in his region. He said that he was forced to join the revolution, and told that membership is required "to serve the nation, to liberate the nation, to build the country, to develop the countryside and the next generation." Like many other persons in their area, however, he did not understand how this could be done. He continued to narrate that in the beginning, he was tasked as a messenger for senior cadres.

He remembered delivering messages to a certain "Van,"⁵ but did not specifically state that he was referring to Ieng Sary. Later, he said he was appointed to manage village and commune affairs, and then became chief of Andong Meas District. He

also recalled that “Van” attended a number of meetings during the revolution. During these meetings, cadres discussed farming, proper conduct, solidarity, solving problems, and plans on the course of the revolution. Significantly, Romam Yun also explained that people who deviated from plans were “rid of or dismissed.” These dissidents were accused of being enemies, imprisoned or taken to the forest. When asked to elaborate on how Angkar identified an “enemy,” Romam Yun professed, “if the villages were clean, there were no enemies; if not clean, there were enemies.” He admitted that he did not really understand the situation then.

When Mr. Chan Dararasmey, National Deputy Co-Prosecutor, asked about the forced evacuation in 17 April 1975, Romam Yun said that they only heard about this from information passed from mouth-to-mouth but he personally did not see any relocation in their area. This ended the OCP’s examination of Romam Yun. The Defense’s turn to question him has been deferred to January 2012 to give way to the video link testimony of the first witness, Mr. Long Norin.

C. Long Norin’s Testimony

Due to the failing health of Mr. Long Norin, the first witness to appear for this case, the Chamber decided to receive his testimony through video link from his home in Banteay Meanchey Province. On the screen, the witness was seen in his living room with staff from WESU, who occasionally repeated questions for him. Long Norin viewed the Party proffering through a questions on a screen-in-screen insert.

a. Long Norin’s Background and Early Life in the CPK

Long Norin was born in 1938, in Dong Village, Malai District, Banteay Meanchey Province where he still resides. He stated that he is a farmer. From 1960-1971, he studied gymnastics in Prague, Czechoslovakia. Heeding the call of King Sihanouk to fight for his country, he went to Beijing and joined the resistance. It was in Beijing that he met Ieng Sary. Shortly after, he went to Hanoi and worked for the National United Front of Cambodia (**FUNK**) radio station headed by Ieng Thirith. Later, he went back to Cambodia via the Ho Chi Minh Trail. He then worked in Steung Treng as a farmer at Office B20 and B15. The witness likewise recounted that subsequently, Nuon Chea and Khieu Samphan sent him to Preah Vihear to study the people and their needs.

Following the “liberation” of Phnom Penh on 17 April 1975, he received orders to go to Phnom Penh where he arrived during the evacuation. Long Norin claimed, however, that he was not aware that people were being evacuated. He said he merely saw people walking out of the capital but he said he did not know where they were heading. In Phnom Penh, Long Norin was assigned to work at Office B1, the Ministry of Foreign Affairs.

b. Life at the Ministry of Foreign Affairs

From April 1975 until January 1979, Long Norin remarked that he worked at the Ministry of Foreign Affairs, which Ieng Sary headed. In the Ministry, his tasks included typing documents, preparing passports, and listing foreigners coming to Cambodia. According to Long Norin, around 1976 or 1977, his immediate superior instructed him to make a biography and asked whether he was suspected of being a

member of the CIA, he said he did not think so. He also recalled that Ieng Sary asked him if he was affiliated with the CIA and if he knew a certain Tach Chea. He related that Tach Chea was a former schoolmate of his in the Pedagogical School and a teammate in football. He surmised that Ieng Sary was interested in his friend because the latter was a CIA agent and was close to him. Later, Long Norin admitted that he knew that Tach Chea was with the CIA because he had contact with the embassies. The witness explained that embassies had a tendency to have connections with CIA agents. He also qualified that he, on the other hand, limited his contact with embassies of socialist countries.

At the start of the Thursday hearing, the OCP requested Long Norin to verify if the document shown to him on screen was his biography. The witness authenticated the document and confirmed that the handwriting therein was his. A section in his biography showed that he and Tach Chea were friends. He likewise explained that his biography was an honest account of his life. He professed that Angkar reformed him. When asked whether he was afraid when Ieng Sary inquired if he was a CIA, and when he was instructed to prepare his biography, Long Norin answered “I thought that one day, my turn would come”. Interestingly, the Prosecution revealed that Long Norin was spared from the purge of many foreign-educated personnel at the Ministry. Moreover, despite being implicated in three S-21 confessions, the leadership did not order him to be re-educated. The Prosecution inferred that Long Norin’s self-criticizing biography may have helped him.

c. Credibility and Reluctance to Testify

Long Norin’s testimony was generally coherent and responsive. However, he contradicted himself at times and did not remember details clearly. This became evident when the Civil Party Co-Lawyers questions similar to those previously asked by the OCP but elicited different answers from Long Norin. For instance, while Long Norin initially said he stayed in Beijing for half a year, he later claimed he was there for one year and a half. In any case, he seemed to have remembered better when asked the second time about the circumstances surrounding his biography – he stated that it was Ieng Sary who ordered his immediate supervisor to tell him to write his biography – a link to Ieng Sary that he could not provide an hour before.

Significantly, it appeared that Long Norin was evasive when queried regarding purges in the Ministry of Foreign Affairs and Ieng Sary’s participation in these purges. When asked what happened to those who were considered “unclean” or found to be traitors, he replied that nothing happened to them. When he was further questioned about arrests of former diplomats and employees of the Ministry, he repeatedly maintained he was not sure and that he did not know or remember. This prompted Mr. Dale Lysak, international Co-Prosecutor, to confront the witness and ask: “(i)s there some reason you are reluctant to testify today?” The witness then assured him that he was not reluctant and he would answer if he can. Lysak made the following observation:

we have seen [...] a fair reluctance to testify, I am later on going to take him through a few statements from his prior interview that are inconsistent with what he is testifying here today. And in relation to that, it is certainly relevant to know whether or not he has maintained relationships with Mr. Ieng Sary since the Democratic Kampuchea period that give him a reason to protect Mr. Ieng Sary and not to be perfectly candid about the events of that period.

The Prosecutor proceeded to ask Long Norin questions about his relationship with Ieng Sary. While Long Norin declared that he had no communication with Ieng Sary after 1979, it appeared that he had established an organization named Democratic National United Movement with Ieng Sary in the 1990s and had acted as the latter's spokesman. Upon objection by Mr. Michael Karnavas, Ieng Sary's international counsel, on his line of questioning, Lysak went on to confront Long Norin with his prior statements before the Co-Investigating Judges in December 2007 that, according to the OCP, Long Norin's statements in 2007 were inconsistent with his present testimony. In his interview with the OCIJ, he appeared to have detailed Ieng Sary's statements on traitors in the Ministry of Foreign Affairs.

The Civil Party Co-Lawyers were likewise successful in highlighting other inconsistencies in Long Norin's testimony. Such contradictions in the witness' previous statements and his present testimony may have effectively placed his credibility in question. It is incumbent on the Trial Chamber to determine the evidentiary value it will afford Long Norin's testimony.

III. Legal and Procedural issues

a. Presence of Witnesses in Court Prior to Testimony

Mr. Ang Udom, Ieng Sary's national defense lawyer, raised the issue of witnesses attending hearings before they testify. He asked whether the Chamber, like domestic courts, prohibits civil parties and witnesses who have not given their testimony from attending hearings or getting information on the proceedings to avoid influencing their testimony. International CPLCL Ms. Elizabeth Simmoneau-Fort quickly clarified that there should be a distinction between civil parties and witnesses. She explained that civil parties have the right to attend all proceedings. Later in the day, President Nil Nonn assured that the Chamber will do its best to comply with Internal Rule 88(2), which states:

The Accused shall not communicate with each other. Whenever possible, experts and witnesses shall stay in a separate room from which they cannot see or hear the proceedings. While in such room, the witnesses shall not communicate with each other.

To this end, the Chamber instructed the WESU to help address this matter. Significantly, President Nil Nonn acknowledged that because of the nature of the ECCC, domestic law provisions cannot entirely apply in the present proceedings. He explicated that witnesses' access to modern means of communication from different media and other electronic means are beyond the ECCC's control. Judge Lavergne added that there are around 500 persons in the gallery and the Court cannot check everyone's identification every day. This is why the Internal Rule has been amended, and the Chamber will endeavor, "in so far as possible," to ensure that no witnesses or experts are present during the hearing prior to them giving testimony. Judge Lavergne further reminded the Parties that this is not a mandatory regulation, but rather, a general duty to be implemented by the WESU.

Indeed, the proceedings before the ECCC are of such importance that media – traditional or otherwise – regularly feature developments with the aim of keeping the public informed. While there is no getting around a pragmatic approach that acknowledges the fact that witnesses and experts have easy access to information

about Case 002, it remains important that witnesses' testimonies are, to the best extent possible, prevented from being influenced.

b. Oath by Civil Party and Courtroom Assistants

Before Klan Fit began giving his testimony, Mr. Michiel Pestman, Nuon Chea's international defense lawyer, inquired whether he has taken an oath. In addition, Pestman wanted to know whether he is testifying with regard to facts or to damages. The President answered that in contrast to witnesses,⁶ neither the CPC nor the Internal Rules require a civil party to take an oath prior to giving testimony. Not satisfied with the answer, Pestman reiterated his query whether Klan Fit's testimony will cover facts or his claim for damages. He posited that Klan Fit has to take an oath when testifying as to facts. Mr. Pich Ang, national CPLCL, declared that the question is inappropriate as Klan Fit is not a witness. Judge Lavergne again clarified that civil parties are parties of the proceedings and as such, they can testify without taking an oath. He pointed out that civil parties may testify as regards the damage they allegedly suffered, as well as facts. It is the Chamber's responsibility to determine the weight it will accord a civil party's testimony as to facts.

The difference between civil parties and witnesses lies in the fact that the former have a personal interest in the outcome of the case. They seek to prove the responsibility of the accused for the crimes that caused them injury. Their demand for commensurate reparations is hinged on the guilt of the accused. The role of a witness, on the other hand, is to provide information – both inculpatory and exculpatory – to the Chamber to establish the guilt or innocence of the accused. Recognizing this difference, Mr. Vann Nath, one of the few survivors of S-21, opted to participate as witness rather than a civil party in Case 001, in order for his testimony to bear greater probative value.

Another matter that was raised, this time by Mr. Kong Sam Onn, Khieu Samphan's national defense lawyer, was the necessity of having the WESU staff assisting Klan Fit, take an oath in accordance with Article 144 of the CPC. President Nil Nonn clarified that the WESU staff was not acting as an official translator from Khmer to the Kachok dialect but was merely assisting to ensure that Klan Fit understood the questions. Since the assistant did not provide interpretation services and only helped facilitate Klan Fit's examination, he did not need to take an oath.

c. Communication between Civil Parties and Their Lawyers

After a brief adjournment, Karnavas pointed out that the Civil Parties testifying before the Chamber consulted with their lawyers during the break. Karnavas called this practice "inappropriate." He opined that a person testifying before the Chamber, regardless of whether he is a witness or a civil party, should have no further contact with anyone once he begins providing his testimony in order to prevent them from being influenced. He stressed that lawyers should not coach or even give the appearance of influencing their clients' testimony. International Co-Prosecutor, Mr. William Smith, agreed with Karnavas, insofar as it applies to witnesses. Additionally, Ms. Elizabeth Simmoneau-Fort, international CPLCL, reiterated that since a civil party is not a witness but a party to the proceedings, a civil party is allowed to consult with his lawyers. Pich Ang further argued that, the principle of equality of arms will be violated unless civil parties are allowed to discuss with their counsel at all times. Mr.

Kim Mengkhy, a national Civil Party co-lawyer, likewise posited that Karnavas' objection is incompatible with Cambodian practice because it has the effect of curtailing the right of a party to communicate with counsel.

After hearing the arguments of the Parties, the Chamber ruled that based on domestic practice and the Internal Rule 88(2), which only applies to the accused, witnesses and experts, civil parties are entitled to consult with their lawyers at all stages of the proceedings.

d. Refreshing Witness Memory with Previous Testimony

To enhance the efficiency of trial proceedings, the Trial Chamber issued Memorandum E141 and E141/1, giving witnesses the opportunity to, with the help of the WESU, refresh their memories before giving testimony by reviewing the statements they made during the investigative phase.⁷ The Nuon Chea Defense objected, and asked that the Chamber temporarily stay its decision to present witnesses with prior statements pending resolution of their objection.

Judge Cartwright clarified that providing witnesses with copies of their previous statements is likewise practiced in the investigative stage in order to assist witnesses in refreshing their memory. She emphasized, however, that witnesses are not allowed to bring a copy of their statements in court, as the WESU retrieves the copy as soon as the witness finishes reading the document.

e. Leading Questions

The issue of posing leading questions came to the fore on Tuesday when the Ieng Sary Defense objected to a question Civil Party Co-Lawyer Ms. Moch Sovannary asked Civil Party Klan Fit. Karnavas objected on the ground that her question was meant to direct the Civil Party to the answer she wanted to elicit. The President sustained the objection. Subsequently, Karnavas made a similar objection after Moch Sovannary referred to the "policy against Vietnam," which Klan Fit did not mention in his testimony. Karnavas described the question as "classic leading of the witness." He further stated that the questions should be limited to "who, what, why, when, explain and describe" and not any statement leading to a desired answer. The President denied this objection, explaining that the question was based on facts that had been indicated in the Closing Order. Mr. Arthur Vercken, Khieu Samphan's international lawyer, did not leave this ruling uncontested and argued that the Closing Order does not establish facts. The President, however, dismissed this argument for lacking in substance.

Based on the foregoing, the issue of the propriety of leading questions is likely recur throughout the proceedings (the same matter was raised numerous times in Case 001). That witnesses are summoned by the Chamber and not by the Parties under IR 87.4 (thus making them witnesses of the Chamber and not of any particular party, regardless of which party included them in their respective witness lists), may have been exacerbating the situation. Thus, harmonizing the adversarial system the ECCC has adopted under IR 21.1(a) and its adherence to Cambodian legal procedure, which is largely inquisitorial may prove useful. Moreover, while it is foreseeable that the Chamber would rule on objections on a case-by-case basis, it would be helpful

for it to provide the Parties with guidelines when this occurs or during trial management meetings.⁸

f. Scope of Questioning and Exceptions

In its Severance Order,⁹ the Chamber decided to separate the proceedings in Case 002 into the following of discrete cases that incorporate particular factual allegations and legal issues:

- a) The structure of Democratic Kampuchea;
- b) Roles of each Accused during the period prior to the establishment of Democratic Kampuchea, including when these roles were assigned;
- c) Role of each Accused in the Democratic Kampuchean government, their assigned responsibilities, the extent of their authority and the lines of communication throughout the temporal period with which the ECCC is concerned;
- d) Policies of Democratic Kampuchea;
- e) Factual allegations described in the Indictment as population movement phases 1 and 2; and
- f) Crimes against humanity including murder, extermination, persecution (except on religious grounds), forced transfer and enforced disappearances (insofar as they pertain to the movement of population phases 1 and 2).¹⁰

Consequently, questions in the first trial must only relate to these facts. However, in exceptional cases, the Chamber allows the Parties to ask questions beyond the issues of the first trial segment. When Simmoneau-Fort sought to clarification what constitutes “exceptional circumstances,” the President referred to the Severance Order and reminded the Parties to limit their questions to matters related to the first segment. Unsatisfied, Simmoneau-Fort inquired if the Chamber would allow Parties to ask Klan Fit questions outside the first trial segment’s subject matter but the Chamber informed the international CPLCL that the Chamber would most likely reject this request. The OCP raised the same matter and asked what “exceptional reasons” means to help them prepare a request that the Chamber would consider. In response, the President referred to Court Document No. 124/7.1/Corr. 2¹¹ and explained that if Parties want to discuss topics beyond the scope of the Severance Order, they have to submit a reasoned request in advance.

The OCP touched on this issue again when Mr. Vincent de Wilde D’Estmael asked if it were possible to ask Long Norin about Case 002 in its entirety and not only about the first trial segment. He argued that exceptional reasons were due to the health of the witness, it is possible that Long Norin would not be able to testify at a later date. According to de Wilde, Long Norin’s failing health justifies asking him about all the charges in the Closing Order. Karnavas objected to this, stating that such applications should be made well in advance and offer greater specificity. He insisted that other Parties should be allowed to respond. The Chamber ruled in favor of the OCP, after international Co-Prosecutor reiterated the request to question Long Norin in all aspects of Case 002.

The Nuon Chea Defense likewise raised the issue of the scope of questioning at least twice during the Civil Party Co-Lawyers’ examination of Klan Fit. The Chamber denied Pestman’s objection to Moch Sovannary’s question on Klan Fit’s political training courses in Phnom Penh, on the ground that it related to the history of the CPK. While the Chamber sustained Pestman’s second objection and reminded Moch Sovannary that questions should be limited to subjects covered by the first

segment of the trial, it did not however, give a reason for its ruling. As such, the parameters within which questions posed to witnesses and Civil Parties should lie remain unclear, and it would be unsurprising if the Parties continue to raise requests and objections on this issue.

g. The Right of the Accused to Waive His Right to be Present

The right of the accused to waive his right to be present in his trial was again put to the test during the first two days of evidence hearing. Nuon Chea asked the Chamber a number of times to allow him to go back to the detention center, citing physical fatigue and an increase in his blood pressure. In the afternoon of the first day, the President instructed Nuon Chea to continue his testimony for another 30 minutes, in an effort to maintain the smooth flow of proceedings. After the morning break on the second day however, Nuon Chea adamantly insisted that he would be unable to continue providing precise answers due to his condition. Relying on a medical report by the doctor on duty in the courtroom, the President rejected Nuon Chea's request to go back to the detention center and instead ordered that the Accused be brought to the holding cell so he could continue participating remotely through audio-visual facilities means. The Chamber furthered ordered that the Accused be brought back to the courtroom after the lunch break. Mr. Andrew Ianuzzi, Nuon Chea's Counsel, was unsuccessful in persuading the Chamber to allow his client to go back to the detention facility and not to participate once he has waived his right to be present.¹² The Chamber however, made no indication whether or not this ruling will become the standard procedure when any of the Accused seeks to be excused and claims that he is unable to follow the proceedings through remote participation.

As a general rule, there is a fundamental requirement that an accused be present in his trial. If the accused is unable to attend on account of a physical or mental condition, the court needs to be provided with expert evidence to justify the absence of the accused.¹³ Moreover, a number of domestic jurisdictions, among them Cambodia,¹⁴ France¹⁵ and the United States,¹⁶ require the accused to be present. In these jurisdictions, the accused is generally required to be present during his trial but may waive his right to be present under circumstances, particularly when he has health concerns.

The ECCC's IR 81.1 confirms the requirement that the Accused be tried in his or her presence. IR 81.5, on the other hand, provides for exceptions, on account of health reasons or other serious concerns. Under this rule, the Chamber may continue the proceedings in the absence of the accused with his consent. The question in the case at bar, however, is not whether the accused has the right to be present in his or her trial, but if the accused may waive his or her right to present.

Based on the practice adopted by the Chamber in the case at bar, an Accused may waive his right to be present, provided that he submits a formal request to the Chamber in advance. This process will allow the Chamber to make an informed decision on the matter.¹⁷ However, when the absence of the accused causes substantial delay in the proceedings, and where the interest of justice so requires, Rule 81.5 allows the Chamber to order the participation of the Accused by appropriate audio-visual means. In addition, Rule 81.4 provides that proceedings may continue in the absence of an accused who, following an initial hearing, continues to refuse or fails to attend proceedings or is expelled from them. In these

cases, the accused may be defended in the proceedings by his counsel. From these provisions, it appears that although the general rule requires the presence of the accused in the proceedings, his absence is nevertheless not entirely proscribed, as long as his counsel represents him in the proceedings.

IV. Civil Party Participation and Civil Party and Witness Protection and Support

Throughout the week, at least 10 Civil Parties participated in the proceedings inside the courtroom. Other Civil Parties were also in attendance in the public gallery.

a. Civil Party Co-Lawyers take the Lead in Questioning Civil Parties

In an effort to facilitate questioning, the Trial Chamber instructed the CPLCL to take the lead in questioning the two Civil Parties who testified in this week's proceedings. This allowed the Civil Party Co-Lawyers to take a more proactive role in directing the examination of the Civil Parties. This is likewise an acknowledgement of the importance of the participation of Civil Parties in the present proceedings.

b. Repetitive and Irrelevant Questions

AIJ's monitors observed that in the course of the testimony of the Civil Parties, some questions posed by the Civil Party Lawyers to their clients tended to be repetitive or irrelevant to the scope of this segment of the trial. The Trial Chamber commented that Moch Sovannary did not appear to have used her time allotted wisely in asking questions. This prompted the Chamber to be stricter in allocating time for Parties for the rest of the week.

c. Victim and Witness Support

Despite the absence of professional interpreters for the two Civil Parties who testified this week, the Chamber endeavored to provide them with support by allowing WESU staff to accompany and assist them during their testimony. These WESU personnel repeated and clarified questions to the Civil Parties in instances when they were unable to understand the questions asked.

In the same vein, Long Norin also received adequate support from WESU. Due to his grave illness, Long Norin was provided a video link from his home so he did not have to travel to the courtroom. A WESU officer also supported the witness throughout his testimony, ensuring that he heard and understood the questions, repeating questions when necessary, and anticipating requests to relieve himself. The day prior to Long Norin's testimony before the Chamber, the WESU officer likewise read him the statements he gave the OCIJ to help refresh his memory.

V. TRIAL MANAGEMENT

a. Health Concerns, Time Allocation and Schedule

The Trial Chamber continued to show resolve in maintaining the smooth flow of proceedings this week by setting strict time limits to Parties' examination of the witness and Civil Parties. However, the health concerns of the Accused, the Civil

Parties and witness largely dictated the progress of this week’s trial and prompted the Chamber to revise the schedule several times.

Highlighting the need for the Parties to use their allocated time efficiently, President Nil Nonn exclaimed, “[t]ime flies and never waits,” before granting the OCP and extra 15 minutes to question Romam Yun. The Chamber granted this extension to allow the OCP to ask this Civil Party regarding forced evacuations. Additionally, the Chamber reminded the Parties to be more aware of their time allocations in the coming hearing days.

b. Translation Issues

Klan Fit and Romam Yun, the two Civil Parties who testified this week, are not native Khmer speakers. Since there was no professional interpreter in the Civil Parties’ Kachok dialect, the Chamber ensured that they received assistance to facilitate their examination. The President also directed the Parties to keep their questions as short and simple as practicable.

Another matter related to translation is the speed of questioning by the national Civil Party Co-Lawyers and the national Deputy Prosecutor. They were spoke too fast in a number of instances when putting questions to Civil Parties, and the interpreters were hard-pressed in translating their questions. Though there was no manifest lapse in interpretation, the interpreters had to ask the President to remind them to slow down.

c. Technical Concerns

There were a few minor challenges that marked the video link from Long Norin’s house in Banteay Meanchey Province, as the audio facilities did not function well in some instances. Some external factors also caused some technical concerns in the reception of Long Norin’s testimony. First, ceremony music from a neighboring house filtered into the audio feed, disrupting the questioning a number of times. Second, Long Norin’s testimony on Thursday afternoon was cut short due to a power shortage in the witness’ house, which disconnected the video link. Despite these concerns however, the video-linked testimony proceeded smoothly in general and provided a viable alternative to actual presence in court for elderly and frail witnesses and Civil Parties who live in areas far from the ECCC.

DATE	START	MORNING BREAK	LUNCH	AFTERNOON BREAK	RECESS	TOTAL HOURS IN SESSION
Monday 05/12/11	09.02	10.29-11.02	12.01-13.32	14.37-14.59	15.21	3 hours and 51 minutes
Tuesday 06/12/11	09.03	10.22-11.05	12.00-13.35	14.45-14.55	16.00	4 hours and 31 minutes
Wednesday 07/12/11	09.15	10.20-10.40	12.01-13.37	14.37-14.57	15.59	4 hours and 28 minutes
Thursday 08/12/11	09.12	10.41-11.03	12.04-13.34	14.46-15.00	16.07	4 hours and 49 minutes
Average number of hours in session: 4 hours and 24 minutes						
Total number of hours this week: 17 hours and 39 minutes						
Total number of hours, days, and weeks at trial: 29 hours and 54 minutes						

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;
- **Case 001** refers to *Case of Kaing Guek Eav alias “Duch,”* Case No. 001/18-07-2007-ECCC; and
- photos are courtesy of the ECCC.

Glossary of Terms

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	Witnesses and Experts 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 Trial Chamber. “Severance Order pursuant to Rule 89ter.” (22 September 2011). E124. [Hereinafter, t **SEVERANCE ORDER**].

² Trial Chamber. “Notice of Trial Chamber’s disposition of remaining pre-trial motions (E20, E132, E134, E135, E124/8, E124/10, E136 and E139) and further guidance to the Civil Party Lawyers”. (24 November 2011). E145.

³ OCIJ. “Closing Order”. (15 September 2010). D427 [hereinafter, **CLOSING ORDER**] par.1577.391.

⁴ Ranakiri Province borders Laos on the North and Vietnam on the East. It was part of the Northeast Zone during the Khmer Rouge regime. This Zone was run directly by Pol Pot from 1968-1970, and thereafter by Ieng Sary. See Kiernan, Ben. *The Pol Pot Regime: Race Power and Genocide in Cambodia under the Khmer Rouge, 1975-1979*. 2nd ed. 2002. p. 81.

⁵ Ieng Sary’s revolutionary alias was reportedly “Van”. See **CLOSING ORDER**.

⁶ IR 24(1) provides: “Before being interviewed by the Co-Investigating Judges or testifying before the Chambers, witnesses shall take an oath or affirmation in accordance with their religion or beliefs to state the truth.” Similarly, Article 328(2) of the CPC states: “before answering the questions, each witness shall swear that he will tell the truth according to his belief or religion.”

⁷ Case 002. Case No. 002/19-09-2007/ECCC/TC. Trial Chamber. “Provision of prior statements to witnesses in advance of testimony at trial.” (24 November 2011). E141/1.1.

⁸ De Wilde D’Estmael, reminded the court that Karnavas had asked the senior legal officer Ms. Susan Lamb in the informal trial management meeting about this and she said it is allowed. However, Karnavas said he was asking about things that had been said before, but in this case, the Civil Party did not mention “policy,” and that therefore De Wilde’s remark was out of context.

⁹ SEVERANCE ORDER. See footnote 1.

¹⁰ *Ibid.* par. 2. 2.

¹¹ Trial Chamber. “Request for Correction on Document E124/7.1 in English version“ (21 November 2011). E124/7.1/Corr-2.

¹² A similar scenario occurred during the preliminary hearing on the fitness to stand trial. See Transcript of Preliminary Hearing on Fitness to Stand Trial, E1/10.1 (31 August 2011), p. 42 f., lines 17 – 5. 25 – 5.

¹³ ICCPR Article 14; ECCC Law Article 35 new; ICTY Statute Article 21; SCSC Statute Article 17; The Rome Statute Article 63.

¹⁴ In Cambodia, the accused must be present unless he is prevented from being so because of health reasons or other serious reasons. See Constitution of Cambodia Art. 31, Code of Criminal Procedure of the Kingdom of Cambodia Art. 300, 309.

¹⁵ In France, the accused is required to be present before court and if he refused to appear he can either be forcibly brought before court or tried in his absence; if he disrupts proceedings he may be expelled from the courtroom and tried in absentia; however, the accused cannot choose to be tried in his absence unless he is only charged with a misdemeanor. See French Code of Criminal Procedure Art. 319, 320, 322, 411, 413.

¹⁶ In the United States, the accused must be present at the beginning of the trial, but under certain circumstances may not be required to attend the other trial phases or may be able to waive his right to do so. See United States Constitution Amendment 5, 6 and 14; United States Federal Rules of Criminal Procedure Rule 43.

¹⁷ Transcript of Initial Hearing, E1/4.1 (27 June 2011), p. 75, lines 1 – 20.