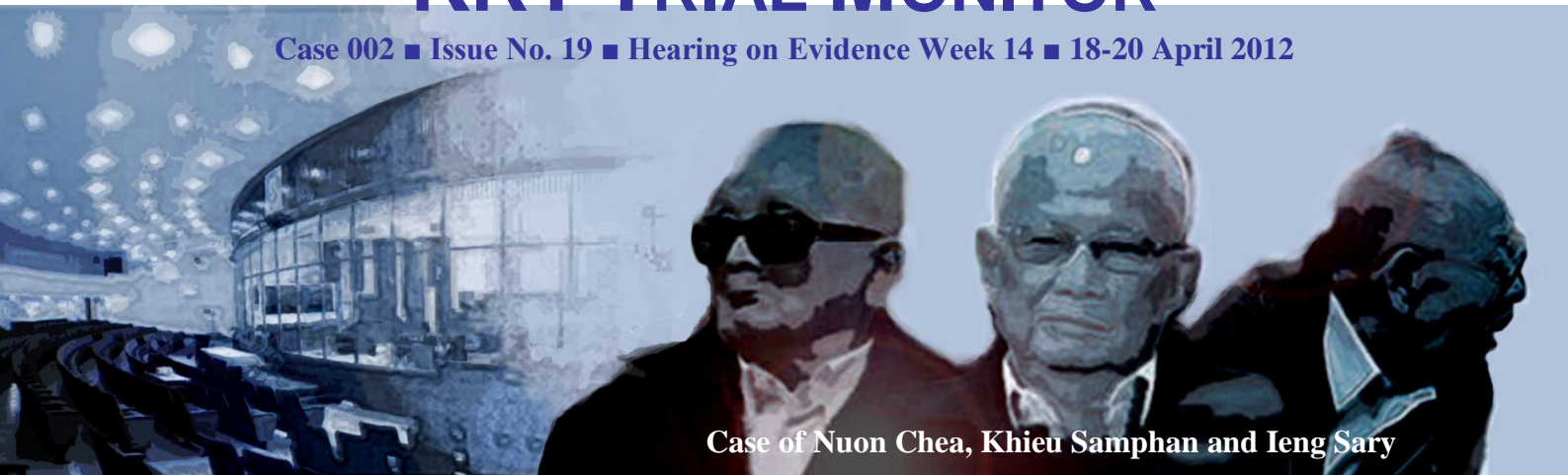


KRT TRIAL MONITOR

Case 002 ■ Issue No. 19 ■ Hearing on Evidence Week 14 ■ 18-20 April 2012



Case of 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

*When he was in power, he was a good person.
He provided good education to us.*

- Witness Saut Toeung, on Nuon Chea

I. OVERVIEW

After a short break for the Khmer New Year, trial resumed on 18 April with Nuon Chea momentarily breaking his silence to read a statement in response to the testimony of Kaing Guek Eav alias “Duch.” In Nuon Chea’s statement, he accused Duch of lying, and categorically denied that he was the latter’s superior during the DK regime. At the end of his statement, he expressed that he would not answer questions. Despite objections from the OCP and the CPLCL, who demanded that Nuon Chea answer their queries, the Trial Chamber acknowledged the primacy of the right of the Accused to remain silent as prescribed under Article 35 new (g) of the ECCC Law. However, the Trial Chamber ruled that it may take Nuon Chea’s selective exercise of this right into consideration when determining the evidentiary weight of his testimony.

With Nuon Chea’s refusal to answer questions, the Trial Chamber called a new witness, Mr. Saut Toeung, a former Khmer Rouge guard. After a discussion on the need to properly advise the Witness on his right against self-incrimination, his testimony resumed in the afternoon. The Chamber appointed a lawyer to sit beside the Witness and advise him about potentially self-incriminating questions, in accordance with Rule 28.9. Saut Toeung’s testimony provided the Chamber with an interesting glimpse of Nuon Chea’s role and activities in DK.

II. SUMMARY OF SAUT TOEUNG’S TESTIMONY

Mr. Saut Toeung is a 62-year old farmer from Andoung Meas District, Rattanakiri Province. In his testimony, he recounted his role in the CPK from the time he joined the revolution in 1968 until his assignment as a guard for Angkar’s K-1 compound, as well as Nuon Chea’s personal bodyguard. The Witness, who said he accompanied Nuon Chea to various trips around the country and abroad, provided details of these trips. He also revealed that for a time, he acted as a messenger between Duch and Nuon Chea, corroborating Duch’s reported interactions with the DK leader.

All the Parties, except the Khieu Samphan Defense Team, elected to examine Saut Toeung. Ieng Sary's national counsel, Mr. Ang Udom, asked only a few questions that sought to undermine any links between the Witness and Ieng Sary.

A. Roles of the Witness in the CPK

The Witness recounted that he joined the revolution in 1968. As he was too young to go into the battlefields, he was assigned to the children's mobile unit. In 1972, he became a member of the Youth League, the preparatory organization for membership to the CPK. Although Saut Toeung initially denied having lived in Office B-20, he later admitted that he did live there and helped transport vegetables, rice and ammunitions.

Duties during the DK regime and interactions with the Accused. According to the Witness, he was transferred from the children's mobile unit to the guard unit of the CPK called "Y-10." Khami, the supervisor of Y-10, regularly held criticism sessions. On the other hand, Pang, whose real name was Chhim Sam Aok, conducted the training sessions and read the *Revolutionary Flag* to the many in the CPK's ranks who were illiterate.

Through his new position, he had access to high-ranking party officials because he was assigned to guard Angkar's Office K-1 at the Chaktomuk Theater. Located at the riverfront, K-1 was reportedly where the DK leadership held office. Saut Toeung testified that he saw Nuon Chea and other leaders enter K-1 but he did not know what happened inside the building. Among the leaders he saw in K-1 were Ieng Sary and Khieu Samphan but he never had any occasion to speak with them. Apart from guarding the office, he said he was also on security detail during DK rallies in Phnom Penh, where he saw Pol Pot and the three Accused in attendance.

Brother No. 2's Bodyguard. Saut Toeung was eventually assigned as one of Nuon Chea's bodyguards. According to the Witness, he accompanied the Accused on trips to the provinces to preside over meetings and provide training to cadres. He further testified that Nuon Chea went to the provinces every two to three months, and that they had visited, among others, Battambang, Kampong Speu, Kampong Chhnang, Takeo and the East Zone to meet with other leaders, including Sao Phim, Ta Nim, Ta Pal, Ta Tuch, Kul and Ta Mok. The Witness admitted however, that he never personally saw or heard what went on during these meetings and trainings.

Nuon Chea reportedly went to dam worksites to check on the progress of construction, as well as to cooperatives to check on rice cultivation during his trips. In his testimony, Saut Toeung defended his former boss, saying Nuon Chea had intended to provide people three meals a day and a dessert per week; however it was the sector committees who did not implement this directive.

Saut Toeung also elaborated on Nuon Chea's trip to China and North Korea from 2 to 16 September 1978. He detailed that Chinese leaders welcomed the Cambodian delegation on their arrival and they proceeded to travel to rural areas. They visited Mao Tse Tung's tomb, as well as steel, pipe and fruit juice factories. The hosts held a banquet at the Great Hall of the People. The Witness said he was outside the Hall and did not hear what was discussed during the banquet. After China, they went to North Korea where they also stayed for a week and visited the countryside.

Messenger between Nuon Chea and Duch. At the heels of Duch having said that Nuon Chea was his superior in S-21 and Nuon Chea's vehement denial of this allegation, Saut Toeung's revelation that he acted as a messenger between these two persons appeared to corroborate Duch's version of the facts.

Saut Toeung reportedly received documents, either from Nuon Chea himself or from Pol Pot's aide, Pang, and delivered them to Duch, who received the papers himself. In the same manner, Duch gave him documents for delivery to Pang or Nuon Chea. He further indicated that he effected these deliveries four to five times in a span of a month in 1978. Moreover, while he exchanged short conversations with Duch during his deliveries, they never talked about what the letters contained. Saut Toeung testified that he never dared to open any of the letters he delivered. Despite the alleged exchange of correspondence between Nuon Chea or Pang and Duch, Saut Toeung insisted that he never heard Nuon Chea sending people to S-21.

B. Flight from Phnom Penh in January 1979

The Witness recounted his escape from Phnom Penh to Battambang Province on 7 January 1979 during the invasion of the capital by the Vietnamese. It appears that, in a prior statement to the OCIJ, the Witness had said that while he was on the run, he turned around, saw smoke coming from K-1, and knew that documents were being burned. However, when he testified before the Chamber, the Witness denied knowledge of the destruction of K-1 files.

In addition, Saut Toeung admitted that he continued to be involved with the Khmer Rouge even after the fall of DK. He was assigned to the transport unit in Pursat.

C. Demeanor and Credibility of the Witness

The examination of the Witness by international Co-Prosecutor Mr. Dale Lysak revealed that Saut Toeung initially disavowed his involvement with the CPK when he appeared before the OCIJ in 2007. He only admitted that he served as Nuon Chea's bodyguard and messenger after a confrontation with Duch before the OCIJ in 2009. Explaining his earlier denial, he said, "...I said so because of fear, but now I am more aware and I am speaking the truth." The Nuon Chea Defense used the Witness' previous recalcitrance to suggest that he only changed his testimony because of the assurances from the OCP and the OCIJ that he will not be prosecuted for the crimes committed in the DK. They further asserted that Saut Toeung did not understand the oath he took when he made his statements before the OCIJ.

Saut Toeung appeared uncertain during the first part of his testimony. This is hardly surprising, considering the debates in the courtroom on the risk of self-incrimination. Subsequently however, he answered questions on matters he remembered without hesitation. The time that had passed since the occurrence of the events in DK has tarnished the Witness' memory but the core of his testimony was sufficiently coherent. Notably, Saut Toeung was able to explain most of the ostensible contradictions between his statements before the OCIJ and his present testimony. However, he recanted his statement on the burning of documents at K-1 he reportedly gave the OCIJ. In general, Saut Toeung appeared candid in his interactions with the Chamber and the Parties, notwithstanding challenges to his credibility, and his admission that he did not thoroughly understand the import of the right against self-incrimination and his oath before the OCIJ.

III. LEGAL AND PROCEDURAL ISSUES

Following Nuon Chea's invocation of his right to remain silent after his response to Duch's testimony, the Trial Chamber finally issued an oral ruling that a negative inference may be drawn from the selective exercise by an accused of the right to remain silent. The need to safeguard the rights of the witness and to fully inform him of the right against self-incrimination also became the center of debate at the start of Saut Toeung's testimony,

which was ultimately resolved by the Chamber by providing the Witness with the assistance of counsel. Various objections to questions were also raised, most notably, the recurring issue of repetitive questions throughout this week.

A. The Selective Exercise of the Right to Remain Silent by the Accused

Nuon Chea's selective exercise of his right to remain silent prompted objections from both the Prosecution and the CPLCL. Lysak argued that this is unacceptable, and referred to a pending motion the OCP filed on this matter.¹ He urged the Bench not to attach any evidentiary weight to Nuon Chea's exculpatory assertions, and instead to draw negative inferences from his selective exercise of his right to remain silent.

International CPLCL Ms. Elizabeth Simonneau-Fort expressed the Civil Parties' indignation over Nuon Chea's refusal to answer questions from the Parties and even the Bench. She reiterated the argument articulated by her colleague, Mr. Barnabé Nekuie, on 4 April 2012 that no rule allowed Nuon Chea to step out of his silence to make a statement, and then subsequently refuse to answer questions and step back into silence. She argued that the right to remain silent is not absolute, and its selective exercise is against the fair trial rights of all Parties, as well as the principle of due process embodied in Rule 21 of the Internal Rules.

The response of Nuon Chea's national counsel, Mr. Son Arun, was unclear, but it may be gleaned from his submission that his client may still be willing to answer questions in the future.

When the session resumed after the morning break, the Trial Chamber finally issued its much-anticipated ruling on this matter. The Trial Chamber stated that it would not require the Accused to answer questions pursuant to Article 35 new (g) of the ECCC Law, which proscribes compelling the accused to testify against themselves or to confess guilt. It further declared, however, that in assessing the guilt or innocence of the Accused, the Chamber will consider all evidence before it, including the testimony of the Accused and the manner by which he testifies. As such, in assessing the credibility of the Accused, the Chamber will consider his selective exercise of his right to remain silent (i.e. his alternating between giving statements and remaining silent). The Chamber agreed with the Prosecution that an adverse inference may be drawn from selective silence, but it clarified that the Chamber's final decision will not be based exclusively from the inference drawn from silence.

None of the constitutive documents of the *ad hoc* and other hybrid tribunals contains any provision on the consequence of the selective exercise by the accused of his right to remain silent. To date, only the ICC Statute prohibits its chambers from considering the silence of the Accused in the determination of guilt or innocence. It does not, however, address the issue of selective exercise of this right, that is, when an accused is willing to give statements and comments but invoked this right in order to refuse to answer questions. Unfortunately, the Trial Chamber did not expound upon any existing jurisprudence relevant to this issue, and merely declared that its ruling is congruent with the jurisprudence of international tribunals.

B. Right of a Witness to Protection Against Self-Incrimination

The right of a witness to protect himself against self-incrimination is expressly acknowledged and protected under Rule 28 of the Internal Rules. In accordance with this Rule, the President informed Saut Toeung of his right against self-incrimination at the start of his testimony, and asked him if understood. The Witness, looking confused, answered, "I do not thoroughly understand it." This brought Nuon Chea's international counsel Mr. Andrew Ianuzzi to his feet to ask that the Witness be properly apprised of his right against self-

incrimination, citing the statement of the Prosecution during Duch's testimony, that a witness runs the risk of prosecution. Ianuzzi moved for an *in camera* hearing for the reception of the Witness' testimony in accordance with Rule 28.8. The Prosecution complained that, by raising the issue of self-incrimination in Suat Toeng's presence, the defense counsel deliberately sought to intimidate the Witness.

CPLCL Pich Ang expressed surprise over Ianuzzi raising this issue since the Witness, who he said was neither a senior leader nor a person most responsible for the crimes committed, was outside the personal jurisdiction of the ECCC. The issue of self-incrimination, Pich Ang argued, should not be a concern for the Witness

After some deliberation, the Trial Chamber denied the request on the ground that it was not timely raised. The Witness began his testimony.

A few minutes later, Ianuzzi again raised the issue, warning that the testimony was covering areas where the Witness might incriminate himself. He asked that the Witness be fully apprised of his rights, and that he be provided with a lawyer in accordance with Rule 29.9. The Prosecution objected to this, accusing the Defense of interfering with the Witness' testimony. Simmoneau-Fort urged the Chamber to lay the matter to rest by assuring the Witness that he will not be prosecuted at the ECCC. Ieng Sary's international counsel, Mr. Michael Karnavas, refuted the CPLCL, arguing that while a person could not be prosecuted under the ECCC Law, he nevertheless runs the risk of being prosecuted before the domestic courts. Karnavas reminded the Trial Chamber and the Parties that this was the OCP's position during Duch's examination. The Chamber declared a short recess and ordered an *in camera* session to further discuss the issue.

The Witness' testimony before the public resumed after lunch, signifying that the Nuon Chea Defense motion to hold the examination behind closed doors was ultimately unsuccessful. In order to protect Saut Toeung's rights, however, the Chamber provided him with counsel to assist and advise him when he ran the risk of self-incrimination, in accordance with Internal Rule 28.9. The assisting counsel provided support to the Witness throughout his testimony on Wednesday and Thursday. On the last day of testimony, the Witness appeared without counsel but assured the Chamber that he will only respond to questions that he can answer.

C. Repetitive Questions

Among the recurring objections that the Defense Teams raised this week was the use of repetitive questions. Karnavas objected on this ground after national Civil Party Lawyer Ms. Ty Srinna persisted in asking questions that sought to prove meetings between Nuon Chea and Duch despite the Witness maintaining that he never saw them meet. The next day, the national CPLCL objected when Son Arun tried to repeat a question already asked by the OCP. Son Arun argued that counsel for Civil Parties also repeated a number of questions the day before and thus, he should be given an opportunity to ask the Witness questions as he saw fit. The Chamber sustained both objections and correctly reminded the Parties, in the interest of efficiency, to avoid asking repetitive questions.

D. Limitation of Oral Submissions in Open Court

At the start of the proceedings on Wednesday, Nuon Chea's international counsel, Mr. Jasper Pauw, submitted, for the record, that Senior Legal Officer Susan Lamb informed him via email that they were not allowed to make oral submissions in Court that day. He argued that the oral submissions that they intended to make would have dealt with important fair-trial concerns that came to light during Duch's examination and that such submissions "must be discussed in public, for the wider audience to see and hear." He further stated that, "Defense

concerns as to the violation of our fair trial observations should not be relegated to written submissions.” The Chamber did not comment on the matter the Nuon Chea Defense raised.

IV. WITNESS PROTECTION AND SUPPORT

In addition to efforts to protect the Witness against self-incrimination, the Chamber also implemented measures to assist the Witness in giving his testimony. For example, to accommodate the Witness’ difficulty reading, the Chamber instructed the Parties to read aloud passages of documents they wanted him to comment on. The Witness was also provided with a pair of reading glasses, after he was asked to identify CPK senior leaders in a picture, and he informed the Chamber that he could not see clearly without his glasses.

V. TRIAL MANAGEMENT

Proceedings started on Wednesday this week after the Khmer New Year, with an additional 40-minute hearing on Friday to conclude the testimony of the Witness. A few technical glitches caused minor disturbances, but court personnel remedied these fairly quickly.

A. Time Management

It appeared that the Parties were not entirely aware of the time allocations before the hearing commenced this week. In the middle of questioning by the Prosecution, Simonneau-Fort intervened and declared that she had just received an email from the Court’s Senior Legal Officer informing them that the OCP and CPLCL would share a day and half to question the Witness. However, Simonneau-Fort pointed out that the OCP had already used up most of the day for its questions and requested the Trial Chamber to inform the Parties of the time allocations well in advance so that Parties may judiciously divide the time allocated between them.

To resolve this, at the end of Wednesday’s session, the Trial Chamber asked the Parties to indicate how much time they need for questioning witness Saut Toeung. The OCP indicated that they needed until noon the next day, while the CPLCL asked for two to three hours to examine the Witness. The Nuon Chea Defense asked for at least half a day while the other Defense Teams both asked for an hour each to conduct their examination.

From these time indications, the Trial Chamber scheduled an additional hearing on Friday to conclude the examination of the Witness. While the CPLCL used up all the time allocated to them, most of the Parties finished their questioning ahead of their indicated schedules.² This resulted in a Friday trial that lasted for less than 40 minutes.

Scheduling examination of new witness. After the conclusion of Saut Toeung’s testimony, the Trial Chamber announced that next week the Chamber will hear the testimony of another witness, TWC 568. This is a commendable step, which allows the Parties and the public to anticipate the next week’s schedule.

C. Attendance

All the Accused were present at the beginning of the three days of hearing this week, with Ieng Sary requesting to participate in the proceedings remotely from the holding cell after the end of the first session for the first two days. Nuon Chea asked to participate in the hearing from his holding cell at the end of the second session on Wednesday. Although the second session was closed to the public on Thursday, it appeared Nuon Chea also asked to be excused to the holding cell, since he was absent from the courtroom when trial resumed after lunch. Khieu Samphan, on the other hand, was present in the courtroom on all hearing days.

Attendance by the Public. On Wednesday, approximately 300 people from Pursat Province watched the hearing at the public gallery until end of the third session. On Thursday, around 300 students from Kampong Cham Province attended the session with 50 students from New York City. On Friday, the last day of hearing, there were approximately 300 people from Kampong Speu Province in the public gallery.

D. Translation and Technical Issues

At least several times on Wednesday's session, the proceedings were interrupted by noises from the sound system. At one point, the President Nil Nonn exclaimed, "(w)hat happened to the sound system after Khmer New Year?" and instructed the court officers to check the audio-visual system.

Translation Issues. The main challenge in translation this week was caused by the speed of interchange between two native Khmer speakers. International counsel for Khieu Samphan, Ms. Anta Guisse, stood up twice to say that she was experiencing difficulty in getting the French translation while Ty Srinna was putting questions to the Witness. Guisse emphasized that the interpreters were not at fault; rather the two speakers failed to pause in between their questions and answers to enable the interpreters to catch up, especially since the French version is based on the English translation of the Khmer exchanges.

Mr. Ang Udom, Ieng Sary's national counsel, suggested that the counsel for the Witness remind his client to pause before answering a question. In the end, the President instructed Ty Srinna to speak more slowly and reminded the Witness to answer only when his microphone was on. The counsel struggled to comply, but at times, the exchange between her and Saut Toeung was too fast, causing difficulties in translation.

E. Time Table

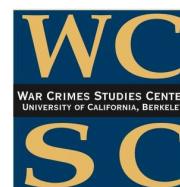
DATE	START	MORNING BREAK	LUNCH	AFTERNOON BREAK	RECESS	TOTAL HOURS IN SESSION
Wednesday 18/04/12	9.05	10.37-11.10	11.18-13.36	14.39-15.00	16.12	3 hours and 55 minutes
Thursday 19/04/12	9.02	10.35-11.01	12.03-13.32	14.31-14.52	15.56	4 hours and 38 minutes
Friday 20/04/12	9.03	-	-	-	9.40	37 minutes
Average number of hours in session:				3 hours and 3 minutes		
Total number of hours this week:				9 hours and 10 minutes		
Total number of hours, days, and weeks at trial:				225 hours and 26 minutes		
52 TRIAL DAYS OVER 15 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 ECCC;
- the quotes are based on the personal notes of the trial monitors during the proceedings; and
- 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)
FUNK	National United Front of Kampuchea
GRUNK	Royal Government of National Union of Kampuchea
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, Kounila Keo, Vidjia Phun, Princess B. Principe, Sovanna Sek and 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 See Office of the Co-Prosecutors. Co-Prosecutors' Request for Notice to be Given to Accused Khieu Samphan on the Consequences of a Refusal to Respond to Questions at Trial (17 February 2012). E164.

² The OCP completed their questions at 11:15 am. Andrew Ianuzzi used 40 minutes for his questions. On Friday, the Chamber granted Son Arun 15 minutes to put his questions to the witness, while the Khieu Samphan Defense unexpectedly announced that it will not examine the Witness as he has not stated anything related to their client. Ieng Sary national counsel, Mr. Ang Udom, then posed questions to the witness for less than 20 minutes.