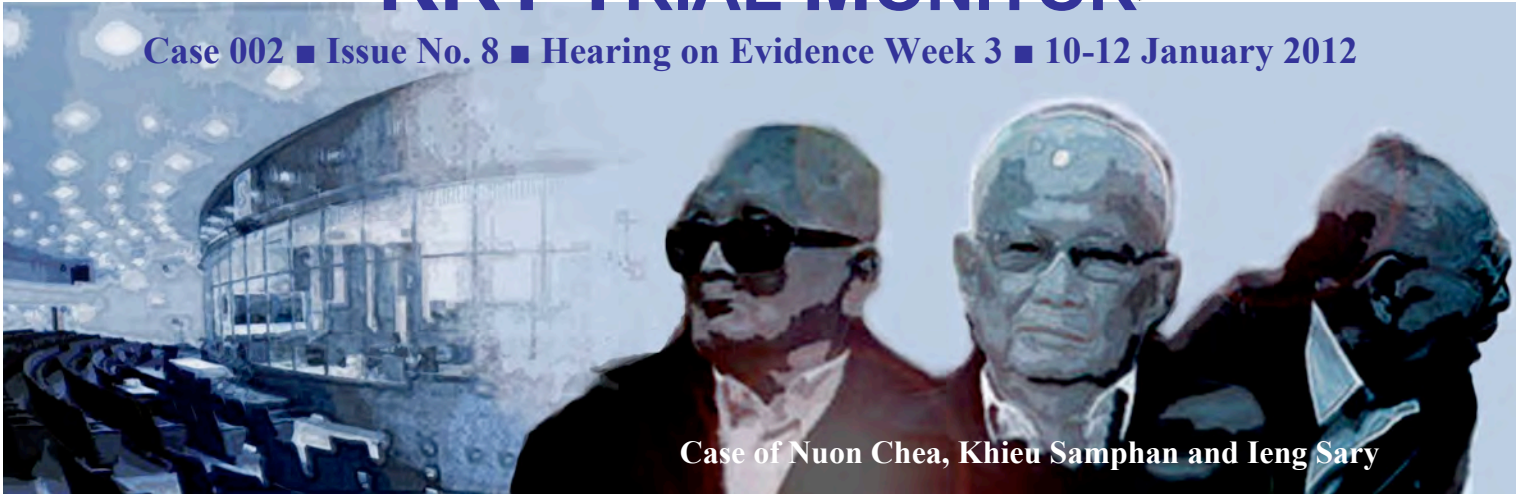


# KRT TRIAL MONITOR

Case 002 ■ Issue No. 8 ■ Hearing on Evidence Week 3 ■ 10-12 January 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

*...Not everyone was considered an enemy;  
otherwise, our nation could have been severely divided.*

- Nuon Chea

## I. OVERVIEW

After a three-week recess, the Trial Chamber opened sessions for 2012 with the testimonies of Civil Parties Klan Fit and Romam Yun, and Accused Nuon Chea and Khieu Samphan. It was a week punctuated by tense, and at times, impassioned exchanges between the personalities in the courtroom. This issue of KRT Trial Monitor reports on the legal and procedural issues in contention this week, and surveys the continued reception of documentary and testimonial evidence related to the history of Democratic Kampuchea.

Klan Fit and Romam Yun concluded their testimonies by narrating their experiences as CPK cadres, their encounters with the Accused, and their respective experiences with incarceration and forced labor towards the end of the regime. Nuon Chea, on the other hand, testified on the early years of the CPK, until the planning of the evacuation of Phnom Penh. His testimony was frequently stalled by his repeated insistence to see original versions of documents when confronted with evidence from the Case File. The Trial Chamber ruled that, as a matter of procedure, the Parties may refer to electronic copies of Case File documents in court, unless the authenticity of the copy is specifically challenged by another party. Nevertheless, Nuon Chea continued to demand originals all week, becoming increasingly agitated as the days wore on. His repetitive demands caused the Judges of the Trial Chamber to become noticeably exasperated, and by late in the week they concluded that the Accused was exercising his right to remain silent when he refused to respond to copies, despite protests from his defense counsel that Noun Chea was, in fact, challenging the authenticity of the documents being presented to him.

---

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://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.

Khieu Samphan continued to invoke his right to remain silent this week. In spite of his clear unwillingness to answer questions, the Court repeatedly asked him to comment on passages from Case File documents. This triggered frustrated objections from his attorneys.

## **II. SUMMARY OF TESTIMONIES**

The following is a summary of the testimonies of Accused Nuon Chea, and Civil Parties Mr. Romam Yun and Mr. Klan Fit.

### **A. Nuon Chea's Testimony**

In this week's hearing, the OCP questioned Nuon Chea on the history of the CPK. The initial part of his examination focused on a Khmer Rouge publication called *Revolutionary Flag*. Counsel then proceeded to cover four key periods in the CPK's history from 1960 to 1975. The first period related to the first CPK Congress of 1960, which covers the appointment and policy lines of the CPK. The second period pertained to the CPK Congress of 1963. The third period focused on the relocation of "Office 100," as well as the stretch between 1963 and the Lon Nol coup of 1970. The fourth period concerned 1970 until the "day of liberation" in April 1975, when the Khmer Rouge seized power over Phnom Penh.

#### **1. *Revolutionary Flag***

At the commencement of this week's hearing, the OCP asked Nuon Chea to clarify matters relating to publication of *Revolutionary Flag* to follow up on Judge Cartwright's December 2011 examination of the Accused on the same subject. According to Nuon Chea, this magazine was established even before the Geneva Accords of 1954, and not during the first CPK Congress in 1960. Nuon Chea explained that the Standing Committee created the *Revolutionary Flag* because of what he described as the chaotic and fragile situation in Indochina after the Geneva Accords. *Revolutionary Flag* was a handwritten magazine that the CPK circulated prior to the Democratic Kampuchea regime. According to Nuon Chea, the publication was later renamed and printed in typeset after the "liberation" in 1975, when the KR leadership gained access to printing presses. Nuon Chea testified that *Revolutionary Flag* had a cover depicting an image of one flag. The later incarnation of the publication, published and disseminated as *Red Flag*, featured an image of five flags on the cover.

Counsel for the Prosecution sought to elicit evidence from the Accused about KR policies, by asking him to respond to or comment upon various passages in *Revolutionary Flag*. In one key exchange, International Co-Prosecutor, Mr. Dale Lysak, inquired about import of the phrase "contradiction," which appears throughout the magazine, and was also mentioned by Nuon Chea during the opening statements. In response, Nuon Chea distinguished between an "antagonistic contradiction" and an "internal contradiction." He differentiated these two concepts in this manner: an "antagonistic contradiction" is one between an aggressor and an invaded country. It is a matter of life and death. An "internal contradiction," on the other hand, is one between landowners and peasants. It may be resolved through "study sessions," discussions and other specific procedures. Using excerpts from *Revolutionary Flag*, Counsel challenged Nuon Chea's description of "internal contradictions." The Prosecution confronted the Accused with passages suggesting that the notion of "internal contradictions" in fact included life and death struggles between classes within Khmer society. Although Nuon Chea initially refused to comment upon the electronic version of the magazine excerpts presented to him in court, ultimately, he responded to the Prosecution's question. Nuon Chea denied that "internal contradictions" (between classes) had the same grave connotations as "antagonistic contradictions" (with outsiders). According to him, it would have made no sense for the contradiction between landowners and peasants to be treated as a matter of life and death in KR ideology, because then these people would have been reduced to "brutal landowners" and "henchmen."

The Prosecution pressed further with questions about the rural/urban divide, and CPK ideology to allegedly treat certain classes of people as party enemies. Nuon Chea acknowledged that the party considered the countryside as its backbone rather than urban areas, but he framed this in terms of pragmatism, and natural rural affinity for CPK principles, rather than in terms of CPK animosity toward urban classes. He explained that, unlike people from urban areas who enjoy a relatively higher standard of living, those from rural areas were often too poor to even afford food and clothes. According to him, the CPK took a pragmatic approach and educated poor people to improve their living standard. Significantly, Nuon Chea also stated that rural areas were more difficult for enemies to penetrate.

Nuon Chea's repeated demands to see originals of *Revolutionary Flag* and *Red Flag* magazines brought issues on document authenticity and reliability to the fore this week. Part IV of this report, covering legal and procedural issues will analyze the matter in greater detail.

## **2. The First CPK Congress of 1960**

Having confronted Nuon Chea with CPK policies published in *Revolutionary Flag*, the OCP proceeded to examine Nuon Chea regarding CPK leadership – who the leaders were and how they were appointed – and the conduct of the first CPK Congress in 1960. It was during this congress that the party's early policies were adopted. It is also worth noting that in 1960, the party was still referred to as the "Labour Party."

### **a. Appointment of Leadership Committees and Zone Secretaries**

According to Nuon Chea's testimony, he, together with Tou Samouth, Saloth Sar (later, Pol Pot), Mei Manh, and Su Heng were the leaders of the CPK. Being the most senior member, Tou Samouth was appointed president of the CPK and secretary of the Standing Committee. Nuon Chea was the deputy secretary of the Standing Committee in charge of education and liaison with Vietnam. According to him, he was in charge of rural areas while Saloth Sar and Mei Manh oversaw Phnom Penh. Saloth Sar, moreover, controlled operations involving intellectuals. The Accused further narrated that he, Tou Samouth and Saloth Sar began recruiting people in the East, West and North. Subsequently, two more members, Keo Mas and Ta Mok, became members of the CPK's Central Committee in 1960 and 1963, respectively. Vorn Vet soon replaced Keo Mas, after the leadership found that the latter was untrustworthy with confidential matters. Nuon Chea added that Ieng Sary and Son Sen were likewise members of the Standing Committee, and that Sao Phim was the secretary of the East Zone.

As regards zone leaders, the Accused stated that each zone nominated its own secretary separately, and the nominees represented their respective zones at the 1960 congress. Six to seven zone nominees who were from movements against the French and Khmer chiefs from the zones, attended first congress. Nuon Chea further confirmed that the congress collectively appointed the nominees as zone secretaries.

### **b. Party Policy Lines Drawn at the 1960 Congress**

When questioning Nuon Chea about the CPK's policy on identifying enemies, Lysak referred to a purported transcript of the 1960 Congress, which indicated that there were two kinds of enemies: the imperialist, especially the "American imperialist," and the feudalist, including landowners and reactionaries. Nuon Chea firmly maintained that the CPK defined enemies based on the regime rather than class, or people from a particular class. Nuon Chea explained this, first, by saying that the document Lysak cited is inaccurate, and then clarifying that the CPK's enemies were "imperialist's henchmen" and the feudalist regime. He proceeded to explain that "imperialist henchmen" betrayed their own nation by siding with the imperialists that invaded Cambodia. The feudalist regime, on the other hand, refers to "those most heinous feudalist landowners and the reactionaries." Nuon Chea was quick to say,

however, that not all landowners were considered feudalist. When Lysak intimated that the CPK branded aristocrats, including the King, ministers and commune chiefs, as enemies, Nuon Chea disagreed and said some aristocrats were nationalists, and as such, could not have been considered enemies. He added that the CPK did not consider any group as its enemy, and warned the OCP not to oversimplify the matter. Instead, individuals – informants and spies – were the enemies and each enemy was considered on a case-by-case basis. He emphasized that not everyone could have been considered an enemy; otherwise, Cambodia would have been severely divided. The Accused further emphasized that the party's slogan was to "reduce enemies, increase friends as much as possible."

If Nuon Chea is to be believed, CPK party lines adopted in the 1960 Congress could only be amended through a general party congress attended by the entire membership from all over the country. As such, the Central and Standing Committees had no authority to unilaterally change the party lines. Nuon Chea claimed that he could not remember whether the party line had been amended between 1960 and 1975.

When the questioning turned to whether the Accused acted as Prime Minister when Pol Pot was ill, Nuon Chea denied ever having served as prime minister. He confirmed that Pol Pot was sick for many months but claimed that neither he nor Khieu Samphan replaced Pol Pot. He said they could not have taken over Pol Pot's position since neither of them was in charge of the military. Instead, it was Son Sen who temporarily took over when Pol Pot was sick.

As regards the establishment of Secret Defense Units, Nuon Chea declared that these units were not created during the 1960 congress. Rather, the people themselves created and organized the Secret Defense Units to defend cadres who were their relatives. The Accused denied that the Secret Defense Units had members who were child soldiers. He insisted that members were 15- or 16-year olds who did not carry arms or heavy weapons but were equipped only with poles and other tools. Moreover, he explained that the Secret Defense Units did not constitute armed struggle, as the party's key focus was its political struggle. Interestingly, when Lysak asked Nuon Chea about the authority of the Secret Defense Units to "smash spies who infiltrated party meetings,"<sup>1</sup> and what was done to persons identified as spies, Nuon Chea appeared to have lost track of the time period they were discussing. Instead of responding based on events that occurred in the 1960s, he answered in the context of what happened after April 1975. He explained that captured spies were investigated for one to two years before they were "rounded up and taken to S-21 where their confessions or testimonies would be taken further."

### **3. The Second CPK Congress of 1963**

Nuon Chea recalled that more people attended the second party congress held in 1963. He stated that the main criteria in electing the secretary were his "revolutionary value" (what this meant was not explained), support from the masses, and age and seniority. As a corollary, the Accused related that the second congress elected Pol Pot as Secretary because the latter was more qualified than he was. Consequently, Nuon Chea remained Deputy Secretary. With respect to the composition of the Standing Committee, Nuon Chea confirmed that the members were: Pol Pot as the Secretary, himself as the Deputy Secretary, Ieng Sary, So Phim and Ta Mok. He claimed that he could not remember the rest of the Standing Committee membership. Also worth noting is that it was during this congress that the party's name was changed from "Labour Party" to "Communist Party of Kampuchea."

### **4. Period between 1963 and 1970**

According to Nuon Chea's testimony, between 1963 and 1970 Pol Pot, Ieng Sary and Son Sen decided to transfer the CPK's headquarters and a Central Committee office called "Office 100," from their original location near the border of Vietnam to a new location in

Rattanakiri Province. The province, which is in the Northeast Zone, was reportedly an ideal location for a revolutionary base since it was difficult for enemies to penetrate. Interestingly though, the Central Committee never met when “Office 100” was in Rattanakiri because it was so onerous to get there. As Nuon Chea explained, it took a month to travel to and from the “Office 100” location in Rattanakiri, because they had to travel by foot.

Other provinces in the Northeast Zone included Mondulakiri, Kratie, and Stung Treng. Nuon Chea admitted having supervised this zone, as well as the Northwest and Southwest zones. He claimed, however, that zone secretaries oversaw the latter two areas more closely than he did. The Accused also testified that there were possibly two to three more zones, but he could not recall which ones they were since, as he explained, the leadership determined divisions in accordance with the objectives they wanted to achieve. City Committees, according to Nuon Chea, were independent from zones. He testified that Vorn Vet supervised the Phnom Penh Committee.

While Nuon Chea was unable to recall certain meetings held in 1964 and 1965 that had been mentioned in Khieu Samphan’s book (referenced in court by Lysak), he did remember one conducted by the Standing Committee in 1966. During this meeting, the Standing Committee decided to combine the CPK’s political and armed struggle. As the Accused explained, the movement had become intense and there was a need to supplement political principles with armed struggle. Nuon Chea named himself, Pol Pot and Son Sen as Standing Committee members who attended the meeting together with other cadres he could not recollect. Ieng Sary was abroad at the time so he did not attend the meeting.

## **5. Period between the Lon Nol Coup in 1970 and “Victory Day” of 1975**

Nuon Chea denied having knowledge of endeavors of the National United Front of Kampuchea and the Royal Government of the National Union to seek an alliance with King Sihanouk following General Lon Nol’s coup d’ etat in March 1970. He said this were administrative concerns in which he was not involved. He likewise claimed that he was unaware of Khieu Samphan’s involvement in these matters.

The OCP had a difficult time jogging Nuon Chea’s memory regarding the alleged relocation of Office 100 from Rattanakiri Province to the vicinity of the Chinit River or the existence of Security Center 71 in the area. Nuon Chea’s memory ostensibly failed him when the OCP asked if he remembered meeting Khieu Samphan at Chinit River in September 1970. This question was in reference to a statement Khieu Samphan previously gave the OCIJ, claiming that he had first met Pol Pot and Nuon Chea at the aforementioned place and date. What Nuon Chea remembered was providing educational courses to people who lived by the Chinit River.

Lysak’s persistence paid off in relation to eliciting information about the Central Committee’s meetings during the period between March 1970 and April 1975. Initially, Nuon Chea declared that he could not recall that the Central Committee resumed holding meetings in 1970 or 1971. When Nuon Chea was asked where the Central Committee’s meetings from 1970 to 1975, he said the locations changed from time to time. However, after several probing questions from Counsel, Nuon Chea admitted that the Central Committee held its meeting at Chinit River after the office was transferred there from Rattanakiri.

## **6. The Third CPK Congress of 1971**

Nuon Chea confirmed his attendance to the CPK’s third Congress in 1971. He claimed he could not recall, however, the location of the meeting, the participants and the alleged decision to close all markets in liberated areas.

## **B. Romam Yun's Testimony**

Civil Party Romam Yun from Rattanakiri Province began testifying in December 2011 and was questioned by the Civil Party Lawyers and the OCP. His poor health prompted the Chamber to postpone his further examination by the Parties. In this week's proceedings, Romam Yun's testimony continued with questions from the Defense teams.

leng Sary's national counsel, Mr. Ang Udom, referred to a number of documents to help refresh Romam Yun's memory during his examination. With the permission of the Chamber, the greffier read several documents, including parts of a rogatory letter and a statement dated 20 August 2008, which Romam Yun had previously submitted to the Victims Support Section to give additional information. According to this document Romam Yun, alias "Khamphy," was assigned as the regional deputy chief of Veun Sai District in 1978, alongside nine other Khmer Rouge members who were assigned to various posts in the District. Civil Party Klan Fit, who also testified this week, was among the nine other KR members assigned within the District. He was reportedly assigned as the deputy chief of District 21. Romam Yun further indicated in the document that he, together with the nine others, went to Phnom Penh where they were told to plant potatoes. A month later, the Khmer Rouge sent him, Klan fit and two companions to Wat Sleng, while the rest were arrested and taken to Tuol Sleng. In his statement, Romam Yun stated that he wanted to bring a civil party complaint to the ECCC about the disappearance of his six friends. During his testimony, the Civil Party admitted that he was ordered to write his biography while he was in Phnom Penh.

Under questioning from the Defense, Romam Yun often claimed that he did not clearly remember events that happened in the 1970s. As such, he did not answer a number of questions. International Civil Party Co-Lawyer Mr. Barnabé Nekuie confirmed his client's failing memory. Counsel objected to Ang Udom's line of questioning and remarked that the leng Sary Defense was taking advantage of Romam Yun's poor memory. The Trial Chamber overruled this objection and allowed Ang Udom to proceed with his examination of the Civil Party. The other Defense Teams did not examine Romam Yun.<sup>2</sup>

In general, even when being questioned by the Judges of the Trial Chamber, Romam Yun appeared to have been confused during his testimony. His answers often seemed unresponsive to the questions being asked. For instance, when Judge Lavergne inquired whether 17 April 1975 corresponds to a specific event and if he know what happened on this date, the Civil Party said he did not know and would not be able to answer unless he was reminded. When Judge Lavergne followed up and asked if Romam Yun knew the date that day, the latter said he did not know. It remains to be seen whether Romam Yun's answers and generally confused state will affect the evidentiary weight the Trial Chamber will attach to his testimony.

## **C. Klan Fit's Testimony**

Klan Fit, also a former member of the Khmer Rouge, was summoned by the Chamber to continue giving his testimony, which commenced in December. On Tuesday, 10 January 2012, the OCP focused on the period prior to 1975. The Defense Teams proceeded with their inquiries on the next day.

According to Klan Fit, a man named Thang Sy was instrumental to his involvement in the revolution. This Laotian man, who reportedly had been already been a revolutionary when Klan Fit was still in his teens, apparently told the latter that, unless he joined the revolution, he would be considered an enemy and be killed. Klan Fit said he joined the revolutionary movement despite not understanding what it meant and stood for, or even which party was involved because he was afraid and merely followed orders.

As regards his personal encounters with Ieng Sary, Klan Fit stated that he had met Ieng Sary twice before 1970: once at K-5 in O Plaing<sup>3</sup> and another time at Chai. According to Klan Fit, he was working in the fields when armed men instructed by Ieng Sary coerced him to attend a meeting at K-5. Once at the meeting, Ieng Sary reminded him that he was the last to arrive and warned him that unless he joined the revolution, he would have nothing to eat. Klan Fit further claimed that Ieng Sary forced him to join the revolution. The second instance Klan Fit reported seeing Ieng Sary was at a meeting in Chai Village prior to the “liberation” of Phnom Penh in April 1975. Chiefs of communes, districts and sectors attended this meeting, and Klan Fit admitted that when he attended that meeting, he was already the commune chief of Talan.

Significantly, Klan Fit identified Ieng Sary, together with other senior leaders, as the persons who issued orders to evacuate people from Phnom Penh to rural areas. He confirmed that Ieng Sary and these other senior leaders were the only persons who had the power and authority to issue the order of evacuation and determine whether their order was implemented properly.

When asked by the OCP about meeting Nuon Chea, Klan Fit indicated that prior to 1975, he had attended two political sessions in Phnom Penh that Nuon Chea conducted. The Civil Party enumerated that independence, education, party discipline and ensuring peace were some of the subjects Nuon Chea discussed during the meetings. He admitted that while he did not see Nuon Chea’s face – given that over 500 to 600 people attended the meeting – he heard Nuon Chea introduced as the chair of the meetings. Klan Fit further clarified that, apart from heading these meetings, he was not aware of Nuon Chea’s role in the revolution.

When questioned about his knowledge of Khieu Samphan, Klan Fit testified that he had never met the former President of the State Presidium and that he did not know about the latter’s position in Democratic Kampuchea.

Compared to his demeanor during his testimony in December, it appears that Klan Fit had become more comfortable with appearing before the Chamber. Additionally, while he expressed difficulty in recollecting some events occasionally, he was able to answer questions in a more coherent manner without need of assistance from WESU personnel.

#### **D. Khieu Samphan’s Comments**

The final witness the Chamber called to the stand during this week’s proceedings was Khieu Samphan. At the outset of his examination, Khieu Samphan made clear that he did want to answer questions on the history of DK, and that he had nothing to add to the statements he made in December 2011. He stated that, moving forward, he will confine his response to questions relating to the administrative structure of the regime. Nevertheless, Judge Lavergne proceeded to question the accused about the history of DK, with little success. Judge Lavergne asked Khieu Samphan to comment on a statement the Accused had given the OCIJ in December 2007 regarding his own role in DK: “My role was pure protocol. Everybody knows that Pol Pot saw in me a son of the ruined feudal class, a patriotic intellectual who had no influence.” In reply, Khieu Samphan explained that the passage Judge Lavergne read from his OCIJ documents were consistent with his averments in December 2011. He merely added that this excerpt reflected the conditions of his inclusion in the Central Committee, that is, he was merely tolerated. He claimed that was not meant to be a member at all because he was from the feudal class and his views were not in line with the CPK’s.

Apart from this comment, Khieu Samphan limited his response to confirming that he wrote the book entitled “Cambodia’s Recent History and the Reasons behind the Decisions I Made.” Judge Lavergne continued to ask the Accused to comment on passages read from various documents but the Accused steadfastly refused to answer these questions or make further comments.

#### **IV. LEGAL AND PROCEDURAL ISSUES**

Developments in this week’s hearings gave rise to issues that are expected to persist in the course of the proceedings, particularly the admissibility of evidence, in light of the volume of documents that will be presented in the trial and the use of copies of documents instead of originals. Another issue that needs to be clarified is the Chamber’s interpretation of the right of the Accused to remain silent, taking into consideration the invocation of this right by both Ieng Sary and Khieu Samphan. The other matters the Parties debated on were the scope of civil party testimony and allegations of political interference by the Cambodia Government.

##### **A. Admissibility and Authentication of Documentary Evidence in the Case File**

During the last day of hearing in December 2011,<sup>4</sup> the Nuon Chea Defense objected to the use of electronic copies of *Revolutionary Flag* on the ground that the authenticity of these records was in question. Nuon Chea repeatedly demanded to see the originals of the magazine, and this became a recurring legal issue in court this week, with the Nuon Chea Defense raising similar objections as their client testified. Nuon Chea relentlessly expressed dissatisfaction over the electronic copies of *Revolutionary Flag* and *Red Flag*, pointing out several specific differences between the copies and his memory of what the original documents looked like.

The Trial Chamber overruled the objection by the Defense, noting that the Court has wide discretion to admit evidence under Internal Rule 87.1, and concluding that it did not find any grounds to reject the document under IR 87.3. Judge Lavergne further explained that while these documents are deemed admitted, the Chamber will determine their evidentiary value at a later stage, and presumably assign less weight to any document where its authenticity is in question. Despite the Chamber’s ruling, Nuon Chea continued to demand original documents. His international counsel, Mr. Michiel Pestman, likewise persisted in raising challenges to the authenticity of the electronic copies. Mr. Son Arun, Nuon Chea’s national defense counsel, questioned the Chamber’s ruling by arguing that Cambodian national courts require original copies of documents to be presented before they are admitted into evidence.

Mr. William Smith, the international Co-Prosecutor, argued that, under international criminal law, there is no need to present original documents unless there is a significant doubt as to the authenticity of copies. He maintained that there was no need to present the originals because the Nuon Chea Defense had not given specific indicators to challenge the authenticity of the documents. Smith suggested that the demands of the Accused to be presented with original documents were not supported by clearly articulated, specific doubts about authenticity, and therefore appeared to be simply aimed at delaying the proceedings. Smith warned Nuon Chea that his continued refusal to answer questions in the absence of original documents might result in the Chamber placing less weight on his testimony at the end of the case, because this behavior made him appear evasive.

In response to the repeated objections of the Accused and his apparent mounting frustration, the Chamber explained that, like other international tribunals, the ECCC has adopted the practice of digitizing the case file for the sake of expediency, because of the considerable volume of documents. Ieng Sary’s international counsel, Mr. Michael Karnavas, rose to point out that, while international courts may not require originals to be placed before the accused, they do require that a custodian testifies to establish the chain of custody of the documents.



National Defense Counsel, Kong Sam Onn, added that, while the use copies facilitate the proceedings, the question is whether such copies were made validly and whether the genuine source of the document has been well maintained.

The Court set aside these arguments momentarily, noting that next week's proceedings will be dedicated to oral submissions on the issues of admissibility and authenticity of documents. Given how much of this week's proceedings was spent dealing with repeated objections by the Accused, it is worth asking whether this matter should have been discussed and resolved earlier in the trial. A more expedient resolution of the issue could have precluded repetitious and often protracted comments and objections from the Parties. It is unclear why the Trial Chamber chose to schedule the oral arguments several weeks into January, when they knew prior to the recess that this was an issue hotly contested by the Defense. Hopefully the Chamber will use the upcoming hearings to establish more clear and transparent standards for the admission and authentication of documents.

## **B. Right to Remain Silent**

There was some controversy this week over the right of the Accused to remain silent in the face of repeated questioning by the Chamber. As noted above, on Thursday afternoon, the Chamber called Khieu Samphan to the stand despite his previous statements that he did not wish to testify. The President of the Chamber pointed out that there was some confusion regarding whether Khieu Samphan actually did want to testify about particular matters, and, if so, what the extent of his participation would be. In response, Kong Sam Onn advised the Chamber that Khieu Samphan maintained the position that he would not answer any questions relating to the historical background of the Khmer Rouge regime. He emphasized that his client was exercising his right to remain silent. Khieu Samphan himself confirmed his counsel's assertions and explained that he may answer questions on the administrative structure of the DK.

Notwithstanding these pronouncements, Judge Lavergne proceeded to explain to the Accused that the Chamber called him to the stand: (i) to clarify the comments he made in response to the OCP's opening statements in December, particularly those in connection with the Closing Order and the CPK's historical background; and (ii) to comment on certain documents the Chamber considers important in establishing the CPK's historical background. In an effort to give Khieu Samphan an opportunity "to change his mind," Judge Lavergne made several attempts to obtain comments from the former by reading out passages from documents handpicked by the Chamber. Kong Sam Onn interjected a number of times to remind the Chamber of Khieu Samphan's exercise of his right to remain silent. He likewise said that his client's "right to remain silent has not been fully respected by way of putting more questions to him like this. So this makes us feel that Khieu Samphan is compelled to respond to questions although he is not willing to do so." The Accused, while receptive to the passages read to him, adamantly reiterated that he had nothing to add to his previous statements.

This turn of events highlights the need to clarify the Chamber's interpretation of the right of the Accused to remain silent, as it is hard to understand why Khieu Samphan was even asked to take the stand, despite his and his counsel's unequivocal, timely and repeated declarations that he was exercising this fundamental right. The Chamber's insistence to obtain information from Khieu Samphan through one question or request to give comments after another, may have had the effect of pressuring Khieu Samphan into responding.

## **C. Scope and Evidentiary Weight of Civil Party Testimony**

To date, a substantial portion of Civil Party witness testimony has related to facts relevant to the crimes charged in the indictment, rather than details about the injury and damages the witnesses claim in support of their Civil Party status. While the factual information they

provide may be helpful to the Chamber in reaching a final verdict on the criminal charges against the three accused, the lack of testimony about direct harms these Civil Parties have suffered and the special bonds of affection they had with victims could be detrimental to their individual claims in the end. A review of Romam Yun and Klan Fit's testimonies, thus far, shows that they have each only obliquely addressed the elements necessary to support a Civil Party claim.

This led the Defense to raise concerns about the proper use by the Chamber of Civil Party testimonies. International Counsel for Nuon Chea asked the Court to clarify whether Civil Party testimony could be used in support of a conviction, or whether Civil Parties testimony ought to be strictly limited to the harm they suffered as a result of the crimes with which the Accused are charged. Pestman argued that, since Romam Yun is a Civil Party (who never swore an oath) and not an ordinary witness, his testimony must be restricted to his personal sufferings. Noting that Romam Yun's testimony almost exclusively concerned facts about the Khmer Rouge, Pestman argued that the Civil Party witness' statements were effectively irrelevant to the proceedings. Ang Udom concurred and added that the much of the Chamber's time had been wasted because the Civil Parties' testimonies were outside of the scope of their individual claims. He emphasized that unlike witnesses and experts, Civil Parties cannot produce evidence on the crimes purportedly committed by the Accused. The CPLCL, citing IR 23, countered that Civil Parties are entitled to speak of facts relevant to the case. They received support from international Co-Prosecutor, Mr. Vincent de Wilde d'Estmael, who further opined that the Defense arguments about the value and relevance of Civil Party testimony was in fact disrespectful to these Civil Parties.

As the OCP concluded, the parameters of Civil Parties' testimonies are well within the Chamber's wide discretion. Rule 23(1) affords Civil Parties ample latitude in their means of supporting the OCP through their participation in the trial. It seems necessary to emphasize however, that civil parties play a role different from witnesses and experts, as they have a personal interest in the case. Their testimonies seek to assist the OCP in proving the guilt of the Accused because their claims for reparations are hinged on the Chamber finding the Accused accountable for the crimes that allegedly caused injury to the Civil Parties. The more important issue, however, is the necessity of clarification from the Chamber that on the one hand, testimony from Civil Parties may be used as corroborating evidence, but on the other, their testimony will carry less weight than that of ordinary witnesses because they are parties-in-interest, and cannot be used as the sole factual basis for a conviction on a particular charge against any of the Accused.

#### **D. The Nuon Chea Defense's Allegations of Political Interference**

Defense Counsel for Nuon Chea once again raised grave concerns in open court this week about potentially prejudicial public statements made about his client by Prime Minister, Hun Sen. According to the Nuon Chea Defence, journalists quoted Cambodia's Prime Minister at a press conference in Vietnam, describing statements Nuon Chea gave to the Court in December as "deceitful." With much indignation, Pestman further pointed out that the Prime Minister had also recently been quoted calling Nuon Chea a "killer" and a "perpetrator of genocide." Counsel complained that these statements by a high government official on Nuon Chea's guilt constituted a clear violation of his client's right to a fair trial. "It's not up to the Prime Minister to decide whether my client is guilty; it's up to you, the Judges in this court," averred Pestman. He went on to say that remarks like this made by a high public official "put undue pressure on this Court, or any court to convict." It has the effect of undermining the independence of judges, particularly Cambodia's "notoriously weak" judiciary. The remedy Pestman sought was "a very strong response by this Court," officially condemning Prime Minister Hun Sen's statements, and asking him to refrain from making such remarks in the future. Counsel reminded the Chamber that it is "very important that Your Honours defend the integrity of this Court, at least what is left of it."

The Chamber allowed Pestman to air his objections to the Prime Minister's behavior, but the Court strangely did not actually address any of the grievances, nor the remedy requested. Presumably, the Court saw no merit in the Defense objection, and chose not to publicly rebuke the Prime Minister. However, they gave no explanation in response to concerns raised by the Defense. After allowing the Defense to speak, they simply moved on with the proceedings. From a trial management perspective, it seems ill-advised for the Court to appear so thoroughly unresponsive to an issue that the Defense have repeatedly raised and will, absent a clear pronouncement from the court one way or another, likely continue to raise in future sessions.

## **V. CIVIL PARTY PARTICIPATION**

Romam Yun and Klan Fit are the first two Civil Parties who have appeared before the Chamber in Case 002. Their testimonies were characterized by a number of challenges, including seemingly insufficient guidance from their lawyers, and the necessity of addressing special needs they and other Civil Parties may have when they are examined in court, such as interpretation services and medical attention.

### **A. Need for an Effective Claim for Reparation**

This week's proceedings gave rise to some concerns about the adequacy of Civil Party preparation for trial and the protection of Civil Party interests by their legal counsel. Pursuant to Rule 23, the purpose of a Civil Party action before the ECCC is twofold: (i) to support the prosecution by participating in the criminal proceedings against the Accused; and (ii) to seek moral and collective reparations. While the two Civil Parties, Romam Yun and Klan Fit, may have been able to provide insights on the material facts of the case in relation the first purpose, statements that substantiate their claims for moral and collective reparations the Civil Party Lawyers could have propounded more questions to give meaning to the second purpose. It does not help the Civil Parties when, after giving testifying before the Chamber, the Defense is able to say that they had not given any evidence about the damages they allegedly incurred, as Pestman pointed out in relation to Romam Yun's testimony. When asked about his civil party application and his request for reparations, Klan Fit said he did not understand the term "civil party" and that he did not file a complaint. He also said he did not want anything from the three Accused and merely wanted to know the reason why Angkar was not satisfied with his work despite endeavoring so hard.

In light of the foregoing, it appears necessary for Civil Party Lawyers to give more attention to first, ensuring that their clients understand the nature and purpose of their participation in the proceedings, and second, to leading the Civil Parties through questions in Court that will help substantiate their clients' claims for civil party status and reparations. This could prove particularly challenging, considering the reportedly limited resources available to Civil Parties and their lawyers.

### **B. Assistance to Civil Parties**

Both Klan Fit and Romam Yun received assistance from the Witness and Expert Support Unit when they gave their testimony. Special consideration was given to these Civil Parties because their native language was Kachok and not Khmer. WESU staff helped ensure that they understood the questions, and that they were physically fit to appear in court.

## **VI. TRIAL MANAGEMENT**

This second week of hearing of evidence highlighted by two trial management concerns that are likely to recur throughout the trial: the Chamber's scheduling strategy, considering the volume and availability of documentary and testimonial evidence expected to be presented in court, and breaches of courtroom etiquette, on account of the heated debates among the Parties.

### **A. Attendance by the Accused and Counsel**

All three Accused were present at the start of each day's proceedings. However, after the morning sessions on 11 and 12 January, the Chamber allowed Ieng Sary and Nuon Chea to participate in the proceedings from their holding cells through audio-visual facilities. Only Khieu Samphan remained in court the entire time. It is worth noting that his international counsels were absent throughout the week.

### **B. Court Schedule**

In its Scheduling Order dated 15 December 2011, the Trial Chamber advised the Parties of the need for flexibility in the treatment of the trial's timetable. This was put into practice right away when, at the start of the week (and through no fault of the Chamber), the two Civil Parties were unavailable to testify because Romam Yun was ill. Demonstrating scheduling flexibility, the Court called Nuon Chea to the stand instead. It would be unsurprising if the Parties exercised not only flexibility but also forbearance on account of other changes in the week's schedule. As the trial progresses, however, the Trial Chamber would need to be able to manage the trial in a more transparent and organized way. This is crucial, in order to avoid situations where the Parties did not even know what to expect during the later part of the day, as when de Wilde d'Estmael asked the Chamber what the schedule was after lunch, or wasting precious time on account of early adjournments for lack of witnesses.

### **C. Court Etiquette**

The heated atmosphere in the courtroom resulted in some lapses in etiquette between the Parties. In his zeal to defend his client from what he sees as confusing questioning, Son Arun used language the Chamber considered inappropriate. He also appeared to have misunderstood or misstated a ruling made by the Chamber in stressing his point. Son Arun's speech earned rebuke from the President Nil Nonn, who warned counsel not to use "bad words" in addressing the Co-Prosecutors. Interestingly however, it seemed the President's reprimand and tone may have also been intemperate. This episode was followed by Nuon Chea's apparently sarcastic comments addressed to Lysak, prompting the President to admonish the Accused.

The intensity of the debates before the Chamber had significantly escalated this week. While it is interesting to see the Parties so engaged in the proceedings, observation by the Parties of court etiquette is nonetheless required in the conduct of the trial.

### **D. Time Management and Table**

This week, the Chamber started proceedings a few minutes past 9:00 am. The hearing on Wednesday finished early after Klan Fit's testimony. Similarly, the Chamber adjourned the hearing early, as Khieu Samphan did not give comments to the passages read to him by Judge Lavergne, and there were no other witnesses on standby.

DATE	START	MORNING BREAK	LUNCH	AFTERNOON BREAK	RECESS	TOTAL HOURS IN SESSION
Tuesday 10/01/12	09.07	10.38-11.03	12.24-13.39	14.52- 15.11	16.12	5 hours and 6 minutes
Wednesday 11/01/12	09.08	10.31-11.04	12.05-13.33	15.02-15.23	15.37	4 hours and 3 minutes
Thursday 12/01/12	09.09	10.31-10.51	12.09-13.35	-	15.00	4 hours and 5 minutes
<b>Average number of hours in session:</b> 4 hours and 24 minutes						
<b>Total number of hours this week:</b> 13 hours and 14 minutes						
13 TRIAL DAYS OVER 4 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, 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://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.

<sup>1</sup> This is in reference to Nuon Chea's answer to a question posed by Judge Cartwright in December 2011.

<sup>2</sup> It appears that the Nuon Chea Defense did not examine both Civil Parties as a standing objection, on the ground that unless the civil parties take an oath, their testimony should be limited to the damage they have allegedly suffered and should not cover facts. See CASE 002 KRT TRIAL MONITOR Issue No. 1 (week ending 9 December 2011).

<sup>3</sup> The transcript of the hearing on 6 December refers to the location of "O Plang," the location of K-5 as "Chong Ou Blang." See Trial Chamber. Transcript of Hearing (6 December 2011). E1.17.1. Lines 5-6. 82.

<sup>4</sup> See CASE 002 KRT TRIAL MONITOR Issue No. 2 (week ending 15 December 2011).