



“A Prison Without Walls”

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The second day of the trial of Nuon Chea, Khieu Samphan and Ieng Sary in Case 002 at the ECCC began in a more subdued manner, with the yard around the courthouse noticeably empty of much of the international media and their cameras and gear that had filled the space on the first day of the proceedings. The public gallery also filled slowly, with many seats unoccupied by the time the court came to order. While some of the regular observers were absent, many in the audience appeared to approve of the presence of a large number of students from the local police academy, with at least one person noting aloud the importance of this lesson in history for those who will one day hold power themselves.

The proceedings in the courtroom did not reflect the restrained atmosphere in the public gallery, though, as the day began with an accusation by Ieng Sary’s defense counsel of a violation of his client’s rights and continued throughout the day with a passionate conclusion to the Co-Prosecutors’ opening statement and heated exchanges between Nuon Chea’s defense counsel and the court and culminating in a speech by one of the Accused himself.

Preliminary Matter: The Accused’s Presence in the Courtroom

President Nil Nonn called the court to order shortly after 9 a.m. and immediately recognized Ieng Sary’s international co-lawyer Michael Karnavas, who had remained standing after the judges had entered the courtroom.

Mr. Karnavas started the court proceedings for the day by renewing an application made yesterday, requesting the court to allow Ieng Sary to participate in the proceedings from his holding cell in the courthouse. He stated that the court was “forcing [Ieng Sary] to be here,” despite the accused’s willingness to waive his presence, and that by doing so the court is violating the rights of the accused. “Opening statements are not evidence” and are therefore not indispensable, argued Mr. Karnavas. “What are indispensable are the rights of the accused.” Referring the court back to an observation and brief on the issue filed by Ieng Sary’s counsel after questions had arisen during the initial proceedings in Trial 002 in June 2011, Mr. Karnavas urged the Trial Chamber to reconsider its ruling on the matter.

In response to Mr. Karnavas' request, International Co-Prosecutor Andrew Cayley reminded the court that the observation filed by Ieng Sary's team had been rejected. Mr. Karnavas stood to address this comment, and remained standing despite Mr. Cayley's request for him to allow the Prosecutor to finish his remarks. Mr. Cayley continued that the Prosecutor's position is that all of the accused should be present, but that, if the court is of the mind to allow Ieng Sary to follow the trial from his cell, a written waiver will be needed, so that the accused cannot claim on appeal that he was not allowed to participate in trial.

As soon as Mr. Cayley completed his remarks, Mr. Karnavas interjected with additional comments, not allowing the Cambodia Civil Party co-lawyer Pich Ang, who stood to give the civil parties' response, a chance to speak. Mr. Karnavas stated that he wished to correct some "half truths" presented by the Prosecutor; specifically, he said, the observation filed by Ieng Sary's team had not been rejected. He also noted that the accused had filed a model appearance waiver with their observation to be used for an occasion such as this one. He insisted that he was not asking for sympathy for his client, but rather that the court assess the facts honestly and fairly, Urging the court not to waste the "millions of dollars of taxpayer money" that had been paid for the technology in the holding cell, Mr. Karnavas argued that the accused cannot participate "if he is present but his mind is not engaged."

Before allowing Mr. Ang to respond, President Nonn admonished the lawyers regarding the exchange, stating that, if this back and forth arguing continues, the trial will take months. He instructed the defense counsel to wait for the responses from both the Prosecutor and the Civil Parties before taking his stand once again.

Finally given his opportunity to speak, Mr. Ang stated that it is necessary for the civil parties to have Ieng Sary present in the courtroom and that it is imperative for him to hear the charges against him in person and to show to the public and the civil parties that he is willing to participate.

After a brief conference at the bench with the judges, President Nonn ruled that, in order to show the parties and the public that the accused has heard all of the charges against him, Ieng Sary's application is rejected. This ruling prompted applause from one person in the public gallery, which was quickly stopped by a look from a nearby security guard.

Co-Prosecutor Continues Opening Statement

Having completed this initial matter, the Court passed to the Co-Prosecutors to complete their opening statement. International Co-Prosecutor Andrew Cayley stood to continue with his statement. While revisiting many of the same matters raised by Co-Prosecutor Chea Leang yesterday and echoing her theme of Democratic Kampuchea as a slave state and "a prison without walls," Mr. Cayley used his remaining time to preview some of the evidence that the Prosecution will present during the trial proceedings, specifically highlighting evidence that the Prosecution claims will show the three Accused's roles and power within the Communist Party of Kampuchea ("CPK") and Democratic Kampuchea.

Referring to an organizational chart of the Communist Party of Kampuchea, Mr. Cayley argued that the CPK exercised its power through three parts: regional authorities, military organizations, and government agencies.

Highlighting the hierarchical regional structure of the CPK and its authority, he emphasized that, while information flowed from the bottom to the top in these structures, orders flowed from top down in the zones, sectors, and then districts and communes that comprised Democratic Kampuchea. Mr. Cayley stated that CPK statutes and regulations required each regional group to report to the echelon above it, and by March 1976, the Central Committee of the CPK had ordered this reporting to take place weekly. Telegram operators who sent many of these reports, Mr. Cayley said, will testify at trial that the standard distribution list for these reports included the three accused and that Nuon Chea specifically responded to many of the telegrams regarding “enemies” within the zones. Mr. Cayley also referred to documentary evidence in the form of telegrams that the Prosecution alleges links the accused to purges and executions both of Vietnamese soldiers and of suspected “infiltrators” of the CPK.

Turning to the military structure and the government agencies, Mr. Cayley emphasized that both of these groups were also required to regularly report to the CPK leaders and specifically the Central Committee. He stated that witnesses from both groups will be brought forward at trial to testify to the Accused’s roles within this reporting structure.

All of this required reporting shows, Mr. Cayley argued, that the Accused cannot credibly claim that they did not know what was taking place in Democratic Kampuchea and that they had no control over the events. Rather, he said, the Accused’s control was “frightening, pervasive and complete.” The Accused were informed of everything that happened in Democratic Kampuchea. “If the accused wanted an orange..., it would be picked for them and brought to Phnom Penh,” Mr. Cayley contended, but, if a parent picked an orange or caught a fish to feed a starving child, he would be arrested, branded a traitor, and most likely tortured and executed. Every act of disobedience was treated as a threat toward the CPK and punished severely.

The Co-Prosecutor’s Case for Joint Criminal Enterprise

Mr. Cayley argued that this widespread control cannot be blamed solely on Pol Pot. The plans and policy of the CPK were organized and systematically implemented at the regional, military, and government levels. “Such atrocities cannot be due to one man alone,” he maintained, but rather through “a common criminal plan or joint criminal enterprise of which the Accused knowingly and willingly participated.”

While the three accused listened with seemingly no emotional response, the Co-Prosecutor then revisited the specific charges against the Accused, previewing evidence of the Accused’s own words and actions that the Prosecution claims will show each Accused’s participation in the joint criminal enterprise as well as their individual responsibility for the crimes alleged.

Regarding the charges of forced evacuation of the cities, Mr. Cayley argued that this policy began within the CPK well before the evacuation of Phnom Penh on 17 April 1975 and started as a carefully planned strategy that had already for years been implemented in regional areas under

CPK control. Mr. Cayley specifically highlighted a 1974 speech in North Korea by Khieu Samphan, in which Mr. Samphan “bragged” about the CPK’s success in forcing people out of cities and into the countryside. He also noted a 1977 speech by Nuon Chea in which Mr. Chea described evacuation as part of the “class struggle” and as strategically important to CPK policy, as there are “few enemies in rural areas” but many hiding in the cities.

Turning to what he called “the second policy of joint criminal enterprise,” namely the establishment of cooperatives and worksites of enslavement, the Prosecutor recounted the number of steps allegedly taken by the CPK to turn all of Cambodia into “a prison without walls.” Citing a 1977 speech by Nuon Chea, Mr. Cayley maintained that the implementation of the cooperatives was not an option and that no one was allowed to opt out and grow his own food. Mr. Cayley stated that, during this 1977 speech, Mr. Chea referred to a West Zone cadre who had criticized the cooperatives in his presence, stating that privately owned cattle were fatter than those at the cooperatives; this cadre was soon sent to S21 Security Centre and forced to sign a lengthy confession as a traitor.

Mr. Cayley also highlighted the “unrealistic expectations” of the Central Committee of the CPK, citing the “three tons per hectare” of rice quota and the plan to increase water flow 200-300 percent over the course of one year by building gigantic dams and canals. These expectations led to the people working night and day, through disease and exhaustion, with starvation rations. The Accused were well aware of these inhumane conditions, Mr. Cayley claimed, because they regularly visited and inspected worksites, to which witnesses will testify at trial.

The third policy of joint criminal enterprise – the reeducation of “bad elements” and the killing of enemies – consisted of the unlawful arrest, detention, torture and execution of anyone perceived to be a traitor, infiltrator or enemy, Mr. Cayley stated. This policy began in November 1960, he claimed, when the CPK set in place the police to use armed violence to eliminate its enemies. This party line was “fundamental to the accused’s agenda” and all party members were required to accept it.

To this day, Mr. Cayley stated, Nuon Chea insists that all who were killed under the Khmer Rouge regime were enemies or traitors. The Prosecutor then screened a video clip of an interview in which Nuon Chea states that these people had to die to save the country. But who were these traitors? Mr. Cayley maintained that it was an ever expanding group which at first included landowners, capitalists, and intellectuals, and eventually expanded to “internal enemies,” such as the Khmer Krom and Cham minorities as well as nearly anyone in the Eastern Zone, “whose crime was living too close to Vietnam.”

Mr. Cayley argued that the Accused directly participated in the implementation of this policy through their role as CPK Standing Committee members. He introduced the key witness of S21 Chair, Comrade Duch, who will describe how each of the accused, and specifically Nuon Chea, were involved in determining arrests and providing authority to “smash” enemies and for executions to be carried out.

Mr. Cayley specifically highlighted the allegedly personal role of Ieng Sary in this policy as Minister of Foreign Affairs. With Ieng Sary listening impassively from his reclining wheelchair,

Mr. Cayley described how Mr. Sary was responsible for identifying enemies in that agency and determining who would be sent to work in cooperatives or to be detained at S21, Mr. Cayley claimed. With this authority to “determine[] life or death of his cadre,” Mr. Sary alleged chose to protect from arrest members of his staff, friends, and people he knew from his school days in France. While acknowledging that Mr. Sary should be given credit if he did indeed try to save lives, Mr. Cayley argued that these decisions actually show that Mr. Sary wielded significant power over the lives of many people, with the Ministry of Foreign Affairs being transformed into a holding area for suspected enemies, known as the “antechamber of death.”

Additionally, in his role as the CPK’s “highest representative to the international community,” Ieng Sary also repeatedly denied the killings and death whenever questioned by the international community, Mr. Cayley claimed, dismissing any allegations of human rights abuses as “the propaganda machine of imperialists.”

Likewise, both Khieu Samphan and Nuon Chea personally participated in the reeducation and execution of enemies, Mr. Cayley claimed. Citing a 1977 speech by Mr. Samphan, Mr. Cayley reported that he urged his fellow party members to “wipe out the enemy.” For Nuon Chea, Mr. Cayley previewed the expected testimony of Duch who will allegedly testify that he provided confessions every three to five days directly to Mr. Chea. And, in a 2005 interview shown by the Prosecutor to the court, Nuon Chea stated that they killed “only the bad people; these traitors did not follow our policies.”

Mr. Cayley then discussed the fourth CPK policy alleged – the targeting of the Cham, Vietnamese and Buddhists. Reiterating the arguments made yesterday by Chea Leang, Mr. Cayley recounted the policy of closing all pagodas and defrocking monks and of deporting and later killing any Vietnamese. He also highlighted a November 1975 telegram, copied to Nuon Chea, that ordered the removal of 50,000 Cham from the East Zone.

In response to a possible question of whether the treatment of the Vietnamese and Cham constitutes genocide or whether it is part of a wider plan to purge the enemies of the CPK, Mr. Cayley argued that it was both. He claimed that Khieu Samphan specifically called for “national hatred of Vietnam” in his speeches, inciting genocide against them. Stating also that the Cham minority group was not treated the same as other suspected enemies, Mr. Cayley argued that the assumption was made that “if you were Cham, you were the enemy.”

Finally, regarding the regulation of marriage, Mr. Cayley recounted a few personal stories of women affected by the policy of forced marriage and specifically one woman who was executed because she fell in love without authorization. All of these policies created what Mr. Cayley called “the CPK’s utopian nightmare.”

In conclusion, Mr. Cayley urged the court “to bring some small measure of justice” to the Cambodian people. He stated that the court has a “unique opportunity to address this issue of impunity’ and to send a strong warning from the past to the future. While the Co-Prosecutors do not dispute that other institutions outside of Cambodia contributed to some of what has happened in its history, Mr. Cayley stated, none of those events can serve as a defense to what the Accused did to the people of Cambodia.

A shaky voice betraying his emotions, Mr. Cayley recounted the story of a man who was the only survivor of a massacre in Siem Reap province on 31 December 1977, in which the man's entire extended family was clubbed to death. This man is now building a technical college at the same spot where the massacre occurred. But many other people were robbed of the opportunity to do the same and Cambodia has been "robbed of decades of progress," Mr. Cayley proclaimed. "How much has been lost," Mr. Cayley declared, by these "thieves of time and common murderers of a whole generation... No one is unaffected by what these three elderly men have done."

Civil Parties' Request Rejected

Upon the conclusion of the Co-Prosecutor's opening statement, the court recognized the Civil Party Lead Co-Lawyer Pich Ang. Mr. Ang requested clarification from the court on two points. First, he asked when the Civil Parties would be allowed to introduce and have recognized the three new international Civil Party Lawyers. Second, Mr. Ang requested the court to reconsider its decision not to allow the Civil Parties to make an opening statement.

In response, President Nonn stated that the introduction would be completed later in the day and by the end of the day's session, as it had to be delayed yesterday due to a technical glitch. Secondly, President Nonn reiterated that the ECCC Internal Rule 89 *bis* does not indicate any right for the Civil Parties to make an opening statement and that the Trial Chamber has made it clear in written decisions that any opening statement or observations by the Civil Parties will not be considered by the court. Therefore, the court rejects the request of the Civil Parties.

As Pich Ang remained standing, President Nonn then announced the recess for lunch.

Response to the Prosecutor's Opening Statements by Nuon Chea

After calling the court to order following the lunch recess, President Nonn announced that each of the Accused would now be given the opportunity to respond to the Co-Prosecutor's opening statement. President Nonn then passed the proceedings to the defense counsel for Nuon Chea to respond first, stating that Mr. Chea would be allowed to remain seated during his statements due to his advanced age.

Nuon Chea's international co-lawyer Michiel Pestman admitted that the "short opening statement" of the Co-Prosecutors had taken Nuon Chea's team by surprise. Stating that they had not yet had the opportunity to discuss the opening statement with their client, Mr. Pestman requested the leave of the court to divide their response into two parts: first, Mr. Chea would give his response this afternoon for approximately two hours with a break halfway as reading is difficult for him, and, second, the defense counsel would speak tomorrow morning for 45 minutes after they have had the opportunity to incorporate Mr. Chea's statements into their response.

After conferring with the other judges, President Nonn responded that the Trial Chamber had clearly set the schedule for these proceedings in previous documents and that the defense should have been well aware that they would be allocated only half a day to present their response. Mr. Pestman clarified his request by stating that they are not asking for extra time, but rather that they be allowed to continue tomorrow as their understanding of the schedule was that they would be allowed to respond tomorrow.

The court requested that the defense counsel provide evidence of any document that stated they would not have to respond until Wednesday of this week. When Mr. Pestman was not able to provide it at that exact moment, President Nonn stated that the Chamber cannot entertain the request and that Nuon Chea's team will have to use the time allocated this afternoon.

Though appearing somewhat frustrated by the court's response, Mr. Pestman moved forward with Nuon Chea's response to the Co-Prosecutor's opening statement, stating that, unlike the Prosecution which covered all of the charges in the Closing Order, the defense has decided to limit its response only to those issues that will be raised in this part of the separated trial: the history of the CPK, the historical context of Democratic Kampuchea, the evacuation of Phnom Penh, and "Phase II" of the population movement. Mr. Pestman then reported that Nuon Chea's counsel had filed a motion for disqualification of Judge Cartwright as raised yesterday and repeated their request for Judge Cartwright to step down from the proceedings pending a ruling on this motion. Finally, before passing the response to Nuon Chea, Mr. Pestman noted that, while they "rarely agree" with the Civil Parties, they also believe that the Civil Parties should be given an opportunity to make an opening statement or response in this trial.

After Mr. Pestman completed his comments, President Nonn instructed the security guards to bring Nuon Chea to the witness dock. With the help of two guards and one staff member, Nuon Chea was moved to the dock and seated with his back to the audience and flanked by the two guards. Realizing that one of the Accused would finally be allowed to make a lengthy statement, a number of attendees in the public gallery appeared alert and eager to hear how Nuon Chea would respond to the charges against him. But, as Nuon Chea's two-hour monologue continued, the atmosphere in the gallery became more and more subdued, though whether the change came from a lack of connection to the speech or the long hours of the day was unclear.

Throughout his speech, Nuon Chea repeatedly hit upon the three themes that his counsel will likely use in his defense for his participation in the CPK policies: (1) Vietnam's expansionist tendencies, which Nuon Chea claimed were threatening Kampuchea and therefore required a response from the CPK; (2) the U.S. air strikes in the early 1970s causing widespread humanitarian crises; and (3) the alleged infiltration of the CPK and the Khmer Rouge by traitors, spies, and enemies of the people that needed to be eliminated. Although he focused mostly on meetings of the CPK, these themes ran throughout and punctuated every part of his response.

Nuon Chea began his response by greeting the court, the parties, and his fellow Cambodians. He also gave his respect to the Cambodian ancestors "who sacrificed their lives" to make Cambodia what it is today and to help it "escape from the policy of racial extermination, land-grabbing, and imperialism" of Vietnam and other countries that sought to destroy the country. Stating that his

comments will be for history and not political reasons, he maintained that these proceedings and the court are “unfair,” in that only certain facts will be discussed and the events before 1975 and after 1979 will be ignored. “Only the body of the crocodile will be discussed,” he stated, “not its head or its tail.”

Nuon Chea then launched into a detailed history of the Communist Party in Southeast Asia, beginning with the split of the “Indochina Communist Party” in 1951, into three separate parties in Vietnam, Laos and Kampuchea, though, he claimed, with the Vietnamese party still attempting to control the other two parties. Using the agendas of various General Assembly and party meetings throughout the 1960s and 1970s, Mr. Chea seemed to be trying to explain the reasoning behind the CPK policies during the period of Democratic Kampuchea. But his response jumped over large periods of time with little comment on how the policies were being implemented in Democratic Kampuchea or any response to the charges leveled against him in the Prosecutor’s opening statement.

Specifically, in discussing the 1973 CPK General Assembly meeting in which the plan to evacuate Phnom Penh was formulated, Nuon Chea claimed that the CPK had to “do its best” to liberate the city before Vietnam could liberate their own cities because Vietnam would use the need to “liberate” Phnom Penh as a pretext to attack Kampuchea. Once Phnom Penh was liberated, the city would then need to be evacuated in order to “analyze the actual attitude of the Vietnamese” and to increase the sense of solidarity among the people. Mr. Chea did not discuss, however, the impact of this decision on the people of Phnom Penh or any of the events that occurred because of the evacuation.

After completing his history of the CPK and its decisions, Nuon Chea concluded by saying that all the actions he took during the time of Democratic Kampuchea was to serve the nation and people of Cambodia. “Oppression and injustice compelled me to fight for my country, leave my family behind and liberate my motherland,” he maintained. He then called on Vietnam to “abandon its wishing to be its older brother” and end its alleged expansionist tendencies toward Cambodia. He also encouraged Cambodians to “give up [their] hatred” toward the Vietnamese, so that they can move forward into the future. With some quiet murmurs from the audience, Nuon Chea then ended his response and returned to his seat behind his defense counsel.

After Nuon Chea completed his statement, Michiel Pestman returned to his previous request for the Trial Chamber to allow the defense counsel to continue their response to the Co-Prosecutors tomorrow morning. Citing the Scheduling Orders of 18 October and 25 October, as well as the schedule posted on the ECCC website and hanging throughout the courthouse, Mr. Pestman argued that the defense and people outside the court were led to believe that the defense responses would not begin until Wednesday, November 23rd.

The judges conferred again on this matter, and President Nonn responded that, while it was “regrettable” that the defense counsel did not have time to complete their responses, Nuon Chea was given the opportunity to respond. The Trial Chamber allocated the time, he stated, and, if the defense counsel chooses not to use it, then that is their decision.

Recognition of Civil Party International Co-Lawyers

Without giving Mr. Pestman the opportunity to respond, President Nonn then moved on to the recognition of the Civil Party international co-counsel. Pich Ang presented three lawyers – a Cameroon lawyer with Avocats San Frontieres and two French lawyers with the French International Federation for Human Rights – to be recognized by the court. President Nonn recognized the lawyers for the court.

Response by Ieng Sary to Co-Prosecutor’s Opening Statement

Ang Udom, Ieng Sary’s national co-lawyer, rose to address the court, reporting that the defense counsel will not proceed with any response or observation to International Co-Prosecutor Cayley’s opening statement. Stating that the opening statements are not the evidence, Mr. Udom reported their decision not to respond does not amount to a concurrence or agreement with the opening statement of the Co-Prosecutors.

Mr. Udom also raised an issue regarding the evidence to which the International Co-Prosecutor raised in his opening statement. He stated that Ieng Sary’s counsel had sent a letter on November 21st to the Office of the Co-Prosecutors, requesting a list of the witnesses, documents, and facts in evidence which will be used in the opening statement. The Co-Prosecutors responded with a memorandum stating that all of these documents are contained in the case file and that the Co-Prosecutors are confident that these documents are related to the facts before the court. As the defense counsel “are not in position to research all the sheer volume of evidence” contained in the case file and providing this information would be “a piece of cake” for the Co-Prosecutors, Mr. Udom requested the court to instruct the Co-Prosecutors to provide this information to Ieng Sary’s counsel.

President Nonn responded to Mr. Udom’s comments by referring to Internal Rule 89 *bis* (2), which grants the Accused an opportunity to respond but does not make it compulsory. He then requested clarification from Mr. Udom as to whether Ieng Sary will take the floor on Wednesday.

Mr. Udom stated that, while Ieng Sary will not respond to the International Co-Prosecutor’s opening statement directly, he does request the opportunity to read the brief statement that he was not allowed to read on the first day of these hearings in place of his response.

Noting that the time has now come in the proceedings for the Accused to make these statements at his own discretion, President Nonn states that he will be given the opportunity to read his statement at the commencement of the proceedings on Wednesday.

Clarification on Nuon Chea’s Time to Respond

Before the court adjourned for the day, Judge Cartwright made one clarification for the court regarding its ruling on the request of Nuon Chea’s defense counsel to continue their response on Wednesday morning. She stated that the Trial Chamber had inferred from Mr. Pestman’s statements that Nuon Chea’s team did not wish to use the remainder of the time allotted to it today. She affirmed that Nuon Chea will no longer be given the opportunity at this point to

respond to the opening statement, although she noted that there will be other opportunities during the trial.

Mr. Pestman stood and requested an opportunity to respond to Judge Cartwright's "observation." Judge Cartwright then tersely informed Mr. Pestman that her statement was not "an observation, but a ruling," effectively ending any further comment on the matter and closing the proceedings for the day.

The proceedings will continue on Wednesday, 23 November 2011, with a statement from Ieng Sary and the response by Khieu Samphan to the Co-Prosecutor's opening Statement.