

*Nuon Chea comments on documentary evidence presented by the prosecutor in Trial 002 at the ECCC on Thursday.*

**Which Document List Is It?  
Case 002 Document Debate Continues**

*“I have devoted myself – I had to abandon everything for the purpose of my nation”  
- Nuon Chea*

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On Thursday, February 16, 2012, the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) continued Case 002 against accused Nuon Chea, Ieng Sary and Khieu Samphan. During the previous three days of proceedings, the prosecution and civil parties highlighted specific documentary evidence by placing such documents before the Chamber and reading out excerpts in open court.

The day’s proceedings were scheduled to conclude the portion of the Case 002 trial dedicated to exploring the historical background of the Democratic Kampuchea (DK) period (1975-1979). This period included such important events as the creation of the Khmer Rouge movement, the formation of its official political wing – the Communist Party of Kampuchea (CPK), and the

civil war fought between the Khmer Rouge and United States (US)-backed Lon Nol regime from 1970 to April 17, 1975, when the Khmer Rouge seized control over all of Cambodia.

### ***Nuon Chea Responds to Documents Placed before the Chamber***

The day's proceedings began with accused Nuon Chea being given the opportunity to comment on the documents placed before the Chamber over the previous three days. Nuon Chea first informed the Chamber that he had difficulties reading the text of the documents highlighted by the parties, because he is a "gentleman of advanced age." He then requested copies of documents purportedly containing interviews with the accused and denied that all of the interviews were genuine. Nuon Chea specifically denied ever having given an interview in the English language, stating, "I have devoted myself – I had to abandon everything for the purpose of my nation, and ... I never gave any interviews in English."

Nuon Chea then requested to reserve his right to comment on issues of *Revolutionary Flag* until their authenticity has been ruled on by the Chamber. He noted that he had heard the testimony of Documentation Center of Cambodia (DC-Cam) director Youk Chhang,<sup>1</sup> who he stated had "good will" in cooperating with the Chamber. Nonetheless, Nuon Chea "insist[ed]" that the Chamber still "verify" the authenticity of all documents received from DC-Cam. He stated that he desired that the issue of authenticity be "well-considered" before moving forward with the trial. Nuon Chea also accused the Office of the Co-Investigating Judges (OCIJ) of being biased against him and noted the allegations of bias leveled by former OCIJ staff in 2011. He further stated that it is "beyond reasonable doubt" that the assertion by the prosecution that documents are genuine is a self-serving statement, and thus, the Chamber should facilitate access for all parties to original, hard copies of documents. Nuon Chea stated that it is important that he be given access to original documents in order to "enable [him] to effectively participate in this mission to find the truth for the whole nation."

Next, Nuon Chea averred that some of the witnesses who had already given testimony in Case 002 were "insignificant" and evinced a "lack of cooperation" with the Court during questioning. He also stated that the witnesses his defense team requested to be heard were not called by the Chamber. Nuon Chea stated that due to this absence,, there were still "gaps" in the evidence related to the historical background of the DK period, claiming that the "public has not been informed" sufficiently of what happened during this time. Nuon Chea stated, "We only got the head of the crocodile, not the whole body," He also highlighted what he saw as the Court's failure to discuss sufficiently the American bombing campaign in Cambodia, which he claimed was an attempt to "wipe out" the Cambodian race in Cambodia. He then accused the prosecution of attempting to establish an "incomplete version of history."

This concluded the remarks of Nuon Chea. Khieu Samphan and Ieng Sary declined to comment on any of the documents. The Chamber President then turned the floor over to the Nuon Chea defense to comment on documents. Prior to handing the floor over to his colleague, Andrew Ianuzzi, to make these remarks, Nuon Chea defense counsel Jasper Pauw made a formal request that the Chamber grant the defense 45 minutes "somewhere in the near future" for it to make

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<sup>1</sup> Mr. Chhang testified for three days on the topic of the policies, procedures and processes used by DC-Cam in collecting Khmer Rouge-related documents. DC-Cam is the largest source of documentary evidence at ECCC. Mr. Chhang serves as co-managing editor of the Cambodia Tribunal Monitor.

submissions on the historical context of the DK period, which Nuon Chea believes has not been sufficiently explored.



*Nuon Chea's international counsel Andrew Ianuzzi responds to the documents presented by the prosecution over the previous three days.*

### ***Confusion Concerning the Day's Topics of Discussion***

Chamber President Nil Nonn interrupted Mr. Pauw's statement, informing him that the Chamber had already ruled on this issue and limiting the defense's response strictly to its comments on specific documents. He directed the defense to present any other submissions to the Chamber following standard procedures. Mr. Pauw responded by arguing that the Chamber's reliance on written submissions created problems for the transparency of the Court. Again, he was cut off by the President, who reminded Mr. Pauw that a decision on the documents the Nuon Chea defense wished to place before the Chamber would be issued in due course.

Mr. Pauw then turned the floor over to Mr. Ianuzzi to make submissions related to evidence on communication apparatus in DK.

Mr. Ianuzzi first submitted that where witness statements discuss directly the acts of the accused, or go to the very heart of key factual issues, such witnesses should be heard in open court before their prior testimony can be admitted. This submission prompted an objection from the prosecution, which argued that objections related to witness issues were not a proper topic for the day's discussion. Mr. Ianuzzi responded by observing that one of the documents listed as a proper subject for the day's debate was indeed, a witness statement made by Meas Mut, former commander of the Khmer Rouge navy and, in Mr. Ianuzzi's words, "as we all know, a suspect in Case 003."

Following some additional debate and apparent confusion among the parties, the Chamber judges conferred briefly. Thereafter Judge Fenz attempted to clarify the meaning of the day's scheduling memorandum. However, all counsel appeared to still be in a state of somewhat confused disagreement even after Judge Fenz's instructions.

Mr. Ianuzzi stated that the Nuon Chea defense had prepared to discuss the revised list of documents provided by the ECCC Senior Legal Officer, while the prosecution continued to assert that witness statements were out of bounds for the day's proceedings.

Ieng Sary defense counsel Michael Karnavas then weighed in on the issue and stated that, in his view, all parties had prepared to discuss a revised list of 95 specific documents provided to the parties by the Court's administration. Khieu Samphan national defense counsel Kong Sam Onn then submitted that the Chamber should not be permitted to revise the document list without providing all the parties time to study the list and prepare their submissions.

At this point, the Chamber took its morning break earlier than usual in order to deliberate as to how to rectify the prevailing confusion.

Following the break, Judge Jean-Marc Lavergne attempted to end the confusion. He first indicated that the accurate list of documents was the most recent one containing 95 documents and observed that some of the documents may seemingly contradict other instructions concerning the day's proceedings regarding referencing witness testimony. Judge Lavergne reminded the parties that oral argument was limited to the issue of whether the documents are authentic and reliable. He then turned the floor over to the parties to make further arguments.

#### ***Ieng Sary Retires to the Holding Cell at his Usual Hour***

Ieng Sary defense counsel Ang Udom then rose and made his daily request that Ieng Sary be excused for the remainder of the day's proceedings and be remanded to the courtroom holding cell to view the proceedings via audio-visual link. The Chamber President granted the request, and Ieng Sary was taken out of the courtroom.

International prosecution counsel Falguni Debnath then rose and objected to the defense's use of actual names of potential witnesses. In response, Chamber President Nil Nonn instructed all parties to use pseudonyms when referring to witnesses and then turned the floor over to the Nuon Chea defense to comment on challenged documents.

#### ***Nuon Chea Defense Objects to Six Documents and Requests Testimony of Henry Kissinger***

Mr. Ianuzzi then read out the titles of six documents that the Nuon Chea defense objected to specifically. These were:

1. The witness statement of Meas Mut, head of the Khmer Rouge Navy;
2. A letter of reply from Steven Heder regarding Ouk Bunchoeun and Sim Kha;<sup>2</sup>
3. The transcription of an interview with Ouk Bunchoeun conducted by Mr. Heder;
4. A hand-written English translation of Ben Kiernan's interview with Ouk Bunchoeun;
5. A typed version of the same interview with Ouk Bunchoeun; and
6. An interview with Chea Sim<sup>3</sup> and Heng Samrin<sup>4</sup> from December 2, 1991.

With respect to these six documents, Mr. Ianuzzi objected to the use of any of the documents because none of the individuals have been placed on the witness list by the Chamber. He also

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<sup>2</sup> Ouk Bunchoeun and Sim Kha are currently Senators in the ruling Cambodia People's Party (CPP) in Cambodia.

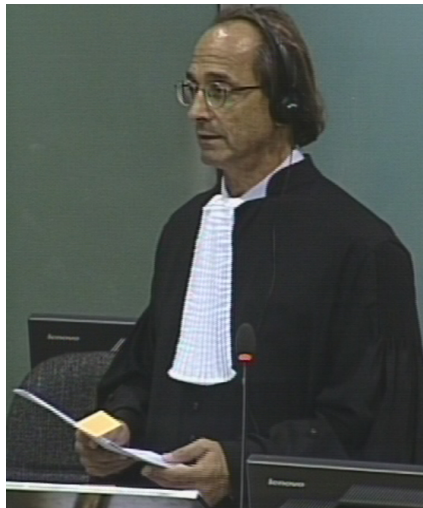
<sup>3</sup> Chea Sim is currently the President of the Cambodian Senate.

<sup>4</sup> Heng Samrin is currently Chairman of the National Assembly of Cambodia.

noted that all of the five individuals, except Meas Mut, had already ignored valid summonses issued by the ECCC requesting their testimony in open court.

Finally, Mr. Ianuzzi informed the Chamber that the Nuon Chea defense would submit a written application to the Chamber regarding the recent statements by Cambodian Prime Minister Hun Sen to the Vietnamese press that Nuon Chea is a “deceitful killer and a perpetrator of genocide.” This statement prompted an interjection by the Chamber President, who instructed Mr. Ianuzzi not to stray into irrelevant matters or those previously ruled on.

Mr. Ianuzzi then stated that “Dr. [Henry] Kissinger will be traveling in the region in the next few months” and requested that “perhaps the Chamber could consider whether or not [Dr. Kissinger] could grace [the court] with his presence.” He argued that Henry Kissinger<sup>5</sup> would undoubtedly be a very useful witness to the “still unclosed” portion of the trial concerning the background and history of the DK period.



*International counsel Michael Karnavas objects to specific categories of documents for the Ieng Sary defense.*

### ***Ieng Sary Defense Objections to Specific Categories of Documents***

The floor was then turned over to the Ieng Sary defense to discuss the 95 documents on the list. Mr. Karnavas for the Ieng Sary defense first objected to the use of a timeline created by the Office of the Co-Investigating Judges (OCIJ), arguing that, if the document is used, its author must be called to testify.

Next, Mr. Karnavas argued that without any supporting live testimony regarding the “mechanics” of how telegrams were disseminated throughout DK, all telegram documents should be excluded.

The third group of documents to which the Ieng Sary defense objected were all documents created by Steve Heder. Mr. Karnavas argued that Mr. Heder worked for the prosecution before moving to the OCIJ and that there may be translation errors in some of the documents, as highlighted in one such specific document by the Khieu Samphan defense on a previous day.

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<sup>5</sup> Henry Kissinger served as Secretary of State of the United States from September 1973 to January 1977.

The Ieng Sary defense also objected to the use of what it termed “Duch” material, meaning materials from ECCC Case 001 and statements made by the accused in that case, Kaing Guek Eav, alias Duch. Mr. Karnavas argued that if Duch’s testimony is to be used, he must be brought to the Court and sworn in as a witness because the Trial Chamber had found that Duch had not been entirely forthcoming during his testimony in Case 001.

Mr. Karnavas then reiterated the Ieng Sary defense’s objection to the use of confessions obtained under torture at *Tuol Sleng* prison. He alternatively argued that if the Chamber does use such confessions, it must carefully limit its use of such documents, according to international jurisprudence.

The defense next objected to the use of witness interviews not conducted by the OCIJ, arguing that the individuals who conducted such interviews were not qualified investigators. He added that if such interviews are used, then whoever conducted the interview should be called as a witness.

Mr. Karnavas then commented on video evidence, noting that such evidence is easily manipulated. He left it up to the Chamber to determine the appropriate role of video evidence.

As for the Foreign Broadcast Information Service (FBIS) reports on the case file, Mr. Karnavas objected to the use of these documents because they were created by the US Central Intelligence Agency (CIA). Mr. Karnavas submitted that the CIA, while it does perform important work often, is clearly also engaged in the “dark art of confabulation and misinformation.” Thus, he requested that the Chamber independently verify the contents of FBIS reports if they are admitted.

Next, Mr. Karnavas turned to the contentious issue of the *Revolutionary Flag* booklets. He stated that the defense was not trying to argue that the booklets were all manufactured or somehow inauthentic, but he requested that the booklets be treated as hearsay evidence<sup>6</sup> and be “independently triangulated” on the accuracy of their contents. He noted that the Chamber had already conducted a “monumental hearing” on the admissibility of documents such as *Revolutionary Flag* booklets and informed the Chamber that the Ieng Sary defense does not object to the use of copies of verified original documents but solely wishes to have the contents of the booklets verified with other evidence.

Mr. Karnavas also requested that a document written in German be translated and the defense permitted to comment or object to the document thereafter. Regarding purported minutes of CPK meetings, Mr. Karnavas again asked that the content of such documents be treated as hearsay that requires independent verification.

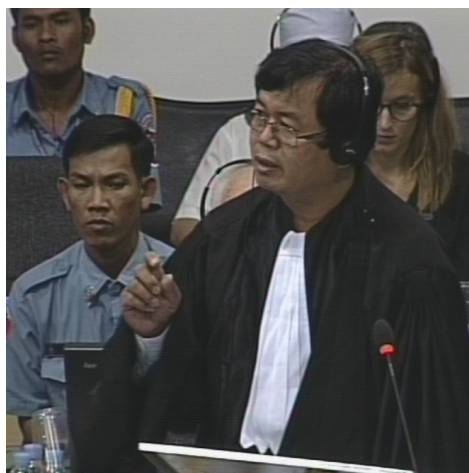
On the topic of DK period speeches, Mr. Karnavas objected to a specific speech purportedly delivered by Ieng Sary at a welcome dinner for Daniel Bernstein, who visited Cambodia in April

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<sup>6</sup> A hearsay statement is defined generally as an out-of-court statement submitted for the truth of the matter asserted therein.

1978.” He further stated that he had “googled” Mr. Bernstein and discovered that, during the DK period, Mr. Bernstein was “what was known as a fellow traveller, communist sympathizer, [while] today he is a venture capitalist.” Mr. Karnavas appeared to enjoy highlighting Mr. Bernstein’s radical change in apparent political allegiances and requested that, if the speech is admitted, Mr. Bernstein be called as a witness or that the speech’s authenticity be independently verified.

Mr. Karnavas also commented on purported CPK official statements and circulars and reports created by foreign governments and the media. He again argued that the documents are hearsay and always require independent verification before the Chamber can rely on them.



*Khieu Samphan’s national counsel Kong Sam Onn reiterates the defense’s objections to the use of documents provided by the Documentation Center of Cambodia.*

### ***Khieu Samphan Defense Comments on Documents***

Counsel Kong Sam Onn then commented on documents on behalf of the Khieu Samphan defense. He began his submission by arguing that the Chamber had admitted numerous irrelevant documents. As for interviews, Kong Sam Onn argued that the only way to verify the accuracy and contents of such documents is to call someone involved in the interview process.

Next, Kong Sam Onn made extensive submissions arguing that the process of collecting documents was biased against the accused. During this testimony, he reiterated the defense’s objection to all documents provided by DC-Cam, which he labeled a “biased organization” that seeks only “inculpatory evidence.”

Kong Sam Onn then objected to a series of individual documents prior to the lunch break.

### ***Nuon Chea Retires to the Holding Cell at his Usual Hour***

Just prior to the lunch break, the Nuon Chea defense made its usual request that Nuon Chea be permitted to retire to the holding cell for the afternoon session to view the proceedings via audio-visual link. As usual, the Chamber granted this request, contingent upon receipt of a request form signed by Nuon Chea.

### ***Khieu Samphan Defense Completes Its Challenge to Specific Documents***

During the afternoon session, Kong Sam Onn continued making objections to specific documents. At one point in this testimony, he requested that the Chamber take up DC-Cam director Youk Chhang on his offer, made during his oral testimony, to provide “Uncle Nuon” with original copies of *Revolutionary Flag* booklets for Nuon Chea’s examination. During these challenges, Kong Sam Onn argued that interviewers be called to “confront” the accused to confirm the reliability of documents and to ensure that the context of the documents’ creation is explored.

### ***Response to Objections by Prosecution***

After Kong Sam Onn completed outlining the defense’s objections to documents, the prosecution was provided an opportunity to respond. However, several minutes into the presentation by national prosecution counsel Chan Dara Reasmey, the Court encountered technical difficulties with the transcription process, triggering a delay in the proceedings.

Once the proceedings resumed, Chan Dara Reasmey began his presentation anew by discussing a documents concerning the structure of the DK government referred to previously during witness testimony. The proceedings, however, were again halted, this time by an objection from Ieng Sary defense counsel, Michael Karnavas. Mr. Karnavas argued that the prosecution was improperly commenting on a document outside the list of 95 documents provided by the ECCC Senior Legal Officer that had been the source of so much confusion during the morning session. This objection was sustained by the Chamber President, who directed the prosecution to limit its submissions to arguments related to the 95 documents on the list only.

Chan Dara Reasmey then moved on and provided an overview of several videos apparently on the document list and argued that each video illustrates important information and is reliable. He then turned the floor over to international prosecution counsel Falguni Debnath to continue the prosecution’s submissions for the day.



*International Assistant Prosecutor Falguni Debnath responds to the defense’s objections.*



Ms. Debnath began by arguing that generally the defense teams had overstated the requirements for admissibility at the international level during their arguments. For example, she noted that the defense teams had argued that it was necessary to call an interviewer as a witness as a prerequisite to the admission of the interview itself, which she argued goes far beyond what is necessary to admit such a document under prevailing international jurisprudence.

Ms. Debnath then argued that the DK “commerce” documents appear authentic and reliable because they show the systematic bookkeeping of the CPK and include annotations mentioning various CPK officials, such as Van Rith, the DK Commerce Minister.

Next, Ms. Debnath discussed certain French government documents and FBIS documents, stating that these documents often corroborate one another and arguing that each set of documents are authentic and reliable. During this process, the prosecution described the physical appearance and official markings appearing on many documents held by the Cambodian government.

Ms. Debnath also covered CPK documents describing the arrest of Hu Nim and his transfer to *Tuol Sleng* prison to be tortured and executed, along with Hu Nim’s actual confession. Regarding the confession, which was obtained through torture, Ms. Debnath argued that it demonstrates that Hu Nim was sent to the prison and tortured. She also noted that the confession contained annotations by prison secretary Duch indicating which other CPK officials received the confession. She submitted that these items of evidence should be admissible as exceptions to the general ban against evidence obtained under torture. Ms. Debnath also discussed an analysis of confessions written by a prison official named Pon, which she argued “weaves the various confessions into a massive, interconnected plot.”

After discussing *Tuol Sleng* documents, the prosecution turned to documents from Steven Heder and argued that these documents are suitable for admission. Ms. Debnath informed the Chamber that Mr. Heder left the Office of the Co-Prosecutors (OCP) before submissions based on documents he created were drafted, and thus, he had no hand in drafting such submissions.

Next, Ms. Debnath declined to comment on the use of witness statements not collected by the OCIJ, to which the defense teams had objected, stating that witness statements were not supposed to be the topic of the day’s arguments.

Ms. Debnath also stated that the Nuon Chea defense team had attempted to utilize the witness statements of the very same current Cambodian officials in previous filings.

The prosecution then argued that other specific documents to which the defense had objected and argued that each of these documents contain sufficient indicia of authenticity and reliability to be admitted over the objections.

### ***Civil Party Responses to Documents Challenged by Defense***

Following the completion of the prosecution’s presentation, the floor was turned over to the civil parties to make submissions. Counsel Elisabeth Simonneau-Fort stated that the defense had objected to a set of documents that had already been subjected to “attentive scrutiny” by a series

of professional judges and should thus be entitled to a presumption of admissibility. She also noted that many of the day's objections had already been raised and addressed during previous hearings. Finally, Ms. Simonneau-Fort also commented that the Convention Against Torture (CAT) should be stringently applied by the Chamber to ensure that the prohibition against torture evidence is not weakened by the ECCC.

***Nuon Chea Defense Replies to Prosecution Comment on Use of Witness Statements***

The Chamber then noted that it had a small surplus of time remaining and allowed the Nuon Chea defense to comment on the prosecution's statements regarding the defense's previous use of witness statements from the four current Cambodian officials (see above).

Mr. Ianuzzi then clarified that the Nuon Chea defense only objected to the use of these statements "to prove the acts or conduct of the accused or pivotal issues in the case, without [the individuals] appearing for cross-examination." Indeed, Mr. Ianuzzi stated that the Nuon Chea defense had already proposed that these individuals testify.

Following this submission, Chamber President Nil Nonn announced the day's adjournment. He also noted that Case 002 proceedings would be in recess until Monday, March 12, when the proceedings will resume at 9 a.m. More information on the recess and Case 002 developments to date is available on the ECCC website at: <http://www.eccc.gov.kh/en/articles/trial-chamber-adjourns-judicial-recess-case-002>.

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CORRECTION: In the February 15, 2012, Cambodia Tribunal Monitor (CTM) blog post, it was stated that the civil parties placed video clips of interviews with accused Khieu Samphan before the court drawn exclusively from the film *Facing Genocide*. This assertion was incorrect. The first three film clips were excerpted from the film *Survive: In the Heart of the Khmer Rouge Madness*. Only the final clip shown by the civil parties was taken from *Facing Genocide*.