

Judge Ya Sokahn asks the defendants for their comments on documents placed before the Trial Chamber at the ECCC on Thursday.

**Case 002 Trial Continues:
Documents Placed before the Trial Chamber**

“So long as I don’t see the document, I don’t respond”
- Accused Nuon Chea

By: Randle DeFalco
J.D. Rutgers School of Law – Newark
Legal Advisor, Documentation Center of Cambodia (DC-Cam)

On Thursday, February 9, 2012, the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) continued its proceedings in Case 002 against accused Nuon Chea, Ieng Sary and Khieu Samphan. The day’s proceedings were dedicated to placing documents before the Chamber related to the historical background of Democratic Kampuchea (DK) period.

Documents Placed before Chamber by Judge Ya Sokahn

After Chamber President Nil Nonn opened the day’s proceedings, he noted that the Chamber is well aware of the right to remain silent and informed the accused that they can simply decline to comment on any document without explaining their reasoning. The President then gave the floor to Judge Ya Sokahn to place documents before the Chamber.

Judge Ya then placed the first document before the Chamber, which consisted of an outline of revolutionary policies of the Communist Party of Kampuchea (CPK). Per his established habit, Khieu Samphan declined to comment on the document. Nuon Chea's counsel, Michiel Pestmen then informed the Chamber that Nuon Chea wished to comment on the document but had difficulty understanding and processing the contents of documents read out to him, even in the Khmer language. Nuon Chea himself then stated that he wished to comment but required a hard copy of the document.

The Chamber ordered that a hard copy of the document be provided to Nuon Chea, and the Chamber judges then conferred briefly. Nuon Chea then immediately requested the "original document." Chamber President Nil Nonn responded by repeating yet again the Chamber's previous ruling that copies of documents are admissible in lieu of originals unless there is a specific reason to doubt the veracity of the copied document. Nuon Chea then responded that he could not comment until he had studied the whole document.

The President instructed Nuon Chea to "take his time" in studying the document and informed him that he could comment on the document at a later point.

The next document placed before the Chamber was an interview with Ieng Sary, wherein he stated that he changed his name in order to attend high school. Ieng Sary declined to comment on the document.



Ieng Sary continued to invoke his right to remain silent when asked for any comments during Thursday's proceedings.

The third document placed before the Chamber by Judge Ya was a biography of Ieng Sary, which discussed his educational background and roles in the revolution leading up to the DK period. Ieng Sary again declined to comment, and President Nil Nonn informed Judge Ya that it was not necessary to ask the accused for a comment for each document but that the accused could indicate if they wished to comment on any specific document.

At this point Ieng Sary's international defense counsel, Michael Karnavas, rose and argued that it was "an abuse of the process" for the Chamber to seek comment on each document from an accused who had already unequivocally invoked his right to remain silent, noting that the ECCC is an internationalized institution that must follow international fair trial standards. He further argued that "seeking a comment is no different than asking a question" and requested that the

Chamber cease seeking comments from Ieng Sary moving forward, characterizing the process as “coercion.”

President Nil Nonn responded by stating that the Chamber was actually seeking to ensure the rights of Ieng Sary are respected by providing him the opportunity to comment on the documents, which are relevant to his case.

Judge Ya then placed additional documents before the Chamber, included Khieu Samphan’s book, issues of *Revolutionary Flag* magazine, CPK circulars, CPK speeches, witness statements, interviews with the accused, and additional books. During this process, Judge Ya read out excerpts from each document prior to placing it into evidence.

After Judge Ya concluded placing documents before the Chamber, the floor was turned over to the parties to place documents, beginning with the prosecution.

Prosecution Places Documents before the Chamber

International prosecution counsel Dale Lysak then placed documents before the Chamber. The first documents submitted by the prosecution were related to Nuon Chea’s claim the previous day that he was not a member of the CPK’s Military Committee. Mr. Lysak read out statements made in interviews by both Ieng Sary and Khieu Samphan which stated that Nuon Chea was a member of the CPK’s “Security Committee.” Ieng Sary’s statement indicated that this Committee, which included Nuon Chea, Pol Pot and Son Sen, would report on security and military matters to the rest of the CPK Standing Committee.



Pol Pot (front, left) walks with the Chinese delegation led by Wang Dongxing (front, right), during the delegation’s visit to Democratic Kampuchea on November 5, 1978. Khieu Samphan and Noun Chea follow behind. During this visit, Pol Pot is alleged to have asked for direct aid from China, but the request was purportedly rejected. (Source: Democratic Center of Cambodia)

These documents prompted a response by Nuon Chea, who claimed that there “is a mistake in th[ese] documents” because he was engaged in other matters at the time and thus was not involved in security issues.

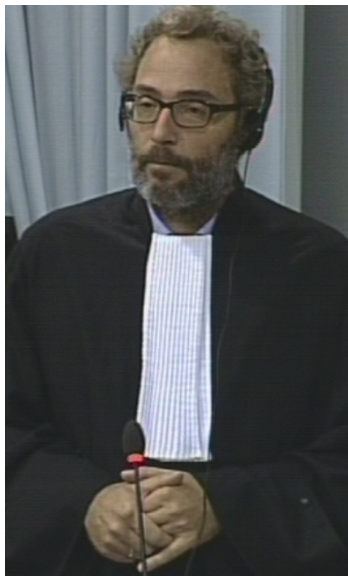
The Chamber acknowledged Nuon Chea's comment and turned the floor back over to the prosecution to continue placing documents before the Court. Mr. Lysak then read out additional documents the prosecution sought to place before the Trial Chamber, including excerpts of radio broadcasts of a speech purportedly delivered by Nuon Chea.

Nuon Chea "categorically reject[ed]" the document purporting to contain excerpts from a speech he allegedly gave, stating that he was never the acting Prime Minister of DK and that it was, in fact, Son Sen who held this position. He continued by stating that if there is a tape recording of the speech, he would like to have a copy of it but that otherwise he rejects the report.

Following a discussion regarding translation of documents, the prosecution turned back to placing documents before the Chamber. However, Nuon Chea appeared agitated by the assertion that he ever served as acting Prime Minister in DK, and prior to the morning break, he requested the production of "any document" that states he held this position. Chamber President Nil Nonn responded by instructing Nuon Chea to confer with his lawyers regarding any documents on the case file, as all such documents are available on the ECCC computer filing system.

Ieng Sary Retires to the Courtroom Holding Cell at his Customary Hour

At this point, just before the morning break, Ieng Sary's defense counsel rose and made the now-customary request to the Chamber that Ieng Sary be allowed to retire to the courtroom holding cell for the remainder of the day's proceedings due to health issues. This request was granted by the Chamber, who reminded the defense to submit a written waiver in its now-formulaic exchange with the defense.



International counsel Michiel Pestman requests the opportunity to complete his questioning of his client Nuon Chea.

Tension between the Bench and Nuon Chea Defense Continues

Following the morning break, Nuon Chea international defense counsel Michiel Pestman rose and stated that the Nuon Chea defense had "a request and some observations." Mr. Pestman then requested that the defense be provided with a list of documents to be put before the Chamber by the prosecution so that Nuon Chea can prepare over the weekend to comment. He then stated that

Nuon Chea's previous demands for "original documents" should be interpreted by the Chamber as a "challenge to the authenticity of those documents." Mr. Pestman then stated that he had a comment about the list of proposed witnesses the Chamber had directed the Nuon Chea defense to provide and asked whether he should voice these comments presently or at the end of the day's proceedings.

Chamber President Nil Nonn responded by instructing Mr. Pestman not to provide any comments at all and instructed the Nuon Chea defense team to make its requests regarding witnesses in writing to maintain witness confidentiality. He noted that Judge Sylvia Cartwright had even provided the Chamber's instructions in English in order to avoid confusion.

Mr. Pestman then thanked the President for this clarification and "announce[d]" that the Nuon Chea defense "is working very hard on this list" of proposed additional witnesses. He began to explain the list further, but President Nil Nonn interrupted and instructed counsel to refrain from bringing up issues the Chamber had previously ruled on, suggesting that Mr. Pestman refer to the transcript if he is confused about the Chamber's ruling. He then stated "I think your time is up" and began to turn the floor over to the prosecution to continue putting documents before the Chamber.

Mr. Pestman, however, seemed unsatisfied with the Chamber's response and remained standing despite having his microphone turned off. He also appeared to make statements in the courtroom that were not picked up by the Court translation service. President Nil Nonn asked Mr. Pestman to "please be seated," but Mr. Pestman continued to persist by making more inaudible statements. Following some technical glitches, Judge Nil Nonn allowed Mr. Pestman to make his statement but sternly warned him to make only new submissions. Mr. Pestman then requested the opportunity to finish examining Nuon Chea on the topic of the context of the historical background of the DK period.

The President then instructed Mr. Pestman that he had not been stripped of the right to question his client but had waived his questioning time by veering off into other matters. Mr. Pestman responded that he had not waived the rights of his client and wished to conclude his questioning. The President then asked him how much additional time Mr. Pestman required to finish questioning Nuon Chea. Mr. Pestman responded that he required thirty additional minutes to complete his questioning of his client, Nuon Chea.

The Chamber granted this time to the Nuon Chea defense and instructed Mr. Pestman to limit his questioning to the topic of the historical background of the Khmer Rouge movement.

Defense Resumes the Examination of Nuon Chea

Mr. Pestman first asked Nuon Chea to elaborate on his previous testimony that his father had owed debts. Nuon Chea responded by stating that his father had been a rice trader who had lost a lot of money following the end of World War I, when rice prices plummeted and a ship carrying his rice had capsized. Nuon Chea further testified that this debt was so large, the family had to pay interest on it for twenty years without even paying back the capital.

Next, Mr. Pestman asked Nuon Chea to elaborate on the "beatings" he witnessed of lower class people where he grew up. Nuon Chea responded that he saw servants beaten by other servants

upon the orders of their masters. He also testified that French legionnaires, such as soldiers from Morocco, went around his village arresting women and mistreating the people and that this behavior fostered a “hatred of injustice” in Nuon Chea. He also testified that he joined the Khmer *Isarak* freedom movement in 1950, reiterating his previous statements about his early communist associations.

Upon further questioning, Nuon Chea testified that the French legionnaires had actually raped women in his village, and he stated that these men “were so barbaric.”

Mr. Pestmen then asked Nuon Chea when he first met Heng Samrin.¹ Nuon Chea responded that he met Heng Samrin in the East Zone, where he worked with Sao Phim. Nuon Chea stated that at this point, Heng Samrin was a messenger who was a good person but “extremely poor.” Nuon Chea further testified that Heng Samrin was “courageous” and provided Nuon Chea with protection while escorting him to the border with Vietnam. Nuon Chea also stated that Heng Samrin escorted him to the border numerous times, as Nuon Chea was tasked with liaising with Vietnamese authorities at the time.

When asked when was the last time Heng Samrin escorted him to the border, Nuon Chea responded that this was in 1978 or early 1979, though he appeared confused by the question. After Mr. Pestman clarified his question, Nuon Chea responded that the last time he was escorted by Heng Samrin was in 1975 and explained that, when the Khmer Rouge took power, the road to Vietnam became open and Khmer Rouge officials did not have to go through the jungle secretly anymore.

Mr. Pestman then asked what Heng Samrin’s official position was in the CPK just prior to the Khmer Rouge victory of 1975. This prompted Chamber President Nil Nonn to interject and instruct Nuon Chea not to answer the question. The President then announced that the defense’s questioning time had run out. Upon application, however, Mr. Pestman was granted permission to ask one final question, provided that it was relevant.

Mr. Pestman used this opportunity to ask Nuon Chea whether it is true that Heng Samrin became a CPK Division Commander in 1975 who participated in the liberation of Phnom Penh on April 17, 1975, and is the sole surviving former Division Commander who entered Phnom Penh on that date.

Predictably, Chamber President Nil Nonn instructed Nuon Chea not to answer this question, deeming it irrelevant. This concluded the questioning of Nuon Chea by his defense counsel.

Chamber Rejects Nuon Chea’s Daily Request to Retire to the Holding Cell

Mr. Pestman then made the defense’s “usual” request to the Chamber that Nuon Chea be permitted to retire to the holding cell for the afternoon session based on his poor health. The prosecution then interjected and reminded the Chamber that it planned on putting documents before Chamber during the afternoon session relevant specifically to Nuon Chea, who therefore might desire to comment on the documents. Mr. Pestman responded by stating that Nuon Chea

¹ Heng Samrin is the current chairman of the National Assembly of Cambodia.

would participate via the holding cell audio-visual link and comment as necessary by communicating with counsel.

After the Chamber Judges conferred, President Nil Nonn reminded the parties that the afternoon session would be dedicated to putting “inculpatory” documents before the Chamber. In light of this fact, the Chamber rejected Nuon Chea’s request to retire to the holding cell, deeming it especially important that Nuon Chea be present. Nuon Chea himself then interjected and stated that he would not be able to continue for the afternoon session. The President did not budge, however, and he ordered the Court security personnel to return Nuon Chea to the courtroom for the afternoon session.² The President did state that the Chamber would “inspect” this situation when the proceedings resumed for the afternoon session.



International prosecutor Dale Lysak places documents before the Trial Chamber.

Prosecution Puts Additional Documents before the Chamber

Following the lunch break, prosecution counsel Dale Lysak continued putting documents before the Chamber, beginning with a document Mr. Lysak stated met Nuon Chea’s earlier challenge to produce a document naming Nuon Chea as the acting Prime Minister in DK. This document was a British Broadcasting Corporation (BBC) report that included an excerpt from a radio broadcast statement purportedly made by Khieu Samphan, stating that Nuon Chea would “temporarily replace” Pol Pot as premier of DK.

² This order seemed somewhat confusing, due to the fact that Nuon Chea’s co-accused, Ieng Sary, had already been excused for the day and was already in the holding cell viewing the proceedings via audio-visual link. Although the documents for the afternoon concerned Nuon Chea mostly, Ieng Sary presumably continued to enjoy the right to comment on the documents if he saw fit to do so.

Nuon Chea then commented on this document, calling it inaccurate and reiterating his claim made during previous proceedings that Son Sen had stood in for Pol Pot when Pol Pot was sick.

The prosecution continued to present documents, including several purportedly containing statements made by Nuon Chea. During this presentation, Nuon Chea commented regularly and reiterated his refusal to recognize any non-original documents. Nuon Chea asked rhetorically at one point why the originals were not given to him for inspection, if they are genuine.

These comments were brushed aside by the Trial Chamber, who had previously reminded Nuon Chea of its ruling that copied documents are presumed admissible.

The prosecution then proceeded to present additional documents before the Chamber, including many alleged former speeches or statements made by Nuon Chea. Nuon Chea sought to comment on some of these documents but appeared frustrated and confused by the Chamber's ruling that he would have a later opportunity to comment after inspecting the documents raised by the prosecution. He maintained, "I want all the documents put before me" and insisted that he cannot comment by simply listening to the documents being read out.

This statement triggered the Chamber judges to confer briefly, after which Chamber President Nil Nonn informed Nuon Chea that all of the documents being discussed are already on the case file and that Nuon Chea's counsel can provide him with copies of the documents to examine. The President further informed Nuon Chea that he would have time the following week to respond to the documents put forth by the prosecution.

The prosecution then continued putting documents before the Chamber, including documents discussing the CPK's views on Buddhism and the role of King Norodom Sihanouk.

When Nuon Chea was asked whether he would like to comment on these documents, he responded simply, "So long as I don't see the document, I don't respond."

Prosecution Reads out List of Facts Agreed upon by Ieng Sary Defense

Following the completion of its presentation of documents, the prosecution presented the Chamber with a limited set of facts it had reached agreement upon with the Ieng Sary defense.

This list of facts covered facts that are minor and/or were already the subject of lengthy testimony and submissions by the parties. The topics covered included such facts as the occurrence of the 1960 Congress where the CPK was formed and that Ieng Sary was present, along with other prominent individuals, and that the Standing and Central Committees of the CPK were composed of both full-rights and candidate (or "alternate") members.

After the prosecution concluded presenting these limited agreed-upon facts, Chamber President Nil Nonn announced the day's adjournment and informed the parties that the proceedings would resume on Monday, February 13 at 9 a.m. with the continuation of placing documents before the Chamber.