



*President Nil Nonn addresses evidentiary issues on Tuesday at the ECCC.*

### **Cross-Examination of Duch Begins**

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On Tuesday, April 3, 2012 the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) continued trial proceedings in Case 002 against accused Nuon Chea, Ieng Sary, and Khieu Samphan. On the day's schedule was the cross-examination of the prosecution witness Kaing Guek Eav, *alias* Duch, but after the civil party finished their direct examination, procedural issues needed to be resolved and the judges given an opportunity to ask questions, leaving only an hour for the defense.

The viewing room was mostly empty, attended only by a group of about 300 Khmer high school students and around a dozen national and international observers.

#### ***Civil Parties Run Out of Time***

Lyma Nguyen, international civil party counsel, began the day by questioning Duch about his recollection of the treatment of foreign nationals at S-21. Duch testified that he remembers the four westerners who were brought to S-21 but does not recall reading the confessions nor does he recollect the interrogation techniques used. He repeatedly mentioned that he remembers a day when the foreigners were forced to eat fruits, allowing those who worked at S-21 to determine which ones were poisonous. Ms. Nguyen was not familiar with this incident and chose not to pursue it.

Ms. Nguyen's questions indicated a desire for Duch to testify about the level of detail that was included in the written confessions of people who were purported to be members of the CIA, such as their activities, operations, and missions. Duch testified, however, that he could only recollect that they confessed to coming to Cambodia on an espionage mission.

After multiple attempts to ask questions aimed at refreshing Duch's memory of the written confessions of the foreign nationals through questions such as "did these victims write about

regional foreign affairs” or “how did the CIA operate in South East Asia,” Michael Karnavas, counsel for Ieng Sary, asked the chamber to “end this charade” and allow counsel to use the testimony to refresh the witness’s testimony. In response, the Chamber President, Nil Nonn, requested that Ms. Nguyen refrain from asking questions about the content of the confession because the witness already testified that he only remembers about the fruits.

Ms. Nguyen then tried to obtain clarity on whether the interpreter for the western confessions wrote the Khmer version. Duch replied that to the best of his recollection, “the interpreters were there from the beginning until the confessions were obtained. The English versions were written by the prisoners who had to write down their confession. The Khmer version of the confessions were in the handwriting of the interrogators.”

Ms. Nguyen then asked Duch about his fluency in English. Duch testified that his English at the time was “very embryonic” but that he was able to “grasp the situation at S-21.” He went on to tell the chamber, with an apology for needing to use offensive language, that he knew that the prisoner he selected to translate was fluent in English because of his ability to repeat the phrase “son of a bitch” without an accent.

The testimony then turned to the tasks required of S-21 as a counter-espionage unit. Duch stated that he never determined whether the confessions were true, that was the responsibility of his superiors. More specifically, each confession was sent to either Son Sen or Nuon Chea, and the Standing Committee then decided what further actions were required. His ultimate goal was to extract confessions. Ms. Nguyen asked whether the confessions were also sent to other people, such as Ieng Sary or Khieu Samphan, but Duch requested not to answer the question.

Ms. Nguyen inquired whether the confessions of the special prisoners were ever used as propaganda for the Communist Party of Kampuchea (CPK). Duch’s response was that the CPK, through Son Sen and Pol Pot, would sometimes use the confessions of prisoners as propaganda. Ms. Nguyen then inquired whether the directive to burn the western prisoners was a policy of the CPK or done on a case-by-case basis. Duch’s reply was limited to stating that the general decision was to make sure that everyone was killed and not released.

A document titled the “Final Joint Plan” and dated July 11, 1977, was then tendered into evidence. Duch testified that the document was created after Son Sen instructed him to “add up all of the prisoners” and “describe the enemy networks of S-21.” Duch reported that he asked “Comrade Pon” to write the document. After Son Sen went to Neak Leung, no one talked about the document again.



*International Civil Party Counsel  
Lyma Nguyen*

Ms. Nguyen then asked Duch to draw his attention to a section titled “Substance of the Summary,” which discussed the inter-workings of the Vietnamese, Soviets, and CIA. This prompted Mr. Karnavas to object on the grounds that no foundation had been laid. After a short deliberation, and a request for the document identification numbers to be given again, the President asked Duch whether he had ever seen this document before, and clarified that “before” meant prior to being

summoned to testify before this court. Duch responded that the first time he saw this document was during Case 001. After taking a moment to consider the issue, the President informed Ms. Nguyen that she may continue with her original line of questioning. Duch was then asked whether the contents from part B resemble the content of the confession, and he confirmed that it did.

Ms. Nguyen then asked the court for additional time, arguing that the civil parties represent diverse groups of clients, all of whom are looking for the truth behind the actions of the Khmer Rouge regime. The President informed her that she had twelve minutes remaining.

Due to the limited time, Ms. Nguyen changed her line of questioning to clarify prior testimony given by Duch that Nuon Chea had asked S-21 to record two confessions from prisoners of war per week for broadcasting. Duch responded that on January 8, 1978, Nuon Chea asked him to record the confession of a Vietnamese prisoner.

Ms. Nguyen then asked whether there were any radio broadcasts where the leaders called for adverse or discriminatory treatment of Vietnamese people living in Cambodia, and Duch stated that he did not know of any. He also was not able to respond to questions about the number of Vietnamese who were deported. Duch was able to testify, however, that the CPK never treated the Vietnamese migrants as a minority group, but did treat the Cham people as a minority group. It was reported that the Cham Muslim people were evacuated in order to have them “tempered” and ensure that they “abandon their religion.”

Ms. Nguyen continued the line of questioning on the CPK’s policy on religion, pointing to a section of the constitution of the Democratic Kampuchea that referred to “reactionary religions.” She inquired whether Buddhism and Islam were considered reactionary, and was told that they were not, but Christianity was considered to be a reactionary religion.

The president then informed Ms. Nguyen that her time had expired, and she stopped her examination of the witness.

### ***Return to Monday’s Debate on Admitting Evidence Before the Court***

The president then called upon Prosecutor William Smith, who asked the President if he could take a moment to clarify the procedure for putting prior witness statements before the Chamber. More specifically, he inquired if yesterday’s ruling differed from the memorandum previously sent by the honorable judges that stated documents could be put before the Chamber through a special hearing. In this instance, he was particularly concerned about Annex 12, the prior written statement of witness Duch, and Annex 13, the complaints. He noted that on March 2<sup>nd</sup> the justices stated that this issue would be dealt with in a written decision by the Chamber at a later date. He asserted that the prosecution was acting under the presumption that these documents have been put before the Chamber, and requested guidance on how to proceed if they have not.

Mr. Smith then proceeded to request clarification on whether all the documents attached to interviews of witnesses would be considered put before the chamber unless there was an objection by a party during the testimony. More specifically, he wanted to know whether the justices meant that when a witness appears in court, their written records are automatically

placed before the chamber. Further, he asked, does that dispense of the requirement that parties need to identify all the prior statements when the witness appears? He stated that the prosecution believed this to be the case, but if this was not the case, they would like to know immediately so that they can enter the necessary documents into evidence.

The President then gave the floor to Michiel Pestman, counsel for Nuon Chea. He stated that they “urgently need a decision on how to put witness statements before the chamber.” He also wanted to re-raise the point that Michael Karnavas made on Monday regarding the probative value of statements that were put before the court but not discussed. He reminded the court that this is the “first of many trials” and that the defense team was “not allowed, and do not intend to, question these particular witnesses at length about topics not currently on the agenda – such as S-21.” He then further questioned the probative value of the statements given by the witness that touch on issues not covered by the first trial. The chamber was then specifically asked whether it would rely on documents where the defense was not able to conduct a cross examination. He suggested that Duch come back when S-21 was on the agenda, allowing the defense to question him thoroughly.



*Michiel Pestman, international counsel for Nuon Chea*

Michael Karnavas was then given the floor, and he told the judges that he would “welcome clarification.” He pointed out that yesterday Mr. Smith requested that he wanted the testimony from the previous trial to be admitted but that request was not made again today. He was not clear whether that meant the request had been withdrawn. He also pointed out that the prosecution spent six days questioning the witness on a variety of issues, and, on top of that, wants 60 or 70 more statements that Duch has given over a period of several years also to be included in evidence. He informed the Chamber that if all of the documents requested by the prosecution are entered into evidence, it will be very difficult for the defense to know what will actually be used as evidence. He did concede that there are some documents that might not have gone through this process that should be admitted into evidence for various reasons, but he thought that those should be subject to a hearing where the prosecution would have to adequately justify why the document had not been presented earlier.

The president then called upon Mr. Kon Sam Onn, counsel for Khieu Samphan, who supported the request for more clarification on the rule and reminded the judge that there are more than 60 sessions of statements of Duch that were recorded and that many of them are contradictory. Elisabeth Simonneau-Fort, international civil party lead co-lawyer, then inserted her belief that the chamber has already clearly stated that all records of interviews during judicial investigations should be considered to be placed on the record. She added that if Duch’s statements are part of the record, the civil parties are entitled to use these statements.

### ***Court Takes Morning Recess***

At this point, the Chamber adjourned for a thirty-minute morning break. Ang Udom, counsel for Ieng Sary, made his usual request that his client be permitted to waive his right to be present in

the courtroom and retire to his holding cell to observe the remainder of the day's proceedings via audio-visual link, especially due to his back and leg pain. As per usual, the President granted the request but required that a waiver be submitted to the court with the defendant's signature or thumbprint.

### ***Court Needs Time to Consider Procedure for Admitting Evidence***

The court reconvened fifteen minutes behind schedule, and the President announced that a decision on the procedural issues discussed before the break would be provided after the lunch recess.

### ***Judge Lavergne Seeks Clarification from Duch***

The President then turned the floor over to any judge who had questions for Duch. Judge Jean-Marc Lavergne was the first to take the floor.

Judge Lavergne began by asking about the three categories of enemies on which Duch had



*Judge Jean-Marc Lavergne*

testified on March 20, 2012. More specifically, he wanted to know whether the policy of trying to recruit some of the enemies to the revolution contradicted with a policy that encouraged people to have nothing to do with the enemy. He asserted, "One appeared to be an overture and the other exclusion." Duch began a detailed explanation of how the Monarchy was smashed, which he believed indicated that there was no discrimination between the types of enemies. He was interrupted by Judge Lavergne with a request to answer the question more directly, and eventually Duch explained that there was no strategy to have the enemy join the revolution. Duch also clarified that the Royal Family had been in the

liberation zones for a while before they were eliminated.

The questioning then turned to what happened when ordinary people arrived at the Omlaing from the liberation zone. Duch described how the area had been bombed by B-52s. He also testified that a twelve-year-old boy had been arrested and interrogated, but his confession was not used to implicate people because of his age. In contrast, he remembers another boy of about 18 years who implicated people while being interrogated, and those people were arrested and sent to M-13 for questioning. He then started discussing a middle-age person who had an affair with another man's wife but was interrupted by Judge Lavergne who requested that Duch not dive into such level of detail.

Judge Lavergne then rephrased his question and asked whether it was true the policy to rally to the enemy was not applied to ordinary people. Duch responded that "the policy to persuade or convince enemies was applied to even ordinary citizens." The response confused Judge Lavergne, who asked how this policy of reaching out to people applied to ordinary citizens. He noted that a citizen who crossed the boundary between the liberated zone and the enemy zone were considered to be spies. He could not understand how this was consistent with an open-door

policy. In response, Duch clarified that the open door policy was not applied after 1970 and that the policy to classify enemies into three classes was never put into practice.

The questions then turned to the CPK policy of embracing all people, regardless of their political leanings or religious beliefs. Judge Lavergne asked whether this policy applied to the people in or around Omlaing, more specifically, whether the CPK make good on its promise that all people who joined them would not need to be concerned about food and work. Duch admitted that no support was provided to these people.

Conversation then turned to the evacuation in Omlaing in 1974. Duch was reminded that he testified on March 20<sup>th</sup> that people in the market had to be evacuated and he was certain that there would be an evacuation when he saw the trucks. Duch then clarified that he had not personally seen the trucks. He was then reminded that most of the people evacuated were sent to Pursat and asked whether there were also executions, and Duch responded that he had no recollections of any. It was then clarified that Duch did not know about the procedure for the evacuation and that his brother-in-law, who was a policeman for the CPK, was responsible for the plan.

The conversation then turned to the evacuation of people in Phnom Phen after April 17, 1975. It was established that Duch saw a lot of people come to Omlaing. When people arrived, they were taken to an office and had to state their occupation and their biography. It was then decided whether they were to be smashed. In July it was learned that those who were not smashed were under the authority of the “old people.”

### ***Court Breaks for Lunch***

At this point, the Chamber adjourned for the lunch break. Mr. Pestman, counsel for Nuon Chea, made his usual request that his client be permitted to waive his right to be present in the courtroom and retire to his holding cell to observe the remainder of the day’s proceedings via audio-visual link. As per usual, the President granted the request, but required that a waiver be submitted to the court with the defendant’s signature or thumb print.

### ***Further Delay on Admission of Evidence Ruling***

After the lunch break, the President opened the afternoon session by informing the involved parties that the Chamber was not yet able to decide on the matter before it on how evidence becomes admissible before the court, stating that it would be addressed later in the afternoon session.

### ***Judge Lavergne Continues His Questioning***

Judge Lavergne then asked for a document already entered into evidence to be shown to Duch. It was a notebook written by brother Mon Nig,<sup>1</sup> a staff member of S-21. Duch testified that Mon Nig would take notes during study sessions. After some confusion over the correct translation of one of the notes written by Mon Nig, it was established that the essence of the note was that the CPK was teaching that affection between parents and children and between spouses hinders work and service to the nation. Further, it was stated that love should be abandoned and feelings disregarded. It was also pointed out that Nuon Chea had his nephew arrested. Duch testified

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<sup>1</sup> Spelled phonetically according to ECCC live translation in English.

that under the CPK rule, gratitude toward the parent was not important – it was the Party that deserved gratitude.

It was then established that four of Nuon Chen's family members had been arrested: two nieces and two nephews-in-law. The nieces were doctors who had studied in China, and one was the person in charge of the health care staff in the Ministry of Foreign Affairs. In principle, Duch testified, it was Pol Pot and/or Nuon Chea who order their arrests, and their confessions were sent to the Upper Echelon.

Judge Lavergne then addressed a previously admitted confession of a prisoner with the alias Van, dated July 13, 1978, which mentioned that one of Nuon Chea's nieces had been arrested. Duch was asked whether he remembered ever discussing this issue with Nuon Chea, but Duch said no.

Judge Lavergne then inquired about times that Duch was asked to delete names from confessions. Duch said that it did not happen often and that there was no rule that if someone was interrogated three times they would be arrested. Duch would, however, review the list to see which people had implicated each other. Duch was asked to recall a time when Khieu Samphan was implicated and asked about Nuon Chea's reaction. In response, Duch recalled that Nuon Chea had spoken about how Duch could have been a diplomat, a way of indicating his displeasure with what Duch had done because diplomats were frequently followed and arrested. They then backtracked in time and spoke about M-13 and particularly arrests occurring at one specific pagoda. Duch established that the soldiers arrested there had been in conflict with their supervisors.

The conversation then turned to the tasks of Khieu Samphan during the period of Democratic Kampuchea (DK). Duch testified that Khieu Samphan had been in charge of several units, the electric factory, and in charge of all the papers in Office 870. He was not the personal assistant of Pol Pot, Duch asserted, but rather the one who knew about Pol Pot's personal decisions.

### ***The President Takes Over the Questioning***

The President then took over the questioning of Duch, beginning by focusing on the organization of the party. Duch testified that during the CPK there were four ministries and multiple offices and committees. The ministries were national in scope and the others were more local. The district committee had the same make-up as the S-21 committee. The court then adjourned for the afternoon recess.

### ***Court Rules on Admitting Evidence***

After the break, the president re-opened the proceedings by ruling on the evidentiary issues that were raised earlier in the day. He began by stating that decisions regarding objections to documents will be issued in due course, but he will address the issue for the current witness. He then stated that all written records of interviews with Duch by the co-investigating judges during Case 001 and 002 have been placed in the file and are considered put before the Chamber, regardless of whether the written records of these interviews have been discussed in court. He further clarified that all of the documents are considered put in front of the Chamber in their entirety and may serve as a basis for questioning the witness. In terms of the transcripts of Case

001, he clarified that parties may put relevant portions before the Chamber but must clearly identify those sections they plan to use as the basis for their questioning.

The president then went on to reiterate the Chamber's prior ruling that all documents attached to the written records of interviews with witness or civil party members who have testified to date and those witnesses, civil parties and experts identified for the next trial session are considered to be put before the tribunal unless objected to by the parties during the testimony.

### ***Cross-Examination by Nuon Chea Defense Begins***

The court then handed the floor to the Nuon Chea defense to begin its cross-examination of the witness. Michiel Pestman began by requesting that his client be allowed five minutes to speak in his own defense tomorrow morning. After the Chamber agreed to this request, Mr. Pestman turned his attention to Duch, asking him why he continued to look at the prosecution while being questioned by the civil parties. Duch responded that "eye contact is something followed by westerners" and while it is good to do, he forgot whom he was addressing. Mr. Pestman requested that Duch look at him during the examination because he is a westerner. President Nil Nonn, apparently angered by this request, interrupted the questioning and reminded Duch that he was giving testimony to the Chamber and should therefore focus on the bench while answering questions.

Once the protocol on proper eye contact was established, Mr. Pestman turned his attention to whether Duch had told the truth during his testimony. He began by asking for clarification on what Duch meant yesterday when he told the prosecutor that "everything he said the other day, I upheld." Mr. Pestman then walked him through a series of people, specifically three journalists, asking whether Duch had told "the truth" to them. Duch testified that he told one of these journalists the truth, but that the other two "manipulated" his words and he "fully rejects" their commentary.

Duch was then asked whether he was familiar with the term "being economical with the truth." Duch refused to answer the question because it was too hypothetical. The President then intervened, requesting that Mr. Pestman focus on the case file in front of him. He was further scolded for his reference to "Mr. Christopher" (referring to one of the journalists) because that information was obtained outside the courtroom. Mr. Pestman responded that he would get back to this person later.

Mr. Pestman then asked whether Duch had a good memory, causing him to respond, "That is up to your judgment; I cannot judge myself." Mr. Pestman then stated that Duch had recited several dates during his testimony, such as August 15, 1977, and asked whether Duch was certain of these dates. Duch stated that he might have misquoted some of the dates, but he was certain of August 15.

Mr. Pestman then asked whether he personally tortured prisoners at M-13. Duch refused to answer. Mr. Pestman protested to the President, claiming that the witness has a duty to respond. Further, he asserted that Duch cannot incriminate himself because he has an irrevocable decision against him, arguing further that there is no reason why he should be allowed to remain silent. The President affirmed that Duch has the right to remain silent in order to keep from



incriminating himself. Mr. Pestman argued he thought that was only for people that hadn't been irrevocably convicted, but the President refused to consider it further.

Mr. Karnavas then joined the debate, stating that there is ample jurisprudence that once an accused has been convicted and exhausted the appeal process, he can be compelled to testify and his failure to do so warranted sanctions. He pointed out that at this point the only way he could incriminate himself was to lie under oath, which would constitute perjury, but as long as his testimony is true there is no chance of incrimination. He urged the Chamber to reconsider.



*Ieng Sary's international defense counsel Michael Karnavas*

Prosecutor William Smith then offered his take on the debate. He noted that the question was about whether Duch had performed torture at M-13. He noted Duch has not been indicted for incidents there, and if there is any chance that he might be, he retains the right not to testify. He conceded that Duch should be compelled to testify on any issues to which he had been convicted.

Mr. Pestman argued that it was “very unlikely” that Duch would be indicted for any atrocities committed at M-13 because he had been in prison for nine years, and he has still yet to be indicted for any crimes committed at M-13. He agreed, however, to hold off on his questions until tomorrow.

Mr. Pestman then asked Duch about the bombing of M-13. Duch responded by telling Mr. Pestman that his math was wrong, he had not been in prison for nine years. The President intervened, reprimanding Duch for asking questions directly to defense counsel.

The conversation then returned to the bombing by the Americans of M-13. It was established that the staff and prisoners at M-13 had to hide in the trenches for their own protection and that Pol Pot kept the incident secret so as to not scare the people. Duch dodged a question on whether he was there, stating he did not know if the bombing influenced the food in the area, and he refused to answer about the number of casualties. Mr. Pestman turned to the President again, urging him to remind the witness of his duty to testify. The President told Duch he had to answer the question, clarifying that he was allowed to respond that he did not know but he had to answer. Duch replied that he chose not to answer because he thought the question was repetitious -- he had already testified that the CPK chose to withhold this information. The President explained that the defense was trying to establish whether Duch knew anything about the incident. Duch then answered that he did not. Duch was able to recall, however, that the bombings increased the number of prisoners at M-13.

The questions then turned to whether Duch ever tortured people at S-21. Duch said he once slapped a prisoner two or three times in the face, but this was the extent of interrogating a prisoner. He also testified that he never killed anyone there. Mr. Pestman then asked the same question, but about his time at M-13. This sparked another round of objections from the

prosecution, which the President sustained. Mr. Pestman said he would get back to this issue the next day.

Duch was then asked to speak about how he felt about the work he did identifying members of the CIA for the CPK. Mr. Smith objected to the line of testimony, accusing Mr. Pestman of establishing the presence of the CIA as fact. He conceded, however, that the questions would be appropriate if they related to his independent knowledge outside the confessions. Mr. Pestman responded that Mr. Smith had misread his intentions, asserting he was not trying to establish that the confessions were true but rather that the witness believed the statements to be true. Mr. Smith's objection was sustained, but he was reminded to object before the witness answered the question.

Mr. Pestman rephrased, asking whether Duch would describe his work at S-21 between 1975 and 1976 to be "useful, if not even critical, to the survival of the CPK." Duch proceeded to give a long answer, but Mr. Pestman interrupted him, saying that his line – "my work was like a drop in the ocean" – sufficiently answered the question.

The questioning then seemed to return to whether Duch was a reliable witness. Duch was first asked whether his bicycle was lost or stolen. Duch said that it was not relevant to the facts and refused to answer. The President sustained the witness's decision not to answer. Mr. Pestman noted that he should be able to explain why he thought the information was relevant but agreed just to revisit it tomorrow. He then asked Duch the name of his female friend who refused to study mathematics with him. The President instructed the witness not to answer because the question was not relevant, and Mr. Pestman offered to revisit the issue tomorrow.

Mr. Pestman then asked whether Duch had ever seen someone being tortured. Duch, limiting his answer to S-21, said that he was too busy reviewing papers. Going further, he stated that one time he oversaw the translation of a foreign confession, but the interrogation was not conducted in his presence. Mr. Pestman urged Duch to also answer with respect to his experience at M-13, but Duch refused.

Duch was then asked whether he enjoyed torturing. This prompted an objection from Mr. Smith, who stated that Duch had already testified that the only torture he inflicted was a couple of slaps in the face and therefore this question did nothing more than "antagonize and unsettle" the witness. Mr. Pestman said that he was trying to establish the credibility of this witness. Mr. Smith stated that the question was based on speculation that the witness had committed torture and thought a more appropriate question would be whether he enjoyed the process at S-21. The President sustained the objection.

Mr. Pestman was invited to proceed, but he informed the judge that it was the time at which court normally adjourned. The President then ended the testimony for the day, and informed the Chamber that Mr. Pestman will continue his testimony on Wednesday morning.