



Preview of the Defense: Khieu Samphan and Ieng Sary Respond

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Opening statements in Trial 002 ended today with more of the spirited debate and verbal fireworks that have punctuated these proceedings from the beginning. With Nuon Chea's team denied an opportunity to continue its response to the Co-Prosecutors' opening statement, the court gave the floor to Ieng Sary and Khieu Samphan to make their remarks and preview their defense as they wished.

In the packed public gallery, the audience of mostly secondary school students and villagers was restless and talkative for most of the morning, even during the proceedings, though the reason was unclear. Yet, despite this restlessness, the audience listened attentively to both Ieng Sary and Khieu Samphan, seemingly eager to hear more from these men and perhaps receive some explanation for the events and atrocities that occurred under the Khmer Rouge regime.

Preliminary Matter: Recognition of Defense Counsel

President Nil Nonn called the court to order, immediately passing to Nuon Chea's national co-lawyer Son Arun, who was standing. Mr. Arun repeated an earlier request for the court to recognize a new international lawyer who will join Nuon Chea's team, stating that the needed documents had now been provided to the court. President Nonn responded that, although the judges have completed their review of the documents, they are waiting for translations of the document to be completed before they will sign the recognition application and that therefore it is not appropriate to complete the recognition at this time.

Ieng Sary Addresses the Royal Pardon and Amnesty

President Nonn then moved forward with the day's proceedings, turning to Ieng Sary's national co-lawyer Ang Udom to introduce Mr. Sary's statement to the court that had been postponed at the end of proceedings on Tuesday. In response, Mr. Udom stated that Mr. Sary had asked his counsel to read the statement on his behalf and requested that the court allow him to do so.

After conferring with the judges, President Nonn announced that the judges had unanimously decided that the Accused must read his own statement, as he is present in court. He then instructed the security guards to escort Ieng Sary to the witness dock. Six security guards surround Mr. Sary, with three actually helping him into his wheelchair and taking him to the

dock. Many in the public gallery leaned forward in their chairs and strained to see what was happening.

Once seated in the witness dock, Ieng Sary greeted the court and the public and began his statement. After noting that he had been granted the Royal Pardon and Amnesty by King Sihanouk in 1996, Mr. Sary stated, “I am very exhausted. I do not know how I can do this. My heart does not allow me to continue reading.” He then requested to be allowed to take a break and continue with his statement later.

President Nonn asked Mr. Udom how many more paragraphs need to be read on Mr. Sary’s speech. Rather than answering this question, Mr. Udom requested once again to be allowed to read the speech on Mr. Sary’s behalf. President Nonn again rejected the request, stating that the ruling had already been made. Acknowledging that Mr. Sary suffers from shortness of breath, he said the court would allow Mr. Sary to take breaks as needed.

While the president was speaking, Mr. Udom had moved to the witness dock and conferred quietly with his client. Apparently confirming Mr. Sary was able to continue, Mr. Udom returned to his seat, and Mr. Sary resumed his speech.

Mr. Sary stated that, while he disagreed with the Trial Chamber’s decision that the Royal Pardon and Amnesty does not apply in the ECCC, he respects the court’s authority to render the decision. He declared that he is troubled, however, by the Trial Chamber’s refusal to grant a stay in the proceeding until the Supreme Court Chamber rules on his appeal of this matter. Noting that he has been in custody for more than four years awaiting the trial, he criticized what he sees as the court’s lack of timeliness in deciding the Royal Amnesty and Pardon matter and its decision to begin the trial with a major legal issue unresolved. Despite this decision, though, Ieng Sary stated that he would continue to participate to a certain extent in the proceedings “out of respect for the institution.”

As soon as Ieng Sary had completed his statement, Mr. Udom rose to correct two minor mistakes in Mr. Sary’s reading of the text. As Mr. Udom began to read the statement again, President Nonn interrupted him and told him to highlight only the two terms that need correction. Mr. Udom read the two sentences needing correction, noting that Mr. Sary had misspoken the words “apply” and “until” in Khmer, prompting quiet laughs throughout the public gallery.

Nuon Chea’s Team Renews its Objection and Request

After Ieng Sary had been returned to his seat behind his defense counsel, President Nonn moved onto Khieu Samphan for his response to the Co-Prosecutors’ opening statement. Both Khieu Samphan and Michiel Pestman, one of the international co-lawyers for Nuon Chea, stood at the same moment. Although looking in the direction of Mr. Pestman, President Nonn appeared to ignore the lawyer until Mr. Pestman addressed the court directly. Requesting Mr. Samphan, who had by this time arrived at the witness dock, to take his seat, President Nonn allowed Mr. Pestman to continue but warned him to be brief.

Mr. Pestman stated that he is restating his objection, this time for the record, to the Trial Chamber's ruling yesterday regarding his request to continue Nuon Chea's response to the opening statement on Wednesday morning. Referring to Judge Cartwright's statement that the court had inferred Nuon Chea's waiver of his right to respond, Mr. Pestman declared that "a waiver [of a right] can never be inferred" but must be made unequivocally. Noting that their application for the disqualification of Judge Cartwright had not made them popular with the court, he stated that his client should still be given his full opportunity to respond.

In response, President Nonn reiterated that Nuon Chea's team had been given half a day to make their statements on Tuesday. While Nuon Chea himself had used one hour for his response, the counsel had not used the remaining time wisely, even after repeated warnings by the court. Stating that he hoped the message was now clear, President Nonn turned from Mr. Pestman and requested Khieu Samphan to begin his response to the Co-Prosecutors' opening statement.

Khieu Samphan Responds

In distinct contrast to Nuon Chea's response on Tuesday, Khieu Samphan focused his statements as a reply to the Co-Prosecutors, addressing them directly and targeting specific issues he saw in the opening statement. He also provided a clear preview of his defense, namely that he lacked actual knowledge of the crimes committed during the Khmer Rouge regime and that he lacked decision-making authority in Democratic Kampuchea. Also in contrast to the response to Nuon Chea, the audience in the public gallery remained alert throughout Khieu Samphan's speech and appeared to follow his statement closely and with great interest.

Beginning with his overall response to the proceedings and the court itself, Mr. Samphan stated that he is not very knowledgeable about the proceedings and that, from what he has seen so far, no one else understands the procedures very well either. Over the past two days especially, Mr. Samphan said, he felt like "things have strayed beyond my expectation."

Attacking what he called the "guesswork" of the opening statement, Mr. Samphan then challenged the Co-Prosecutors' reliance on anonymous witnesses and untested sources, such as newspaper articles and books. "As far as I know, historians, journalists, chroniclers, and novelists are not judges," he stated. "They have not taken the oath to become investigating judges in order to support the charges in their submissions." As these writers are not legally bound to be right, he argued, they can be biased and partial and use their writings to express opinions, not only facts. Addressing Co-Prosecutor Chea Leang directly, Mr. Samphan stated, "May I remind you, Mrs. National Co-Prosecutor, after 17 April, the French newspaper *Le Monde* published an article entitled 'Phnom Penh Liberated'; I am sure you would take the opportunity to criticize me if I had relied on this." He then called into question the fairness of a trial that "merely rel[ies] on anonymous witnesses and articles and books written by journalists."

Mr. Samphan then addressed the Co-Prosecutors' implication that his interest in the Communist Party during his time as a student in Paris signaled the commencement of the joint criminal enterprise in which all three Accused are alleged to have engaged. Observing that, at that time, Communism "was the one movement that gave hope to a million youth around the world," Mr.

Samphan defended his membership in the Communist party as his way of helping his country and his opposition against Lon Nol and other forces seeking to control and occupy Cambodia.

Mr. Samphan then urged the Co-Prosecutors not to ignore the historical context that preceded the Democratic Kampuchea regime. Referring to the carpet bombing of Cambodia by U.S. forces from 1970 to 1973, he asked the international Co-Prosecutor, “Can you imagine what my country faced after such a bloody killing and war? ‘... No, I can see you cannot imagine. You ignored and fabricated the context during that period of history.” Citing the bombings, Vietnam’s expansionist tendencies, and the military coup d’état led by Lon Nol and the subsequent resistance against him, he stated that all of these factors created a “chaotic situation” in Cambodia. He revealed that he had hoped this situation, which existed before he arrived in Phnom Penh, would excuse any “minor responsibility” he may have had for what happened during the evacuation of the city and keep the Co-Prosecutors from bringing charges against him. “[M]y hope was short-lived,” he acknowledged.

Moving onto what appears to be the heart of his defense, Mr. Samphan then challenged what he sees as the lack of evidence in the case file showing that he had real decision-making authority in Democratic Kampuchea or actual knowledge of the atrocities happening in the country from 1975 to 1979. He claimed that, among the thousands of pages of documents in the case file (some of which, he said, still have not been translated into English and/or French), not a single page confirms that he was an official member of the Standing Committee of the Communist Party of Kampuchea or that he served as the head of the central Political Office 870.

Mr. Samphan expressed his concern with the Co-Prosecutors’ use of the term “the Party Center,” a term that he claimed the Co-Prosecutors invented for this trial but that did not exist during the time of Democratic Kampuchea. Asserting that the Co-Prosecutors incorrectly used this term in place of “the Standing Committee,” he declared, “You [the Co-Prosecutors] would have the public believe that everybody is lumped together in the same bag. But it is a lie, a manipulation. In fact, you know very well that Democratic Kampuchea was ... compartmentalized and had a penchant for secrecy.”

Regarding his knowledge of the atrocities occurring in Democratic Kampuchea from 1975 to 1979, Mr. Samphan equated his role as President of the State Presidium with that of former King Sihanouk when he was Head of State. Implying that worksites were whitewashed for the official visits on which he accompanied King Sihanouk, he asked, “Do you really think that workers were being murdered in front of us?” He called this inference “really absurd,” comparing it to the “absurd” accusation by the Co-Prosecutors that the Angkar personally directed the forced marriages and ensured that these marriages were consummated. “I was not part of the Angkar, of course,” he said, “but I imagine that, with a country to run, members had other things to do than check if people were having sex.”

Mr. Samphan then addressed claims by the Co-Prosecutors and commentators that he has changed his words in his statements and books. Stating that these changes reflect an evolution of his knowledge and understanding of what occurred during this period of history, he then asked, “Is my thought process to be held against me as well?” He then urged the judges to remember that, “in 36 years, a man learns and changes.

Finally, Mr. Samphan closed with an appeal directly to the public, stating that he hoped the trial would give him an opportunity to explain to them how it was possible for him to occupy a senior position in Democratic Kampuchea without being part of the decision-making process and without being fully informed of what was happening in the country at the time. “I will do my best to participate and live up to this pledge,” he concluded.

At the conclusion of Khieu Samphan’s remarks, the court adjourned for the morning break.

Khieu Samphan’s Defense Counsel Responds

After the court was called to order after the morning break, the new national co-lawyer for Khieu Samphan, Kong Sam Onn, began his response to the Co-Prosecutors’ opening statement. While echoing much of what Mr. Samphan raised in his statement, Mr. Onn focused specifically on the historical context of the trial and the issue of Khieu Samphan’s authority and control within Democratic Kampuchea.

First, Mr. Onn brought the court’s attention to the effect of the passage of time on the evidence and on our understanding of the events that occurred from 1975 to 1979. Highlighting a theme that Mr. Samphan had also raised, Mr. Onn stated that these proceedings are “a trial between Communist ideology and the Western ideology.” Over the past half century, the Communist ideology, which, for a time, had been such a driving force across the world, has gradually disappeared as the Western ideology has risen into prominence. Whereas this tribunal derives from this new place of Western ideology, the court must remember, Mr. Onn urged, that Communism created a different way of thinking, one where political violence was common and often determined who would be king and who would be arrested or killed. The present application of current law on an act that occurred within this context half a century ago, therefore, creates “a complicated view.” But, when viewed in the historical context of 1975, Khieu Samphan’s actions and “patriotic spirit” may have been appropriate.

Mr. Onn then turned to the issue of Khieu Samphan’s authority and control as President of the State Presidium in Democratic Kampuchea. As Mr. Samphan did, Mr. Onn called the court’s attention to the role of former King Sihanouk as the Head of State during the first year of Democratic Kampuchea. While acknowledging that the court cannot summon the King to provide clarification on his role, he requested the court to examine King Sihanouk’s published notes and statements on this issue. These notes show, Mr. Onn claimed, that King Sihanouk had no real power as Head of State, and the lack of power in this role continued after Mr. Samphan replaced him. Mr. Onn urged the court also to examine closely the minutes of the CPK meetings on which the Co-Prosecutors will rely during trial to determine whether they are proper recordings of these meetings. As some of the documents lack signatures of the recorders, he intimated, they could have been faked and typed at a later date, casting doubt on their authenticity.

Regarding Khieu Samphan’s knowledge of the specific crimes alleged by the Co-Prosecutors, Mr. Onn reminded the court that his knowledge must be proved beyond a reasonable doubt. Mr. Onn claimed that Mr. Samphan only knew what he was allowed to know under the regime.

Officials of Democratic Kampuchea knew clearly that they must pay attention only to his or her assigned work and to “mind his own business,” and therefore, they could not have known everything. This lack of complete knowledge necessarily included Khieu Samphan.

In conclusion, Mr. Onn again brought the court’s attention to the “chaotic situation” created in Cambodia by the U.S. bombings and external and internal conflicts occurring in the early 1970s. This chaos creates doubt as to how the killings and crimes happened, he argued, in that parties and forces within Cambodia and opposed to the Khmer Rouge regime could also have committed these atrocities. His final request to the court, therefore, is that it examines the details of all witness testimony and documents to ensure these statements were not obtained through torture and are genuine.

After Mr. Onn concluded his statement, Khieu Samphan’s international co-lawyer, Jacques Vergès, gave his response. Mr. Vergès began by taking a moment to acknowledge “the forgotten dead” – the victims of the U.S. bombardment of Cambodia in the 1970s and those children born on the Ho Chi Minh Trail who were blinded or struck deaf and mute by Agent Orange. He stated that the public must know that these dead are not forgotten by this court.

Equating the Co-Prosecutors’ opening statement with a novel by the French author Alexandre Dumas, Mr. Vergès then addressed what he called the “fantastical view of reality” painted by the Co-Prosecutors – that of an entire people oppressed by “the evil trio” of the Accused. He declared that the claim that all of the population was affected by and involved in the events alleged to have happened in Democratic Kampuchea is “a complete fabrication of history.” While acknowledging that men made mistakes and may have committed crimes, he stated that they were not monsters. Painting the three accused as monsters completely responsible for the crimes is wrong, he argued, and the Head of State – Khieu Samphan – has nothing for which to apologize. Mr. Vergès concluded with a quote by Napoleon Bonaparte – “Everything excessive is vain” – and called on the judges to see the “excessive” statements of the Co-Prosecutors for what they are – completely vain.

The Accused’s Intent to Testify

With the conclusion of the response by Khieu Samphan’s team, President Nonn determined that it was an appropriate time to adjourn the proceedings. Before he could do so, though, the national Co-Prosecutor Chea Leang requested clarifications from the Accused on their intention to testify during the hearing of evidence. She noted that both Khieu Samphan and Ieng Sary had indicated their willingness to participate in the hearings during their statements to the court today, although Ieng Sary had previously provided written notice to the court that he would not testify. Nuon Chea, however, had not provided any indication of his intent on this matter.

In response, Michael Karnavas, the international co-lawyer for Ieng Sary, answered that he was “shocked” that the national Co-Prosecutor was confused by Mr. Sary’s use of the word “participate.” In a somewhat condescending tone, Mr. Karnavas then “clarified” for the Co-Prosecutors the meaning of the word: Participate does not mean to testify, he stated, but to be engaged in the proceedings through such actions as being present in court and conversing with and providing instructions to his lawyers. He confirmed that Ieng Sary had already indicated in

writing that he would not be testifying and that he still intends to exercise his right to participate without testifying.

Michiel Pestman then rose to respond for Nuon Chea's team, commenting sarcastically, "I am not sure how much time is allotted for my answer." Mr. Pestman then provoked the anger of the court by suggesting again that there may be time for him now to present his response to the opening statement. President Nonn quickly interrupted Mr. Pestman and, clearly irritated with Nuon Chea's defense counsel, stated loudly that the court had made the ruling on his response to the opening statement. Gesturing angrily toward him, he then directed Mr. Pestman to answer only the question now before the court on the intention of his client to testify, stating that any other remarks are now irrelevant and making clear by his reaction that the judges will not tolerate further sarcastic comments.

Mr. Pestman chose to ignore the implication of President Nonn's comments, though, and, in a derisive tone, thanked the court for its "helpful" clarification, further stating that he is "not impressed by the ability of this court to schedule." Regarding his client's intention to testify, all he would say is that "we will cross that bridge when we come to it."

Khieu Samphan then responded to the national Co-Prosecutor's request for himself, stating that he cannot yet give his response. He stated that he would like to wait until he hears the Co-Prosecutors' evidence and then determine the "right moment" to respond.

The Civil Parties Provoke the Defense

President Nonn then requested the Civil Parties to give their view on this matter. Elisabeth Simonneau Fort, the international lead co-lawyer, responded that the civil parties believe that, "out of respect for the people of Cambodia, who they [the Accused] claim they love very much," the Accused should be expected to provide some explanation for their actions at the outset of the trial. "If they could actually tell the truth," she noted, "that would be even better."

The national lead co-lawyer Pich Ang also responded for the civil parties, stating that, if the Accused chooses not to respond, possibly they are admitting their guilt already.

This comment prompted an immediate reply and interruption by Mr. Karnavas, who called the civil party lead co-lawyers to task for their "fundamental misunderstanding" of fair trial rights. Stating that the right to remain silent is not qualified and that silence does not equal guilt, he accused Ms. Fort and Mr. Ang of "pandering to the audience," since they were denied an opportunity to make an opening statement. He requested the court admonish them both for their "grossly inappropriate comments."

Although Mr. Ang had risen again to respond, President Nonn shut down any further argument and warned the civil parties to avoid making these types of comments to the Accused in the future. He acknowledged the Accused's right to remain silent and their right to exercise it when they wish throughout the upcoming hearings.

With the conclusion of the day's debate and statements, President Nonn adjourned the court. Proceedings in Trial 002 will resume on Monday, 5 December 2011, with the commencement of the evidentiary hearings.