



Counsel Lyma Nguyen questions Duch on behalf of the civil parties on Monday at the ECCC.

Duch Remains on the Hot Seat

By Heather N. Goldsmith, J.D., Northwestern University School of Law

On Monday, April 2, 2012, after a half hour delayed start due to a traffic jam, 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. The day had been scheduled exclusively for civil party questioning of Kain Guek Eav, *alias* Duch, but on Thursday, March 29, 2012, the International Deputy Co-Prosecutor, William Smith, requested an additional 1.5 hours of examination of the witness. While the Chamber President, Nil Nonn, denied the request, he allowed civil party counsel, Lyma Nguyen, to relinquish one hour of her allotted time to the prosecution.

The viewing room was mostly empty, attended only by a group of Khmer high school students, half a dozen foreign law students, and a handful of national and international observers.

Prosecution Wraps up Examination of Duch

International Deputy Co-Prosecutor William Smith used his time in court to clarify a couple remaining questions from the prior week's examination of Duch. He reminded the witness, and those in attendance, that Duch had previously testified about rallies and meetings held by the leaders of the Communist Party of Kampuchea (CPK) between the years of 1975 and 1979. He then asked Duch how many times he personally attended the meetings, to which Duch responded that he had been present at rallies on April 17th in 1976, 1977, and 1978. He also attended rallies on September 30th during the same years. In addition, he attended a special rally on January 6, 1978. He also stated the accused and former deputy secretary of the CPK, Nuon Chea, was also present at these meetings.

Mr. Smith then focused his questioning on the original policies of the CPK by asking Duch about an article in the party's publication the *Revolutionary Flag* that served as a public announcement of the establishment of the CPK. After a photocopy of the document was admitted into evidence, Duch was asked to speak about the phrase "contradiction of classes" that was mentioned in the text. He stated that there were five classes of people and that there were "complex and entangled" contradictions between them which "played a leading role in society." By way of example, he stated that peasants comprised 85% of the entire population, but they were oppressed by all other classes, particularly the landowners. Thus, the peasants were in contradiction with the landowners.

Mr. Smith then asked Duch to explain what the article meant by the phrase "life and death contradiction." Duch explained that it meant, "For one to prosper, the other must die." Mr. Smith also noted that the article mentioned both "contradictions" and "antagonistic contradictions" and asked Duch to clarify the difference between the two. Duch's response was that an antagonistic contradiction was between two parties that rely on each other for movement. It should be noted that the meaning of this answer was not entirely clear to those observing the proceedings.

The questions then returned to the role that Khieu Samphan played as the Chairmen of the Central Office Committee, adding to the testimony from March 28. During the line of questioning, Michael Karnavas, counsel for Ieng Sary, reminded the Chamber and prosecution that it was essential that Duch's testimony accurately differentiate between information known to him during the period in question and information that was later learned as part of the judicial investigation. Mr. Smith noted that he agreed with Mr. Karnavas fully and promised to phrase all of his questions accordingly. Duch then testified that after Doeun's arrest, Khieu Samphan replaced him as the Chair of the Central Office Committee and that of the two men, Khieu Samphan was the higher ranking in the party.

Mr. Smith then turned his questioning to the relationship between Pol Pot and Khieu Samphan, which sparked another objection by Michael Karnavas, who accused the prosecutor of trying to gain an unfair advantage by asking the witness to speculate about Khieu Samphan despite the fact he testified earlier that the two had never met. The prosecutor rephrased the question, asking whether during Duch's time at S-21 he was aware of any relationship between Khieu Samphan and Pol Pot, and if so, could he describe the nature of that relationship. Duch responded that Khieu Samphan was known to give a lot of respect to Pol Pot and that Pol Pot "paid his subordinate great attention."

Questions then turned to the policy of CPK members towards members of the "Front", short for the Kampuchean United Front for National Salvation, a Cambodian regime that threatened the Khmer Rouge. Duch responded that they were first sent to re-education centers, but later were interrogated at S-21.

Mr. Smith then switched the line of questioning again, this time asking about whether documents were left behind when Duch was forced to leave S-21 on January 7, 1979. Duch responded that there were tanks in front of his home and he had to leave without taking anything. Further, Nuon Chea had never given him instructions on what to do with the documents, even when he must have realized that the end of the regime may be near as evidenced by the order to quickly execute the prisoners, likely close to 500 in number, who remained at S-21.



*International Deputy Co-Prosecutor
William Smith*

He continued to testify that in 1983 Nuon Chea arranged a meeting with him where he inquired about what happened to the documents at S-21. Upon learning that they were not destroyed, he reprimanded Duch, stating that he was “bad” for not taking care of the documents. Mr. Smith inquired about Nuon Chea’s mood at the meeting, sparking Michael Karnavas to object on the grounds that it was speculative. The president sustained the objection. Mr. Karnavas took another opportunity to remind the prosecution and judges to ensure that Duch’s testimony to clearly differentiate between the knowledge that he gained through his experience as the chairman of S-21 and that through the findings of the investigating judges. Duch was then asked by the prosecution whether he had told the truth during the course of his testimony, to which Duch responded that some of his answers were based on what he knew and others on what he understood.

Court Takes Morning Recess

At this point, the Chamber adjourned for the 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. As per usual, the President granted the request, requiring that a waiver be submitted to the court with the defendant’s signature or thumbprint.

Civil Parties Begin to Make Their Case

The case was then turned over to Civil Party lawyer Hon Kimsuon, who began by thanking the witness for his compassion and cooperation over the past few years and particularly for apologizing to the families of the more than 12,000 families who perished at S-21.

Getting to business, Duch then testified that Ieng Sary was the Minister of Foreign Affairs during the Democratic Kampuchea regime, a post he received after the assembly election. Further, he mentioned that ambassadors who were representing the Khmer Rouge abroad were called to return and many sent to S-21.

Mr. Sokon then inquired about letters that were sent from Ieng Sary to S-21. Duch testified that there were no letters. Mr. Sokon still continued with the line of questioning, prompting Mr. Karnavas to exclaim that his questions were “highly improper and suggestive” and argued that Mr. Sokon was asserting facts not in evidence and claiming that they are true, which in essence

means he was providing testimony. The president thanked Mr. Karnavas and encouraged Mr. Sokon to rephrase the question.

Mr. Sokon then turned his attention to Duch's recollection of the hierarchy of the Central Committee, specifically about the right to smash inside and outside the ranks. The answer did not touch upon the question, sparking yet another objection. The President asked counsel to refrain from asking the same questions as the prosecution and advised the witness to answer the questions precisely.

Duch then returned to testifying about the chain of command, clarifying that Ieng Sary had to approve all arrests from the Ministry of Foreign Affairs. He stated that to his knowledge, this was followed in all but one case where a person was arrested under a false name.

Mr. Sokon then asked Duch to testify about his recollection of three men who were killed in S-21 and whose families were civil defendants in Case 001. He testified that they were not "ordinary" prisoners: two of them had been diplomats and the other was a "very progressive person." It was established that their names were sent to the Ministry of Foreign Affairs before being sent to S-21, and that in principle, the names of all diplomats, intellectuals who had gone abroad were first submitted to the Ministry of Foreign Affairs prior to being sent to Duch at S-21.

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 the holding cell to observe the remainder of the day's proceedings via audio-visual link. As usual, the President granted the request, requiring that a waiver be submitted to the court with the defendant's signature or thumbprint.

Civil Parties Attempt to Finalize Their Case

After returning from lunch, Ms. Lyma Nguyen took over the questioning of Duch, who agreed to cooperate with her. She began her questioning by talking about the Democratic Kampuchea former air force commander, Sou Met. Mr. Karnavas immediately objected, accusing Ms. Nguyen of setting the stage for civil case 003 rather than arguing case 002. Ms. Nguyen explained that she was trying to establish similar communication channels within the army of the revolutionary army of Kampuchea that had been testified to in case 001. The President allowed her to continue with her questioning but reminded her to limit her questions to the three men currently on trial.

A letter from Sou Met to Duch dated March 30, 1977, was then entered into evidence. The letter pertained to three men who had confessed to being traitors. Duch was asked to clarify a line about Sou Met wanting to request Angkar's advice on whether to take further action meant that he needed to speak with Pol Pot about whether the men should be sent to S-21. It was also established that both men reported directly to Son Sen.

Next, a letter sent to Duch from his superior on May 30, 1977, was entered into evidence. In the letter Duch was requested to get more confessions in order to help Pol Pot search for more enemies. It was pointed out that Son Sen had not signed the letter, and Duch was asked why. He

said that it was because Sou Met actually wrote the letter. When asked how he knew, Duch responded that he could recognize the handwriting.

Another letter was then submitted into evidence, this time one to Duch from Son Sen dated August 10, 1977. The document concerned a request from the “upper echelon” of the CPK to obtain confessions immediately so that Angkar could follow-up on his investigations. He was instructed to respond directly to Angkar.

Duch was then questioned on whether the name Angkar in the letter referred to Pol Pot or Son Sen. He replied, that Son Sen never referred to himself as Angkar in the first person and that it referred to Pol Pot. Ms. Nguyen then drew Duch’s attention to the fact that this letter was dated just five days prior to when Son Sen left for Neak Leung and Nuon Chen took over as Duch’s supervisor. She then asked whether he was aware of whether Son Sen informed Nuon Chen of his tasks and responsibilities in his new role before he took over the position, but Duch informed her that his answer would only be speculative. He also could not answer whether he continued to receive letters from Son Sen after August 15, 1977.

The questions then turned to how messages were sent between Duch and his superiors. It was established that Duch could not send messages to Angkar and that if Angkar wanted to deliver a message to him, it would go by a messenger that had been introduced to him at an early date. There was no system of coding for the messengers.

The conversation then turned to the capture of foreign nationals off the coast of Cambodia. Ms. Nguyen read from Chapter 16, Article 21 of the Constitution of the Democratic Kampuchea, which stated that the nation adheres to a policy of independence and will accept to external interventions. She asked whether Duch taught this part of the constitution; he responded that the party adhered to it “absolutely and firmly.”

Duch then testified that Meas Muth was commander of the navy for the revolutionary army of Kampuchea.

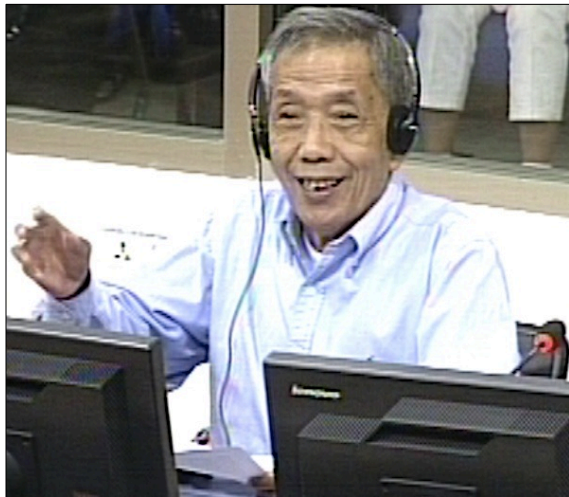
It was then established that Duch had previously testified that the Minister of Foreign Affairs was fully in charge of foreign affairs. Additionally, he had testified that a large number of Thai fisherman were sent to S-21 after being arrested with orders from the general staff Son Sen, not the Ministry of Foreign Affairs. It was also established that they were not considered special prisoners and were executed summarily.

Duch then testified about four foreign nationals from western origin who were detained, executed, and burned after death inside car tires into ashes so that their bones would be incinerated, leaving no evidence, at S-21. He commented that the “wide-eyed westerns” had “entered Cambodia illegally without permission from the Ministry of Foreign Affairs” and were therefore believed to be “spies.” The Ministry of Foreign Affairs had nothing to do with their arrest, interrogation, and execution – this was the responsibility of Pol Pot and Nuon Chea, Duch testified. The westerners required special attention because Duch had to find prisoners with strong English skills who could translate the confessions. Other than needing to find translators and burn the bodies in tires; however, Duch could not recall any other special instructions on

how to treat the foreign nationals. No pictures were taken to prove that the orders had been carried-out.

It was further clarified that the westerners were sent to S-21 in two lots. The first one before August 15, 1977 (the day Nuon Chen took over Son Sen's responsibilities) and the second one after that date.

The *Revolutionary Flag* Magazine from May to June 1978 was then given to the witness, having already been entered into evidence by the prosecution. Duch testified that he used parts of this magazine to teach about the principles of the CPK. He was then asked to read provisions that referred to the "contradictions between socialists and capitalists" and the need "to attack the CIA, Yun, and KGB." While Ms. Nguyen tried to have Duch clarify whether the term Yun referred to Vietnamese nationals, the question was never answered, and she eventually stated that she was just going to proceed with further questioning. Duch did comment, however, that it was the policy of the CPK to "smash" the Yun.



Duch then testified that his understanding was that a member of the CIA was any Khmer person who received an appointment from America. Further, when asked whether this understanding came from "party propaganda such as the *Revolutionary Flag*," he responded that "the life and death enemy of the Democratic Kampuchea was to be decided by the secretary of the party, no one else could determine that."

Duch was then asked to extrapolate on his earlier testimony that Son Sen reprimanded him for not extracting enough CIA confessions at S-21. Duch said that Son Sen had taken out a piece of paper and said that a CIA agent was found at S-32 and

asked why a CIA agent had not been found at S-21. He could not recall the exact date, but thought it was sometime in December because it was right before he got married. The court then adjourned for its afternoon recess.

Time Out to Clarify Lingered Questions

After returning from the break, Michiel Pestman, defense counsel for Nuon Chea, expressed his concern over rumors that the defense would be allowed a total of only three days to cross-examine Duch. The President confirmed the rumors. Mr. Pestman informed the court that he would need two days, and asked his fellow defense lawyers how much time they anticipated using.

At this point, Arthur Vercken, defense counsel to Khieu Samphan, asked the President whether he could clarify whether the judges' ruling would be based on the totality of the investigation or whether they would limit themselves to the documents that were produced before the Chamber

and debated in public. He mentioned that he was raising the point at this moment because it greatly impacted the information that he would need to present in the defense.

The President responded by defending his position of only giving the defense three days, stating that history has shown that the defense sometimes asks for more time and then does not use it. He added that it makes scheduling very difficult. He mentioned that counsel was supposed to inform the Chamber of their time requirements last Friday. He was also concerned about repetition of questions.

Mr. Vercken was sympathetic to the President's concerns but again reiterated that he needed to know what documents and testimony was going to be considered by the court in order to properly plan his defense.

Michael Karnavas, counsel for Ieng Sary, was then invited to speak by the President. He stated that right now he has two-days' worth of questions, but he will edit it down so that he does not repeat questions that have been adequately addressed by the Nuon Chea defense team. He also urged the President to grant the civil parties an additional hour due to the delay this morning and the time required to take care of these procedural issues.

Prosecutor William Smith then argued that he thought the investigations and prior statements should be considered by the Chamber in their entirety because the witnesses were available for examination.

Civil party lawyer Hon Kimsuon then testified that his understanding was that the Chamber would consider any document presented before it but urged that the point be clarified for everyone. He also mentioned that the civil parties would appreciate another hour of testimony.

Mr. Vercken then challenged the statement of Mr. Smith, stating that what he proposed is not the practice of international courts. He asserted that the Chamber must deliberate on documents tendered into evidence and a public debate should be held on the issues raised. He mentioned that this is what happens in France and at the International Criminal Tribunal for Rwanda.

The President then exclaimed, "How many more times do you need to take the floor, Michiel Pestman?" but then allowed him to take the floor. Mr. Pestman began by pointing out that it was clear that time was going to be an issue – it was already known that at least four days would be needed for the defense in total. Further, he does not understand why the prosecution is being allowed more time to examine the witness than the defense – he believes the time should be equal. He then turned his attention to the probative value of the statements before the investigative judges. He mentioned that he had this discussion with the senior legal officer and



Nuon Chea defense counsel Michiel Pestman

now found it important that it be on the record. According to him, the senior legal officer stated that only excerpts discussed by the witnesses could be used as evidence.

Mr. Smith then took the floor, trying to “clarify a couple points of confusion.” He began by stating that the prosecution provided a list of document to be put before the Chamber. They asserted that once a witness appears, the documents associated with that witness become available for the entire Chamber. He noted that in the International Criminal Tribunal for the Former Yugoslavia (ICTY), if the witness appears and is available for cross, all statements are admitted into evidence, and if s/he is not available for cross, the evidence may still be admitted as long as it is not material to the case.

Michael Karnavas then tried to speak but did so before being called upon by the President. As such, he was not given the floor.

The President then ended the debate by ruling that the proceedings would extend for an extra twenty minutes this afternoon to make up for the time lost in the morning, and that time would be given to the civil parties. He then addressed the main issue under debate, stating that under Internal Rule 87 (3), a document will be considered to be placed before the court when they are summarized before the court. Because the provision is believed to be similar to French Civil Law, Judge Jean-Marc Lavenge was asked to give greater insights into the Chamber’s decision. The judge echoed that “for the Chamber to rule it has to rely on documents tendered into evidence.” He then went further, stating that when a document is tendered into evidence, it is the entire document that is tendered, not just the part that is read out. Further, all prior testimonies need to be tendered into evidence, allowing questions to be asked, before they can be considered by the court. According to him, this is the cornerstone of adversarial proceedings. The floor was then returned to Lyma Nguyen to continue her questioning until 4:20 p.m.

All Eyes Back on Duch

Ms. Nguyen then jumped right back in to where she left off, asking Duch to clarify December of which year did Son Sen pressure him to get confessions that people were involved in the CIA. He responded, “In December 1975, right before I got married.” He was then asked whether he felt pressured to collect CIA testimony after the conversation with Son Sen and replied, “No one could reject the order of the party. Soldiers had to obey their orders.” Duch did not answer whether Son Sen was also under pressure to extract CIA confessions or whether Nuon Chea ever imposed orders to obtain such confessions but did mention that the CIA confessions were necessary to implement “counter-espionage.”

A document that was admitted into evidence during case 001 that contained a schedule of people who had been tortured at S-21 was then entered into evidence. Duch was asked to state that information such as the prisoner’s name, age, gender, and nationality were included. On the schedule were two 29-year-old males believed to be foreign intelligence from Hawaii. One was named Christopher Edwards De Launce and the other Michael Scott Deeds. Duch testified that he was not sure if he had met these men. He only met one or the four foreigners and could not remember his name.

After Duch testified that he had seen the confessions of all four westerners at S-21, Ms. Nguyen tried to enter the confession of Michael Deeds into evidence. The President asked for clarification on the purpose of the document. Ms. Nguyen explained that they had heard a lot about the CIA, KGB, and Yun. She mentioned that she did not want to enter the document to prove the truth of its contents, noting that there is ample jurisprudence that confessions under torture are unreliable. Rather, she wanted to use the confession to offer evidence of its resemblance to party propaganda through its length, details, and slant taken.

The judges conferred and asked her to proceed with her questioning without entering the document into evidence. Ms. Nguyen challenged their ruling, pointing to a ruling made by the Office of the Co-Investigating Judges in case 002 on July 28, 2009, that stated, "Questions of reliability in the information does not apply if it is not used for the confession." She then told the court, "In this case, the confession is not relied on for its usefulness" but added that if the court was "against her," she could move on. The court conferred again and stuck with their original decision.

Ms. Nguyen then proceeded to question Duch about the confession from his memory. He testified that the confessions were lengthy and made orally in English. A prisoner who was skilled in English would then translate the confessions in real time. It was clarified that the interrogations and translations were carried out by two different people. The interrogators were all trained at M-13 and were "skilled at their job." He was asked whether copies of documents such as the *Revolutionary Flag* were ever used by the interrogators during their examination of the victims, and he responded that these documents were used for members of the party, but he could not believe they were ever conveyed to a prisoner.

Court then adjourned for the day. It will resume at 9 a.m. tomorrow with an hour of questioning from the civil party and then Nuon Chea's defense team will begin their arguments.