

KRT TRIAL MONITOR

Case 002/02 ■ Issue No. 2 ■ Opening Statements ■ 17 October 2014



Case of Nuon Chea and Khieu Samphan

Asian International Justice Initiative (AIJI), a project of East-West Center and the WSD Handa Center for Human Rights and International Justice at Stanford University (previously known as the UC Berkeley War Crimes Studies Center)

*You [the Trial Chamber] showed that you disbelieved our case in general,
and that you disbelieve anything that does not suit the fairy tale that you are writing.
Now that you have found me guilty in the first judgment, I believe that
you have a clear bias to me in this second trial.*

- Nuon Chea

I. OVERVIEW

This week marked the opening of evidentiary hearings in the second trial of Case 002. This follows the initial hearing, which took place on 30 July 2014,¹ and the Trial Chamber's announcement of the Judgment in Case 002/01 on 7 August 2014.² Victims, the co-Accused, and Court observers have awaited this trial for its focus on a wider scope of alleged crimes, including forced marriage, and charges that the Accused participated in acts of genocide against Cham Muslims and ethnic Vietnamese. The trial is also significant insofar as it is expected to cover a greater number of crime sites (cooperatives, work sites, and security centers across the country) than fell within the scope of Case 001 and Case 002/01.³

However, on the trial's long anticipated opening day, the prospect of further delays dominated discussion inside the courtroom and out, as Defense teams for both of the co-Accused announced their intent to boycott the trial. Counsel for the Accused are unhappy that the Trial Chamber elected to commence evidentiary hearings in Case 002/02 while the Prosecution and Defense are still in the process of filing appeals against the Judgment in Case 002/01 with the ECCC's Supreme Court Chamber. Defense Counsel has further argued that the Trial Chamber judges ought to recuse themselves from proceedings while the Judicial Administration Committee decides on Defense motions for their disqualification from Case 002/02. In light of these announcements and objections, the Court delayed further evidentiary hearings, and scheduled a closed trial management meeting to take place on 21 October 2014.

Section II of this report summarizes three sets of documentary submissions filed prior to the start of evidentiary hearings in Case 002/02. Section III covers the opening statements of the Parties, in Court on 17 October 2014, as well as a subsequent press conference called by the Defense teams, to further explain the decision of the Accused to boycott the proceedings. Section IV covers trial attendance, time management, and matters of courtroom administration.

II. SUBMISSIONS PRIOR TO THE START OF EVIDENTIARY HEARINGS IN CASE 002/02

The Parties filed a number of written submissions prior to October 17th that were referenced heavily in the opening statements and the Defense announcement of their intent to boycott. These documents include notices of appeal against the Judgment in Case 0002/01 from the Nuon Chea Defense and the OCP; the Khieu Samphan Defense's request for a postponement of Case 002/02 and the Trial Chamber decision on the matter; and, lastly, the Nuon Chea Defense's motion for disqualification of the judges from Case 002/02, and the OCP response.

A. Notices of Appeal Against the Judgment in Case 002/01

On 29 September 2014, the defense team for Nuon Chea filed its notice of appeal against the Trial Chamber's final judgment in Case 002/01.⁴ The defense team for Khieu Samphan also filed a notice of appeal, but the submission had not yet been published on the ECCC website as of the date of publication for this report. The OCP filed a notice of appeal, as well, which seeks solely to extend the Court's application of Joint Criminal Enterprise (**JCE**).

1. Nuon Chea Defense Team's Notice of Appeal

The Nuon Chea Defense notified the Supreme Court Chamber of its intent to appeal the Accused's guilty verdict on 223 specific grounds.⁵ Virtually all of these separate grounds fall into one of the following broader categories: errors concerning the legitimacy and fairness of the proceedings, and errors of law and fact which systematically violated Nuon Chea's right to be presumed innocent.

i. Criticism of the Legitimacy and Fairness of the Proceedings

The notice of appeal argues that the Trial Chamber incorrectly applied legal standards, and appeared less concerned with ascertaining the truth than, "writing the final chapter of a propaganda campaign on behalf of Nuon Chea's political opponents."⁶ Furthermore, the Defense submits that the Chamber erred in refusing to summon Heng Samrin and other possibly exculpatory witnesses for testimony. The appeal notice claims that the Chamber limited the Defense's efforts to challenge the "credibility, reliability and probative value" of approved evidence.⁷ The notice of appeal raises allegations of the Trial Chamber's faulty use of evidence. Specifically, the submission references the use of expert testimony that allegedly exceeded proper boundaries, was unauthenticated, or disproportionately relied on Anglo-American and French sources.⁸ The notice further criticizes the lack of adequately articulated standards for evaluation of out-of-court statements in the absence of cross-examination, and the Defense claims that the Chamber incorrectly assessed the credibility, reliability and probative value of testimony.⁹

ii. Criticism of the Trial Chamber's Errors in Fact and Law

The notice asserts that multiple errors of facts formed the basis of the Trial Chamber's finding that Nuon Chea was responsible for "the discipline of cadres and other internal security matters" and the authority to instruct CPK cadres to commit crimes.¹⁰ For example, the Trial Chamber found that the forced population movements (phases I and II) caused one or more deaths. On appeal, the Defense will argue that the Trial Chamber based these factual findings on irrelevant anecdotes and other evidence lacking in probative value.¹¹ The appeal notice makes similar arguments concerning the Chamber's definitions of "New People" and Khmer Republic officials.¹²

The notice of appeal further impugns the Trial Chamber's application of the law of JCE, as well as the factual basis for the alleged nature of the CPK leaders' shared intent. The Defense asserts that the systemic form of JCE ("JCE II") did not exist under international customary law in 1975, and constituted a narrower form of specific criminal liability.¹³ Moreover, the appeal notice argues that, regardless of the legal grounds for applying JCE to crimes committed between 1975 and 1979, the Judgment erred in finding JCE in the planning of forced evacuations (phases I and II) or

mistreatment of former Khmer Republic officials.¹⁴ The appeal disputes the Chamber's finding that Nuon Chea exercised effective control over the troops involved in the evacuation of Phnom Penh and the second phase of movement.¹⁵ The Defense similarly appeals the Chamber's conclusion that the Accused was aware of murder, extermination, political persecution and other inhumane acts and knowingly failed to stop them.¹⁶

2. Co-Prosecutors' Notice of Appeal

The OCP appeal does not dispute any of the factual or legal findings in the Judgment, except on the matter of JCE.¹⁷ The notice of appeal from the Co-Prosecutors argues that the "extended form" of JCE (also known as JCE III) should have been accepted as a mode of liability within the jurisdiction of the ECCC, but the Judgment concluded that JCE III did not exist in customary international law or Cambodian law in 1975.¹⁸ Citing decisions from the ICTR Appeals Chamber, the ICTY Trial and Appeals Chambers, and the Special Tribunal for Lebanon, the OCP notice of appeal argues that this conclusion was an error of law.

B. Khieu Samphan Defense Requests and Trial Chamber Decision

On 25 August 2014, the Defense for Khieu Samphan requested a stay of trial proceedings in Case 002/02, pending final Judgment of the appeal in Case 002/01 by the Supreme Court Chamber. Alternatively, the team filed a motion for disqualification of the current judges from the Trial Chamber for Case 002/02.¹⁹ The former request argues that the Trial Chamber relied on facts outside the scope of Case 002/01 for its judgment in that trial, and has therefore already established criminal responsibility in Case 002/02. The Defense request refers to the Supreme Court Chamber's warning of such a "risk of an overlap of findings" in subsequent trials.²⁰ The Defense then notes specific instances of such an overlap, in which the Chamber's Case 002/01 Judgment appeared to make preemptive findings on the criminal responsibility of the Co-Accused in relation to charges to be adjudicated in Case 002/02, such as the events at cooperatives, work sites, and security centers, as well as crimes related to forced marriage.²¹ The Defense motion argues that the Chamber exceeded the scope of Case 002/01, and any continuation of Case 002/02 would unfairly try Khieu Samphan and violate his right to the presumption of innocence as well as his right to be tried by an impartial tribunal. As such, the Defense proposes that the ECCC empanel a new bench of judges to form the Trial Chamber in the proceedings of Case 002/02.

On 19 September 2014, the Trial Chamber denied the Defense request for a stay of proceedings. The Trial Chamber acknowledged its responsibility under Article 33 of the ECCC Law to provide a fair and expeditious trial,²² but it concluded that, under the guidelines articulated in the ECCC Internal Rules, the Defense's request did not warrant a stay in proceedings. However, the Chamber did agree to refer the alternate pleading (seeking to disqualify of the judges and empanel a new Trial Chamber) to the Special Bench organized by the Judicial Administration Committee.²³

C. Application for the Disqualification of Judges and Response

On 29 September 2014, the Nuon Chea Defense filed an application for the disqualification of Judges Nil Nonn, Ya Sokhan, You Ottara and Jean-Marc Lavergne from Case 002/02 and all further proceedings in the case of Nuon Chea, pursuant to rule 34(2).²⁴ The Defense cited an appearance of bias that already existed in Case 002/01, a fear of future bias in Case 002/02, and additionally, in the case of the national (Cambodian) judges, a perceived lack of independence from government pressure.²⁵

1. Nuon Chea Defense Application for Disqualification

The Defense made two arguments in support of disqualifying the national judges, specifically. First, Defense argued that the judges' refusal to summon Heng Samrin throughout the proceedings of Case 002/01 suggested a lack of independence or at least gave an appearance of

bias.²⁶ Second, Defense argued that the national judges had personal interest in the case, which rendered their service as judges in Case 002/01 improper.²⁷ In support of the broader argument to disqualify both national and international judges, Defense made four arguments. First, the use of particular language in the Case 002/01 Judgment gave rise to an appearance of bias.²⁸ Second, certain errors in the Case 002/01 Judgment demonstrated an existing appearance of bias that could impact Case 002/02.²⁹ Third, the judges' findings in the Case 002/01 Judgment on factual issues relevant to Case 002/02 gave rise to their appearance of bias with respect to Case 002/02.³⁰ Fourth, the findings of Judges Nonn, Sokhan and Lavergne in the Case 001 Judgment on factual issues relevant to Case 002/02 gave cause for concern that the Accused are likely to face future bias in Case 002/02.³¹ The Defense motion concludes by arguing that, "The totality of the Judges' alleged appearances of bias, taken together, not only demonstrate that the Judges lack the necessary professional integrity to serve in the ECCC Trial Chamber but undermine the very legitimacy of the ECCC overall."³²

The Nuon Chea Defense Team requested that the judges voluntarily step down pending the final disposition of the disqualification application, under Internal Rule 34(5).³³ This would necessarily delay proceedings in Case 002/02.

2. OCP Response to Nuon Chea Defense Application

The Co-Prosecutors requested dismissal of Nuon Chea's disqualification application, arguing that the Defense failed to demonstrate either actual bias or reasonable apprehension of bias. The OCP contended that much of the application involved the Defense's disagreement with the factual and legal conclusions in the Case 002/01 Judgment. The Co-Prosecutors argued that the appropriate mechanism would be an appeal to the Supreme Court Chamber, not a disqualification application.³⁴ Furthermore, the OCP argued that several of the Defense's complaints amount to an improper attempt to re-litigate prior submissions that were previously rejected by the Trial Chamber.³⁵ The OCP characterized the disqualification application as another strategy to undermine the ECCC as an institution so that the Accused could avoid criminal responsibility.

3. Upcoming Determination of Applications for Disqualification

The Trial Chamber forwarded both disqualification motions (from the Nuon Chea and Khieu Samphan Defense teams) to the Special Bench organized by the Judicial Administration Committee.³⁶ The Nuon Chea Defense has requested an oral hearing before the Special Bench to reply fully to the OCP's response.³⁷

III. OPENING STATEMENTS ON 17 OCTOBER 2014

None of the Judges of the Trial Chamber voluntarily recused themselves in response to the pending Defense motions. The Court opened evidentiary hearings in Case 002/02 as scheduled, on 17 October 2014, and heard the opening statements of the Parties. After the Greffier listed the crimes to be covered in the new trial, the Co-Prosecutors gave a substantive opening argument, surveying the evidence the Prosecution anticipates in the coming weeks. The Defense teams, by contrast, used the time to reiterate their grievances with the Trial Chamber. Both Accused made statements directly to the Court, announcing their intent to boycott the proceedings, pending the ruling of the Special Bench. The OCP and the Civil Parties urged the Court to compel Defense Counsel to continue to attend trial despite the wishes of the Accused. The Defense called a press conference for the day after the hearing in order to elaborate on the decision to boycott. AIJI trial monitors attended this press conference and have reported on it below in Section D.

A. Opening Statements by the Co-Prosecutors

In her opening statements, National Co-Prosecutor Chea Leang provided details of upcoming witness testimony and evidence, which Counsel argued will prove the involvement of the co-

Accused in the commission of the crimes under the scope of Case 002/02.³⁸ Ms. Chea explained that the senior leadership of the DK regime viewed Tram Kok District as a model for the nation, and that the crimes which allegedly took place there were therefore the result of the senior leaders' ideological and logistical planning. The Co-Prosecutor detailed how Buddhist monks from all over Takeo Province were forced to disrobe and convert to work as soldiers, farmers, and laborers. Evacuees who arrived from Phnom Penh and others were gathered at Wat Champa Leu, and any officials of the Khmer Republic were taken away and killed. The Co-Prosecutor referred to orders in the District for cadres in cooperatives to interrogate children, particularly toddlers and infants who refused to be separated from their mothers, and "sweep them clean," meaning to kill them.

Presenting the OCP's view of DK economic planning, Chea Leang described the crimes committed at work sites for large-scale public projects. She contextualized the Trapeang Thma and 1 January dams and the Kampong Chhnang airfield as key projects in the CPK's attempted "Great Leap Forward." The Co-Prosecutor asserted that the regime's economic ideology required manual labor both day and night, without sufficient provision of food and medical care. Ms. Chea also discussed the alleged crimes committed at security centers across the country, including S-21 in Phnom Penh and Au Kanseng in the Northeast Zone, among others. The final crime covered in Case 002/02 concerns the regime's use of forced marriage. The Co-Prosecutor explained that, although this policy harmed both husband and wife, women especially bore its negative impacts and were repeatedly subjected to abuse and rape under the oversight of CPK cadres.

In his subsequent statements, International Co-Prosecutor Nicholas Koumjian explained the Prosecution view of the difference between the killing and mistreatment of "new" people and the Genocides of the Cham Muslims and ethnic Vietnamese. Although the former suffered crimes against humanity in DK for economic or political reasons, only the latter groups faced destruction in whole or in part for their ethnic, religious, or racial identity. The Co-Prosecutor held the Co-Accused responsible as figureheads of the Center and for not stopping crimes of which they were aware. Counsel asserted that Nuon Chea communicated formal DK policies as part of his responsibility to educate cadres, and Khieu Samphan upheld these same policies as the international and domestic face of the regime. Mr. Koumjian sought to rebut past defenses from the co-Accused, such as their tendency to "blame the dead man," Pol Pot. The Co-Prosecutor noted Pol Pot's reliance on the support of senior leaders. Although he recognized that the co-Accused were not aware of each death around the country, Mr. Koumjian argued that their aspirations to power demonstrated lack of regard for the consequences of CPK policies.

B. Opening Statements by Nuon Chea and Khieu Samphan: Boycott of Case 002/02

1. Statement of Nuon Chea

During the afternoon session, Nuon Chea was given the opportunity to speak during Defense opening statements. The Accused criticized the main findings of the judgment in Case 002/01 and discussed why his defense team had motioned for the disqualification of four judges of the Trial Chamber (see II.C). The Accused argued that the Trial Chamber had ignored concrete evidence that the CPK was internally divided. Contrary to the Chamber's finding, he asserted that the Party lacked any strict hierarchy, and argued that Zone officials acted autonomously. Nuon Chea accused the Chamber of intentionally ignoring evidence of a "traitorous" faction inside the CPK led by Sao Phim and Ruos Nhim with Vietnamese backing, and he referred to the Court's decision not to summon "the most important witness in the trial," Heng Samrin,³⁹ as proof of the Court's failures.⁴⁰ The Accused asserted that this traitorous faction outside his control committed most of his alleged crimes, including the "so-called genocide" of Vietnamese and Chams, the torture and murder at S-21, and the purges in the Eastern Zone. In Nuon Chea's opinion, the Chamber "presented a story that was simple but ultimately just a child's fairy tale."

Nuon Chea expressed displeasure that he must continue with a second trial with the same judges of the Trial Chamber. He argued that the judges already found him guilty in the first trial and

therefore showed their inability to act impartially and without bias. The Accused referred to Cambodian law, which requires judges to step down until a motion for their disqualification is decided,⁴¹ as he criticized the Chamber's decision to continue the proceedings even with such motions pending. Nuon Chea then announced that he asked his lawyers to boycott all further proceedings in Case 002/02 until the Special Bench has decided on disqualification. However, he also clarified a desire to subsequently proceed with the trial, in order to present his position.

2. Response by Khieu Samphan and his Co-Defense Lawyers

Like Nuon Chea, Khieu Samphan also addressed the Court directly. He echoed Nuon Chea's dissatisfaction with the Case 002/01 Judgment and the sentence against him of life imprisonment. Khieu Samphan explained that he had advised his counsel to appeal the Judgment to the Supreme Court Chamber. Echoing previous arguments about the verdict being prejudged, Khieu Samphan argued that he already knows, based on the Judge's views from the Judgment in Case 002/01 that the Chamber will convict him in Case 002/02. Moreover, arguing that he and his defense team had been working "meticulously on the preparation of the appeal," Khieu Samphan submitted that they were not prepared to participate in the trial of Case 002/02 while concurrently preparing for comprehensive appeals of Case 002/01 to the Supreme Court Chamber. He explained that he has therefore advised his lawyers to focus on the appeal rather than proceedings in Case 002/02. The Accused submitted that requiring simultaneous work on the appeal and the new trial would disadvantage him in both. If forced to attend Case 002/02 hearings, the Accused emphasized that any such appearance would occur "under duress" and contrary to his fundamental right to participate effectively in his own defense. He concluded that he and his defense team would "happily return" to this proceeding after filing the appeal in Case 002/01.

After the Accused's statement, his International Lawyer, Anta Guissé, sought to further explain to the Trial Chamber why the Defense had undertaken this action. In response to accusations that the Defense was engaging in stalling tactics, Ms. Guissé submitted that defending her client against errors in Case 002/01 is no waste of time, as these errors may recur in the second trial. She asserted that Khieu Samphan should have the time and resources to develop his defense properly in his appeal. Anta Guissé then criticized the Chamber for commencing trial in Case 002/02 despite Defense applications for disqualification of the judges. She doubted the possibility of a fair trial in Case 002/02 with the same judges who reached a guilty verdict in Case 002/01. Ms. Guissé asserted it was the duty of the Defense team to make the best choices in the interest of their client and to defend him to the best of their means.⁴² She added that they are "not trying to desert the trial" but making an "enlightened choice" taking into account Defense strategy and the few choices before them.

National Defense Counsel for Khieu Samphan, Kong Sam Onn explained that defense attorneys must "follow [their] client's instructions based on the applicable laws and the code of ethics for lawyers" and cannot reject their requests.⁴³ While he acknowledged the "necessity of expedited proceedings in this Chamber for many reasons, including the advanced age of the accused [and] burden of financial expenses," Mr. Kong urged the Court to "review those challenges as issues but not as the basis to violate the rights of [Khieu Samphan] in the proceedings in this Court." He requested that the Chamber adjourn the proceedings, or continue the proceedings without the presence of the Defense. Following the conclusion of Kong Sam Onn's statement, both Defense teams left the courtroom in accordance with their announcements.

C. Reactions of the OCP and Civil Parties and Trial Chamber Announcements

In response to the Defense teams' unexpected boycott, International Co-Prosecutor Nicholas Koumjian rose to emphasize the "vital" fact that the Chamber, not the co-Accused, decides when and how to run proceedings. Although he recognized the burden of simultaneously filing an appeal in Case 002/01 and attending proceedings in Case 002/02, Mr. Koumjian referenced the Trial Chamber's attempt to ease the workload by meeting for only three days of hearings per week

during the filing period for appeals. The Co-Prosecutor requested that the Trial Chamber order the Defense Teams to appear in the courtroom at the next hearing, as they are court officers bound to instructions of the Chamber. The Co-Prosecutor additionally referred the Chamber to the jurisprudence of the Special Court for Sierra Leone, which, as Mr. Koumjian explained, faced a similar situation but ordered lawyers for the Accused to appear notwithstanding their client's requests.⁴⁴ Ms. Marie Guiraud, the International Civil Parties Lead Co-Lawyer, concurred with the OCP and called for the co-Accused to "actively" participate in the trial of Case 002/02, in order to ascertain the truth and justify their conduct. After convening with the judges, President Nil Nonn decided to adjourn the day's proceedings early, announced that the Trial Chamber would issue a decision on the professional conduct of the Defense lawyers in due course, and instructed all Parties to attend the newly scheduled Trial Management Meeting on Tuesday, 21 October 2014.

D. Saturday Press Conference by Defense Lawyers for the Co-Accused

On 18 October 2014, the day after the opening hearing in Case 002/02, following the surprise announcement of a boycott of further proceedings by each of the Co-Accused, the Defense teams held a joint press conference at the Foreign Correspondents' Club in Phnom Penh. The event – a first for the Defense teams at the ECCC – was intended to provide an additional opportunity for the attorneys to justify the boycott to the press and members of the public. Ms. Anta Guissé emphasized the urgency of the appeal of the Case 002/01 Judgment, and she expressed doubts that the same judges who convicted her client in that trial could remain impartial in the proceedings of Case 002/02. Victor Koppe, the International Lawyer for Nuon Chea, added that "the whole situation could have been prevented" if the Trial Chamber followed the Supreme Court Chamber's advice from almost a year ago, to find new judges for Case 002/02.⁴⁵ He reiterated statements from his client and from his team's disqualification application (see II.C), arguing that Cambodian law is clear that judges must halt their work until a final decision on a disqualification motion is issued. Mr. Koppe emphasized that Nuon Chea wants the trial to continue, and that he is still healthy and strong. In comparison to the overall length of the case, Mr. Koppe argued that a brief postponement would hardly lengthen proceedings.

Mr. Kong Sam Onn responded to a question about the legality of the boycott in relation to the ECCC's Internal Rules by arguing that any conflict with the Internal Rules was superseded by the Counsel's adherence to two principles: One from the Law on the Status of Lawyers in the Kingdom of Cambodia,⁴⁶ and the other from the Cambodian Constitution's protection of the rights of the Accused to conduct their own defense.⁴⁷ Mr. Kong reiterated his declaration from the day before that he would resign from his position if the Court does not allow him to fulfill his client's request to boycott proceedings in Case 002/02. In response to a reporter's question, Anta Guissé claimed that the two Defense teams had each independently decided to withdraw from proceedings, as evidenced by their divergent justifications for the boycott. She also sought to rebut statements from the OCP that all Parties had to manage the simultaneous work of the Case 002/01 appellate filing and the start of Case 002/02 trial hearings. Ms. Guissé noted that the OCP appeal sought only an extension of the JCE application of the ECCC rather than the more difficult task of the Defense appeals, which seek to overturn a lengthy Judgment of factual and legal findings forming the basis for her client's criminal responsibility. She also highlighted the statements of Judge Jean-Marc Lavergne at the 12 December 2013 trial management meeting for Case 002/02,⁴⁸ in which he resisted the OCP's suggestion that Case 002/02 could proceed before the Judgment in Case 002/01 was reached, as the prospect of such simultaneous work appeared unreasonable.

IV. TRIAL MANAGEMENT

The opening hearings in Case 002/02 this week saw minor translation problems, and more significantly, when the Defense teams for Nuon Chea and Khieu Samphan announced a boycott of the trial, the Chamber adjourned the day's proceedings early and put the previously arranged schedule of evidentiary hearings in flux.

A. Attendance

On the first day of substantive hearings in Case 002/02, the Co-Prosecutors and each of the co-Accused gave brief opening statements. There was a larger number of outside observers to the proceedings than usual, due to the day's significance at the outset of a new trial.

Civil Parties Attendance: There were fewer than ten Civil Parties observing the hearing in the courtroom. A large group of approximately 200 Civil Parties protested outside the front entrance of the Court, demanding a change in the Internal Rules to permit individual monetary reparations.

Judges Attendance: Mr. Martin Karopkin (USA) joined the Trial Chamber for his first day as the new international reserve judge, after having taken his oath the day before. He replaces Judge Claudia Fenz (Austria) who became a regular international judge on 1 September 2014.

Parties: All Parties were represented in the courtroom. National Civil Parties Lead Co-Lawyer Pich Ang left the courtroom during the morning break to consult with the protest group of Civil Parties outside the Court. The two defense teams began a boycott of the trial by leaving the courtroom after their statements during the afternoon session.

Attendance by the public:

DATE	MORNING	AFTERNOON
Friday 17/10/2014	<ul style="list-style-type: none">▪ Approximately 30 villagers from Pursat Province▪ 300 students from three different High Schools in Pursat province▪ 34 law students from ELBBL, Royal University of Laws and Economic (RULE), Phnom Penh▪ 30 foreign observers	<ul style="list-style-type: none">▪ 200 villagers from Preah Sdech District, Prey Veng Province▪ 30 foreign observers

B. Time Management

The Trial Chamber worked to strike a balance between time allocations for all Parties, ensuring that the hearing ran smoothly, but the unexpected boycott forced the Chamber to adjourn proceedings early (see III.B-C). As an example of its attempt to use the opening hearing efficiently, the Chamber denied the Civil Parties Lead Co-Lawyers' request to make opening remarks.⁴⁹ The Trial Chamber also announced it would postpone the appearance of the first witness one week, until 27 October 2014, due to a late addition of evidence. The length of this postponement is unclear due to the subsequent announcement of a boycott. Lastly, the Chamber informed Parties of a closed trial management meeting on Tuesday, 21 October 2014.

C. Courtroom Etiquette

There were a few heated moments in the courtroom during the day's proceedings. When Khieu Samphan and his lawyers attempted to speak at the start of the hearing, President Nil Nonn cut off the microphone of Ms. Anta Guissé and asked the team to wait until their scheduled time for statements and follow the sequential order of the hearing agenda. In the past, the Trial Chamber has allowed the Co-Accused or their counsel to raise issues outside the official agenda. During the Defense Teams' Saturday press conference, both Ms. Guissé and Mr. Son Arun posited that the Chamber was already aware of plans to announce a boycott and silenced the Defense in order to enable the OCP to make their opening statements prior to adjournment. After each of

the co-Accused completed their opening statements, their defense counsel made statements further explaining their objections before leaving the courtroom immediately.

D. Translation and Technical Issues

There were very minor translation issues that caused brief interruptions, including an incident when the Khmer and English translation channels were briefly switched. Interpretation took place slowly when the international Co-Lawyer for Khieu Samphan spoke rapidly in French.

E. Time Table

DATE	START	MORNING BREAK	LUNCH	AFTERNOON BREAK	RECESS	TOTAL HOURS
Friday 17/10/2014	9:02	10:29 – 10:53	11:44-13:28	---	14:53	3 hours and 43 minutes
Average number of hours in session				3 hours and 43 minutes		
Total number of hours this week				3 hours and 43 minutes		
Total number of hours, day, weeks at trial				3 hours and 43 minutes		
ONE TRIAL DAY OVER ONE WEEK						

Unless specified otherwise,

- the documents cited in this report pertain to *The Case of Nuon Chea and Khieu Samphan* before the ECCC;
- the quotes are based on the personal notes of the trial monitors during the proceedings;
- the figures in the *Public Attendance* section of the report are only approximations made by AIJI staff; and
- photos are courtesy of the ECCC.

Glossary of Terms

Case 001	<i>The Case of Kaing Guek Eav alias “Duch”</i> (Case No. 001/18-07-2007-ECCC)
Case 002	<i>The Case of Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan</i> (Case No. 002/19-09-2007-ECCC)
CPC	Code of Criminal Procedure of the Kingdom of Cambodia
(2007) CPK	Communist Party of Kampuchea
CPLCL	Civil Party Lead Co-Lawyer
DK	Democratic Kampuchea
ECCC	Extraordinary Chambers in the Courts of Cambodia (also referred to as the Khmer Rouge Tribunal or “KRT”)
ECCC Law	Law on the Establishment of the ECCC, as amended (2004)
ERN	Evidence Reference Number (the page number of each piece of documentary evidence in the Case File)
FUNK	National United Front of Kampuchea
GRUNK	Royal Government of National Union of Kampuchea
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IR	Internal Rules of the ECCC Rev. 8 (2011)
KR	Khmer Rouge
OCIJ	Office of the Co-Investigating Judges
OCP	Office of the Co-Prosecutors of the
ECCC RAK	Revolutionary Army of Kampuchea
VSS	Victims Support Section
WESU	Witness and Expert Support Unit

* This report was authored by Thilo Gottschalk, Vanessa Hager, Daniel Mattes, Chamrong Pich, Lina Tay, Stephanie Teh, Penelope Van Tuyl, and Oudom Vong as part of AIJI's KRT Trial Monitoring and Community Outreach Program. AIJI is a collaborative project between the East-West Center, in Honolulu, and the WSD Handa Center for Human Rights and International Justice at Stanford University (previously known as the UC Berkeley War Crimes Studies Center). Since 2003, the two Centers have been collaborating on projects relating to the establishment of justice initiatives and capacity-building programs in the human rights sector in South-East Asia.

¹ See CASE 002/02 KRT TRIAL MONITOR. Issue 1, Initial Hearing, (30 July 2014).

² See forthcoming CASE 002/01 KRT TRIAL MONITOR, Final Report, (TBA).

³ Trial Chamber. "Decision on Additional Severance of Case 002/02 and Scope of Case 002/02." (4 April 2014). E301/9. [hereinafter, **DECISION OF CASE 002/02 SEVERANCE AND SCOPE**]. See also CASE 002/02 KRT TRIAL MONITOR. Issue 1, Initial Hearing, (30 July 2014), I and II.C.

⁴ Trial Chamber. "Case 002/01 Judgment" (7 August 2014). E313. [hereinafter **CASE 002/01 TRIAL JUDGMENT**].

⁵ Nuon Chea Defense. "Notice of Appeal Against the Judgment in Case 002/01" (29 September 2014). E313/1/1. [hereinafter **NOTICE OF APPEAL**].

⁶ **NOTICE OF APPEAL**, Ground 3, p.2.

⁷ **NOTICE OF APPEAL**, Ground 11, p.3.

⁸ **NOTICE OF APPEAL**, Grounds 30-31, p.5. The notice refers to the works of Ben Kiernan and Elizabeth Becker as examples of "unauthenticated" sources.

⁹ **NOTICE OF APPEAL**, Grounds 32-33, pp.5-6.

¹⁰ **NOTICE OF APPEAL**, Grounds 41-44, p.9.

¹¹ **NOTICE OF APPEAL**, Ground 6, p.9

¹² **NOTICE OF APPEAL**, Grounds 186-189, pp.23-24.

¹³ **NOTICE OF APPEAL**, Grounds 198-199, p.25.

¹⁴ **NOTICE OF APPEAL**, Grounds 201-209, pp.25-29.

¹⁵ **NOTICE OF APPEAL**, Ground 220, p.30.

¹⁶ **NOTICE OF APPEAL**, Ground 221, p.30.

¹⁷ Office of the Co-Prosecutors. "Co-Prosecutors' Notice of Appeal of a Decision in Case 002/01" (29 September 2014). E313/3/1. [hereinafter **OCP NOTICE OF APPEAL**].

¹⁸ **CASE 002/01 TRIAL JUDGMENT**, para. 691.

¹⁹ Khieu Samphan Defense. "Mr. Khieu Samphan's Request for Reconsideration of the Need to Await Final Judgment in Case 002/01 before commencing Case 002/02 and the Appointment of a New Panel of Trial Judges" (25 August 2014). E314/1. [hereinafter **KHIEU SAMPHAN'S REQUEST**]. Paras. 48,54.

²⁰ **KHIEU SAMPHAN'S REQUEST**, para. 9, citing Supreme Court Chamber, "Decision on Khieu Samphan's Immediate Appeal against the Trial Chamber's Decision on Additional Severance of Case 002 and Scope of Case 002/02" (29 July 2014), E301/9/1/1/3, para. 85.

²¹ **KHIEU SAMPHAN'S REQUEST**, paras. 23-35.

²² Trial Chamber. "Decision on Khieu Samphan's Request to Postpone the Commencement of Case 002/02" (19 September 2014). E314/5. [hereinafter **TRIAL CHAMBER DECISION ON KHIEU SAMPHAN'S REQUEST**], paras. 10-11.

²³ **TRIAL CHAMBER DECISION ON KHIEU SAMPHAN'S REQUEST**, paras. 8-9.

²⁴ Internal Rule 34(2) states, "Any party may file an application for disqualification of a judge in any case in which the Judge has a personal or financial interest or concerning which the Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias."

²⁵ Nuon Chea Defense. "Nuon Chea Application for Disqualification of Judges Nil Nonn, Ya Sokhan, Jean-Marc Lavergne, and You Ottara" (29 September 2014). E314/6. [hereinafter, **DISQUALIFICATION APPLICATION**].

²⁶ **DISQUALIFICATION APPLICATION**, paras. 38-52.

²⁷ **DISQUALIFICATION APPLICATION**, paras. 53-60.

²⁸ **DISQUALIFICATION APPLICATION**, paras. 61-70.

²⁹ **DISQUALIFICATION APPLICATION**, paras. 71-92.

³⁰ **DISQUALIFICATION APPLICATION**, paras. 93-114.

³¹ **DISQUALIFICATION APPLICATION**, paras. 115-121.

³² **DISQUALIFICATION APPLICATION**, paras. 123.

³³ Internal Rule 34(5) states, "An application for disqualification of a Co-Investigating judge shall be submitted to the Pre-Trial Chamber. In any other case it shall be submitted to the Chamber in which the judge in question is

sitting. The Judge in question may continue to participate in the judicial proceedings pending a decision. However, he or she may decide to step down voluntarily at any point in the following proceedings.” Mr. Victor Koppe argued during the Defense Teams’ Saturday Press Conference that, as judges must step down in the Cambodian domestic court system once any Party has filed an application for disqualification, the judges of the ECCC should voluntarily do the same.

³⁴ Office of the Co-Prosecutors. “Co-Prosecutors’ Response to Nuon Chea’s Disqualification Application” (10 October 2014). E314/9. [hereinafter, **OCP RESPONSE**], Para. 17.

³⁵ **OCP RESPONSE**. See Trial Chamber. “Decision on Ieng Thirith, Nuon Chea and Ieng Sary’s application for disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony” (23 March 2011). E55/4.

³⁶ The Special Bench consists of Judges Thou Mony (presiding), Rowan Dowling, Chang-ho Chung, Huot Vuthy, and Prak Kimsan. These members were determined following a second motion for disqualification of Pen Pichsaly, a national judge from the Special Bench, due to his position as chief of prosecution at the Cambodian Ministry of Justice. Following Pen Pichsaly’s voluntary recusal, the JAC appointed ___ to take his position on the Special Bench. See Judicial Administration Committee. “Interoffice Memorandum: Request to Appoint Judge for the Special Panel to Replace Judge Pen Pichsaly” (13 October 2014). E314/4/4.

³⁷ Nuon Chea Defense. “Nuon Chea Request for an Oral Hearing on Defense Applications for Disqualification of Judges” (14 October 2014). E314/6/1. The Defense relies on the International Covenant on Civil and Political Rights, Art. 14(1); ECCC Establishment Law, Arts. 10 new, 33 new, 34 new; Constitution of the Kingdom of Cambodia, Art. 31; Code of Criminal Procedure of the Kingdom of Cambodia, Art. 316.

³⁸ These crimes were laid out in the **DECISION OF CASE 002/02 SEVERANCE AND SCOPE**. They include enslavement, religious persecution, deportation of the Vietnamese, political persecution, forced marriage and rape, imprisonment, torture, murder, extermination, and attacks against humanity and dignity.

³⁹ Heng Samrin today is the President of the National Assembly and holds the third highest position in the ruling Cambodia People’s Party (CPP), below Prime Minister Hun Sen and Senate President Chea Sim. The three of them were senior cadres in the Eastern Zone who fled to Vietnam at the outset of purges in the Zone in 1978. With January 1979 Vietnamese occupation of Cambodia, they gained positions of political power that last to this day.

⁴⁰ For the split 3-2 decision between the national and international judges on employing coercive measures to summons Heng Samrin (TCW-223) for testimony, see Trial Chamber. “Final Decision on Witnesses, Experts, and Civil Parties to be Heard in Case 002/01” (7 August 2014). E312. Paras. 86-98, 104-111.

⁴¹ Article 559 of the 2008 Cambodian Code of Criminal Procedure states, “The application shall be notified to the judge against whom it is made. This judge shall cease to participate in the investigation or trial. In urgent cases, the challenged judge shall be replaced by another judge to be appointed by the president of the court to which he belongs.”

⁴² There is some justification for this statement in Regulation 9.2 of the ECCC DSS Administrative Regulations. It states that Co-Lawyers “shall put the client’s interests before their own or those of any other person, organisation or state, having due regard to the provisions of the Law on the ECCC, the Internal Rules, these Administrative Regulations and any Code of Conduct to which they are bound.”

⁴³ An examination of the rules of professional conduct at other international tribunals appears to provide some justification for this stance. Article 14(2) of the International Criminal Court’s Code of Professional Conduct for Counsel (ICC-ASP/4/Res.1) states, “When representing a client, counsel shall: (a) Abide by the client’s decisions concerning the objectives of his or her representation as long as they are not inconsistent with counsel’s duties under the Statute, the Rules of Procedure and Evidence, and this Code; Article 9(1) of the International Criminal Tribunal for Rwanda’s Code of Professional Conduct for Defence Counsel states, “Counsel owes a duty of loyalty to his or her client. Counsel must at all times act in the best interests of the client and must put those interests before their own interests or those of any other person.” However, both these codes and the Internal Rules of the ECCC continually note that requirements of close consultation with clients do not permit lawyers to disobey the other rules, codes, and procedures governing their conduct at the tribunal. As such, varied interpretations of the rules of official conduct will likely color any decisions on the justifiability of the boycott.

⁴⁴ Special Court for Sierra Leone. “Case against Former Secretary of the Interior and National Coordinator of the Civil Defense Force, Samuel Hinga Norman” (beginning of trial on 3 June 2004). See U.C. Berkeley War Crimes Studies Center, Sierra Leone Trial Monitoring Project, “Weekly Update Number 1” (23 June 2004), p.1.

⁴⁵ Supreme Court Chamber. “Order Regarding the Establishment of a Second Trial Panel” (23 July 2013). E284/4/7/1.

⁴⁶ Article 58 of the Law on the Status of Lawyers in the Kingdom of Cambodia states, in unofficial translation, “Lawyers shall maintain absolute confidentiality. Lawyers shall determine by their own conscience and with the consent of the client what issues to raise in order to defend the interests of the client.”

⁴⁷ Article 38 of the Constitution of the Kingdom of Cambodia (adopted on 21 September 1993), states, “Every citizen shall enjoy the right to defense through judicial recourse.”

⁴⁸ Trial Chamber. Transcript of Trial Management Meeting. (12 December 2014) E1/238.2. Lines 9-25; 1-3. pp.103-4.

⁴⁹ Trial Chamber. “Decision on Civil Party Lead Co-Lawyers’ Request to Make Opening Remarks.” (14 October 2014). E316/1/1.