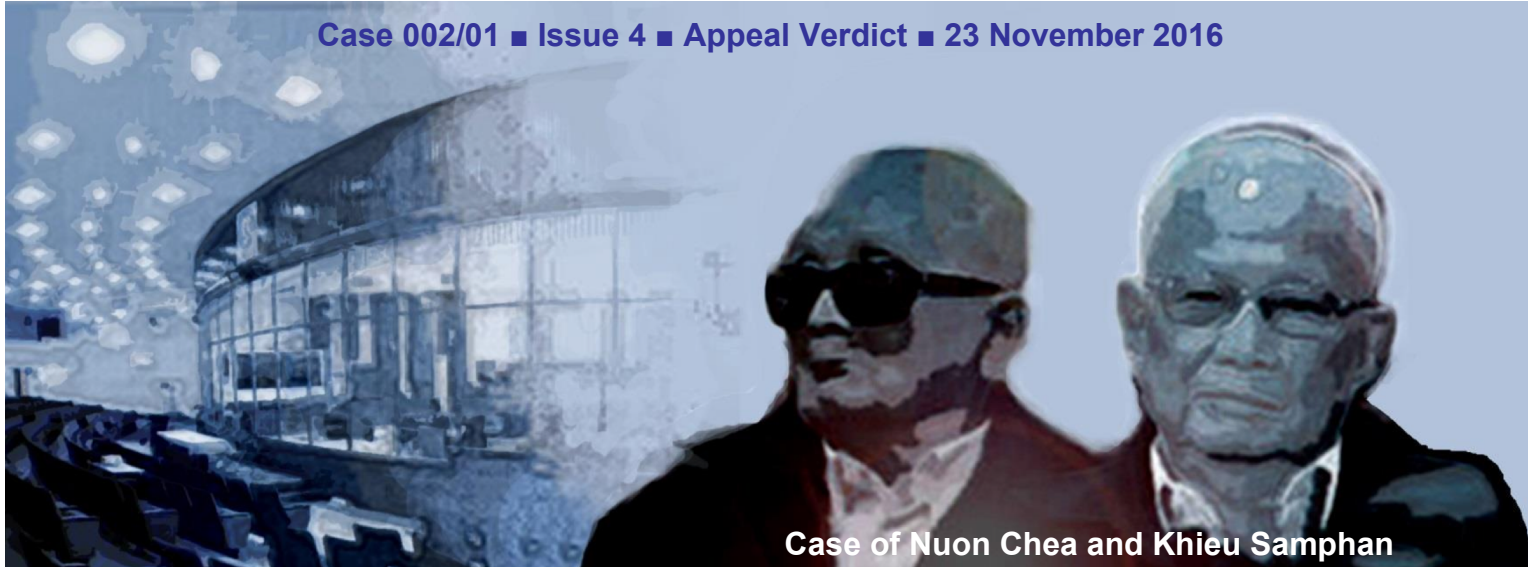


KRT TRIAL MONITOR

Case 002/01 ■ Issue 4 ■ Appeal Verdict ■ 23 November 2016



Case of Nuon Chea and Khieu Samphan

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)

*“The Supreme Court Chamber considers
that the imposition of a life sentence for each of
the Accused is appropriate”*

- Supreme Court Chamber President Kong Srim

I. OVERVIEW

Case 002/01 came to a close this week with the Supreme Court Chamber (**SCC**)’s announcement of their verdict¹ on the appeals against the Trial Chamber’s August 2014 verdict.² SCC President Kong Srim read a summary of the verdict, addressing the “most contentious” of the Defense teams’ combined 371 ground of appeal, as well as the appeal from the Office of the Co-Prosecutors (**OCP**) related to the application of the extended form of Joint Criminal Enterprise, referred to more commonly as JCE III. Although the SCC overturned some of the Trial Chamber’s decisions, including acquitting the two Accused of responsibility for crimes which took place at Tuol Po Chrey in late April 1975, the SCC ultimately upheld the life sentences for each of the Accused, saying this best reflects the gravity of the crimes with which they have been charged. This report provides some background to this week’s judgment, followed by a summary of the key findings announced by the President on Wednesday. A longer, more detailed analysis of the judgment will be issued after monitors have had time to read and digest the full 520 page document.

II. BACKGROUND OF CASE 002/01 APPEAL PROCESS

The Case 002/01 Judgment, issued on 7 August 2014, found both Nuon Chea and Khieu Samphan guilty of crimes against humanity comprising murder, other inhumane acts, forced transfers, forced disappearances, and attacks on human dignity in the territory of Cambodia between 17 April 1975 and 1977. Both men filed appeals against the Trial Chamber’s decision from December 2014, alleging errors of both fact and law.³ This Wednesday, nearly two years after the rather fraught appeal process began, the Supreme Court Chamber finally issued its response to these appeals.

A major point of contention of the Defense Teams was the Trial Chamber’s continuance of proceedings in Case 002/01 while the Case 002/01 process had remained ongoing. In October 2014, both Defense Teams boycotted 002/02 proceedings in order for them to prepare their

appeal briefs.⁴ In response, the Trial Chamber adjourned proceedings until 8 January 2015.⁵ A first round of appeal hearings was held in July 2015, however the second round, scheduled for November 2015, was postponed after Nuon Chea instructed his lawyers not to participate. The hearings were finally held in February, without the participation of the Nuon Chea Defense.

A. First Round of Appeal Hearings

After all Parties filed appeal briefs in November and December 2014, the SCC held an initial round of appeal hearings from 2 to 6 July 2015, at which time the SCC heard testimony from three new witnesses over the course of three days.⁶ The witness testimony focused on Communist Party of Kampuchea (CPK) policies to target former Khmer Republic soldiers and officials following the 17 April 1975. Throughout the testimony, the Parties raised a number of familiar legal and procedural issues that have been contentious during the trial stage of Case 002/01, as well as Case 002/02.⁷ The hearings also elicited a significant amount of new evidence from these witnesses pertaining to whether there were standing orders not to harm the Lon Nol soldiers after Phnom Penh's liberation, as well as whether certain factions alleged to have existed within the CPK. Objections stemming from the severance order and confusion over the scope of Case 002/01 were also raised throughout the course of the hearings.⁸ Overall the hearings proceeded smoothly, and all Parties participated actively.

B. Second Round of Appeal Hearings and Appointment of Standby Counsel

The SCC attempted to hear the second round of appeal hearings on Tuesday 17 November, however they were forced to adjourn proceedings due to the absence of co-counselors for Nuon Chea.⁹ Nuon Chea announced that, due to numerous perceived injustices, the outcome of the appeal hearings were now irrelevant to him. Although he stopped short of withdrawing his appeal entirely, he instructed his lawyers not to take part in proceedings, and announced his intention to leave the courtroom.¹⁰ Co-counsel Victor Koppe was not present at all on that day, and when Court resumed after morning recess, Son Arun was no longer present in the Chamber.¹¹ International Co-Prosecutor Nicholas Koumjian pointed out that Nuon Chea had been summoned to face serious criminal allegations, and not "because of an invitation to something like a cocktail party that you can decline to attend."¹² Ultimately the SSC concluded that Nuon Chea did not have the right to order his lawyers to boycott proceedings. The Court determined that the presence of either Victor Koppe or Son Arun was mandatory, so they adjourned proceedings temporarily.¹³ The Court also asked the Defense Support Section (DSS) to begin arranging standby counsel for Nuon Chea. The Court made clear that the standby counsel's role would be to take over from the current Defense team should they "fail to be present in the courtroom when hearings resume, or absent themselves in the course of the hearings."¹⁴ Counsel Phat Pouv Seang was chosen to fulfill this role on 16 December 2015.¹⁵ Mr. Koppe has since reiterated his position in writing that "the ECCC is indeed and always will be a complete farce." He also made a point of adding that he had provided advance notice via email that his team would not be participating in the appeals process.¹⁶

C. Third Round of Appeal Hearings

The third and final round of appeal hearings were thus eventually held in February 2016 with the presence of standby counsel for Nuon Chea, however since Nuon Chea's national counsel was also present, even if choosing not to participate, standby counsel was ultimately never addressed. Due to the decision by the Nuon Chea Team not to participate, this round of appeal hearings only addressed the grounds of appeal filed by the Khieu Samphan Team who covered their grounds of appeal related to the fairness of proceedings, the Trial Chamber's overall approach to evidence, grounds relating to specific crimes for which the Accused were convicted and those related to individual criminal responsibility and sentencing. The OCP also made submissions related to their appeal that the Trial Chamber erred in choosing not to apply the extended form of JCE. Each Party made submissions on their appeal followed by responses

from the other side. At the end of the last session of the week, Khieu Samphan chose to address the Chamber, asserting his position that the ideology he espoused as DK head of state had been abused by those on the ground and that he was not responsible for this, arguing that he never wanted or intended to commit any crime.

D. Final Verdict in Case 002/01

On Wednesday 23 November the Supreme Court Chamber reconvened for the first time since February to announce the much anticipated final verdict addressing the appeals of both defendants and the OCP in Case 002/01. SCC President Kong Srim read a summary of the main points of the verdict over the course of one and a half hours.

i. Grounds Related to the Right to an Independent Trial and an Effective Defense

The President addressed the ground of appeal in five thematic sections, beginning with those related to the fairness of proceedings. The SCC rejected all grounds of appeal related to the alleged unconstitutionality of the internal rules of the ECCC. It also rejected claims that comments made by Judge Silvia Cartwright in a 2013 interview, or statements of Judge Marcel LeMonde in his book, had been indicative of bias. The SCC did find that the Trial Chamber's failure to call Heng Samrin as a Witness, despite him being requested several times, was "unreasonable," and that the reason given (that calling him would cause a delay) had been "erroneous." Despite this finding, the President announced that the decision not to call Heng Samrin or Ouk Bunchhoeun did not prejudice the Trial Chamber, and that neither witness had been shown to possess evidence not in the possession of other witnesses.

ii. Grounds Related to the Trial Chamber's Approach to Evidence

The SCC also rejected arguments that the Trial Chamber's use of written statements in lieu of oral testimony was a violation of the Accused's right to challenge the evidence presented, arguing:

the right to confront witnesses is not absolute. An entirely unfettered right to examine witnesses against the Accused would bear the risk of compromising a court's ability to render justice in a case with the size and complexity as the case at hand.

The Chamber found that the Trial Chamber had rightly examined written statements on a case-by-case basis and afforded lower probative value to statements of those who had not appeared in court. Likewise the Appeal Judgment rejected the argument that the Trial Chamber had relied too heavily on unsworn Civil Party testimony or statements of suffering and victim impact statements, as: "It was clear that they could contain information relevant to the guilt of the Accused."

iii. Grounds related to Crimes for which the Accused were Convicted

The crux of the judgment related to the grounds of appeal alleging errors of both fact and law related to crimes for which the two Accused were convicted in the course of three main events: the evacuation of Phnom Penh (referred to as population movement phase one), the transfer of people from mid-1975 to 1977 (population movement phase two), and the killing of approximately 250 Lon Nol soldiers at Tuol Po Chrey in late April 1975. Regarding population phase one, the SCC found that although not all of the findings of murder in the Judgment were supported by sufficient evidence, there was still enough evidence to find that the crime against humanity of murder was nonetheless committed. Turning to the other crime against humanity of extermination, however, the SCC reversed the Trial Chamber's decision, finding that "it was not possible to extrapolate that killings had occurred on a massive scale." The SCC found similarly for the charge of extermination during population phase two, overturning that verdict as well.

While quashing the extermination conviction, the SCC added a murder conviction for population movement phase two, which the Trial Chamber had not contained in its original judgment.

The Trial Chamber supported the charge of persecution on political grounds during the evacuation of Phnom Penh, however the Chamber concluded that the Trial Chamber had erred in finding this also applied to the second phase of the population movement. On this basis, they overturned this second finding. Significantly, the SCC also overturned the conviction for both Accused of criminal responsibility related to events at Tuol Po Chrey. Although it did agree there was sufficient evidence to show a massacre of Lon Nol had taken place there, the SCC found there was not enough evidence to show this was part of any national policy targeting former soldiers and officials of the Lon Nol regime, and thus found it was not possible to hold the Accused accountable.

iv. Sentencing

The final Defense grounds for appeal addressed were those related to sentencing. The SCC argued that, although it had identified a number of errors in the 2014 Trial Chamber Judgment, these were not sufficiently significant to warrant a revised sentence. President Kong Srim stated:

In view of the massive scale of the crimes; the complete lack of consideration for the ultimate fate of the Cambodian population, especially the most vulnerable groups; the fact that the crimes were not isolated events but occurred over an extended period of time; and the significant roles of the Accused, the SCC considers that the imposition of a life sentence for each of the Accused is appropriate.

v. The OCP Appeal

Finally the SCC addressed the OCP Appeal, which questioned the Trial Chamber's rejection of JCE III as an applicable mode of liability. The SCC ultimately found this appeal inadmissible as it did not have any bearing on the Accused's conviction and sought only "declaratory relief." Despite this rejection, statements made during the earlier part of the summary the SCC indicated it agreed with the Pre-Trial Chamber's earlier finding that JCE III was not part of customary international law during the DK period and thus was inapplicable to ECCC proceedings.

*This report was authored by Caitlin McCaffrie and Penelope van Tuyl as part of the KRT Trial Monitoring and Community Outreach Program. KRT Trial Monitor 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 Southeast Asia.



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

Case001	<i>The Case of Kaing Guek Eavalias “Duch” (CaseNo.001/18-07-2007-ECCC)</i>
Case002	<i>The Case of Nuon Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan</i>
	(CaseNo.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
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
VSS	Victims Support Section
WESU	Witness and Expert Support Unit

¹ Supreme Court Chamber. “Case 002/01 Appeal Judgment” (23 November 2016) F36 [hereinafter **THE APPEAL JUDGMENT**]

² Trial Chamber. “Case 002/01 Judgment” (7 August 2014). E313. [hereinafter **THE JUDGMENT**]

³ The Defense for Nuon Chea submitted 223 grounds for appeal, see Nuon Chea Defense Team, “Nuon Chea’s Appeal against the Judgment in Case 002/01” (29 December 2014) F16 [hereinafter **NUON CHEA APPEAL**] Khieu Samphan’s Defense Team submitted 148 grounds for appeal, see Khieu Samphan Defense Team, “Mr. Khieu Samphan’s Defence Appeal Brief Against the Judgment in Case 002/01” (29 December 2014) F17 [hereinafter **KHIEU SAMPHAN APPEAL**]

⁴ The Trial Chamber held two trial management meetings in October 2014 and attempted to recommence trial hearings twice during November, however while the Defense team for Nuon Chea chose to be present, the Khieu Samphan Team continued to refuse. In response, on 21 November 2014 the Trial Chamber made a decision to assign standby Counsel for Khieu Samphan in order to continue proceedings “in the interests of justice” see: Trial Chamber. “Decision on the Appointment of Court appointed Counsels for Khieu Samphan” (21 November 2014). E320/2. Following this the Trial Chamber was finally able to resume Case 002/02 hearings on 8 January 2015 with the presence of Standby Counsel Ms. Touch Vorleak and Mr. Calvin Saunders. Both the Khieu Samphan and Nuon Chea Defense Teams expressed strong objections to the presence of the standby counselors. However the LCLCPs and OCP argued that the presence of standby counsel was necessary and justifiable given the need for an expeditious trial. Both standby counselors continue to attend proceedings in Case 002/02. For more information on the boycott see CASE 002/02 KRT TRIAL MONITOR, Special Report: Defense Teams’ Boycott (31 October 2014).

⁵ CASE 002/02 KRT TRIAL MONITOR, Issue 3, Attempts to Resume Hearing (17 and 24 November 2014).

⁶ These witnesses were SAO Van (SCW-4), SAM Sithy (SCW-3) and TOAT Thoeun (SCW-5) as per the decision of: Supreme Court Chamber “Decision on Part of Nuon Chea’s Requests to Call Witnesses on Appeal” (29 May 2015) F2/5. For a summary of their testimony see KRT APPEALS ISSUE 1. SAO Van also testified recently in Case 002/01 under the pseudonym (2-TCW-989), see

⁷ These subjects have been covered extensively in past KRT Monitor reports. See e.g. APPEALS ISSUE 1

⁸ A Severance Order in Case 002 was first released by the Trial Chamber on 22 September 2011, pursuant to Internal Rule 89 *ter*. In October 2011 the OCP requested amendments to the Severance, some of which were adopted by the Trial Chamber in its Impugned Decision on 8 October 2012. However the severance order was ruled invalid by the SCC on 8 February 2013 on the grounds that it lacked clarity and reasoning. A Trial Chamber Decision on Additional Severance of Case 002/02 and Scope of Case 002/02 was released on 4 April 2014. This lack of clarity around the precise scope of Cases 002/01 and 002/02 have led to repeated issues.

⁹ Although Son Arun was present in court during the morning session, he soon left the Courtroom after Nuon Chea, read a pre-prepared statement in which he called the Judgment in Case 002/01 a “shameful failure” and said that the ECCC was being used to “tell a tale approved by the government before the tribunal was established.” See **NOVEMBER APPEAL TRANSCRIPT** Lines 17-18 p. 10 and Line 5, p. 11. The main points Nuon Chea raised to support his claim that the Judgment was biased against him centered around a failure to call witnesses requested by his Defense Team. In particular these witnesses were HENG Samrin, the current President of the National Assembly, and filmmakers Robert LEMIN and THET Sambath. The issue of summoning HENG Samrin, Robert LEMKIN and THET Sambath has been a recurring one at the ECCC. Most recently the Supreme Court Chamber rendered a Decision on 21 October 2015, finding that they would not summons HENG Samrin as a witness nor admit the majority of transcripts from footage taken the filmmakers. Supreme Court Chamber. “Disposition Decision on Pending Requests for Additional Evidence on Appeal and Related Matters” (21 October 2015). F 2/9.

¹⁰ Speaking on behalf of the Civil Parties, Marie GUIRAUD reminded the participants that Rule 81 of the Internal Rules obliges the Accused to be physically present in the courtroom during proceedings except on medical grounds, and that they would only agree to continue if the Accused was present either in the courtroom or the holding cell. The OCP also made arguments to this affect. Subsequently, Nuon Chea announced he was not medically fit to sit in the courtroom and the Bench agreed to his waiver, allowing him to follow proceedings from the holding cell as he usually does.

¹¹ Bar Association of the Kingdom of Cambodia. “Law on the Bar” (23 June 1995) p. 10. [**Hereinafter LAW ON THE BAR**]

¹² **NOVEMBER APPEAL TRANSCRIPT**, Lines 20-21, p. 22. Nicholas Koumjian also voiced his disagreement with Son Arun’s interpretation of the Bar Association Rules, but said that the OCP took the position that appeal hearings could continue as scheduled even without the participation of the Nuon Chea Defense, since they had not been denied any opportunity to be present

¹³ This Decision was based on Article 301 of the Cambodian Code of Criminal Procedure, concerning the mandates the assistance of counsel in certain criminal cases and Internal Rule 81(7), which explicitly addresses the circumstance of a lawyer absent without justification. The SCC made clear that it considered the absence of Victor Koppe and Son Arun constituted misconduct, and noted that it could possibly lead to disciplinary sanctions.

¹⁴ Interoffice Memorandum. “Follow-up to Supreme Court Chamber’s Instruction to Appoint Standby Counsel for Nuon Chea” (19 November 2015). F30/15. The OCP issued a follow-up submission stating that they did not believe appointing standby counsel would be an effective way to resolve the current issue, as the complexity of the appeals process would imply that new counsel would require months of preparation, delaying proceedings in a way that the OCP argued would be unacceptable see Office of the Co-Prosecutors. “Co-Prosecutor’s Submissions on Proceeding with Appeal Hearings” (23 November 2015). F30/16.

¹⁵ PHAT Pov Seang was the former national co-lawyer for IENG Thirith, whose death on 22 August 2015 led to the closing of her case. See Defense Support Section (DSS). “Memorandum: Second Update on the Supreme Court Chamber’s Instruction to Appoint Stand-by Counsel for Mr. Nuon Chea” (16 December 2015) F30/15/12.

¹⁶ Nuon Chea Defence Team. “Victor Koppe’s Response to the Supreme Court Chamber’s Request for Explanations for his Absence from the Appeal Hearing” (23 November 2015).