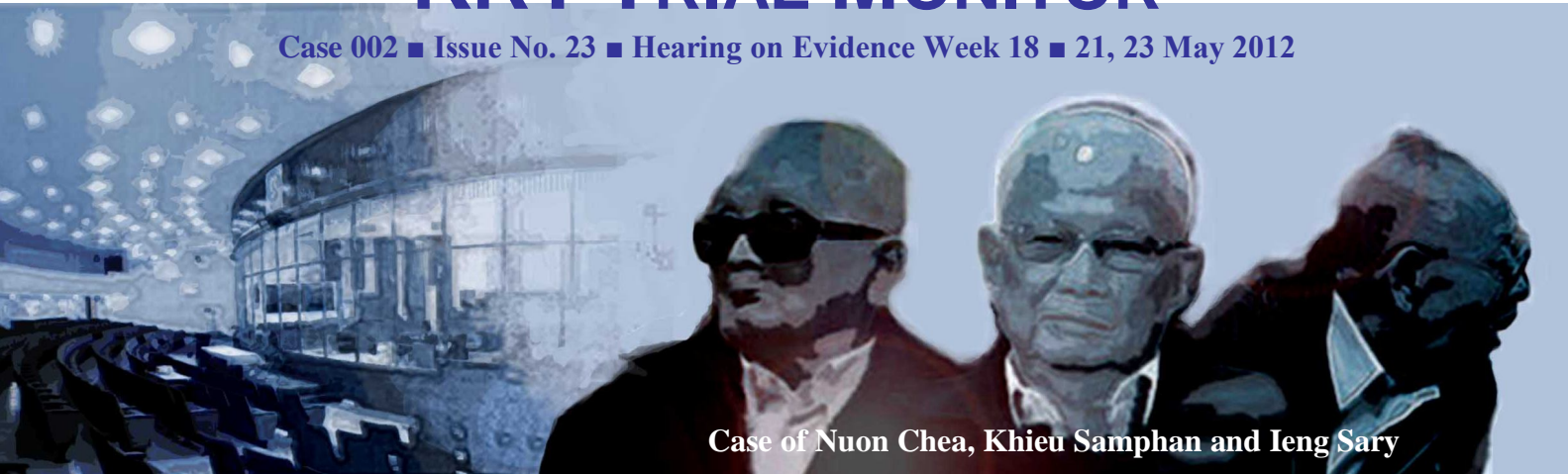


# KRT TRIAL MONITOR

Case 002 ■ Issue No. 23 ■ Hearing on Evidence Week 18 ■ 21, 23 May 2012



## Case of Nuon Chea, Khieu Samphan and Ieng Sary

Asian International Justice Initiative (AIJI), a project of East-West Center and UC Berkeley War Crimes Studies Center

*One of the fundamental rights of an accused person is to be present during his trial, so it is therefore important that this principle be abided by, and therefore it is something that we also follow.*

- Anta Guissé, Khieu Samphan's international counsel

### I. OVERVIEW

The importance of the right of the accused to be present in his trial was highlighted this week in the face of Ieng Sary's deteriorating health. Ieng Sary was rushed to the hospital on Thursday, 17 May 2012, after experiencing severe coughing, difficulty in breathing, and dizziness. When trial resumed on Monday, 21 May 2012, the Accused was still in the hospital and the medical report submitted by his doctor was read in court.<sup>1</sup> Ieng Sary's international counsel, Mr. Michael Karnavas, asked for a suspension of the proceedings without opposition from any of the other Parties. The Trial Chamber granted the request and rescheduled the hearing to Wednesday, 23 May 2012, a day after Ieng Sary's release from the hospital.

On Wednesday, Dr. Lim Sivutha,<sup>2</sup> Ieng Sary's attending physician, testified to provide the Chamber with information on Ieng Sary's medical condition and his recommendations for the conduct of subsequent hearings.<sup>3</sup> After deliberating during the break, the Trial Chamber adopted the medical doctor's recommendation and suspended the proceedings until Monday, 28 May 2012. In order for proceedings to move forward despite Ieng Sary's condition, it also amended the order of scheduled witness testimonies.

Before the end of the proceedings, Judge Laverge pointed out three documents in the court interface that were not in the Case File. He advised the Prosecution and the Nuon Chea Defense to make written applications for the admission of these documents as new evidence under Rule 87.4 of the Internal Rules.

## **II. SUMMARY OF WITNESS TESTIMONY**

The only testimony heard by the court this week came from Dr. Lim Sivutha, leng Sary's attending physician and the Head of the Emergency Section of the Khmer-Soviet Friendship Hospital. Asked to explain the basis for his knowledge of the Accused's medical condition, the doctor indicated that he was familiar with the Accused's health history because he has been one of the doctors treating leng Sary at the ECCC, checking on his condition every five days. For this reason, the Doctor is also familiar with the layout of the ECCC, particularly the holding cell for accused persons and the ECCC medical unit.

According to leng Sary's physician, the Accused was admitted at the Khmer-Soviet Hospital in the morning of 17 May 2012, after complaining of frequent coughing, breathing difficulties, and dizziness. He was initially diagnosed to have flu and bronchitis, in addition to his existing ischemic heart disease. With hospital treatment by a medical team, leng Sary's condition improved and after five days in the hospital, leng Sary was discharged on 22 May 2012. Despite his discharge, leng Sary informed his counsel that he was still experiencing dizziness after sitting up for around five minutes. When asked to elaborate, Dr. Lim Sivutha replied that they were not entirely sure of the cause of leng Sary's dizziness and that they need to examine him over a period of time. The doctor reminded the Chamber that leng Sary suffers from a chronic heart condition that dates back to 1992. While his heart condition has been stable for the past months, it will not improve and the tendency is for his heart condition to deteriorate.

The Medical Report issued by the Khmer-Soviet Friendship Hospital<sup>4</sup> recommended that leng Sary should take a two-day rest following his discharge from the hospital. In his testimony, Dr. Lim Sivutha clarified that the two-day rest period required leng Sary to rest completely, without participating in proceedings, even remotely from the holding cell. The doctor further recommended that once leng Sary is able to attend the proceedings, it would be best to allow him to participate remotely from the holding cell.

Karnavas informed the court that his client was unwilling to sign a waiver to be present in the courtroom for the witnesses who are scheduled to appear in court in the coming days, because their testimonies relate directly to him. However, leng Sary expressed willingness to execute a waiver for reception of other witnesses' testimony.

## **III. LEGAL AND PROCEDURAL ISSUES**

leng Sary's health condition highlighted the right of an accused to be present in his trial, as well as his right to waive that right.

On a separate matter, at the end of this week's proceedings, the Chamber announced that an application for "new evidence" must be made for documents not in the case file but are now in the Parties' documents lists in the court interface, regardless of the intended purpose for presenting the document.

## **A. Right of the Accused to be Present in his Trial**

The fundamental right of an accused to be present in his trial is enshrined both in Article 35 *new* (d) of the ECCC Law and Rule 81(1) of the Internal Rules.<sup>5</sup> It entitles the accused to be physically present at the proceedings, so that he is apprised of the case against him, effectively prepare for his defense and exercise his other fair trial rights.

Due to Ieng Sary's hospitalization, Karnavas asked the Chamber to suspend proceedings pursuant to international fair trial standards. Specifically, since Ieng Sary did not waive his right to be present in court, the proceedings should not go forward without his consent. Karnavas added that it was important to suspend proceedings because he was unable to receive instructions from his client, who was unable to follow the trial while at the hospital. The other Defense Teams supported this request. Mr. Son Arun, Nuon Chea's national counsel, emphasized that suspending the proceedings while Ieng Sary was recuperating is particularly important, since the witness scheduled to testify will provide evidence that would likely refer to Ieng Sary. None of the other Parties objected to the suspension of Monday's proceedings. However, international Co-Prosecutor, Mr. Vincent de Wilde D'Estmael expressed concern regarding when the trial will resume.

In accordance with Internal Rule 81(5) of the Internal Rules<sup>6</sup> and the Parties' unanimous agreement to suspend the hearing, the Chamber adjourned Monday's proceedings and announced the resumption of the hearing on Wednesday, the day after Ieng Sary's discharge from the hospital.

**Resumption of Trial after Ieng Sary's Discharge from the Hospital.** When the trial resumed on Wednesday, before the Chamber called Dr. Lim Sivutha to testify on the condition of the Accused, Karnavas indicated that Ieng Sary has agreed to waive his right to be present during the discussion of his medical status. He further stated that his client declined to provide a waiver for the testimonies of Witnesses TCW-487 and TCW-583 because their testimonies would be intimately related to acts with which he is charged. As for other witnesses whose testimonies may not directly refer to his client, Karnavas indicated that Ieng Sary was willing to waive his right to be present so as not to stall the proceedings.

Notably, the OCP did not question the medical opinion that Ieng Sary was unable to follow the proceedings on account of his physical state. Additionally, while the Civil Party lawyers asked several questions to clarify Ieng Sary's medical condition, they did not object to the suspension of proceedings to give the Accused time to convalesce. After a short recess, the Chamber announced the postponement of the hearing of evidence from Witness TCW-487 and allowed Ieng Sary to follow the entire proceedings remotely from the holding cell when trial resumes.

This week's proceedings demonstrated the Chamber's adherence to the right of the accused to be present in court during his trial. In the face of Ieng Sary's medical condition, the Chamber balanced this with the right of an accused to an expeditious trial. Significantly, the Chamber's conscientious evaluation of the Medical Report from the Hospital suggests that the sacrifice of expediency only comes at the Chamber's satisfaction that the situation is

sufficiently justified by the circumstances. While the Chamber could have accepted the Medical Report at face value, it decided to consult Ieng Sary's attending physician to ensure that the medical condition of the Accused indeed necessitated a change in schedule of proceedings.

As the proceedings progress, the inability of an accused to be present in court due to failing health may become a recurring issue. The ambit of Rule 81(5), an exception to Rule 81, which provides for the right of an accused to be tried in his presence, does not seem to provide the Chamber with much leeway to address the situation. A plain reading of Rule 81(5) suggests that when the medical condition of an accused prevents him from being in court, the Chamber may either continue the proceedings with his consent, or if the absence of the accused reaches a level that causes substantial delay or as justice requires, the Chamber may order that his participation be in the form of audio-visual means without his consent.

#### **B. Disclosure of Medical Information to the Public**

On Monday, the Chamber asked Karnavas if Ieng Sary objected to his medical condition being made public. When the trial resumed on Wednesday, Karnavas indicated that Ieng Sary has no objection to the discussion of his health condition in public.

Although the Internal Rules are silent on the confidentiality of medical information about the Accused, the Chamber has been consistently respectful of the privacy of the Accused and has shown an inclination to obtaining the consent of the Accused before disclosing his medical information to the public. However, since there was no disagreement on this matter by the Chamber or by the Parties to date, it remains to be seen whether the Chamber will continue to request for the consent of the Accused before discussing medical matters publicly in the future. In any case, it remains incumbent on the Chamber to balance the right of the accused to privacy and the right of the public to transparent proceedings.

#### **C. Need for Written Application for Admission of New Documents under Internal Rule 87.4 for Documents not in the Case File**

Under Internal Rule 87(4), the Chamber may admit new evidence it deems conducive to ascertaining the truth at the request of a party if: (i) the party makes a reasoned submission; (ii) the evidence is not irrelevant or repetitious, impossible to obtain within a reasonable time, unsuitable to prove the facts it purports to prove, not allowed under the law, or frivolous and intended to prolong the proceedings, under Rule 87.3; and (iii) the evidence was not available before the opening of the trial.

Before the end of Wednesday's session, the Chamber, speaking through Judge Jean-Marc Lavergne, declared that there were three documents in the document lists on the court interface that were "problematic" as they were not in the Case File: one from the OCP and two from the Nuon Chea Defense. The Chamber instructed the concerned Parties to make a written application for the admission of these documents as new evidence under Internal Rule 87.4. It stated that the Nuon Chea Defense's purpose of using the documents –

impeaching witnesses – do not change the rules, as the same directive applies, “no matter the aim.”

In response, the Prosecution clarified that the purported new document referred to by the Chamber was already included as an annex to another document that they had submitted to the Chamber in April 2011. Nuon Chea’s international counsel, Mr. Andrew Ianuzzi, on the other hand, asked when a written ruling will be issued on the need to submit an application for document to be used to impeach a witness as new evidence, indicating their intention to appeal the matter. This notwithstanding, he asked that oral applications for the admission of new documents be allowed in order to make the discussions public. The Chamber denied this request, reiterating the requirement for a written application.

It is understandable why impeachment documents should be in the case file. This would enable the Judges to consider the document used by a Party to impeach a witness in its entirety when they weigh witness testimony and other pieces of deciding the Case. The requirement for the application be in writing appears to be reasonable, even though it is not expressly stated in the Rules. A written application will afford the Chamber and the Parties sufficient notice of the application prior to the hearing, enabling them to go over the subject document and provide their comment, if needed.

#### **D. Raising Issues before the Chamber**

After stating their position on the need to submit a written application for inclusion of impeachment documents as new evidence, Ianuzzi asked for permission from the Chamber to raise two issues, since they had ample time in the session. The President asked the Counsel what the matters for submission were, stating that the floor was only open on the discussion on the contested documents stated by Judge Lavergne. This prompted Ianuzzi to answer,

There are two points of order: one is a very simple request for clarification and the second, request for information. I was not aware that the floor wasn't always open for any issue. If there was some kind of a script I'm meant to be following, maybe your Honors would like to circulate that. This is a courtroom; there are many issues that come up. Closing the floor, I don't understand that...

After making this statement, he was stopped by the President, who stated, “I don’t think there is any other point for you to raise, Counsel.” However, Ianuzzi persisted in requesting to address his two points. Ianuzzi’s insistence did not appear to have been taken well, as the President exclaimed that counsel cannot just stand on his feet and raise other points not on the agenda. He then demanded that he “clearly state the subject matters” he wished to raise, to enable the Chamber to decide if the topics may be addressed.

Ianuzzi stated that his first point was a request for clarification on the Chamber’s ruling on 2 May 2012 regarding Judge Silvia Cartwright’s alleged gesticulations against the Nuon Chea Defense;<sup>7</sup> and the second was a request for information and follow-up on a request they had already made in court. Apparently finding no merit on the issues Ianuzzi wanted to raise, the

Chamber did not allow him to further elaborate on these points. Instead, the Court adjourned the hearing.

The Chamber undoubtedly has the authority to preside over and control the conduct of the trial. Under Rule 85.1, “the President may exclude any proceedings that unnecessarily delay the trial, and are not conducive to ascertaining the truth.” The cursory dismissal of Ianuzzi’s point of order appears to be an exercise of this Rule. All the same, perhaps it might have been more prudent for the Chamber to hear the matters the Nuon Chea Counsel wanted to raise, to be fully cognizant of the issues and their merits, considering the availability of time during the session. This would also obviate the need for Defense to raise these issues again in future proceedings, and slow the Court’s progress.

#### **IV. TRIAL MANAGEMENT**

Trial Chamber addressed the significant trial management hurdles it faced this week caused by Ieng Sary’s illness and absence from trial. Despite the abbreviated proceedings, the public’s attendance did not waver and the gallery was still packed with observers during the three sessions conducted.

##### **A. Court Attendance**

As previously discussed, due to his illness, the Accused Ieng Sary was absent from the courtroom this week. Nuon Chea and Khieu Samphan were present in court in all of the sessions during this week’s shortened proceedings.

**Counsels’ Attendance.** All the Parties were represented in court this week by both international and national counsels. On Wednesday, the Trial Chamber recognized Ms. Laure Desforges as a Civil Party lawyer.

**Civil Party Attendance.** There were more than 50 Civil Parties from different provinces such as Kampong Thom, Kampot, Kandal, Kampong Cham, Battambang and Pursat who observed the proceedings this week. About 10 Civil Parties were in the courtroom while the rest watched from the main gallery.

**Public Attendance.** On Monday, 300 students and about 10 teachers from Toul Tompong High School, Phnom Penh were in attendance. On Wednesday, 400 students and approximately 20 teachers from Sar Kheng Srey Santhor High School in Kampong Cham Province followed the proceedings. There were also more than 20 Cambodians from different locations such as Battambang, Siem Reap, Phnom Penh, Kampong Chhnang, Kandal, Kampong Thom, and approximately 10 international visitors who observed the hearing. During the first session of Wednesday’s proceedings, the Ambassador of Kuwait to Cambodia was also present.

## B. Time Management

The Chamber responded to the exigencies of this week's hearings with considerable resolve. Apart from adopting Dr. Lim Sivutha's recommendations after requesting him to explain the hospital's Medical Report, it revised the schedule of hearing of evidence to accommodate leng Sary's manifestation that he will not waive his right to be present for the hearing of the testimonies of three witnesses. It also took into account leng Sary's willingness to waive his right if witnesses other than those he identified were called to testify. Taking this into consideration, the Chamber decided revise the schedule accordingly so that proceedings may continue next week, even if the Accused were not well enough to return to the courtroom.

## C. Persistent Translation Difficulties

Notwithstanding this week's short session, crucial translation errors of dates and numbers continued to occur. First, on Monday's session, the English translation for the date of leng Sary's admission in the hospital was heard as "20 May" instead of the correct "17 May," which led to some confusion. There were also other minor differences from the translation of the Medical Report as read out in court than what the released written translation of the document contained. On Wednesday, the translation stated the date "17 April" as the date of hospitalization instead of "17 May." None of these mistranslations, however, was identified and corrected during the course of the proceedings. Finally, there may have also been some uncertainty in the announcement of codes of witnesses who will appear in court next week. Fortunately, lanuzzi sought clarification, and President Nil Nonn stated that TCW-488, or in the alternative, TCW-487 will testify next.

## D. Time Table

DATE	START	MORNING BREAK	LUNCH	AFTERNOON BREAK	RECESS	TOTAL HOURS IN SESSION
Monday 21/5/12	9.26	9.52	-	-	9.52	26 minutes
Wednesday 23/5/12	9.02	9.49-10.45	-	-	11.07	1 hour and 9 minutes
Average number of hours in session:		48 minutes				
Total number of hours this week:		1 hour and 35 minutes				
Total number of hours, days, and weeks at trial:		261 hours and 25 minutes				
		62 TRIAL DAYS OVER 19 WEEKS				

**Unless specified otherwise,**

- the documents cited in this report pertain to *The Case of Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan* (Case No. 002/19-09-2007-ECCC) before the ECCC;
- the quotes are based on the personal notes of the trial monitors during the proceedings; and
- photos are courtesy of the ECCC.

**Glossary of Terms**

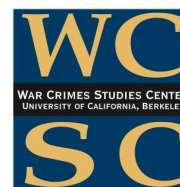
Case 001	<i>The Case of Kaing Guek Eav alias “Duch”</i> (Case No. 001/18-07-2007-ECCC)
Case 002	<i>The Case of Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan</i> (Case No. 002/19-09-2007-ECCC)
CPC	Code of Criminal Procedure of the Kingdom of Cambodia (2007)
CPK	Communist Party of Kampuchea
CPLCL	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)
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



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AIJI TRIAL MONITORING



\* AIJI is a collaborative project between the East-West Center, in Honolulu, and the War Crimes Studies Center, University of California, Berkeley. 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. The Program is funded by the Open Society Foundation, the Foreign Commonwealth Office of the British Embassy in Phnom Penh, and the Embassy of Switzerland in Bangkok.

This issue of **KRT TRIAL MONITOR** was authored by Mary Kristerie A. Baleva, Princess B. Principe, Noyel Ry, Juan Pablo Stein, Penelope Van Tuyl and Alvin Yap, as part of AIJI's KRT Trial Monitoring and Community Outreach Program. KRT TRIAL MONITOR reports on Case 002 are available at <[www.krtmonitor.org](http://www.krtmonitor.org)>, and at the websites of the [East-West Center](http://www.eastwestcenter.org) and the [War Crimes Studies Center](http://www.warcrimesstudiescenter.org).

<sup>1</sup> See Dr. Lim Sivutha. Khmer-Soviet Friendship Hospital. “Report Concerning Mr. IENG Sary’s Health Condition” (20 May 2012) (hereinafter referred to as **MEDICAL REPORT**). E11/70/2.

<sup>2</sup> According to Dr. Lim Sivutha, he completed his education and received his degree in Medicine in 2003. The following year, he completed his specialization on heart diseases in Paris, France. He has been working as a doctor at the Khmer-Soviet Friendship Hospital since 2004.



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<sup>3</sup> See Trial Chamber. "Invitation for Dr. Lim Sivutha, Head of the Emergency Section, Khmer-Soviet Friendship Hospital, to explain before the Trial Chamber at the ECCC's Courtroom in the morning of Wednesday, 23 May 2012" (21 May 2012). E197.

<sup>4</sup> See MEDICAL REPORT.

<sup>5</sup> IR 81 (1) states: "The Accused shall be tried in his or her presence, except as provided in this Rule."

<sup>6</sup> IR 81(5) provides:

Where, due to health reasons or other serious concerns, the Accused cannot attend in person before the Chamber but is otherwise physically and mentally fit to participate, the Chamber may either continue the proceedings in the Accused's absence with his or her consent or, where the Accused's absence reaches a level that causes substantial delay and, where the interests of justice so require, order that the Accused's participation before the Chamber shall be by appropriate audio-visual means. In such cases, the Accused may be defended during the proceedings by his or her lawyer. Where the Accused refuses to choose a lawyer, the Chamber shall order that the accused be represented by a lawyer and request the Defence Support Section to assign him or her a lawyer, from the lists mentioned at Rule 11.

<sup>7</sup> See CASE 002 KRT TRIAL MONITOR. Issue No. 21. Hearing on Evidence Week 16 (30 April, 2-3 May 2012). 9.



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This publication was originally produced pursuant to a project supported by the War Crimes Studies Center (WCSC), which was founded at the University of California, Berkeley in 2000. In 2014, the WCSC re-located to Stanford University and adopted a new name: the WSD Handa Center for Human Rights and International Justice. The Handa Center succeeds and carries on all the work of the WCSC, including all trial monitoring programs, as well as partnerships such as the Asian International Justice Initiative (AIJI).

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