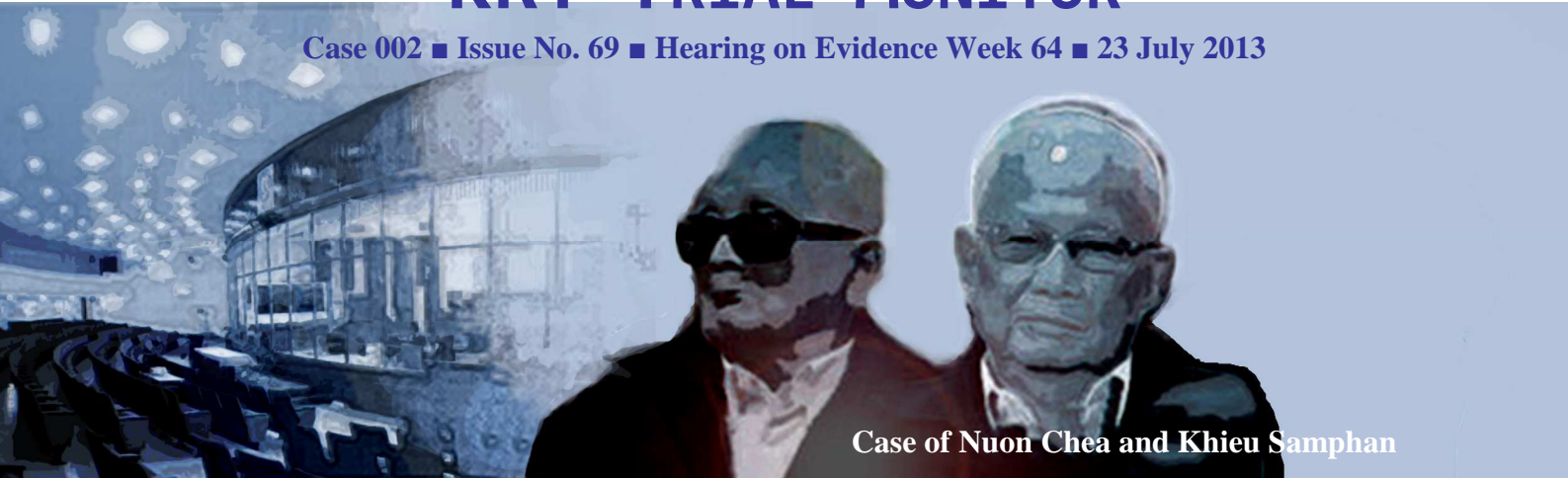


# KRT TRIAL MONITOR

Case 002 ■ Issue No. 69 ■ Hearing on Evidence Week 64 ■ 23 July 2013



Case of Nuon Chea and Khieu Samphan

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

*I just wanted to say that for once we endorse the legal analysis of the Civil Parties, and we agree that the status of a witness and Civil Party cannot be linked to one another.*

-Anta Guissé, Counsel for  
Khieu Samphan

## I. OVERVIEW

On Tuesday this week, the Trial Chamber held a Trial Management Meeting (**TMM**) intended to address a number of outstanding issues before the Chamber and to schedule final deadlines. After hearing oral submissions, the Chamber denied the Prosecution's request to call additional Tuol Po Chrey witnesses, and to recall Civil Party Sar Sarin. The Nuon Chea Defense team's request to summon Rob Lemkin was also rejected. At the conclusion of the hearing, the Chamber directed the Witness and Expert Support Unit (**WESU**) to prepare an official report outlining how Witness Nou Mouk had possession of Ben Kiernan's photograph and interview notes prior to providing his testimony. Regarding the OCP's request for the Chamber to draw adverse inferences against the Co-Accused for selectively exercising their right to remain silent, the Chamber concluded that the issue would be addressed during closing arguments.<sup>1</sup>

President Nil Nonn adjourned the proceedings until 9 October 2013, when the Trial Chamber is scheduled to hear closing arguments from the Parties.<sup>2</sup> On 23 July 2013, the Supreme Court Chamber issued a summary of reasons supporting the decision to dismiss both the OCP and Nuon Chea Defense appeals against the Trial Chamber's written decision on severance. Accordingly, as the Supreme Court declined to expand the scope of Case 002/01, the TMM marked the end of the evidentiary hearings for Case 002/01.<sup>3</sup>

## II. LEGAL AND PROCEDURAL ISSUES

The TMM raised a number of legal and procedural issues, including submissions from the Parties to call additional witnesses and to recall one Civil Party prior to the conclusion of the evidentiary hearing. The Chamber ruled on most of the issues raised, with the exception of whether Case 001 transcripts would be admitted into evidence, and how documents with E/3 numbers would be designated. The Chamber also deferred making a final determination on whether adverse inferences would be drawn against the Co-Accused and requested further information about from WESU regarding allegations that Witness Nou Mouk's testimony had been contaminated.

## **A. OCP's Request to call additional Tuol Po Chrey Witnesses**

The Chamber began discussing the outstanding issues before the court by firstly, turning to the OCP's request to summon five additional witnesses for Tuol Po Chrey. After hearing arguments from all the Parties, the Chamber denied the request on the basis that the additional testimony would be repetitive. CPLCL Pich Ang supported the submission due to the potential for additional witnesses to shed light on the leadership structure of the KR and crimes allegedly committed at Tuol Po Chrey. International counsel for Nuon Chea, Victor Koppe also supported the OCP submission in principle, however, requested that the producer of *One Day at Po Chrey*, Rob Lemkin also be summoned to testify. International Counsel for Khieu Samphan Anta Guissé, stressed that the Chamber would need to close the proceedings at some stage, adding that "[I]f the evidence is inadequate, then we should draw the conclusion that there is not enough evidence." Prosecutor Dale Lysak highlighted the importance of the Witnesses, adding that they could provide first hand accounts of the events at Tuol Po Chrey. Responding to Koppe's request to summon Rob Lemkin, Lysak remarked that the producer seemed to have a "lack of understanding of his own film."

## **B. OCP's Request to Recall Civil Party Sar Sarin**

On Tuesday morning, the CPLCLs found themselves in partial agreement with the Defense teams in relation to an OCP motion to recall Civil Party Sar Sarin. The Civil Party had been called to testify on 29 April 2013, but was excused by the Trial Chamber after he expressed fear for his life and refused to testify unless he was provided personal bodyguards or was relocated to a western country. The Court responded that it did not have jurisdiction to grant the protective measures he sought and the Civil Party was excused. On 18 July 2013, the OCP submitted a request to the Chamber to reconsider its decision not to recall Civil Party Sar Sarin, and to use its power pursuant to IR 35 to compel him to testify.<sup>4</sup> In the afternoon, the Chamber made a final ruling against the OCP motion, reasoning that no new circumstances had arisen to alter the Chamber's initial decision.<sup>5</sup> However, before making its final determination, the Chamber did allow the Parties to present arguments in relation to the submission.

Civil Party lawyer Ven Pov stressed the difference between Civil Parties and witnesses, adding that IR 35 only applies to witnesses. CPLCL Simonneau Fort, who argued that IR 41.5 does not impose an obligation to appear, also emphasized that only witnesses could be compelled to appear before the Court.<sup>6</sup> The Defense teams also supported the CPLCLs distinction between witnesses and Civil Parties. Guissé maintained that as a Civil Party, nothing could be done to compel Sar Sarin to testify if he did not want to. Elaborating on the Civil Party's willingness to testify, CPLCL Pich Ang informed the Court that Sar Sarin wanted to provide information, but was afraid to do so in the absence of the protective measures he sought. Upon learning that the Civil Party was in fact in the gallery observing the proceedings, Judge Lavergne requested Sar Sarin to take the stand. After reiterating the reasons the Court was unable to grant him the protection sought, Judge Lavergne asked the Civil Party if he would be willing to speak nonetheless. For a second time, Sar Sarin told the Court that his testimony would affect neighboring countries, and he was still unwilling to respond without a guarantee for his personal safety. The Prosecution, however, maintained its request to the Chamber, arguing that as a former KR cadre, Sar Sarin was not a typical Civil Party. Moreover, they added that the reference to a "summons" in IR 41 applied generally to anyone, including Civil Parties.<sup>7</sup>

## **C. OCP Request to Draw Adverse Inferences against the Co-Accused**

During the TMM, the Dale Lysak was invited to present arguments in relation to the

Prosecutions' request to the Trial Chamber to draw adverse inferences against Nuon Chea and Khieu Samphan based on their recent refusal to testify. Explaining the request further, Lysak highlighted that in order for adverse inferences to be drawn from silence, the Co-Accused needed to firstly have knowledge of the topics they would be questioned on. Accordingly, the OCP requested two hours to put the questions to the Co-Accused. However, speaking on behalf of the Khieu Samphan team, Guissé maintained that the OCP's request in relation to adverse inferences was a matter for closing arguments. Concurring with the Defense, the Chamber informed the Prosecution that they could argue in favor of the Trial Chamber drawing adverse inferences in their closing briefs, adding that it was unnecessary to directly confront the Co-Accused with topics they had intended to question them on.

#### **D. Request for Confirmation on Documents Admitted into Evidence**

During the TMM, requests from all Parties for the Chamber to confirm which documents had been admitted into evidence were met with an assurance from the Chamber that it would rule on the matter in the future. Exactly when Parties could expect the decision was unclear. However, the Chamber informed the Parties that they would be permitted an additional 25 pages to respond to the material. The OCP informed the Court that, in order to prepare their final submission, they required a ruling on some general topics including whether a large number of witness statements had been admitted into evidence. Both the Defense teams and the Civil Parties voiced their support this motion and requested the Chamber to make the decision as soon as possible. Guissé added that the Khieu Samphan Defense team had noticed a number of translation errors in testimonies, and requested two additional weeks to check the documents. The Chamber did not rule on this request.

#### **E. Request to Summon Rob Lemkin and Additional Witnesses**

The Nuon Chea Defense were also invited to provide oral arguments in support of the request to call Rob Lemkin and 110 additional witnesses in relation to the policy of targeting Lon Nol soldiers and officials. The Chamber rejected the submission, ruling that the Defense had failed to meet the requirements of reasonable diligence pursuant to IR 87.4 and informed the Parties that it would elaborate further on the ruling in a written decision.<sup>8</sup> Koppe had originally raised the issue last week after receiving an email from Rob Lemkin, which stated that the director had information concerning the role of Nuon Chea in the alleged killing of Lon Nol soldiers at Tuol Po Chrey.<sup>9</sup> Koppe argued that the testimony of OCP witnesses concerning the killings had been largely based on hearsay and had proved unreliable during cross-examination. Accordingly, Koppe added that if the Chamber decided to admit the additional 110 statements, then the Defense teams would have an "automatic" right to cross-examine the witnesses. Responding to the Defense arguments, Lysak argued that Koppe had "mischaracterized" the witnesses' testimony and omitted testimony from Al Rockoff, Duch, Philip Short, and Sydney Schanberg. CPLCL Simonneau Fort supported the OCP's position, adding that it was unnecessary to call further witnesses because the Court could refer to pre-trial investigations and test the reliability of the witnesses who had testified on the matter.

#### **F. Request for Information on Nou Mouk's Contact with WESU**

The issue of how Witness Nou Mouk managed to obtain a photo of Ben Kiernan and notes of his interview prior to testifying on 18 June 2013 was also discussed during the TMM.<sup>10</sup> After hearing arguments from the Parties, the Chamber refused to investigate the matter, but ordered WESU to prepare an official report to be presented to the Chamber in two weeks. Anta Guissé had argued that an investigation was necessary to ascertain exactly when Nou Mouk's testimony had been "polluted" and if he had been guided or oriented in any way. Lysak argued that no investigation was necessary, as WESU had merely provided the photograph to

Nou Mouk to ensure they had found the right witness. Moreover, he argued that it was fair that Nou Mouk had been given an opportunity to review his interview.

### **G. Supreme Court Decision on OCP and Nuon Chea Appeals Against Trial Chamber's Second Severance Decision**

On 23 July 2013, the Supreme Court Chamber issued a summary of reasons supporting its decision to dismiss the immediate appeals filed by both the OCP and the Nuon Chea Defense against the Trial Chamber's Second Decision on Severance.<sup>11</sup> The Trial Chamber's decision to sever Case 002 into a number of "mini-trials" has been a recurring issue throughout the course of the proceedings.<sup>12</sup> The current segment, Case 002/01, has been confined to considering crimes against humanity related to the forced movement of the population (phases 1 and 2) in addition to the execution of KR soldiers at Tuol Po Chrey.<sup>13</sup>

Both appeals argued that the Trial Chamber had failed to ensure the representativeness of charges in Case 002/01 and called on the Supreme Court Chamber to expand the scope of the trial. The OCP sought to include charges related to S-21 whereas the Nuon Chea Defense submitted that "reasonable representativeness" required the inclusion of genocide charges, and a cross section of crimes alleged at cooperatives and work sites.

Despite confirming that the Trial Chamber's failure to include a more representative scope of charges in Case 002/01 constituted an error of law and error in the exercise of its discretion, the Supreme Court Chamber found that the severance order "was not so unreasonable as to warrant appellate intervention."<sup>14</sup> Instead, the Supreme Court left the scope of Case 002/01 unchanged, but ordered the Trial Chamber to ensure that Case 002/02 would include charges related to S-21, a worksite, a cooperative, and genocide. The Judges consider that this course of action would remedy the representativeness issue insofar as the combined charges in both Case 002/01 and Case 002/02 would together be reasonably representative of the Indictment. In support of its decision not to expand the scope of Case 002/01, the decision points to the possibility of further delays and concern that the Trial Chamber may be "unprepared to adjudicate" the remaining charges. Moreover, the decision instructs the Office of Administration to "immediately explore the possibility" of bringing in a second panel of judges to enable Case 002/02 to commence as soon as possible following closing submissions. The full written decision is expected to be issued "as soon as possible."

## **III. TRIAL MANAGEMENT**

This week, hearings were held only on Tuesday. The TMM proceeded smoothly, barring a few minor translation difficulties. After hearing arguments from Parties about a number of outstanding issues, the Chamber adjourned for three hours to deliberate. Upon returning at 3.00 pm, President Nil Nonn issued the Chamber's ruling on the various issues and scheduled final deadlines.

### **A. Attendance**

**Accused Attendance:** Nuon Chea continued to observe the proceedings from his holding cells due to his health concerns, while Khieu Samphan was present in the courtroom for every session.

**Civil Party Attendance:** 9 Civil Parties were present in the courtroom and another 38 Civil Parties were presented in the public gallery.

**Parties Attendance:** All Parties were properly represented in the courtroom throughout the week.

### Attendance by the Public:

DATE	MORNING	AFTERNOON
Tuesday 23/07/2013	<ul style="list-style-type: none"><li>▪ 300 students and villagers from Borey Cholsar district and Takeo Province.</li><li>▪ 50 villagers from Phnom Srok District and Banteay Meanchey Province.</li><li>▪ 24 foreign observers.</li></ul>	<ul style="list-style-type: none"><li>▪ 4 foreign observers.</li></ul>

### B. Time Management

The Chamber was observed to manage the final TMM for Case 002/01 in an efficient manner, hearing arguments from Parties in the first two sessions of the day and issuing rulings in the afternoon following a three-hour break. The final 20-minute session was dedicated to informing the Parties about the Chamber's decision on the issues discussed and confirming the schedule for final deadlines.

### C. Translation and Technical Issues

This week, translation problems and minor audio system difficulties were observed at the beginning of the proceedings. At various points throughout the day, translation was excessively delayed prompting both Defense counsel Koppe and Guissé to raise the issue.

### D. Time Table

DATE	MORNING SESSION 1	MORNING SESSION 2	AFTERNOON SESSION 1	AFTERNOON SESSION 2	TOTAL HOURS IN SESSION
Tuesday 23/07/13	9:06-10:34	11:11-12:00	15:07-15:24	None	5 hours and 01 minutes
Average number of hours in session			2 hours 34 minutes		
Total number of hours this week			2 hours 34 minutes		
Total number of hours, days, weeks at trial			635 hours 56 minutes		
207 TRIAL DAYS OVER 63 WEEKS					

**Unless specified otherwise,**

- the documents cited in this report pertain to *The Case of Nuon Chea, Ieng Sary, Ieng Thirith 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; and
- photos are courtesy of the ECCC.

**Glossary of Terms**

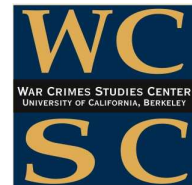
Case 001	<i>The Case of Kaing Guek Eav alias “Duch”</i> (Case No. 001/18-07-2007-ECCC)
Case 002	<i>The Case of Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan</i> (Case No. 002/19-09-2007-ECCC)
CPC	Code of Criminal Procedure of the Kingdom of Cambodia (2007)
CPK	Communist Party of Kampuchea
CPLCL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



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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.

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1 The Trial Chamber has made an oral ruling on the matter on 18 April 2013, which it confirmed again on the 16 July 2013, that the Chamber would take alternation between silence and testimony into account when assessing the credibility of the Co-Accused, however would not determine guilt based solely on an adverse inference. See **CASE 002 KRT TRIAL MONITOR**, Issue 19, Hearing on Evidence Week 14 (18-20 April 2012).

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<sup>2</sup> The Chamber did not officially close the evidentiary hearings due to the fact that the Supreme Court Chamber decision had not yet been released, but announced the scheduling of final deadlines. Parties are required to submit closing statement on 12 September 2013 in any one of court official languages (Khmer, English or French). Closing arguments will be heard on 9 October 2013 to 22 October 2013, including Fridays.

<sup>3</sup> The OCP was granted 225 pages, Defense teams: 125 pages, and CPLCLs: 105 pages for closing briefs.

<sup>4</sup> IR 35 states, "The ECCC may sanction or refer to the appropriate authorities, any person who knowingly and wilfully interferes with the administration of justice, including any person who... b) without just excuse, fails to comply with an order to attend, or produce documents or other evidence before the Co-Investigating Judges or the Chambers."

<sup>5</sup> President Nil Nonn told the Parties that the Chamber did not consider any new circumstances had arisen for Sar Sarin to be recalled, and that the requirements of Rule 35 therefore had not been met.

<sup>6</sup> IR 41.5 states, "At trial stage and beyond, Civil Parties may be summoned through the Civil Party Lead Co-Lawyers."

<sup>7</sup> IR 41.1 states, "A summons is an order to any person to appear before the ECCC. It may be issued to a Suspect, Charged Person or Accused, Civil Party or witness and shall set out the capacity in which the person is being summoned."

<sup>8</sup> IR 87.4 states, "Rules of Evidence.. (4). During the trial, either on its own initiative or at the request of a party, the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth. Any party making such request shall do so by a reasoned submission. The Chamber will determine the merit of any such request in accordance with the criteria set out in Rule 87(3) above. The requesting party must also satisfy the Chamber that the requested testimony or evidence was not available before the opening of the trial."

<sup>9</sup> The Nuon Chea Defense made the request on 15 July 2013 in Court following the conclusion of Stephen Heder's testimony.

<sup>10</sup> **CASE 002 KRT TRIAL MONITOR**. Issue 64. Hearing on Evidence Week 60. (17-20 June 2013).

<sup>11</sup> For the Supreme Court Chamber's 23 July 2013 decision, see Supreme Court Chamber. "Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002- A Summary of Reasons" (23 July 2013). E284/4/7. [hereinafter **Decision on Immediate Appeals**].

<sup>12</sup> For the Supreme Court Chamber's 8 February 2013 decision, see Supreme Court Chamber. "Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01" (8 February 2013). E163/5/1/13. For KRT Monitor coverage, see **CASE 002 KRT TRIAL MONITOR**, Issue 39, Hearing on Evidence Week 34 (8-10 October 2012). For the Trial Chamber's 26 March 2013 oral decision, see **CASE 002 KRT TRIAL MONITOR**, Issue 55, Hearing on Evidence Week 50 (25 & 29 March 2013).

<sup>13</sup> The Trial Chamber's Severance order dated 22 September 2011 lists the charges to be covered in Case 002/01. The scope was subsequently expanded on 8 October 2012 to include both executions taking place in Kampong Tralach Leu District, and executions of former Lon Nol soldiers and officers at Tuol Po Chrey. Following an appeal from the OCP against the scope of charges in Case 002/01, the Supreme Court Chamber on 8 February 2013 invalidated the Trial Chamber's initial severance decision. After having hearing the views of the Parties, the Trial Chamber issued a renewed severance decision on 29 March 2013, maintaining the same scope of the trial in Case 002/01 as it was before the Supreme Court Chamber's invalidation decision.

<sup>14</sup> Decision on Immediate Appeals. Paragraph 9, 3.