

# KRT TRIAL MONITOR

Case 002/02 ■ Issue No. 1 ■ Initial Hearing ■ 30 July 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)

## I. OVERVIEW

On 30 July 2014, the Trial Chamber of the ECCC presided over an Initial Hearing in Case 002/02 against two alleged senior leaders of the Khmer Rouge: Nuon Chea, former Deputy Secretary of the Communist Party of Kampuchea, and Khieu Samphan, former Head of State of Democratic Kampuchea. Following the Court's severance decision, Case 002/02 is the second trial against these Accused.<sup>1</sup>

The scope of Case 002/02 was defined by the Trial Chamber in its decision on additional severance of Case 002 on 4 April 2014.<sup>2</sup> As noted by Trial Chamber President Mr. Nil Nonn, on 29 June 2014, the Supreme Court Chamber upheld the severance, dismissing Khieu Samphan's appeal requesting annulment of the severance order for Case 002/02.<sup>3,4</sup> Following the Supreme Court Chamber's order that, at minimum, charges in Case 002/02 must include genocide, one worksite, one cooperative and the charges related to the S-21 Security Center in Phnom Penh,<sup>5</sup> Case 002/02 specifically addresses charges related to: (i) genocide of the Cham (and related religion persecution in the forced movement of the Cham minority) and genocide of the Vietnamese, (ii) forced marriages and rape nationwide, (iii) internal purges, (iv) S-21; the Kraing Ta Chan Security Centre; the Au Kanseng Security Centre; the Phnom Kraol Security Centre; the 1st January Dam Worksite; the Kampong Chhnang Airport Construction site; the Trapeang Thma Dam Worksite; the Tram Kok Cooperatives, (v) the treatment of Buddhists (limited to Tram Kok Cooperatives), and (vi) political persecution/targeting of former Khmer Republic Officials (implementation limited to Tram Kok Cooperatives, 1st January Dam Worksite, S-21 Security Centre and Kraing Ta Chan Security Centre).

On 11 July 2014, the Court scheduled this preliminary hearing for 30 July 2014 to consider arguments of the parties on a number of legal and procedural matters.

## II. LEGAL AND PROCEDURAL ISSUES

The preliminary hearing closely followed the pre-established agenda, addressing each of the following matters in turn: (1) further specification of civil party reparation awards, (2) status of

preliminary objections and review of legal issues relevant to Case 002/02, and (3) sequencing of the trial proceedings and initial review of potential witnesses, civil parties, and experts.

#### **A. Civil Party Reparations**

International CPLCL Ms. Marie Guiraud, replacing Ms. Elisabeth Simmoneau-Fort, commenced the hearing by outlining specific reparations that the civil parties are seeking. The process of requesting reparations, initiated in Case 002/01, continues with Civil Party Lawyers working in consultation with and on behalf of the various civil parties. Ms. Guiraud acknowledged the indigent status of both Khieu Samphan and Nuon Chea, but stressed that the accused must be made to bear the cost of reparations.

National CPLCL Pich Ang went on to specify proposed reparations within four broad categories: (i) Remembrance and Memorialization; (ii) Rehabilitation; (iii) Documentation and Education; and (iv) Other Reparations Requests.<sup>6</sup> Included in proposed projects were construction of stupas and other facilities conducive to discussions between youth, civil parties, and local authorities; public art depicting living conditions of the civil parties under the Khmer Rouge; the provision of physical and mental health support for elderly and indigent civil parties and their communities; and an “apology session” to release tension between the accused and civil parties.<sup>7</sup>

Unlike in Case 002/01, the reparations sought in Case 002/02 include some ideas aimed at addressing gender-based violence. One proposed project would create an oral history of Cambodian women who suffered sexual violence and discrimination under the regime. Additionally, Mr. Pich Ang suggested establishing a scholarship for children borne out of forced marriages, as well as a project to train civil parties to facilitate discussion and increase awareness of these issues.<sup>8</sup>

There were no objections against the points raised by the Civil Party team. However, Khieu Samphan’s defense team did point out that discussions of moral and collective reparations were premature given that the Judgment in Case 002/01 had not yet been issued as of the date of this preliminary hearing.

#### **B. Status of Preliminary Objections and Review of Legal Issues Relevant to Case 002/02**

All parties had been ordered to give indication by 9 June 2014 of legal issues they intended to raise. Khieu Samphan’s defense was the only party to do so, asking for clarification on the point of Case 002/01 as “general foundation” for subsequent trials. As the defense team had argued during an adversarial hearing in February 2014, Counsel raised concern over beginning a second trial, Case 002/02, when Case 002/01 deliberations were not complete.<sup>9</sup> Ms. Anta Guisse, the International Lawyer for Khieu Samphan, affirmed the defense team’s hope that these issues “can be adjudicated to provide a fair trial.”<sup>10</sup> Overall, she sought clarity on what points specifically will be considered by the Trial Chamber to have been adjudicated or not, raising concerns that evidence may be “brought in through the back door.”<sup>11</sup> Counsel also appeared frustrated by the previous day’s Supreme Court Decision, which had rejected the defense request for annulment of severance of Case 002, and left the team little time to respond.

International Co-Prosecutor Mr. Nicholas Koumjian affirmed that “all issues remain open.” He explained that the Prosecution would not be seeking to use any previously adjudicated facts from Case 002/01. Counsel argued that the Prosecution was proceeding under the

assumption that the upcoming judgment in Case 002/01 would not be definitive for Case 002/02, and all issues will have to be ruled upon again in the next trial.

International defense counsel for Nuon Chea Mr. Victor Koppe remarked that it remains unclear how the defense is to perceive Case 002/02 legally, as he believes the second phase of Case 002 has been framed by the Trial Chamber as both a “trial management tool” and also as a separate trial. He requested a further initial hearing on the issue of “general foundation” following the final Judgment in Case 002/01, scheduled to be delivered 7 August 2014, since it is rumored that the Bench is likely to change in the near future.

Mr. Koumjian gave notice that the Prosecution intends to appeal the Trial Chamber’s decision in Case 002/01 to exclude the third category of Joint Criminal Enterprise (JCE III) from consideration as a form of liability. JCE III would enable the Court to hold the Accused directly criminally liable for acts that were the foreseeable consequence of crimes central to the common criminal purpose the Accused and the other members of the JCE jointly intended.<sup>12</sup> For example, JCE III would allow the Court to assign constructive liability for rapes that, although not specifically intended by the Accused, were the foreseeable consequence of a common criminal plan that included shared intent to murder and force marriages.

### **C. Sequencing of the Trial Proceedings**

Prior to the initial hearing, the Co-Prosecutors had proposed a division of Case 002/02 into five phases: (i) Role of Accused, (ii) Security Centers, (iii) Treatment of Targeted Groups, (iv) Worksites, and (v) Regulation of Marriage.<sup>13</sup>

During the hearing, the Nuon Chea defense challenged the Prosecution’s proposal for the structure of the trial. Mr. Koppe noted that the Nuon Chea defense wished to hear arguments on an additional issue: the existence and character of armed conflict at the time of the alleged crimes (1975 - 1979), as this topic was not among the issues heard in Case 002/01. Mr. Koppe argued this topic should be heard first, as it would “fundamentally affect” other issues to be litigated at trial. Counsel for the Accused submitted that the internal armed conflict cannot be disaggregated from a simultaneously occurring international conflict, and this is a legally relevant matter when it comes to classifying certain acts as one type of a crime or another.<sup>14</sup> Koppe went on to argue that S-21 and the internal purges should be the next issues addressed, as they are essential building blocks for the trial, and will come up frequently in witness testimony. Further diverging from the Prosecution, Nuon Chea’s defense team argued that, following S-21 and the internal purges, they would like to present evidence on the issues of genocide of Vietnamese and Cham, followed by the matter of the airport construction site, and concluding with the role of the Accused and the applicability of JCE liability.

Khieu Samphan’s defense, represented by Ms. Guisse, expressed agreement with Nuon Chea’s team on the first and last topics, but preferred the following order for other issues: cooperatives and work sites, security centers, targeting of specific groups and forced movement, and regulation of marriages.

In response, International Prosecutor Mr. Tarik Abdulhak affirmed the desire to address the role of the Accused first, including the nature of their involvement with internal purges and the oversight of S-21. The Prosecution agreed that this would allow them to deal upfront with issues that would affect the entire case. Prosecution argued that the best order of topics thereafter would be: security centers, targeting of specific groups, cooperatives and worksites, and forced marriages, concluding with expert witnesses and any remaining overview issues. Counsel disagreed with the defense that international armed conflict should

be treated as a separate issue, arguing instead that the topic is pertinent to all other issues under review, and should be discussed throughout the course of proceedings. Mr. Abdulhak noted that the Prosecution bears the burden of proof, and accordingly he requested that the Trial Chamber elect to follow the Prosecution's requested order for topics covered at trial.

The CPLCL voiced support for the Prosecution's preferred order. Disagreeing with the defense proposal, Mr. Pich Ang argued that that exploration of armed conflicts as the first issue would disrupt the timing and flow of proceedings. He concluded by suggesting that testimonies of aging witnesses should be heard first.

#### **D. Trial Schedule**

President Nil Nonn indicated that the Trial Chamber would like to explore beginning evidentiary hearings for Case 002/02 in late September or October 2014. All parties declared their availability to begin trial proceedings at that time, with Nuon Chea's defense reiterating their desire to commence as soon as possible.

#### **E. Initial Review of Potential Civil Parties, Witnesses, and Experts**

Turning to the matter of planned testimony, the President reminded the Chamber that the list submitted by all parties thus far included 88 Civil Parties, 20 expert witnesses and 121 ordinary witnesses, as well as 36 reserve witnesses proposed by the Prosecution. The President sought a possible reduction to these numbers, and asked for input from the Parties on this request. Mr. Koumjian recognized the need to reduce the number of witnesses in principle. However, he emphasized that the Prosecution had already dropped several witnesses in the past few days, and he argued that the remaining Prosecution witnesses were all essential to the case. He argued that the Prosecution's reduced number of 123 witnesses should take 118 trial days to interrogate.

All Parties asserted their belief that the names included on their lists would provide testimony essential to ascertaining the truth. Particularly, the CPLCL urged the Trial Chamber to consider the fact that there are 3,267 Civil Parties, and that the list presented has already been considerably reduced. Ms. Guiraud recognized that while all parties cannot possibly testify, those who do must be representative of all civil parties.

The session drew multiple objections from various parties to the qualifications of specific proposed witnesses. Khieu Samphan's defense objected to three expert witnesses and one reserve expert witness because they had previously worked for organizations researching the Khmer Rouge or the ECCC. However, the court ruled that this is not a disqualifying issue. The Khieu Samphan team also objected to the inclusion of a particular Civil Party, 2TCCP237, as well as a specific expert witness, 2TCE82. They argued that the Civil Party in question had already testified in Case 002/01 and must therefore be excluded from testifying again. They further argued that the expert witness was not qualified as an "expert" and that her work lacks professionalism and clear research methodology. Ms. Guiraud responded to both objections, noting that the Civil Party has very important information and should be allowed to testify. The claims against the expert witness are also unsubstantiated, she said. Ms. Guiraud insisted that the expert witness has both general expertise on forced marriage as well as specific knowledge of the phenomenon in Cambodia – information that would prove critical to the proceedings, according to the CPLCL.

The Khieu Samphan Defense further raised objections towards the expertise and credibility of a witness who would testify on the KR treatment of the Cham and a witness who would testify on statistics specifically related to Vietnamese and Cham victims.



With regard to the overall number of witnesses, the Nuon Chea defense urged the Trial Chamber to include more witnesses from their list, as only four witnesses from both Defense teams had been accepted in Case 002/01. Counsel pointed out that the defense has long sought to call on sitting government officials to serve as witnesses, but they have been unsuccessful thus far.<sup>15</sup>

The refusal of government officials to answer ECCC summonses has long attracted criticism from outside observers. This was a major issue in Case 002/01. Nuon Chea's defense had previously singled out three top government leaders as having "direct complicity" in the alleged crimes and being those with "the most to gain from perpetuating [the] tribunal's simplistic narrative."<sup>16</sup> For three years, the defense had continually pushed for the inclusion of these witnesses, particularly Heng Samrin, President of the National Assembly of Cambodia, in order to seek clarification on perceived discrepancies in the interpretation of testimony from the prosecution. Mr. Koppe asserted that Heng Samrin and other witnesses could confirm that CPK forces did not intend to harm Khmer Republic officials and soldiers when they entered Phnom Penh in April 1975. He further submitted that, if called to testify, Heng Samrin would deny the existence of a kill policy against these representatives.<sup>17</sup> Mr. Koppe stressed that Heng Samrin was the "most important witness"<sup>18</sup> and the only known witness with direct evidence to offer about Nuon Chea's role in the execution of former Lon Nol officials at Tuol Po Chrey. Mr. Koppe implied that if Nuon Chea is guilty, then these people are guilty too: "Their liability rises and falls with our client," he said.<sup>19</sup> Ms. Chea Leang, the National Co-Prosecutor, objected to the inclusion of these witnesses in Case 002/02.

Mr. Koppe took issue with the use of new pseudonyms for three witnesses the defense had previously called in Case 002/01. He added that since the severance of Case 002/02 is recognized as a "trial management tool," these witnesses should be referred to by their names in place of their pseudonyms. After some deliberation, the Trial Chamber agreed to the use of real names for the three controversial figures, known as Samdech Heng Samrin, Chea Sim, and Ouk Bunchoeun during the KR regime. All three currently serve as government officials in Cambodia.

Mr. Suon Visal, National defense Counsel for Nuon Chea, further urged the court to consider calling these three men as witnesses in Case 002/02, despite their current governmental posts: "By virtue of law, everyone is equal before the law."<sup>20</sup> Mr. Suon Visal referenced Article 49 of the constitution, which defines the obligation of a Cambodian citizen to testify.<sup>21</sup>

### **III. TRIAL MANAGEMENT**

Returning to session after a long hiatus, the Trial Chamber did not confront any notable trial management challenges during this preliminary hearing.

#### **A. Attendance**

Nuon Chea observed the proceedings from the holding cell due to his health condition. Khieu Samphan was at the courtroom following the proceeding throughout the three sessions.

**Civil Parties Attendance:** There were a number of civil parties observing the hearing from both in the courtroom and public gallery.

**Parties:** All parties were represented in the courtroom by counsel. Ms. Marie Guiraud was officially appointed by the Trial Chamber to be the International CPLCL after the resignation of Ms. Elisabeth Simonneau Fort. Mr. Yiqiang Liu was also recognized as a new Civil Party Co-Lawyer.

**Attendance by the public:**

DATE	MORNING	AFTERNOON
Wednesday 30/7/2014	<ul style="list-style-type: none"> <li>▪ 250 villagers from Takeo province</li> <li>▪ 150 students from Build Bright University, Phnom Penh</li> <li>▪ 20 monks</li> <li>▪ 15 foreign observers</li> </ul>	<ul style="list-style-type: none"> <li>▪ 470 villagers from Battambang province</li> <li>▪ 50 DC-Cam staff</li> <li>▪ 15 foreign observers</li> </ul>

**B. Time Management**

The Trial Chamber was punctual and managed time well throughout the hearing. The hearing ran longer than some had expected, but still concluded in a timely fashion, at 15:15.

**C. Courtroom Etiquette**

There were no notable issues with heated exchanges between the Parties or the Judges during this hearing. The public gallery was also orderly and quiet.

**D. Translation and Technical Issues**

There were very minor translation issues that caused brief interruptions, including one incident when the Khmer and English translation channels were briefly switched. Ms. Guiraud noted unclear translation of a statement made by her colleague Mr. Ang in regard to the sequencing of proceedings.

**E. Time Table**

DATE	START	BREAK	LUNCH	BREAK	RECESS	TOTAL HOURS
Wednesday 30/7/2014	9.01	10.29 - 10.50	12.15-13.33	---	15.15	4 hours and 35 minutes

**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 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 Jessie Brunner, Francisca Gilmore, Yu Ann Tan, and Penelope Van Tuyl 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.

<sup>1</sup> The Accused are charged with crimes against humanity, genocide, and grave breaches of the Geneva Conventions of 1949, as well as murder, torture, and religious persecution in violation of the 1956 Cambodian Penal Code. The Indictment alleges that the Accused are responsible on account of their participation in a joint

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criminal enterprise for their acts or omissions in Cambodia, between 17 April 1975 and 6 January 1979. The Indictment further alleges that the Accused are liable, additionally or in the alternative, for having planned, instigated, ordered, and/or aided or abetted the various crimes charged and/or that they are culpable by way of command responsibility.

<sup>2</sup> 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 4 April**]

<sup>3</sup> 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.

<sup>4</sup> The SCC stressed that the severed cases are separate and no material finding can be automatically transferred from one case to another.

<sup>5</sup> Decision of Case 002/02 Severance and Scope 4 April.

<sup>6</sup> These are the categories as originally specified. At the initial hearing, the first category was referred to as “Memory and Memorialization” and the final category was not referenced.

<sup>7</sup> From monitors’ notes on proceedings. Official court transcript unavailable at date of publication for this report.

<sup>8</sup> Finally, there was an emphasis on reparations that celebrate the rich, positive history of Cambodia with cultural and artistic activities aimed at developing a more close knit society. Ang also noted his obligation to raise the request for individual reparations.

<sup>9</sup> Trial Chamber. Transcript of Adversarial Hearing. (11 February 2014) E1/239.1 [hereinafter, **Adversarial Hearing Transcript**]. Lines 1-9. Pg. 4.

<sup>10</sup> From monitors’ notes on proceedings. Official court transcript unavailable at date of publication for this report.

<sup>11</sup> From monitors’ notes on proceedings. Official court transcript unavailable at date of publication for this report.

<sup>12</sup> Following a request from the defense teams to make joint criminal enterprise inapplicable to the proceedings of the ECCC, an order from the Co-Investigating Judges dated 8 December 2009 found JCE applicable for international crimes prosecuted at the ECCC. On 12 September 2011, the Trial Chamber reaffirmed the applicability of JCE I and II (the so-called basic and systematic forms of joint criminal enterprise) to Case 002 while finding that JCE III (the so-called extended form of joint criminal enterprise) “did not form part of customary international law and was not a general principle of law at the time relevant to Case 002,” denying the Cp-Prosecutor’s request to re-characterize in the verdict, if relevant, the crimes alleged in the indictment to include JCE III.

<sup>12</sup> Office of Co-Prosecutors. “Co-Prosecutors’ request for the Trial Chamber to consider JCE III as an alternative mode of liability.” (17 June 2011). E100.

<sup>13</sup> The prosecution initially proposed issues to be addressed in the following order: S-21, internal purges, role of the accused/JCE witnesses, Tram Kok Cooperatives and Kraing Ta Chan Security Centre, Au Kanseng Security Centre, Phnom Kraol Security Centre, genocide of Vietnamese, genocide of Cham; 1st January Dam Worksite, Trapeang Thma Dam Worksite, Kampong Chhnang Airport Worksite, forced marriage, and overview/experts. The Lead Co-Lawyers had proposed the following order of trial: S-21, internal purges, role of the accused/JCE, Tram Kok Cooperatives and Kraing Ta Chan Security Centre, treatment of Buddhists, treatment of Vietnamese, treatment of Cham, movement of population (Phase 2) as it relates to the treatment of Cham, 1st January Dam Worksite, Trapeang Thma Dam Worksite, Kampong Chhnang Airport Worksite, Au Kanseng Security Centre, regulation of marriage, and experts.

<sup>14</sup> From monitors’ notes on proceedings. Official court transcript unavailable at date of publication for this report.

<sup>15</sup> For Nuon Chea defense counsel arguments on issues of judicial independence and impartiality, see **CASE 002 KRT TRIAL MONITOR**, Issue 71, Hearing on Closing Statements Week 2 (21 to 25 October 2013).

<sup>16</sup> Trial Chamber. Transcript of Trial Day 219. (22 October 2013) E1/232.1 [hereinafter, **Trial Day 219 Transcript**]. Lines 8-25. Pg. 30.

<sup>17</sup> There is disagreement over the use of the term “scatter” versus “smash,” with the defense arguing that the Khmer Rouge intended only to disperse the soldiers, not to kill them.

<sup>18</sup> Trial Day 219 Transcript. Line 9. Pg. 38.

<sup>19</sup> Trial Day 219 Transcript. Line 17. Pg. 29.

<sup>20</sup> From monitors’ notes on proceedings. Official court transcript unavailable at date of publication for this report.

<sup>21</sup> Constitution of Cambodia. Art. No. XLIX.