

KRT TRIAL MONITOR

Case 002/02 ■ Issue No. 3 ■ Attempts to Resume Hearings ■ 17 and 24 November 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)

"While, indeed, you have the right to be assisted by a lawyer of your own choice, that right is not absolute. Rather, it is necessarily subject to certain limitations where the interests of justice so require."

- President Nil Nonn, speaking to Khieu Samphan¹

I. OVERVIEW

The ECCC Trial Chamber resumed hearings in Case 002/02 this month with the intention of compelling the Defense counsel for both Nuon Chea and Khieu Samphan to participate in proceedings in the trial following a month of postponement since the 17 October opening hearing.² Prior to the Court recess during Cambodia's Water Festival, the Chamber issued a new Scheduling Order, which reduced the remaining number of hearing days before the end of 2014 from fifteen to ten.³ In keeping with this updated schedule, and in response to the justifications for the continued absence of the Nuon Chea Defense team from proceedings, the Special Panel assembled by the ECCC's Judicial Administration Committee also issued a decision on Defense Motions for disqualification of judges. Nuon Chea and his Counsel therefore participated in the 17 November and 24 November hearings, but Khieu Samphan's Defense Counsel continued to boycott, prompting the Trial Chamber to reassess its plan for the remainder of hearings this year.

Following exchanges with Khieu Samphan in the courtroom on 17 November, and in a 21 November Decision, the Chamber announced that it would name Khieu Samphan's current attorneys as "court-appointed counsel," in an attempt to prevent Counsel from continuing to follow the instructions of their client regarding the boycott. In doing so, the Court opined that the wider interests of justice and expeditious proceedings outweigh the specific rights of an Accused to Counsel of her or his choice. In response, the lawyers for Khieu Samphan published a press release just before the start of the 24 November hearing, in which they refused to compromise on their demand that hearings in Case 002/02 resume only after the Case 002/01 appellate filing deadline of 29 December 2014. Facing increasingly limited options and with few scheduled trial dates remaining in the calendar year, the Trial Chamber relented and announced an adjournment of trial hearings until 8 January 2015.

II. LEGAL AND PROCEDURAL ISSUES

The Trial Chamber held two separate hearings in the month of November, each time failing to compel the Defense Counsel for Khieu Samphan back to the courtroom. Although the legal team representing Nuon Chea appeared, Counsel for Khieu Samphan continued to demand postponement of hearings in Case 002/02 until after the 29 December appellate filing deadline in Case 002/01. During the 17 November hearing, the Trial Chamber allowed Khieu Samphan to explain his position but asked him to instruct his lawyers to return to proceedings. When he refused, the Chamber issued a Decision to officially re-classify his counsel as court-appointed lawyers, in a symbolic attempt to reassert authority over the Defense team. In a sternly written press release published immediately prior to the start of the 24 November hearing, however, lawyers Kong Sam Onn, Anta Guissé, and Arthur Vercken refused to compromise. The Defense team prevailed. During a brief morning session, the Trial Chamber announced its decision to postpone further hearings in Case 002/02 until 8 January 2015.

A. First Attempt to Resume Case 002/02 Hearings on 17 November 2014

On November 14th, the Special Panel assembled by the Judicial Administration Committee issued, in brief, its decision on the Defense applications for disqualification of Trial Chamber judges in Case 002/02.⁴ The Special Panel announced that it dismissed the Motions from both the teams for Khieu Samphan and Nuon Chea by a vote of four of five judges, with International Judge, Rowan Downing dissenting. The Decision did not include reasoning for the dismissal or for the dissent, as the announcement was made urgently in order to advance proceedings in Case 002/02.

The announcement responded to the demands of Nuon Chea, with the aim of enticing his counsel back to the courtroom for the resumption of hearings as planned in the Trial Chamber's 3 November Scheduling Order. Nuon Chea and his lawyers were present in the courtroom and ready to participate in the 17 November hearing. Khieu Samphan was present without his lawyers, who had previously informed the Chamber of their unwillingness to participate in the hearing. Khieu Samphan reiterated that substantive proceedings in Case 002/02 should resume only after the 29 December deadline for appellate filings in Case 002/01. The Accused stated that he was in attendance against his will, and that his counsel would continue to miss proceedings in Case 002/02, pursuant to his instructions. Following brief responses from International Co-Prosecutor Nicholas Koumjian and the Civil Parties Lead Co-Lawyer Pich Ang calling for the assignment of *amici curiae* counsel to advance the proceedings, President Nil Nonn announced a recess as the Chamber considered "necessary action" in response to the Defense counsel's absence.⁵

After returning from a four-hour break, the President noted the Khieu Samphan Defense team's absence "with concern," as it violated a direct order of the Chamber.⁶ He then advised Khieu Samphan that his right to a lawyer of his own choosing is not absolute, with limitations especially in relation to the interests of justice and a fair, expeditious proceeding. The President offered four possible courses of action: to reappoint his current lawyers as Court-appointed counsel; to appoint new lawyers not of his choosing as Court-appointed counsel; a combination of both; or, other measures to be determined.⁷ Khieu Samphan reiterated his inability to simultaneously proceed with the Case 002/01 appeal and the 002/02 substantive hearings, and he repeatedly emphasized his fair trial rights. Nonetheless, the President asked Khieu Samphan to inform the Chamber, through the Defense Support Section, by the afternoon of Tuesday 18 November whether he would withdraw his instructions to his counsel to not participate in proceedings in Case 002/02. Depending on his response, the Chamber would consider further steps to "secure the fair and expeditious proceedings in Case 002/02."⁸ The President noted that the misconduct of the Defense lawyers would be examined separately, and he adjourned proceedings for the week.

B. Decision on the Appointment of Court-appointed Counsels for Khieu Samphan

In his mandated response to the Trial Chamber, Khieu Samphan refused to alter his instructions to his lawyers concerning their participation in Case 002/02 proceedings. On Friday, 21 November 2014, the Chamber therefore announced a Decision to proceed with assigning Court-appointed Defense counsel to Khieu Samphan, in an attempt to advance proceedings.⁹ In the Decision, the Chamber noted that its 3 November Scheduling Order sought to accommodate the Defense team with a reduction in the number of hearing days during the appellate filing period. The Decision refers to previous findings of the Trial Chamber, which denied the Khieu Samphan team's repeated motions for postponement of Case 002/02.¹⁰ It also criticizes Counsel for Khieu Samphan for violating Court orders and "disrespecting" Chamber decisions on the basis of client instructions.¹¹ The Decision finds that Cambodian procedural rules do not directly address the issues facing the Chamber, so, according to Article 33 new of the ECCC Law, the decision relies upon procedural guidance from international cases.¹² The Chamber noted that other Courts have found discretion to appoint counsel to assist an Accused obstructing proceedings by exercising his right to choose his own Defense counsel.¹³ The Chamber specifically cites Decisions made at the International Criminal Tribunal for the Former Yugoslavia (*Milosevic, Seselj, and Karadzic*)¹⁴ and at the Special Court for Sierra Leone (*Norman*).¹⁵

In its 21 November Decision, the Chamber repeatedly references "the interests of justice," emphasizing the need for "fair and expeditious proceeding" over particular rights of the Accused.¹⁶ However, the Chamber also aims to provide "the least intrusive restriction of the Accused's right to choose counsel," therefore the Court agrees to maintain the present Defense Counsel, but to re-categorize them as official "Court Appointed Counsel," and thereby direct them explicitly against adhering to the Accused's instructions to boycott proceedings.¹⁷ The Decision then delineates the counsel's obligations as Court appointees, specifically instructing them to participate fully in Case 002/02, attend all hearings, and ignore any instructions from the client not to appear in court.¹⁸ The Decision closes with the Chamber announcing its intention to proceed on 24 November 2014 should Counsel continue to miss proceedings.¹⁹

C. Press Release from Counsels for Khieu Samphan

Minutes before the start of the 24 November hearing, the Defense team for Khieu Samphan sent out a press release in which the Defense Counsel condemned the Chamber's 21 November decision. The lawyers called for Case 002/02 hearings to resume after the appellate filing of 29 December, which they argued "would only delay the proceedings for a few weeks."²⁰ Counsel alleged that the present situation was caused by "the blindness and inaction of the Chamber," which previously dismissed Defense motions for a delay of Case 002/02. Furthermore, with regard to the Chamber's efforts to reduce the number of Case 002/02 hearing days from three days to two days per week for the remainder of 2014 and to reinforce the resources of the Defense Support Section, the lawyers criticized the Chamber's concessions as "a smokescreen to hide from the public." The press release emphasized that the Chamber continued to place "unacceptable pressure" on both the Accused and his team during the appellate filing period for case 002/01.

The Defense team also re-asserted its belief that the Chamber was applying "a double standard" in this situation. The press release cites the Court's decision not to commence the second trial in February 2014, as proposed by the OCP, due to the simultaneous responsibility of the Chamber to write the Judgment in Case 002/01.²¹ The press release contrasts the Judges' previous decision to avoid simultaneous work with their "requirement" that Khieu Samphan and his lawyers do just that, which the Defense asserts "jeopardizes" their client's appeal in Case 002/01.

The Defense statement employs direct, highly critical language to make its point, stating, for example, that, “The judges of the Chamber have only scorn and contempt for the work of the Defense.” The release also claims that, “No international court has ever behaved this way.” In response to the Chamber’s 21 November decision to re-classify them as Court-appointed counsel, the Defense team for Khieu Samphan rejects the appointment, asserting that no Court can dictate a lawyer’s professional conduct, as long as she or he complies with the law. Citing their client’s right to appeal a judgment to a higher court, the lawyers reiterated that Khieu Samphan’s first priority is the Case 002/01 appeal. In the press release, the lawyers reaffirm their agreement with their client’s decision. If they did not, they argue it would be their duty to resign, but they clarify that the Chamber’s Opinion has no role in that decision-making process.

D. Second Attempt to Resume Case 002/02 Hearings on 24 November 2014

The 24 November hearing in Case 002/02 lasted a mere ten minutes, even though a Civil Party was present and prepared to testify. Following announcement from the Greffier that the lawyers for Khieu Samphan again were absent from the courtroom, President Nil Nonn acknowledged the Chamber’s receipt of a letter from the Defense team. The President noted that Counsel raised the same argument as before, continuing to refuse to participate in the trial until the appellate filing deadline had passed in Case 002/01. The President also stated that “everything the Chamber has done to this point” was an attempt to compel Counsel back to the courtroom for substantive proceedings in Case 002/02 to resume, and he reiterated the Chamber’s determination that Khieu Samphan’s lawyers have had both adequate time and resources to prepare for both the appeal and the new trial. The Chamber also noted that the two international Defense lawyers were in Paris at the time, “when their attendance should be at this case, in Phnom Penh.” Although the Chamber had noted that a fair and expeditious trial outweighs the right of the Accused to choose his lawyer, the President also recognized that it is “clear” that the Khieu Samphan Defense team will not participate in proceedings before the end of 2014. The President acknowledged that any replacement of the Defense team would result in “substantial delay” in the trial, as a search for new lawyers familiar enough with the case file would necessitate months of adjournment and training.

Therefore, the President found that the Chamber “has no reasonable alternative but to adjourn the case until January 2015.” He then announced the cancellation of all remaining trial hearings for 2014, warned that the Chamber will consider referring the misconduct of the Defense lawyers to “the appropriate professional body,” and adjourned the trial in Case 002/02 until 8 January 2015.

III. TRIAL MANAGEMENT

The brief hearing sessions on 17 and 24 November 2014 saw the Trial Chamber’s attempts to resolve the continued absence of Defense Counsel for Khieu Samphan. Due to its limited options, the Chamber decided to adjourn proceedings in Case 002/02 until 8 January 2015.

A. Attendance

Over the course of two weeks, both Nuon Chea and Khieu Samphan were present in the courtroom, but Khieu Samphan was unaccompanied by his attorneys, due to their refusal to participate in Case 002/02 hearings at this time.

Civil Parties Attendance: In a notable change from past weeks, fewer than 15 Civil Parties observed the proceedings on these two days of trial hearings. On 24 November 2014, the first Civil Party witness (TCCP-296) was in attendance, in order to testify before the Trial Chamber, but she was sent home due to the adjournment of proceedings until January 2015.

Parties: All parties were represented in the courtroom, excluding Khieu Samphan, with his Counsel continuing to boycott Case 002/02 in defiance of the Chamber's instructions to attend.

Attendance by the public:

DATE	MORNING	AFTERNOON
Monday 17/11/2014	<ul style="list-style-type: none">▪ 5 villagers from Baray District, Kampong Thom Province▪ 345 students from Khmer New Generation Institute, Phnom Penh▪ 5 monks▪ 20 foreign observers	<ul style="list-style-type: none">▪ 5 villagers from Baray District, Kampong Thom Province▪ 7 foreign observers
Monday 24/11/2014	<ul style="list-style-type: none">▪ Approximately 490 villagers from Kraw Kor District, Pursat Province▪ 23 students from Royal University of Law and Economics▪ 10 monks▪ 3 foreign observers	<i>No proceedings</i>

B. Time Management

The Trial Chamber attempted to manage the proceedings effectively, even with the absence of any Counsel for Khieu Samphan. During the 17 November hearing, President Nil Nonn sought to give all Parties the opportunity to comment on the continued absence of Defense Counsel, and he also allowed the Accused to repeatedly explain his stance. Following this exchange of opinions, the President adjourned the morning hearing so the Chamber could discuss and determine "necessary action." However, when the hearing resumed over four hours later, on the afternoon of 17 November, the afternoon session lasted for approximately 16 minutes, calling into question why the lengthy morning recess was necessary to determine that proceedings would have to adjourn for the week.

C. Courtroom Etiquette

A few instances of improper courtroom etiquette occurred throughout the trial proceedings over these two weeks. During the 17 November hearing, for example, President Nil Nonn gave the floor to the International Co-Prosecutor, who wished to reiterate OCP's submission for the appointment of *amici curiae* counsel, but the President failed to allow Khieu Samphan to respond when he raised his hand several times. That afternoon, the President repeatedly ignored Khieu Samphan as he attempted to explain his concerns, and adjourned the proceedings early.

D. Translation and Technical Issues

As the proceedings over these weeks were brief, only a few minor translation and technical issues occurred. The most noticeable took place during the 24 November hearing as President Nil Nonn was announcing the adjournment of proceedings until January 2015. The audio channel for English translation was cut, and the President had to restate a portion of his announcement.

E. Time Table

DATE	START	BREAK	LUNCH	BREAK	RECESS	TOTAL HOURS
Monday 17/11/2014	9:17	---	09:38-13:42	---	13:58	37 minutes
Monday 24/11/2014	9:08	---	9:18	---	---	10 minutes
Average number of hours in session				47 minutes		
Total number of hours these two weeks				47 minutes		
Total number of hours, day, weeks at trial				4 hours, 30 minutes		
THREE TRIAL DAYS OVER THREE WEEKS						

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

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

¹ Trial Chamber. Transcript of Trial Proceedings (17 November 2014). E1/245.1. [hereinafter, **17 NOVEMBER TRANSCRIPT**], p.11, lines 14-17.

² For more on the 17 October 2014 hearing on opening statements and the announcement of the Defense Teams' walkout, see CASE 002 KRT TRIAL MONITOR, Issue 2, Opening Statements (21 October 2014). For the legal questions and precedents relevant to the unwillingness of Defense Teams to proceed with Case 002/02, see CASE 002 KRT TRIAL MONITOR, Special Report, Defense Teams' Boycott (31 October 2014),

³ Trial Chamber. "Scheduling Order for Evidentiary Proceedings" (3 November 2014). E322.

⁴ Special Panel of the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia. "Decision on Applications for the Disqualification of Trial Chamber Judges" (14 November 2014). E314/12.

⁵ 17 NOVEMBER TRANSCRIPT, p.10, line 4.

⁶ 17 NOVEMBER TRANSCRIPT, p.10, lines 20-22.

⁷ 17 NOVEMBER TRANSCRIPT, p.11, lines 24-25; p.12, lines 1-8.

⁸ 17 NOVEMBER TRANSCRIPT, p.16, lines 1-2.

⁹ Trial Chamber. "Decision on the Appointment of Court appointed Counsels for KHIEU Samphan" (21 November 2014). E320/2. [hereinafter, **TRIAL CHAMBER APPOINTMENT DECISION**].

¹⁰ TRIAL CHAMBER APPOINTMENT DECISION, paras. 2-3. For one such decision, see Trial Chamber. "Decision on KHIEU Samphan's Request to Postpone the commencement of Case 002/02" 19 September 2014). E314/5, para 7; TRIAL CHAMBER APPOINTMENT DECISION, paras.12, 15.

¹¹ TRIAL CHAMBER APPOINTMENT DECISION, para 14.

¹² Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, as amended (2004), Article 33 new. The first paragraph of this article reads, "The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level."

¹³ TRIAL CHAMBER APPOINTMENT DECISION, para 15. For more information on the relevant cases in international jurisprudence, see CASE 002 KRT TRIAL MONITOR, Special Report, Defense Teams' Boycott (31 October 2014).

¹⁴ *Milosevic v. Prosecutor*, IT-02-54-AR73.7. ICTY Appeals Chamber. "Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel" (1 November 2004); *Prosecutor v. Slobodan Milosevic*, IT-01-54-T. ICTY Trial Chamber. "Reasons for Decision on Assignment of Defence Counsel" (22 September 2004); *Prosecutor v. Vojislav Seselj*, IT-03-67-PT. ICTY Trial Chamber. "Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence" (9 May 2003); *Prosecutor v. Karadzic*, IT-95-5/18-T. ICTY Trial Chamber. "Decision on Appointment of Counsel and Order on Further Trial Proceedings" (5 November 2009).

¹⁵ *Prosecutor v. Sam Hinga Norman et al.*, SCSL-04-14-T. SCSL Trial Chamber. "Consequential Order on Assignment and Role of Standby Counsel" (14 June 2004). For more on the case, see U.C. Berkeley War Crimes Studies Center, Sierra Leone Trial Monitoring Project, "Weekly Update Number 1" (23 June 2004), p.1. For summary of Mr. Koumjian's statements, which raised the *Norman* case, on 17 October 2014, see CASE 002/02 KRT TRIAL MONITOR, Issue 2, Opening Statements (17 October 2014), III.C.

¹⁶ TRIAL CHAMBER APPOINTMENT DECISION, paras. 12, 15, 17.

¹⁷ TRIAL CHAMBER APPOINTMENT DECISION, para 17.

¹⁸ TRIAL CHAMBER APPOINTMENT DECISION, para 18.

¹⁹ TRIAL CHAMBER APPOINTMENT DECISION, p.7.

²⁰ Defense Team for Khieu Samphan. "Press Release" (24 November 2014).

²¹ The OCP proposed this timeline for Case 002/02's commencement in the following submission: Office of the Co-Prosecutors. "Co-Prosecutors' Submission Regarding the Scope of Case 002/02 and Trial Schedule with Annex A" (5 December 2013). E301/2. para. 2. International counsel for Khieu Samphan, Ms. Anta Guissé, has previously referred to the judges' stated desire not to work simultaneously on the Case 002/01 Judgment and in Case 002/02 hearings. At the 18 October 2014 Defense Teams' Press Conference, she read aloud the specific statements of Judge Jean-Marc Lavergne at the 12 December 2013 trial management meeting which dealt with Case 002/02's scheduling. Judge Lavergne's statements are found here: Trial Chamber. Transcript of Trial Management Meeting. (12 December 2014) E1/238.2. Lines 9-25; 1-3. pp.103-4. For more on that press conference, see CASE 002 KRT TRIAL MONITOR, Issue 2, Opening Statements (21 October 2014), III.D.