

KRT TRIAL MONITOR

Case 002/01 ■ Issue 3 ■ Second Set of Appeal Hearings ■ 16-18 February 2016



Case of Nuon Chea and Khieu Samphan

A project of East-West Center and the WSD HANNA Center for Human Rights and International Justice at Stanford University (previously known as the UC Berkeley War Crimes Studies Center)

“Convicting Khieu Samphan was the goal. He had to be convicted before he passed. That was the objective. That is what we gather from the reading of the Trial Chamber Judgment”

- International Lawyer for Khieu Samphan,
Anta Guissé

I. OVERVIEW

This week the Supreme Court Chamber (**SCC**) convened for the first time in 2016 to preside over a second round of hearings of Parties' appeals against the Judgment in Case 002/01, issued on 7 August 2014.¹ In the Judgment the Trial Chamber found Nuon Chea and Khieu Samphan guilty of crimes against humanity comprising murder, inhumane acts, forced transfers, forced disappearances and attacks on human dignity in the territory of Cambodia between 17 April 1975 and the end 1977. Both men were sentenced to life in prison. Each Defense Team is appealing the Trial Chamber's decision, covering a total of 370 grounds based on errors in both fact and law.² The Office of the Co-Prosecutors (**OCP**) has also appealed the Judgment, claiming the Chamber erred in law by not applying the extended form of joint criminal enterprise (**JCE**) when assessing the guilt of the Accused.³

A first round of appeal hearings was held in July 2015.⁴ This week's hearings were originally scheduled to take place in November 2015, however had to be delayed after the Defense Team for Nuon Chea boycotted proceedings.⁵ Nuon Chea's national co-lawyer was present in the courtroom this week, thereby allowing proceedings to continue, however the Nuon Chea Defense maintained the position they announced in court last November that they would not "participate in these proceedings any further and not ... respond to any kind of questions,"⁶ and international Counsel for Nuon Chea was absent throughout the week. The hundreds of grounds of appeal from the written filings were grouped into six thematic sessions for oral argument and were covered over three days of proceedings. All Parties were provided time to respond to arguments made by the other side.⁷ At the end of proceedings Khieu Samphan made a statement, refuting the charges and stating that he "never wanted to agree to any policy that is against the Cambodian people." Nuon Chea maintained his right to remain silent. The SCC is expected to make a final ruling on the Appeals by the middle of 2016.⁸

II. BACKGROUND OF APPEAL HEARINGS

The appeals process in Case 002/01 has been fraught since the issuance of the Judgment. Just as proceedings were set to commence in Case 002/02 in October 2014, both Defense Teams announced a boycott, arguing that it was impossible for them to effectively represent the Accused in Case 002/02 while simultaneously preparing appeal briefs for Case 002/01.⁹ This ultimately led the Trial Chamber to adjourn the proceedings in Case 002/02 until 8 January 2015, pending the submission of appeals briefs.¹⁰ A first round of appeal hearings was held in July 2015, however the second round, scheduled for November 2015, was postponed after Nuon Chea instructed his lawyers not to participate. This week's hearings will be the last before the SCC makes a final judgment in the case.

A. October 2014 Boycott

The Nuon Chea Defense Counsel's refusal to participate in the proceedings this week is certainly not without precedent. On 17 October 2014, at the beginning of the first scheduled week of evidentiary hearings in Case 002/02, both the Khieu Samphan and Nuon Chea Defense Teams announced their intention to boycott proceedings. Several grounds were provided for the boycott. The Khieu Samphan Defense Team argued they lacked sufficient resources to proceed at that time, while both teams sought a stay of proceedings pending review of an application for disqualification of the judges who issued the Judgment in Case 002/01 from presiding over Case 002/02.¹¹ In both instances, the Defense argued that their boycott was justified because Counsels' obligation to adhere to their client's instructions superseded any directive in the ECCC Internal Rules. On 24 October 2014 both Defense Teams received official warnings for misconduct concerning their boycott.¹²

The Trial Chamber held two trial management meetings in October 2014 and attempted to recommence trial hearings twice during November, however while the Defense team for Nuon Chea chose to be present, the Khieu Samphan Team continued to refuse. In response, on 21 November 2014 the Trial Chamber made a decision to assign standby Counsel for Khieu Samphan in order to continue proceedings "in the interests of justice."¹³ The Trial Chamber could therefore finally resume hearings on 8 January 2015 with the presence of Standby Counsel Ms. Touch Vorleak and Mr. Calvin Saunders. Both the Khieu Samphan and Nuon Chea Defense Teams expressed strong objections to the presence of the standby counselors.¹⁴ However the Lead Co-Lawyers for Civil Parties (**LCLCPs**) and OCP argued that the presence of standby counsel was necessary and justifiable given the need for an expeditious trial. Both standby counselors continue to attend proceedings in Case 002/02.

B. First Round of Appeal Hearings

After all Parties filed appeal briefs in November and December 2014, the SCC held an initial round of oral appeal hearings from 2 to 6 July 2015, at which time the Appeals Chamber heard testimony from three new witnesses over the course of three days.¹⁵ The witness testimony focused on Communist Party of Kampuchea (**CPK**) policies to target former Khmer Republic soldiers and officials following the 17 April 1975. Throughout the testimony, the Parties raised a number of familiar legal and procedural issues that have been contentious during the trial stage of Case 002/01, as well as Case 002/02.¹⁶ The hearings also elicited a significant amount of new evidence from these witnesses pertaining to whether there were standing orders not to harm the Lon Nol soldiers after Phnom Penh's liberation, as well as whether certain factions alleged to have existed within the CPK. Objections stemming from the severance order and confusion over the scope of Case 002/01 were also raised throughout the course of the hearings.¹⁷ Overall the hearings proceeded smoothly and all Parties participated actively.

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

The Supreme Court Chamber attempted to hear the second round of appeal hearings on Tuesday 17 November, however, ultimately adjourned the proceedings due to the absence of co-counsels for Nuon Chea. Although Son Arun, was present in Court during the morning session, he soon left the Courtroom after Nuon Chea, read a pre-prepared statement in which he called the Judgment in Case 002/01 a “shameful failure” and said that the ECCC was being used to “tell a tale approved by the government before the tribunal was established.”¹⁸ Nuon Chea announced that, due to numerous perceived injustices, the outcome of the appeal hearings were now irrelevant to him. Although he stopped short of withdrawing his appeal entirely, he instructed his lawyers not to take part in proceedings and announced his intention to leave the courtroom.¹⁹ Son Arun argued that Article 58 of the Cambodian Bar Association requires lawyers to listen to and follow the wishes of their clients as a matter of priority, and that therefore he was obliged to abide by Nuon Chea’s request.²⁰ Co-counsel Victor Koppe was not present at all on the day.

When Court resumed after morning recess, Son Arun was no longer present in the Chamber, leading to a debate by all remaining Parties over how to proceed with the appeal hearings. International Co-Prosecutor Nicholas Koumjian pointed out that Nuon Chea had been summoned to face serious criminal allegations, and not “because of an invitation to something like a cocktail party that you can decline to attend.”²¹ He voiced his disagreement with Son Arun’s interpretation of the Bar Association Rules, but said that the OCP took the position that appeal hearings could continue as scheduled even without the participation of the Nuon Chea Defense, since they had not been denied any opportunity to be present.

Ultimately the SCC concluded that Nuon Chea did not have the right to order his lawyers to boycott proceedings. The Court determined that the presence of either Victor Koppe or Son Arun was mandatory, so they adjourned proceedings temporarily.²² The Court also asked the Defense Support Section (**DSS**) to begin arranging standby counsel for Nuon Chea. The Court made clear that the standby counsel’s role would be to take over from the current Defense team should they “fail to be present in the courtroom when hearings resume, or absent themselves in the course of the hearings.”²³ Counsel Phat Pouv Seang was chosen to fulfill this role on 16 December 2015, after which the SCC rescheduled the appeal hearings for 16 to 18 February 2016.²⁴ Mr. Koppe has since reiterated his position in writing that “the ECCC is indeed and always will be a complete farce.” He also made a point of adding that he had provided advance notice via email that his team would not be participating in the appeals process.²⁵

III. GROUNDS OF APPEAL

Following his December appointment, standby counsel for Nuon Chea was present in the courtroom throughout appeals hearing this week. However due to the presence of Son Arun in all sessions, standby counsel never addressed the Court on behalf of Nuon Chea. The topics for appeal were grouped into six thematic sessions, to which all Parties had the right to respond. Because the Nuon Chea Defense did not make any oral arguments this week, the subject matter of the hearings almost exclusively reflected the views of Khieu Samphan and his legal team.

A. Defense Grounds relating to Fairness of Proceedings and Constitutionality of Internal Rules²⁶

The Defense Team for Khieu Samphan opened the first session of oral arguments with their position that Case 002/01 lacked procedural fairness in general. They questioned the constitutionality of the ECCC’s Internal Rules, and International Defense Counsel for Khieu Samphan, Anta Guissé, highlighted the inadequacies of the Trial Chamber Judgment in its application of both law and fact, making a number of comparisons to the Tokyo Tribunal, which took place at the end of the Second World War. She argued that there was insufficient

impartiality reflected in the Judgment, labeling the verdict “cosmetic justice.” Ms. Guissé argued that her client had not been afforded the presumption of innocence, and claimed the Trial Chamber had distorted and manipulated the evidence in order to satisfy a conviction; a denial of Khieu Samphan’s fair trial rights.

The Defense complained particularly about the Chamber’s arbitrary use of facts outside the scope of Case 002/01. The Trial Chamber limited the scope of case 002/01 to the DK regime, however according to the Defense, the Trial Chamber often relied on facts outside the temporal scope of the first part of Case 002/01. Further arguments submitted by the Defense for Khieu Samphan included claims of a double standard in addressing witnesses, which emphasized an inability of Cambodian Judges to listen to evidence, and what the Defense argued was an overzealous approach by Judge Jean-Marc Lavergne to the questioning of specific witnesses.²⁷ The Defense also raised the comments made by Judge Silvia Cartwright in her speech at the Aspen Institute in November 2013 as an example of judicial bias.²⁸

In their response, the OCP refuted Defense Team claims that the Trial Chamber was biased; arguing that the few specific examples given to support their claim were insufficient to warrant such a determination. National Co-Prosecutor Chea Leang argued that while the Accused are entitled to a fair trial, the Chamber that presided over the *Tadić* appeal at the ICTY found that a fair trial need not have been a perfect one.²⁹ Chea Leang submitted that, subject to the fundamental principles of a civil law system, a judge has the power to admit any such evidence that they believe gives weight to ascertaining the truth and act within their capacity to examine witnesses. Accordingly, counsel argued, the Trial Chamber’s selective consideration of evidence outside the temporal scope of the case did not amount to “distortion” or “manipulation.” International Deputy Co-Prosecutor, William Smith, argued that the severance in Case 002 was just; drawing attention to the fact that despite the Khieu Samphan Team’s current argument, they were in fact the only team that did not originally appeal the severance order by the Trial Chamber.

B. Grounds relating to the Trial Chamber’s Overall Approach to Evidence

The afternoon sessions of 16 February focused on submissions about the Trial Chamber’s overall use of evidence in the final Judgment. These submissions were largely concerned with the probative value assigned to Civil Party testimony and written statements of individuals who never appeared in Court. The Defense submitted that the Trial Chamber erred in limiting the Defense from conducting their own investigation, which biased the evidence available to Parties. Defense further argued that by allowing Witnesses and Civil Parties to review their interviews prior to giving live testimony, the Trial Chamber had limited the efficacy of in-person questioning and undermined the purpose of the examination process, which is to test credibility. The Khieu Samphan Defense argued that the Trial Chamber had consistently prevented the Defense from asking questions pertaining to Witness or Civil Party reliability. They further submitted that there was a disproportionate reliance on out-of-court statements and that the Trial Chamber had erred in the standard it applied when assessing the probative value of such statements, which had never been tested in court. The argument is that Civil Party testimony that ought to have been considered more narrowly as a statement of suffering was relied upon much more broadly for findings of fact to support convictions against the Accused. The Defense argued that the Trial Chamber gave unwarranted probative value to this type of evidence.

International Co-Lawyer for Khieu Samphan, Anta Guissé, argued that when a Court assesses evidence in a criminal trial proceeding, the bedrock principle is that doubt must always benefit the accused, but within the Trial Chamber the contrary has been observed. She argued that the Judgment repeatedly drew unsupported, broadly consequential inferences from evidence. For example, with respect to the Court’s findings on population movements, Ms. Guissé argued that the Trial Chamber had reached conclusions about her client’s knowledge of population movements after 17 April 1975 based only on written statements concerning population

movements prior to 1975.³⁰ Additionally, the Defense submitted Expert Witness testimony was used improperly, and argued that the Trial Chamber applied a double standard in assessing this evidence not once but in a series of instances, particularly with regard to the Accused's participation in education sessions, drawing inferences that benefit the Prosecution.³¹

The CPLCL, Marie Guiraud, refuted the Defense's claim that too much weight was granted to either Civil Party testimony or applications. She argued that all Parties had been aware that these were to be used as evidence and asserted that Trial Chamber used Civil Party evidence only as corroboration, along with other forms of evidence, to establish factual findings.³² Ms. Guiraud also made the point that although Khieu Samphan had alleged errors of law and fact with regard to the admissibility and probative value of Civil Party testimony, none of the Accused identified with particularity any factual finding of guilt that was the result of an overreliance of Civil Party evidence.

The Co-Prosecutors followed up by arguing that Civil Party evidence is admissible in relation to crimes that go to the heart of the trial, and the OCP maintains that such evidence was correctly weighed and used by the Chamber when looking at the case in its totality. William Smith argued that under 20% of the overall evidence was based on written statements that were admitted without cross-examination. He pointed out that this meant a vast majority of the evidence came from other sources: statements of the Accused, CPK official documents, telegrams, and live testimony from ordinary witnesses. He also argued the Defense had had ample opportunity to challenge this evidence. He concluded, by stating that the Trial Chamber had reasoned its conclusions in the Judgment and therefore its use of evidence was sound. He argued that, "you will lose the forest for the trees if you deem just one piece of evidence is beyond reasonable doubt," – concluding that looking at the totality of evidence demonstrated the guilt of the Accused and the validity of the Trial Judgment.

C. Grounds relating to Specific Crimes of which the Accused were Convicted

The next thematic session addressed grounds of appeal concerning particular crimes of which the Accused were convicted; specifically, crimes against humanity including forced transfer, crimes of political persecution, extermination, and murder. The Defense for Khieu Samphan argued that the Trial Chamber had erred both in fact and in law by relying on facts outside the scope of the severance order to assess guilt, whilst also distorting facts in order to characterize the *actus reus* of crimes against humanity.³³ Defense for Khieu Samphan submitted that the Court was obliged to apply customary international law as it stood at the time of the DK regime. In the 1970s, the Defense argued, customary international law required a nexus between the crimes alleged and an armed conflict, and further required that the crimes alleged were part of a state policy. These elements, Defense maintained, were part of the "chapeau elements" of crimes against humanity. Accordingly, Defense argued, the Trial Chamber erred in law when it found that that no nexus to armed conflict was necessary to convict their client. The Defense went on to argue that the Trial Chamber was inconsistent in its findings about whether this nexus was relevant or indeed existed in 1975 and that the Chamber should have resolved any doubts to the benefit to the Accused. The Defense also objected to the Trial Chamber's characterization of Lon Nol soldiers as "soldiers *hors combat*" or "surrendered soldiers" after 17 April 1975. Ms. Guisse argued in court that it is only logical to talk about *hors combat* soldiers in an ongoing wartime context, and that after the fall of Phnom Penh, this group became part of the civilian population. She said this distinction is "muddled" in the Judgment, which says this group was targeted because they were *hors combat* soldiers, yet identifies the conflict as having ended.³⁴

Regarding the charges of extermination, the Defense argued that the Trial Chamber erred when it assessed *mens rea* for this crime without any consideration for recklessness. Anta Guisse submitted that the Trial Chamber had lowered the *mens rea* threshold in order to convict her client, which was a grave breach of his fair trial rights. In addition, the Defense claimed the Trial Chamber erred in its factual findings when establishing the crime of murder.³⁵ The Defense maintained that

the Trial Chamber distorted evidence in order to find corroboration for alleged killings at Tuol Po Chrey, as there were no eyewitnesses from the event who were closer than a few kilometers away from the scene.

The OCP countered that customary international law did not require a nexus to armed conflict in order to establish crimes against humanity. The Prosecution cited various jurisprudence that a nexus to conflict was far from being required, and argued that such a nexus has no “logical and legal basis” as international law. They argued that the Defense relied too heavily on jurisprudence from Nuremberg. Prosecutor Nicholas Koumjian argued that the tribunal at Nuremberg had to define the scope of its trials narrowly due to the sheer magnitude of crimes committed in the Second World War, and this accounted for the idiosyncratic requirement in that particular institution that there be a nexus to armed conflict. Regarding the Defense’s second argument, about Lon Nol soldiers being considered ‘soldiers *hor combat*’, the OCP argued that there was no provision in international law that stated crimes against humanity must be committed against civilians only. The former soldiers could form part of this broader civilian group, OCP submitted, even if they had been targeted specifically for their positions in the former regime. Finally, in response to the Defense argument that there was insufficient evidence of individual murders to warrant a conviction for extermination, the Prosecution cited the *Limaj* case from the ICTY to support their finding that not every individual fact needs to be proven beyond a reasonable doubt, as long as the totality of evidence is beyond a reasonable doubt.³⁶

D. Grounds relating to the Individual Criminal Responsibility of the Accused

The principal convictions entered against Nuon Chea and Khieu Samphan were based on Joint Criminal Enterprise (JCE), a complex constructive liability theory. JCE was first named and expressly defined at the ICTY, by the *Tadić* Appeals Judgment in 1999.³⁷ *Tadić* articulated three different forms of JCE—basic (JCE I), systematic (JCE II), and extended (JCE III). Because the crimes alleged at the ECCC predate the *Tadić* case, the ECCC had to consider whether JCE was even a recognized form of liability under customary international law at the time of the alleged crimes. Both Defense teams argued throughout the trial, and on appeal, that JCE is not legitimately applied to the cases before the ECCC because it was not a recognized form of criminal liability in the 1970s, and therefore violates the principle of *nullum crimen sine lege*.

In the Judgment, the Trial Chamber dismissed this argument with respect to the first two forms of JCE, adopting the same reasoning given by the Pre-Trial Chamber in an earlier decision on the matter: “Considering the senior positions of the Accused and the customary nature of JCE I and JCE II by 1975, the Chamber finds that this mode of liability was foreseeable and accessible to the Accused.”³⁸ During the appeals hearing Defense challenged this conclusion about the foreseeability of the crime. Anta Guissé argued that in 1975 Khieu Samphan would have been unable to foresee anything other than being charged under the dualist legal system of Cambodia, and was not aware of international legal norms, particularly not the concept of joint criminal enterprise.

Defense also challenged the legitimacy of convictions entered under this form of liability on the grounds that the specific common purpose alleged for the JCE was not criminal. The basic form of JCE liability requires a finding that a plurality of persons shared a common purpose, “which amounts to or involves the commission of a crime,” and “an accused must have participated in the common purpose, making a significant, but not necessarily indispensable, contribution.”³⁹ As the Judgment acknowledged, “With respect to the *mens rea* for JCE I, an accused must intend to participate in the common purpose and this intent must be shared with the other JCE participants.”⁴⁰

In the Judgment, the Trial Chamber found that the majority of actors within the CPK intended to defend the party from internal and external forces “by any means necessary,” and that even though membership in the Party was not inherently criminal, the targeting and forced movement policies the Party pursued in order to achieve its goal of radical agrarianism were criminal.

The Chamber found that both Nuon Chea and Khieu Samphan planned, instigated, aided and abetted the commission of crimes, and in Nuon Chea's case the Chamber found he had also ordered these crimes. During the appeal hearing, Defense challenged the convictions entered under JCE, arguing that the Trial Chamber never identified evidence that Khieu Samphan cooperated with the DK regime with the purpose of committing a crime; arguing that the only common purpose he had pursued was social revolution, which was not a criminal goal. According to Defense counsel, the Case 002/01 Judgment lowered the threshold of *mens rea* necessary to convict under JCE.

The OCP countered that all top leaders of the CPK, including both Accused, were aware that criminal means would be used in order to achieve their radical socialist objectives. Prosecutor Nicholas Koumjian specifically argued that Khieu Samphan made "considerable contributions" to the development of KR policy, and his prominent public role also contributed to the perceived legitimacy of the DK regime, particularly referring to the "seven traitors" speech he made on the radio shortly before the fall of Phnom Penh.⁴¹ He argued that the secretive nature of the regime meant that Khieu Samphan's role as a spokesperson for the regime was even more important. The OCP argued that the Accused had the foreknowledge, contemporaneous knowledge of crimes being committed and did nothing to prevent them occurring, thus the Trial Chamber's conviction should stand.

E. Grounds relating to the Sentence

The final Defense appeal ground covered by the SCC this week related to sentencing. In the Judgment, the Trial Chamber sentenced both Noun Chea and Khieu Samphan to life imprisonment. It is the position of the Khieu Samphan team that their client should be acquitted, however in the event that this is not possible, the Defense Team are seeking a reduced sentence for their client. Khieu Samphan's lawyers argued that the Trial Chamber neglected to place the Accused at the center of the sentencing decision. In the view of the Defense, the needs of the public took precedence. On appeal, they argued that their client should not receive the maximum sentence because this was not reflective on his actual role and position held in the CPK at the time of the perpetration of the crimes. Anta Guissé noted that the Trial Chamber had been unable to determine conclusively that Khieu Samphan had authority over anyone during Khmer Rouge Regime, and argued that his position had been symbolic. She made the observation that "the irony of history is such that the person who was the symbolic representative of DK has also turned out to be the symbolic convict." Ms. Guissé also argued the Chamber had committed an error in finding her client's level of education an aggravating factor, and also called the Chamber's attention to the fact that several character witnesses had spoken about Khieu Samphan's pleasant character and lack of power, saying they never heard him say anything negative about anyone.⁴²

National Prosecutor Chea Leang responded that life imprisonment is wholly appropriate for both Accused. She argued that the grave crimes for which Khieu Samphan and Noun Chea had been convicted involved more victims than ever previously seen in any other international criminal case. Addressing Defense claims that Khieu Samphan was merely a figurehead of the DK regime, Chea Leang responded that: "it is meritless that Khieu Samphan argued that he played a limited role. He is simply evading his criminal responsibility." Dale Lysak pointed to the forced population movement at Oudong in April 1974 (of which there is evidence that Khieu Samphan was aware) as an example to prove the important role the Accused played in the CPK and establish the likelihood that he understood the consequences of population movements that took place after 1975. The OCP also argued that the Trial Chamber was right to find the Accused's level of education to be an aggravating rather than mitigating factor in sentencing, because it showed that Khieu Samphan was an intelligent, university-educated individual who was entirely conscious of the acts he committed and their likely consequences. The Prosecutor urged the SCC to affirm the sentence of life imprisonment.

F. Appeal of the Co-Prosecutors

Having claimed far fewer grounds for appeal than the Defense, the OCP submissions were essentially limited to the argument that the Trial Chamber erred in law by not applying the extended form of JCE when assessing the guilt of the Accused.⁴³ JCE III was excluded from consideration on the grounds that this extended form of the liability theory was not part of customary international law at the time of the DK regime. At trial, and on appeal, the OCP argued that it was “incongruous” to find that JCE I and II conformed to the principle of *nullum crimen sin lege*, but JCE III did not, because all three modes judge the conduct of an Accused. The Prosecution urged the Court not to be overly exacting in its definition of what it means for a law to have existed. Counsel argued, “it would be extremely problematic to preclude criminal liability in international law unless the offence or mode of liability was shown to have existed with the same precise definition at the time of the offence.”⁴⁴ The OCP challenged the argument that Khieu Samphan was not in a position to foresee the deaths of millions as part of the criminal enterprise. They argued that the democratic centralism with which the CPK was organized meant that those in the Center had control over the activities of those lower in rank than them, and as the figurehead of Democratic Kampuchea, Khieu Samphan had access to knowledge that would have allowed him to foresee the effect of the DK policies.

The Defense Team for Khieu Samphan challenged the OCP submissions on two main grounds—one procedural, one substantive. First, Defense argued that the OCP had no standing to submit an appeal on modes of liability and therefore the appeal brief should be dismissed by the SCC. National Defense Co-Counsel argued “the co-prosecutors were not harmed by the Judgment and therefore cannot appeal Case 002/01.” Counsel further submitted that the SCC lacked authority to introduce new constitutive elements to the Judgment.” The OCP countered by arguing that the SCC has the power to admit legal errors of general significance, even if those errors do not invalidate the entire judgment, in keeping with Internal Rule 105(3).⁴⁵ Rule 105(1.b) also explicitly grants the OCP permission to appeal the Trial Chamber’s judgment. Responding substantively to the merits of the OCP appeal, the Defense argued that JCE III was not in fact a part of customary international law in the 1970s, and thus convicting Khieu Samphan under this mode of liability would violate the principle of *nullum crimen sin lege*. They argued that JCE III was only recognized after 15 July 1999, and therefore was absolutely not foreseeable to Khieu Samphan in April 1975.

G. Khieu Samphan’s Address to the Chamber

In the last session on Thursday 18 February, both Accused were provided the opportunity to address the Chamber in person. Nuon Chea waived this right, however Khieu Samphan chose to speak. He said he believed that the Trial Chamber had prejudged his guilt and therefore failed to conduct a fair trial. According to Khieu Samphan, in its determination to convict him, the Court distorted evidence in a manner that benefitted the Prosecution. He submitted that, as an intellectual, he never wanted anything but social justice for Cambodia. He stated that at the time of the KR he merely submitted proposals to establish economic independence, and lessen the divide between rich and poor; stating that he had never intended anyone to die.

Khieu Samphan asserted his fundamental issue with the Trial Chambers Judgment; that in defining the policies of the CPK, the Trial Chamber followed the same approach as that of the OCP and Co-Investigating Judges and only looked at what happened in the bases; failing to find out if such implementation at the local level was consistent with the original directions that were established. He further stated that he believed the revolutionary ideology was abused by people who clung to their feudal power. In his closing statement he said that he could not find words to alleviate the suffering of the Cambodian people and said that he never wanted, intended nor participated in any plan during the DK regime to commit crimes or contribute to the commission of crimes. He closed by asking the SCC to examine the evidence objectively, without prejudice, acknowledging that there was societal pressure to convict him.

IV. LEGAL AND PROCEDURAL ISSUES

Unlike previous appeal hearings, this week was not interrupted with many procedural issues outside the substantive legal arguments of the appeal hearing itself. As in November, Nuon Chea's international Defense Counsel, Victor Koppe, was absent from the courtroom and did not, according to the Chamber, provide advance notice. This incident has precedent, which will be discussed below.

A. Victor Koppe's Absence and Nuon Chea's Defense Team Refusal to Participate

As explained in Section II, Nuon Chea announced in November that he had instructed his lawyers not to participate in the appeal proceedings in Case 002/01, although he did not wish to withdraw his appeal in itself. In response, the SCC adjourned the hearings, re-scheduled them for three months later and appointed standby counsel. This week Mr. Koppe was again absent without providing a reason to the Trial Chamber, although Son Arun's presence in the courtroom meant that proceedings could continue without delay, and without the need for the standby counsel to step in.

V. TRIAL MANAGEMENT

This week the SCC managed to complete the scheduled three days of appeal hearings, even though they did not always keep strictly to time. The decision of the Nuon Chea Defense Team not to participate gave all Parties more flexibility in terms of how long they could take to make oral arguments.

A. Attendance

Nuon Chea waived his right to be present in the courtroom due to his poor health and also waived his right to make oral submissions before the SCC during the Appeal hearing. Unlike Nuon Chea, Khieu Samphan was present in all sessions of the proceedings and made a final oral submission before the SCC before hearings concluded.

Judge Attendance: All judges of Supreme Court Chamber were present in the courtroom throughout the proceedings.

Civil Parties Attendance: There were 14 Civil Parties observed the Appeal proceedings inside the courtroom in each day of the proceedings this week.

Parties: All Parties were properly represented in the courtroom with the exception of Nuon Chea, whose international Defense Counsel, Victor Koppe, was absent without providing a reason. Therefore, Mr. Phat Pouv Seang was present as court-appointed standby counsel for Nuon Chea, however his active participation was ultimately not required.

Attendance by the public:

DATE	MORNING	AFTERNOON
Tuesday 16/02/2016	<ul style="list-style-type: none">▪ Approximately 70 villagers from Kampong Tralach District, Kampong Chhnang Province▪ 10 foreign observers	<ul style="list-style-type: none">▪ Approximately 100 villagers from Kampong Tralach District, Kampong Chhnang Province▪ Five foreign observers

Wednesday 17/02/2016	<ul style="list-style-type: none"> Approximately 350 students from Bak Tuk High School and Zaman University, Phnom Penh 15 Foreign observers 	<ul style="list-style-type: none"> Approximately 60 villagers from Baray District, Kampong Thom Province Five foreign observers
Thursday 18/02/2016	<ul style="list-style-type: none"> Approximately 200 students from Bak Tuk High School and National University of Management, Phnom Penh 18 foreign observers 	<ul style="list-style-type: none"> Approximately 200 villagers from Ou Reang Ov District, Tboung Khmum Province Two foreign observers

B. Time Management

This week the SCC managed to complete the three scheduled days of appeal hearings, largely as a result of the lack of participation by the Nuon Chea Defense Team. Although no formal adjustments to the schedule were made; the decision of the Nuon Chea Defense Team not to participate gave all Parties more flexibility in terms of how long they could take to make oral arguments. The SCC monitored Parties' time and monitors observed the Chamber to be flexible and fair in ensuring a balance of views was heard.

C. Courtroom Etiquette

There were no noteworthy breaches of courtroom etiquette during proceedings this week.

D. Translation and Technical Issues

There were no translation problems that impacted proceedings this week. A few minor technical glitches on audio translation channels caused brief interruptions, however in general the proceedings ran smoothly and effectively.

E. Time Table

DATE	START	MORNING BREAK	LUNCH	AFTERNOON BREAK	RECESS	TOTAL HOURS
Tuesday 16/02/2016	9:03	10:13 – 10:39	11:30 – 13:32	14:25 – 14:55	15:52	4 hours 52 minutes
Wednesday 17/02/2016	9:01	10:40 – 11:08	11:38 – 13:31	14:24 – 14:45	15:44	4 hours 1 minute
Thursday 18/02/2016	9:03	10:23 – 10:48	11:34 – 13:30	–	15:11	3 hours 47 minutes
Average number of hours in session					4 hours and 13 minutes	
Total number of hours this week					12 hours and 40 minutes	
Total number of hours, day, weeks at trial					32 hours and 7 minutes	
7 TRIAL DAYS OVER 3 WEEKS						

*This report was authored by Borakmony Chea, Melanie Hyde, Caitlin McCaffrie, Elizabeth Orr, Thi Son, Lina Tay and Penelope van Tuyl as part of the KRT Trial Monitoring and Community Outreach Program. KRT Trial Monitor is a collaborative project between the East-West Center, in Honolulu, and the WSD HANNA Center for Human Rights and International Justice at Stanford University (previously known as the UC Berkeley War Crimes Studies Center). Since 2003, the two Centers have been collaborating on projects relating to the establishment of justice initiatives and capacity-building programs in the human rights sector in Southeast Asia.



Unless specified otherwise,

- the documents cited in this report pertain to the *Case of Nuon Chea and Khieu Samphan* before the ECCC;
- the quotes are based on the personal notes of the trial monitors during the proceedings;
- the figures in the *Public Attendance* section of the report are only approximations made By AIJI staff; and
- photos are courtesy of the ECCC.

Glossary of Terms

Case001	<i>The Case of Kaing Guek Eavalias “Duch”</i> (CaseNo.001/18-07-2007-ECCC)
Case002	<i>The Case of Nuon Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan</i> (CaseNo.002/19-09-2007-ECCC)
CPC	Code of Criminal Procedure of the Kingdom of Cambodia (2007)
CPK	Communist Party of Kampuchea
CPLCL	Civil Party Lead Co-Lawyer
DK	Democratic Kampuchea
ECCC	Extraordinary Chambers in the Courts of Cambodia (also referred to as the Khmer Rouge Tribunal or “KRT”)
ECCC Law	Law on the Establishment of the ECCC, as amended (2004)
ERN	Evidence Reference Number (the page number of each piece of documentary evidence in the Case File)
FUNK	National United Front of Kampuchea
GRUNK	Royal Government of National Union of Kampuchea
ICC	International Criminal Court
IR	Internal Rules of the ECCC Rev.8 (2011)
KR	Khmer Rouge
OCIJ	Office of the Co-Investigating Judges
OCP	Office of the Co-Prosecutors of the ECCC
VSS	Victims Support Section

¹ Trial Chamber. "Case 002/01 Judgment" (7 August 2014). E313. [hereinafter **THE JUDGMENT**]

² The Defense for Nuon Chea submitted 223 grounds for appeal, see Nuon Chea Defense Team, "Nuon Chea's Appeal against the Judgment in Case 002/01" (29 December 2014) F16 [hereinafter **NUON CHEA APPEAL**] Khieu Samphan's Defense Team submitted 148 grounds for appeal, see Khieu Samphan Defense Team, "Mr. Khieu Samphan's Defence Appeal Brief Against the Judgment in Case 002/01" (29 December 2014) F17 [hereinafter **KHIEU SAMPHAN APPEAL**]

³ Office of the Co-Prosecutors "Co-Prosecutors' Appeal Against the Judgment of the Trial Chamber in Case 002/01 (28 November 2014) F11 hereinafter **OCP APPEAL**]

⁴ CASE 002/01 APPEALS KRT TRIAL MONITOR, Issue 1, First Set of Appeal Hearings (2-6 July 2015). [hereinafter **APPEALS ISSUE 1**]

⁵ CASE 002/01 APPEALS KRT TRIAL MONITOR, Issue 2, Second Set of Appeal Hearings (17 November 2015).

⁶ Nuon Chea himself outlined this position in a speech he gave at the November Appeal Hearings, see Supreme Court Chamber, "Transcript of Appeal Proceedings" (17 November 2015). F1/4.1. Lines 23-25. [hereinafter **NOVEMBER APPEAL TRANSCRIPT**]

⁷ Supreme Court Chamber. "Order Scheduling the Resumption of the Appeal Hearing" (23 December 2015) F30/17, including Annex A – Final Timetable for the Hearing (23 December 2015) F30/17.1.

⁸ ECCC Completion Plan revision 7, 11 January 2016.

⁹ CASE 002/02 KRT TRIAL MONITOR, Issue 2, Opening Statements (17 October 2014). For more information on the boycott see CASE 002/02 KRT TRIAL MONITOR, Special Report: Defense Teams' Boycott (31 October 2014).

¹⁰ CASE 002/02 KRT TRIAL MONITOR, Issue 3, Attempts to Resume Hearing (17 and 24 November 2014).

¹¹ Trial Chamber. "Transcript of Proceedings" (17 October 2014). E1/242.1. p.73-76, 81.

¹² Trial Chamber. "Warning to counsel for NUON Chea and KHIEU Samphan" (24 October 2014). E320. At a public hearing on 21 January 2015 the President of the Trial Chamber announced that Khieu Samphan's Defense Counsel's actions amounted to misconduct and referred KONG Sam Onn and Anta GUISSE to the Cambodian and Paris Bar Associations respectively via a memorandum on 26 January 2015. The Cambodian Bar Association cleared KONG Sam Onn of misconduct on 13 July 2015, see Bar Association of the Kingdom of Cambodia, 'Review of Counsel KONG Sam Onn's Conduct in Proceedings of Case 002/02' (13 July 2015) E330/1/1, and on 17 November 2015 Anta GUISSE was cleared by the Paris Bar Association: see Paris Bar Council Disciplinary Board, The Prosecuting Authority v Anta GUISSE, Decision of 17 November 2015. E330/3.2. Regarding the Trial Chamber's referral of Counsel Victor Koppe to the Amsterdam Bar Association, see Trial Chamber. "Possible Misconduct of a Lawyer Admitted to your Bar Association – Mr. Victor Koppe" (11 December 2015) E378, and Trial Chamber. "Addendum – Possible Misconduct of a Lawyer Admitted to your Bar Association – Mr. Victor Koppe" (19 February 2016) E378/1.

¹³ Trial Chamber. "Decision on the Appointment of Court appointed Counsels for Khieu Samphan" (21 November 2014). E320/2.

¹⁴ Parties particularly objected to the positioning of the standby counsel in the front row of the defense bench, displacing some of the Nuon Chea Defense Team.

¹⁵ These witnesses were SAO Van (SCW-4), SAM Sithy (SCW-3) and TOAT Thoeun (SCW-5) as per the decision of: Supreme Court Chamber "Decision on Part of Nuon Chea's Requests to Call Witnesses on Appeal" (29 May 2015) F2/5. For a summary of their testimony see KRT APPEALS ISSUE 1. SAO Van also testified recently in Case 002/01 under the pseudonym (2-TCW-989), see

¹⁶ These subjects have been covered extensively in past KRT Monitor reports. See e.g. APPEALS ISSUE 1

¹⁷ A Severance Order in Case 002 was first released by the Trial Chamber on 22 September 2011, pursuant to Internal Rule 89 *ter*. In October 2011 the OCP requested amendments to the Severance, some of which were adopted by the Trial Chamber in its Impugned Decision on 8 October 2012. However the severance order was ruled invalid by the SCC on 8 February 2013 on the grounds that it lacked clarity and reasoning. A Trial Chamber Decision on Additional Severance of Case 002/02 and Scope of Case 002/02 was released on 4 April 2014. This lack of clarity around the precise scope of Cases 002/01 and 002/02 have led to repeated issues.

¹⁸ **NOVEMBER APPEAL TRANSCRIPT** Lines 17-18 p. 10 and Line 5, p. 11. The main points Nuon Chea raised to support his claim that the Judgment was biased against him centered around a failure to call witnesses requested by his Defense Team. In particular these witnesses were HENG Samrin, the current President of the National Assembly, and filmmakers Robert LEMIN and THET Sambath. The issue of summonsing HENG Samrin, Robert LEMIN and THET Sambath has been a recurring one at the ECCC. Most recently the Supreme Court Chamber rendered a Decision on 21 October 2015, finding that they would not summons HENG Samrin as a witness nor admit the majority of transcripts from footage taken the filmmakers. Supreme Court Chamber. "Disposition Decision on Pending Requests for Additional Evidence on Appeal and Related Matters" (21 October 2015). F 2/9.

¹⁹ Speaking on behalf of the Civil Parties, Marie GUIRAUD reminded the participants that Rule 81 of the Internal Rules obliges the Accused to be physically present in the courtroom during proceedings except on medical grounds, and that they would only agree to continue if the Accused was present either in the courtroom or the holding cell. The OCP also made arguments to this affect. Subsequently, Nuon Chea announced he was not medically fit to sit in the courtroom and the Bench agreed to his waiver, allowing him to follow proceedings from the holding cell as he usually does.

²⁰ Bar Association of the Kingdom of Cambodia. "Law on the Bar" (23 June 1995) p. 10. [Hereinafter **LAW ON THE BAR**]

²¹ NOVEMBER APPEAL TRANSCRIPT, Lines 20-21, p. 22.

²² This Decision was based on Article 301 of the Cambodian Code of Criminal Procedure, concerning the mandates the assistance of counsel in certain criminal cases and Internal Rule 81(7), which explicitly addresses the circumstance of a lawyer absent without justification. The SCC made clear that it considered the absence of Victor Koppe and Son Arun constituted misconduct, and noted that it could possibly lead to disciplinary sanctions.

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

²⁴ PHAT Pouw Seang was the former national co-lawyer for IENG Thirith, whose death on 22 August 2015 led to the closing of her case. See Defense Support Section (DSS). "Memorandum: Second Update on the Supreme Court Chamber's Instruction to Appoint Stan-by Counsel for Mr. Nuon Chea" (16 December 2015) F30/15/12.

²⁵ Nuon Chea Defence Team. "Victor Koppe's Response to the Supreme Court Chamber's Request for Explanations for his Absence from the Appeal Hearing" (23 November 2015).

²⁶ It was the Nuon Chea Defense Team which argued that the Internal Rules are unconstitutional. Due to their decision not to participate in proceedings, this line of argument was not heard this week.

²⁷ The Defense specifically referred to witnesses PHY Phuon and SO Socheat, the wife of Khieu Samphan. The Defense submit that only PHY Phuon's testimony was relied upon in order to corroborate Khieu Samphan's participation in two CPK general meetings which addressed Khmer Rouge policies and orders to evacuate Phnom Penh. The Defense argued that there were multiple occasions on which President NIL Nonn interrupted proceedings to remind the defense not to intimidate the witness, however this was not the same for SO Socheat who they argued received considerable scrutiny during questioning by Judge Jean-Marc LAVERGNE. The Co-Prosecutors maintain that it is within the Judge's capacity to question a witness in whatever manner they deem appropriate. For a summary of PHY Phuon's testimony see CASE 002/01 KRT TRIAL MONITOR, Issue 29, Hearings on Evidence Week 24 (23-26 July 2012) and for SO Socheat see CASE 002/01 KRT TRIAL MONITOR, Issue 63, Hearings on Evidence Week 58 (10-14 June 2013).

²⁸ Judge CARTWRIGHT spoke frankly about problems she felt faced the ECCC, some of which the Defense believe speak to judicial misconduct, or at least bias. The OCP and Trial Chamber has consistently argued that, although the Judge made these comments prior to the issuance of the Judgment, all hearings in Case 002/01 had concluded and thus she was entitled to express an opinion.

²⁹ Chea Leang cited precedent in the *Tadić* Appeal Judgment at the ICTY (IT-94-1) (27 February 2001).

³⁰ 'The chamber did so in order to set aside the modes of responsibility in order to rule that he knew what had happened before and so we conclude that he agreed to and participated to the JCE prior to 1975. There is no evidence to show he really participated in the decision-making process, but they took this 'evidence' from the prior period.'

³¹ Paragraphs 544-545 of Defense for Khieu Samphan Appeal Brief argue that there are 16 Written Records of Interview which corroborate the claim that Khieu Samphan only spoke at two Standing Committee meetings, and in these cases only presented a report, yet the Trial Chamber relies on this to say that Khieu Samphan "actively participated" in some meetings of the Standing Committee.

³² For further discussion of this debate over the probative value of Civil Party evidence in prior filings, see: Office of the Co-Prosecutors. "Co-Prosecutors' Rule 92 Submission Regarding Civil Party Testimony" (21 February 2013) E267, and the response: Defense for Khieu Samphan. "Reply to Co-Prosecutors' Rule 92 Submission Regarding Civil Party Testimony" (4 March 2013) E267/1.

³³ *Actus reus* is a Latin term referring to the physical act of a crime. In contrast, *mens rea* refers to the intent to commit a crime, separate to its actual commitment.

³⁴ In court the Defense maintained that a group could only be defined as "soldiers hors combat" if an armed conflict was in progress according to the Geneva Convention understanding of the term. To further support her argument, Defense Counsel cited *Martić* Appeal Judgment at the ICTY (IT-95-11), 8 October 2008, paras 311 and 323.

³⁵ There is no jurisprudence to sustain a crime of extermination without a prior crime of murder, and the Khieu Samphan Defense argued that the Trial Chamber had failed to draw substantial connection between the evidence and the Accused in relation to the crimes, specifically that the chamber never established that the 7 famous traitors were ever shot to death.

³⁶ *Limaj et al.* Appeal Judgment at the ICTY (IT-03-66) (27 September 2007).

³⁷ Judgment, *Prosecutor v. Tadić* (IT-94-1-A), ICTY Appeals Chamber, 15 July 1999, paras 185-234.

³⁸ **THE JUDGMENT**, Paragraph 691. As the 2010 Pre-Trial Chamber decision on JCE referenced in the corresponding footnote to this paragraph explained: "In light of its finding that JCE I and II are forms of responsibility that were recognized in customary international law since the post-World War II international instruments and international military case law as discussed above, as well as its earlier finding that these forms of liability have an underpinning in the Cambodian law concept of co-authorship applicable at the time, the Pre-Trial Chamber has no doubt that liability based on common purpose, design or plan was sufficiently accessible and foreseeable to the defendants." See Pre-Trial Chamber, "Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)," (20 May 2010), paragraph 72.

³⁹ **THE JUDGMENT**, Paragraph 692-693.

⁴⁰ **THE JUDGMENT**, Paragraph 694.

⁴¹ The “seven traitors” announced in the speech were LON Nol, SIRIK Matak, IN Tam, Sosthène FERNANDEZ, LONG Boret, CHENG Heng and SON Ngoc Thanh. KHIEU Samphan Defense responded to this argument by saying that the speech was made on behalf of King NORODOM Sihanouk, as the head of the FUNK and GRUNK movements, and so was not reflective of the views of KHIEU Samphan himself. Anta GUISSE also justified the orders by saying that “there is no armed conflict where victors do not celebrate.”

⁴² The Khieu Samphan Defense Team made these arguments in their Appeals Brief paragraphs 653-658.

⁴³ OCP APPEAL.

⁴⁴ OCP APPEAL para 17.

⁴⁵ Internal Rule 105(3) states: “A party wishing to appeal a judgment shall file a notice of appeal setting forth the grounds. The notice shall, in respect of each ground of appeal, specify the alleged errors of law invalidating the decision and alleged errors of fact which occasioned a miscarriage of justice. The Appellant shall subsequently file an appeal brief setting out the arguments and authorities in support of each of the grounds, on accordance with the requirements of paragraphs 2(a) and (c) of this rule.”