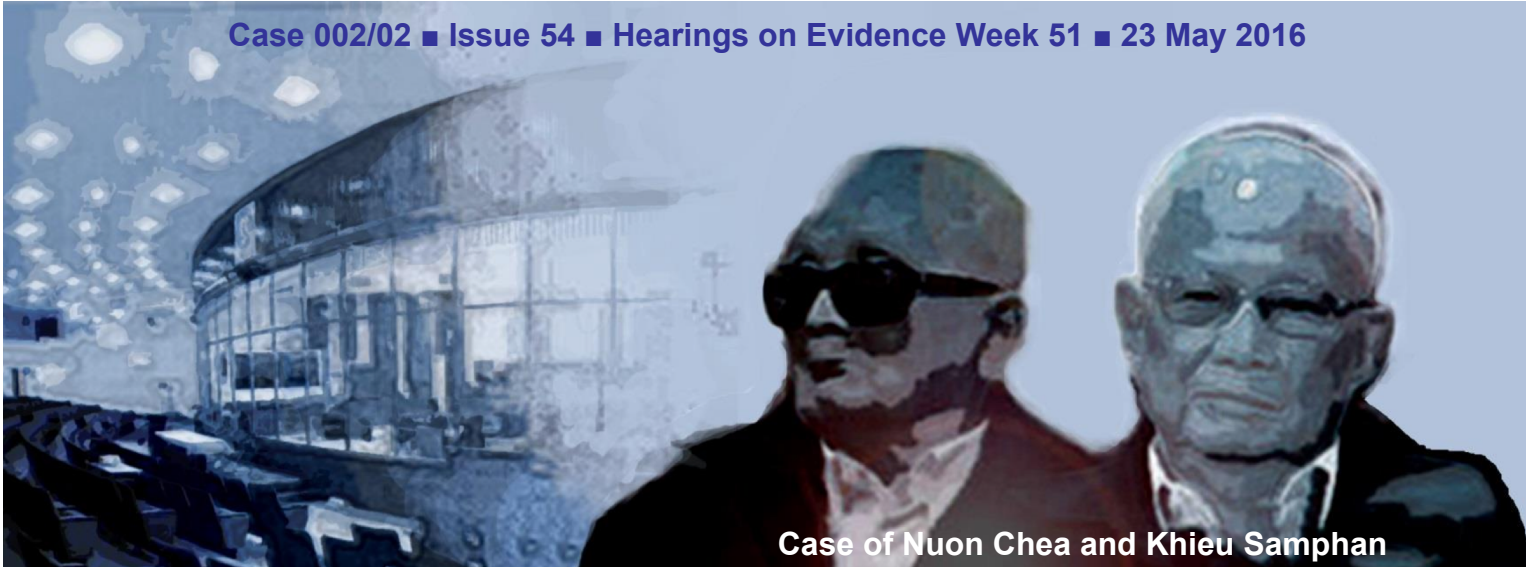


KRT TRIAL MONITOR

Case 002/02 ■ Issue 54 ■ Hearings on Evidence Week 51 ■ 23 May 2016



Case of Nuon Chea and Khieu Samphan

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)

*“The equality of arms is a right of the defense
to protect the Accused and not for the prosecution to invoke”*

- International Defense Counsel for Nuon Chea, Victor Koppe

I. OVERVIEW

The Trial Chamber reconvened briefly on Monday this week after a fortnight’s break for the King’s Birthday holiday and a week-long adjournment to allow parties more time to prepare for upcoming witnesses. Although Witness 2-TCW-816 was originally scheduled to testify on Monday, no witnesses were heard this week at all following the Trial Chamber’s decision to adjourn the proceedings until 2 June 2016. The decision was made in response to the Nuon Chea’s request to reconsider his written request for a four-week adjournment to allow his team additional time to prepare for the examination of the remaining S-21 witnesses.¹ During the morning session on Monday the Chamber also considered a request by the Co-Prosecutors to admit new documents into evidence in Case 002/02. When hearings resume on Thursday 2 June 2016, the Trial Chamber will hear from Witness 2-TCW-816 over three days, followed by Kaing Guek Eav, *alias* Duch, over nine days.²

II. SUMMARY OF WITNESS AND CIVIL PARTY TESTIMONY

No witnesses or Civil Parties testified in court this week.

III. LEGAL AND PROCEDURAL ISSUES

Over two sessions this week, the Trial Chamber heard arguments from all Parties regarding the final two witnesses to testify in the segment on the S-21 Security Center, ultimately deciding to adjourn proceedings to allow further time for Parties to prepare. The Chamber also briefly heard responses to a request from the Office of the Co-Prosecutors (**OCP**) to admit new documents into evidence.

A. Arguments over Scheduling of final two S-21 Witnesses

On Monday 23 May, the Chamber heard responses to a request from Nuon Chea for reconsideration of his previous request for an adjournment of four weeks.³ Although the initial

request had resulted in an adjournment of one week (9 to 12 May) in addition to the already scheduled one-week recess to mark the King's Birthday (16 to 20 May), Nuon Chea's international co-lawyer argued that this time was insufficient to review all the documents necessary for the questioning of the upcoming witnesses 2-TCW-816 and Duch. Counsel Koppe argued that the recent release of an updated list of prisoners from S-21 compiled by the OCIJ based on the investigations into Cases 003 and 004 had released a total of 871 new documents, totaling 6,763 pages.⁴ In addition to the sheer amount of material to review, Counsel Koppe also said that many of the documents were difficult to find or access on the court's online records system; a problem which was confirmed by both the international Civil Party Lead Co-Lawyer, Marie Guiraud, and Co-Lawyer for Khieu Samphan, Kong Sam Onn.

The Nuon Chea Team requested the Trial Chamber to revisit its earlier ruling and extend the adjournment for another three weeks as had been originally proposed. In the alternative, Counsel Koppe argued that the Witnesses could be questioned first by the OCP and LCLCPs, and then the Defense Teams could conduct their questioning later, a practice that Counsel Koppe claimed was common at the ICTY.⁵ Counsel Koppe said: "Once examination in chief has been completed we have additional time to prepare and process new documents and subsequently would continue our cross-examination."⁶ International LCLCP Marie Guiraud pointed out that her colleague was using terminology from the common law system, but that in the civil law system of the ECCC such language was incorrect and that to have a break between questioning would be inappropriate. She argued that Witnesses are called by the Trial Chamber and must be heard continually in the civil law system, adding that a comparison to the ICTY was irrelevant. Ms. Guiraud declined to comment on whether a further adjournment was needed, however said her team would rely on the Chamber to find a "means to allow the resolving of this problem" adding that this "might have implications on time."⁷

Assistant Prosecutor Dale Lysak argued that, while the OCP would always appreciate additional time to prepare, their belief was that the proposed adjournment of three weeks was too long. He also argued against the proposed division of questioning of the upcoming two witnesses, saying this was contrary to the spirit of equality of arms and claiming that the proposal would provide a significant advantage to the Defense Teams.⁸ Counsel Koppe countered this argument, saying that the right to equality of arms was a right of the Accused only, not the prosecution. While Counsel Lysak did not support the Defense motion for an adjournment, he did say that having extra time to prepare would be advantageous to all Parties. In response to the Defense Team proposal, Counsel Lysak proposed an alternative schedule: after hearing 2-TCW-816, Duch testify for five days and be questioned by all Parties, after which point the segment on internal purges could begin, and finally the final four days of Duch's testimony would be heard after the end of that segment.

After a lunchtime adjournment, President Nil Nonn announced that proceedings would adjourn until Thursday 2 June 2016, at which time the testimony of Witness 2-TCW-816 would commence.

B. Responses to Co-Prosecutor's Request to Admit New Documents into Evidence

Following the discussion on scheduling, the Chamber also briefly heard arguments in response to a request from the Prosecution to admit 47 new documents into Case 002/02, seven of which relate to the S-21 Security Center.⁹ The LCLCP and Nuon Chea Defense Teams had no response to the request and stated they would rely on the Chamber's discretion.

The Khieu Samphan Defense Team made a lengthy response. National lawyer for Khieu Samphan, Kong Sam Onn, argued that the OCP request was tardy and therefore did not meet the admission requirements laid down in Internal Rule 87(4).¹⁰ He also argued that the documents were not conducive to ascertaining the truth, particularly written records of interview (WRIs) of witnesses who had not been requested to appear in court. The Defense Counsel

argued that the documents had minimal probative value because their veracity was never tested live and added: “If they are important to ascertain the truth and in the interests of justice, why didn’t the Co-Prosecutor propose to hear testimony from those witnesses?”¹¹

Overall the Khieu Samphan Defense objected to the admission of all but seven documents relevant to S-21, five of which were WRIs of witnesses who had either appeared already or are scheduled to appear. Kong Sam Onn explained the rationale for objecting to other documents. He said the proposed documents related to Khmer Krom were irrelevant, as the treatment of this group did not form part of the Closing Order, similarly to the documents related to rape outside of forced marriage. He argued that as these two topics did not form part of the indictment against the Accused, there was no reason to admit these documents.

Assistant Prosecutor Dale Lysak responded to the arguments made by Defense Counsel Kong Sam Onn. He denied that the OCP motion was tardy, saying that the prosecution is required to assess whether material is exculpatory prior to disclosing it, which takes time.¹² Responding to the particular point made by Kong Sam Onn about the admission of WRIs of witnesses who would not testify, Dale Lysak argued that: “In mass atrocity cases we cannot call every single witness to be heard,” and that for this reason corroborative evidence has great value. He also argued that evidence pertaining to the treatment of the Khmer Krom was “interconnected” with the treatment of the Vietnamese.¹³ Assistant Prosecutor Lysak also proposed the Trial Chamber institute a new procedure by which all WRIs of witnesses who are to appear in court would be admitted automatically prior to their testimony, regardless of whether Parties wish to use them during questioning.¹⁴ The Chamber will issue a decision on this request in due course.

IV. TRIAL MANAGEMENT

This week, the Trial Chamber adjourned after a half-day hearing on Monday. Hearings were then adjourned until next Thursday 2 June 2016 in order to provide Parties with more time to prepare. Next week Witness 2-TCW-816 will begin testifying over three days followed by Duch.

A. Attendance

Nuon Chea waived his right to be present in the courtroom and observed proceedings from the holding cell due to his poor health, while Khieu Samphan was present in the courtroom for Monday’s discussion.

Judge Attendance: All Judges were present in the courtroom on Monday.

Parties: All Parties were properly represented in the courtroom this week. Anta Guissé, international Defense Lawyer for Khieu Samphan, was absent on Monday due to personal reasons; however, her national colleague Kong Sam Onn was present to represent their client.

Attendance by the public:

DATE	MORNING	AFTERNOON
Monday 23/05/2016	<ul style="list-style-type: none">▪ Approximately 190 students from Chea Sim Samaki High School, Phnom Penh▪ Four foreign observers▪ Nine Civil Parties	<ul style="list-style-type: none">▪ Approximately 150 students from Aoral High School, Aoral District, Kampong Speu Province▪ Six foreign observers▪ Nine Civil Parties

B. Time Management

After returning from a two-week break, this week the Trial Chamber continued to deal with issues arising from the recent release of a new list of S-21 prisoners compiled by the OCIJ. Witnesses 2-TCW-816 and former chief of S-21, Kaing Guek Eav *alias* Duch, were each expected to appear before the Chamber this week in relation to S-21 Security Center, however ultimately the Chamber agreed to adjourn proceedings for a further six days in response to Nuon Chea's request for reconsideration of their requested adjournment.¹⁵ Debate was held over an extended morning session on Monday and the Trial Chamber's decision was issued immediately after the lunch break. Court will adjourn until 2 June 2016 at which time Witness 2-TCW-816 will appear over three days, followed by Duch (2-TCW-916).

C. Courtroom Etiquette

There were not any substantial breaches of courtroom etiquette during the brief proceedings this week.

D. Translation and Technical Issues

There were no substantial translation or technical problems this week. The President did pause proceedings briefly during the morning on Monday in order to give the audio-visual unit time to change the DVD recorder as the session had gone over its usual time. This was managed quickly however, and overall proceedings ran smoothly.

E. Time Table

DATE	START	MORNING BREAK	LUNCH	AFTERNOON BREAK	RECESS	TOTAL HOURS
Monday 23/05/2016	9:09	-	10:51-13:38	-	13:41	1 hours 45 minutes
Average number of hours in session				1 hours and 45 minutes		
Total number of hours this week				1 hours and 45 minutes		
Total number of hours, day, weeks at trial				691 hours and 20 minutes		
187 TRIAL DAYS OVER 54 WEEKS						

*This report was authored by Melanie Hyde, Nicholas Maycock, Caitlin McCaffrie, Visot Nom and Lina Tay 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 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

Case001	<i>The Case of Kaing Guek Eav alias “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
DSS	Defense Support Section
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
WESU	Witness and Expert Support Unit

¹ The Nuon Chea Defense Team made a request on 28 April 2016- to adjourn proceedings in Case 002/02 for four weeks in order for them to have time to review an updated list of prisoners detained at S-21 that was recently released by the OCIJ (see Nuon Chea Defense Team, “Nuon Chea’s Urgent Request for Additional Time to Prepare for the Examination of the Remaining S-21 Witnesses in Order to Safeguard his Fundamental fair Trial Rights” (28 April 2016) E402.) Parties debated the proposed adjournment on 3 May 2016 and the Trial Chamber decided to grant a one-week adjournment. For a summary of the discussion that was had at this time see CASE 002/02 KRT TRIAL MONITOR, Issue 53, Hearings on Evidence Week 50 (2-5 May 2016) p. 9.

² KAING Guek Eav (*alias* Duch) was found guilty by the Trial Chamber and sentenced to 35 years’ imprisonment on 26 July 2010, see Trial Chamber “Judgment” (26 July 2010), E188. KAING Guek Eav appealed the verdict to the Supreme Court Chamber, which was dismissed. The OCP also appealed the verdict, and on 3 February 2012 the Supreme Court Chamber quashed the decision of the Trial Chamber and increased the Accused’s sentence to life imprisonment, see Supreme Court Chamber, “Appeal Judgment” (3 February 2012), F28.

³ The request is yet to be made public however the President stated that it was made via email to the ECCC’s senior legal officer on 20 May 2016.

⁴ 4,731 pages if confessions are deducted from the page count.

⁵ Assistant Prosecutor Dale Lysak said his team was unaware of any such precedent at the ICTY, noting that International Co-Prosecutor Nicholas Koumjian has “spent extensive time there” and was not aware of any such practice.

⁶ From Trial Monitors’ notes. At the time of writing the official transcript of this session is yet to be released.

⁷ From Trial Monitors’ notes. At the time of writing the official transcript of this session is yet to be released.

⁸ Mr. Lysak argued that the Defense Teams would unfairly benefit from the extra time, and also that the OCP would be at a disadvantage in not hearing the Defense questioning of witness 2-TCW-816 prior to beginning their questioning of Duch. The Assistant Prosecutor also argued that the Defense Teams have “twice as many lawyers and consultants” as the OCP, claiming this was another disadvantage to the prosecution. Counsel Koppe responded by saying that a simple count of the number of staff on each side was futile as the Defense Teams for the separate cases are prohibited from communicating about details related to the case and thus cannot work together.

⁹ The request was made on 5 May 2016 however is yet to be made public. The seven documents relevant to the segment on S-21 were identified as documents 28, 37, 38, 39, 40, 41 and 43 of the Annex, which is also yet to be publicly available.

¹⁰ Internal Rule 87(4) states that: “During the trial, either on its own initiative or at the request of a party, the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth. Any party making such request shall do so by a reasoned submission... The requesting party must also satisfy the Chamber that the requested testimony or evidence was not available before the opening of the trial.” See: Extraordinary Chambers in the Courts of Cambodia: “Internal Rules (rev. 9)” (16 January 2015) p. 67

¹¹ From Trial Monitors’ notes. At the time of writing the official transcript of this session is yet to be released.

¹² Dale Lysak said the 47 documents currently being proposed had originally come from a list of “many hundred” and that this process takes time.

¹³ In response to this Kong Sam Onn stated that it was “clear” that Khmer Krom were viewed as Cambodians, not as Vietnamese, and that the idea that the two were “interconnected” was incorrect.

¹⁴ Neither the Bench nor other Parties made any response to this suggestion.

¹⁵ For the Trial Chamber’s oral ruling over Nuon Chea’s request for a four-week adjournment last two weeks see CASE 002/02 KRT TRIAL MONITOR, Issue 53, Hearings on Evidence Week 50 (2-5 May 2016) p. 9.