



**Evidentiary Proceedings in Case 002/01 Come to a Close with Final Trial Chamber Rulings, Supreme Court Chamber Decision**

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On Tuesday, July 23, 2013, the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia considered and ruled on a number of legal applications made by the parties to bring the evidentiary proceedings in the first phase of the severed trial in Case 002 nearly to a close.

After the day's hearing had already adjourned, the Supreme Court Chamber then handed down its decision on the appeals by Co-Prosecutors and Nuon Chea against the second severance decision by the Trial Chamber. As the SCC rejected both appeals on their merits and with the Trial Chamber summarily deciding final evidentiary matters today, all that appears to remain now for the present trial is the closing submissions by the parties, to be heard in October 2013, before the chamber can render its first judgment in Case 002.

***Trial Chamber Considers Final Evidentiary Matters***

Trial Chamber President Nil Nonn initiated the day's proceedings by introducing the following issues as being before the chamber:

1. The prosecution's request for more evidence on Tuol Po Chrey;
2. An application to reconsider the decision not to continue the testimony of civil party Sar Sarin;
3. The prosecution's submissions on adverse inferences that could be drawn from the accused's decisions not to testify and on rulings on document admissibility;
4. The Nuon Chea Defense Team's filing to summon new witnesses;<sup>2</sup>

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<sup>1</sup> Cambodia Tribunal Monitor's daily blog posts on the ECCC are written according to the personal observations of the writer and do not constitute a transcript of the proceedings. Official court transcripts for the ECCC's hearings may be accessed at <http://www.eccc.gov.kh/en/case/topic/2>.

<sup>2</sup> As this was the subject of a written submission, the president said it would not be the subject of oral submissions.

5. The Nuon Chea Defense Team's request for new evidence on the targeting of Lon Nol officials and soldiers;
6. The Khieu Samphan Defense Team's request for information on the conditions of Mr. Nou Mao's appearance before the court as a witness; and
7. Submissions on final deadlines.

***The Prosecution Request to Present Additional Evidence on Tuol Po Chrey***

Senior Assistant Prosecutor Dale Lysak informed the court that the prosecution did not have anything to state in addition to their written request for new evidence to be heard on the alleged executions at Tuol Po Chrey.

In support of this motion, Pich Ang, Civil Party Lead Co-Lawyer, told the court that the call for additional evidence would allow strong evidence to be given from those who had been at Tuol Po Chrey and could testify as to the role of the party leadership.

As for the defense, Co-Lawyer for Nuon Chea Victor Koppe said the prosecutors' request had been read by him with interest, especially given the prosecutor's opposition to TCW382 being summoned. Given TCW382 was the producer of the film "One Day in Po Chrey," it surprised Mr. Koppe that the prosecution would call for new evidence in this area yet oppose this witness.

The defense counsel also drew the chamber's attention to his own filing of June 17, calling for new witnesses on Tuol Po Chrey. In that motion the Nuon Chea defense had actually requested one of the witnesses called by the prosecution in their filing. As such, the Nuon Chea defense did not object to this witness being called but would request two further witnesses. While they had doubts as to how much useful testimony another witness could bring, they did not object in principle to the prosecution's filing.

"Any new light would be welcomed by the Nuon Chea team," stated Mr. Koppe, though he again underlined his request for the producer of "One Day in Po Chrey" to be called.

Anta Guissé, Co-Lawyer for Khieu Samphan, initially said that she would leave it to the court whether to allow the additional witnesses. However, she stressed that at some point a line had to be drawn and at that point the court should conclude that the reason it had not heard conclusive evidence of killings at Tuol Po Chrey was because there was none.

Mr. Lysak responded to this claim, making it clear that the prosecution did not see the evidence of killing as inadequate. They wanted two witnesses to be called who had been at the execution site, one of whom was a villager who had witnessed the killing site the day after the massacre. The second was a Civil Party who says he was at the site as a soldier. With the defense claiming there is no evidence of killing, it would be helpful to the chamber to hear evidence of these witnesses, he averred.

Further, Mr. Lysak argued that no comparison could be made between these additional witnesses and TCW382, who is a film producer with little to offer the chamber when compared to those with contemporaneous firsthand knowledge.

***Request to Reconsider the Chamber's Decision Not to Recall Sar Sarin***

President Nonn reminded the chamber that although the ECCC Internal Rules do not contain provisions for reconsideration, the Civil Parties had asked to be heard on the issue of a recall of

civil party Sar Sarin, who had begun testifying on April 29, 2013.<sup>3</sup> This had been the subject of a written filing by the prosecution on June 18.

Ven Pov, Civil Party Co-Lawyer, told the court that as the lawyer responsible for Mr. Sarin, he would support the request for his client to be called as a civil party; however, he rejected the application being made that he should be sanctioned if he refused to do so, in the same manner that a witness would be. Such sanctions would be inappropriate, he argued, as a party to proceedings could not violate Rule 35; Mr. Sarin was a civil party and should be summoned as one.

Mr. Sarin's prior refusal to continue his testimony was based on fear for his own personal security, Mr. Pov reminded the court. The civil party had stated clearly that he had concerns following the death of Dr. Haing Somnang Ngor, the film star who portrayed Dith Pran in the film "The Killing Fields."<sup>4</sup>

Summarizing, Mr. Pov reaffirmed that Mr. Sarin should be called as a civil party but not compelled to testify. In addition, if necessary, security should be provided for him, the counsel concluded.

Civil Party Lead Co-Lawyer Elisabeth Simonneau Fort continued the submission of the civil parties. She claimed that over the last two years she had repeatedly argued that there was a difference between a civil party and a witness. It had been said that a civil party could be obliged to appear through an application of Rule 41. She then turned to an analysis of the wording of that rule. While, in the English wording, the use of the word "summon" did suggest a power to oblige attendance of a civil party, in the French wording "convocation" was used, which she argued lacked such an obligation. As the civil parties are a civil law notion, it was the French tradition that should apply in this instance, she contended.

The second argument by the prosecution referred to the Code of Criminal Procedure. While this does give a right for a civil party to appear at the end of proceedings, Ms. Simonneau Fort stated, it does not oblige attendance. French case law states that where the right is not exercised, this does not impact the defense.

Continuing, Ms. Simonneau Fort noted that it had been argued that a witness can only remain silent if they might incriminate themselves; however no reference has been made to this applying to civil parties. All further authorities drawn upon by the prosecution regarded witnesses, she stated, citing also that the Cambodian Code refers explicitly to witnesses ignoring summons but does not make mention of civil parties.

The counsel stated that the prosecutor is arguing that there should be sanctions against civil parties who refused to appear, and their civil party status withdrawn. Section 35 bis of the Internal Rules gives the civil parties themselves the ability to waive their rights as civil parties. "How can you withdraw a status which is a right to be waived?" Ms. Simonneau Fort questioned.

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<sup>3</sup> Cambodia Tribunal Monitor's account of Mr. Sarin's testimony may be found at <http://www.cambodiatribunal.org/blog/2013/04/fearful-civil-party-refuses-continue-testimony-without-lifelong-police-protection>.

<sup>4</sup> A reference was also made to the testimony of Duch; however this was not clearly translated.

In an extremely brief submission on this matter, Mr. Koppe argued that the Chamber's holding had been that it could reconsider its own holdings where there had been either a change in circumstances or an erroneous decision or if an injustice would ensue if the decision was not reconsidered. In the present circumstances none of these conditions was met, he stated, and so the Chamber should not reconsider its decision that Mr. Sarin should not be recalled.

Kong Sam Onn, Co-Lawyer for Khieu Samphan, said he concurred in part with the civil party lawyers. In addition, he stressed that the civil party had rights throughout the proceedings and should not have his status as a civil party withdrawn. Additionally, Mr. Sam Onn noted, if Mr. Sarin were compelled to testify, he could not be relied upon to provide balanced testimony. He also stated that comparison could not be made with the compulsion of Stephen Heder, who had been called as a witness rather than an expert so that he could be compelled to testify.

Also for Khieu Samphan, Ms. Guissé endorsed the analysis of the civil parties. She asked for the co-prosecutor to be reminded that there is no need to consider an already made decision.

Clarifying the situation with the civil party in question, Mr. Ang claimed that Mr. Sarin did wish to testify as a civil party, but he required sufficient measures so as to allow him to appear in confidence.

Rebutting the arguments against him, Mr. Lysak argued that civil parties have obligations as well as rights. The authority of the chamber to summon a civil party was clear from Rule 41.1 of the internal rules, which he said clearly states that a summons is an order to *any person* who is called to the ECCC and that Rule 41.5 makes it clear that civil parties can be summoned through the civil party lawyers.

Further, while Rule 59.6 specifies that permission must be given by a potential civil party before they can be interviewed by a court investigator, no such permission is necessary for an interview by a judge, Mr. Lysak noted. There is an inherent power in any court over its parties, he continued; a court has more authority over parties to proceedings than it does over a witness, as a party is asking the court for relief.

Moving on to Mr. Sarin personally, Mr. Lysak claimed that he was not a typical civil party who otherwise had shown the courage to testify and relive what had happened to them. Rather, he was a cadre who had allegedly received training from Khieu Samphan and Nuon Chea. During an interview with the Documentation Center of Cambodia, he had been clear that he knew his interview might appear before the court and had said he was keen to testify, the prosecutor reminded the court.

As the prosecutor began to read the interview given by Mr. Sarin, Ms. Guissé objected on the grounds that the prosecution was sliding off into the direction of an argument on the testimony itself, rather than making submissions on the court's ability to summon a civil party.

Attempting to link the quote to the rest of his arguments, Mr. Lysak said that it went to the "third limb" of the court's ability to reconsider its past judgments, that is to say, that it was necessary for Mr. Sarin to testify to avoid injustice.

Further objections from the defense teams ensued, as Mr. Koppe argued that the prosecution was failing to make any new arguments. The material that the prosecutor had begun to read had been before the chamber when the witness last testified, he stated.

Having been urged by the president to keep his submissions short and on point, Mr. Lysak concluded by saying that in refusing to testify, Mr. Sarin had let down his fellow civil parties.

As the submissions of each of the parties drew to a close, Judge Jean-Marc Lavergne addressed the civil party lawyers, inquiring as to whether Mr. Sarin wanted to testify and whether they had discussed the security measures he was requesting with him. Mr. Ang stressed that Mr. Sarin did indeed wish to testify and was actually attending the day's proceedings. He then began to turn around and look for his client.

Given that Mr. Sarin was in the building, it was resolved that he should address the chamber himself, against the wishes of Mr. Koppe who argued that the civil party's views had already been heard and that it was known he was requesting four bodyguards or relocation to the West.

After the civil party had been admitted into the courtroom, President Nonn explained to Mr. Sarin that the chamber had received reports from the Witness and Expert Support Unit (WESU) with the grounds for his refusal to testify. It had stated that Mr. Sarin had requested measures that President Nonn said were beyond the chamber's competencies; as such the chamber considered not calling him again. While the chamber was vested with the authority to provide certain protective measures, lifetime protection with security guards or relocation to a second country was not possible, the president concluded.

Mr. Sarin was asked to affirm if he was willing to testify without these protective measures. He restated that his position had not changed and that he felt his security and safety were at risk. Mr. Sarin then reaffirmed for a second time for Judge Lavergne that he would not testify without protective measures.

Following the brief morning break, Judge Lavergne asked the prosecution whether they maintained the requests they had made in the morning regarding Mr. Sarin. They affirmed that they did, stating that it was for the court to decide who testified, not the party himself.

#### ***Co-Prosecutor's Requests on Adverse Inferences and on Rulings on Documents***

The next issue addressed by the court was the prosecution's request for time to be allocated to them to address adverse inferences, which they had argued should be drawn from both of the accused's decisions not to testify. Mr. Lysak explained that the prosecution wished to be allocated an hour for each of the accused, in order that they could present the areas that they would have addressed had the accused agreed to testify. The prosecution wished for there to be a record of the areas they would have covered.

The second issue was introduced as being a housekeeping matter. The prosecution requested that the court issue rulings on the admissibility of documents that remained to be ruled upon, so that the parties could write their final submissions aware of the evidence they could reference.

In addition, the prosecutor explained that from time to time they had come across materials that had not been issued an E number, probably because of a clerical error. They requested this to be resolved and said they would be sending an email listing such documents.

For the civil parties, Ms. Simonneau Fort supported both requests.

Similarly, Mr. Koppe voiced the Nuon Chea Defense Team's support for the second request – that documents be resolved and E numbers assigned where appropriate. He reminded the court that they were on the verge of admitting 1500 documents, some of which had been the subject of witness requests by the Nuon Chea team. As such, he asked for priority to be given accordingly.

With regard to adverse inferences, Mr. Koppe argued that this was a matter for closing arguments and the prosecution should not be allowed additional time to address the court on this area. Mr. Koppe said he was unsure what the purpose was for his client to be told of the prosecution's list of inferences at this stage. Further, he stated, there was nothing the chamber could do with this list at the present time.

Presently, the Nuon Chea Team was preparing a formal withdrawal of the notification of Nuon Chea that he would testify, Mr. Koppe told the court.

For Khieu Samphan, Ms. Guissé explained that her team would be responding in writing to the prosecutor's request; however, she wanted it to be clear to the court that they opposed the application on adverse inferences on principle. Such arguments belong in the closing arguments, she asserted.

On the allocation of E3 Numbers, Ms. Guissé echoed the request of the other parties, and maintained that it was an issue that had already been brought up by the Khieu Samphan defense team.

Finally, Ms. Guissé reminded the court that her team requested a fortnight to look at the transcripts of the court, in order to check for translation issues.

#### ***Nuon Chea Defense Team Request to Call Witnesses on Targeting of Lon Nol Officials***

Mr. Koppe briefly summarized the arguments in his written filings, which were in the process of being translated into Khmer and French.

The main argument in the request was that there was no reliable direct evidence of the execution of Lon Nol soldiers and officials. Of the statements before the court, he stated, there is no proof of executions, only unreliable assertions and secondhand material. As they did not know the status of the 110 witnesses whose written evidence was being called into evidence, the defense saw it as important to examine the individuals concerned.

The defense counsel also contended that the prosecution's desire to call further witnesses further supported the Nuon Chea Team's argument that the case had not yet been made on Tuol Po Chrey.

Responding to this application, Mr. Lysak argued that the application for 110 witnesses to be heard was being made late in the day and that the defense would have been able to make the application far earlier if it were a serious application.

The prosecution sought the chance to make written submissions on this matter, as he argued that the defense was trying to misstate the issues to make it sound as though they were alleging a

policy to kill or execute, rather than the broader policy actually in question, which was to persecute discriminatorily.

Further, Mr. Lysak accused Mr. Koppe of attempting to get away with a “significant amount of posturing” in an attempt to make early closing arguments about the prosecution’s evidence.

Ms. Simonneau Fort endorsed the position of the prosecution, reaffirming that an application to hear 110 witnesses at this late stage should be rejected. It is not necessary to summon more witnesses, she claimed.

Responding to these claims, Mr. Koppe told the court that while his application may appear late in the day, there had as of yet been no decision to admit the documents, and so in that respect his application was early. The first possible time for a formal request to have the witnesses cross-examined would come after the admission of the documents, he stated.

Drawing the submissions on this matter to a close, President Nonn informed that parties that the matter would be addressed as a part of the witness statement decision, which would be presented later in the day’s session.

#### ***Khieu Samphan Defense Request for Information on Nou Mao’s Testimony***

The prosecution was first to make submissions on the motion of Khieu Samphan’s defense, which had asked the chamber to conduct further investigations into why witness Nou Mao<sup>5</sup> was provided with a photograph and notes of his interview with Ben Kiernan before he testified. The prosecution argued the chamber had already heard that WESU provided the photograph to make sure they had found the correct witness. The provision of notes had caused no damage, they argued. The civil parties concurred with this submission.

Ms. Guissé then defended her motion. It is not simply enough for the chamber to say the photo was shown to him by WESU, she said. Her request was more specific, as she wanted to know when he was shown the documents and how. It is important to know when his testimony was “polluted,” she argued.

While the chamber has been clear that there is no problem with counsel providing information signed by a witness to them, such as statements, she continued, external information is treated differently. Questions needed to be put to the witness on these matters, she stated, contending that the defense has notes that do not tally with the evidence of the witness. Thus she maintained that there was a possibility that the testimony had been contaminated.

Following these arguments, the chamber adjourned for an extended lunch break of three hours, so that the bench could come to a ruling on the matters before the chamber.

#### ***Chamber’s Decisions on Applications***

Following the extended break, President Nonn set out a number of decisions, which he said would also be contained in writing with reasoning at a later date.

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<sup>5</sup> Mr. Mao testified before the ECCC on June 19 and 20, 2013. CTM’s accounts of his testimony may be found at <http://www.cambodiatribunal.org/blog/archive/201306>.

Firstly, he addressed the prosecution's call to hear more witnesses on the events at Tuol Po Chrey and the Nuon Chea's further request to call TCW802 and TCW803. The chamber considered that these witnesses would be repetitive and not conducive to ascertaining the truth. As such, the request was rejected.

Secondly, the Chamber had decided not to reconsider its decision not to recall Mr. Sarin. The Chamber held that even if considered as a fresh application, the prosecution did not allege new circumstances, nor had the internal rule 35 requirements been met. The request was therefore rejected.

Thirdly, the Nuon Chea's defense team's request to summon witnesses on the policy of targeting Lon Nol officials, which would involve summons more than 100 new witnesses, was considered. This request repeats and elaborates on past submissions, the Chamber held. Further, the President stated, there had been a failure of reasonable diligence in finding and selecting the new witnesses on the part of the defense.

Fourthly, on the Khieu Samphan Defense request for information on the photograph and notes put before Mr. Nou Mao, the chamber held that an investigation was not warranted; however, a report on the matter should be written by the WESU within two weeks.

Fifthly, the prosecution's request to make submissions on the accused's decision to remain silent was rejected. The chamber considered that the warnings on April 18, 2012, that were reaffirmed on July 16, 2013, adequately addressed the underlying substance of the prosecutor's request. The Trial Chamber therefore considered the request already answered and did not consider it necessary for the chamber to be presented with the topics that would have been covered by the prosecution.

Sixthly, Nuon Chea's request to admit new documents and summon TCW382 Rob Lemkin, the producer of "One Day at Po Chrey," was rejected, as was the request for investigations to be made into his emails. The Chamber would file its decision on this matter today or tomorrow, rejecting this application in its entirety for reasons set out in writing.

Finally, the president noted that an appeal against the severance decision was still pending with the Supreme Court Chamber. As such, he stated, the timetable the court would set out for further proceedings was tentative, as the evidence phase has not been formally concluded.

As for the timetable, President Nonn stated that parties must submit their closing briefs by September 12, 2013, in any of the ECCC languages, with translations to follow. Closing statements will then be given at hearings to be held from October 9-22, 2013, including Fridays.

Finally with respect to closing briefs, the president stated that the chamber will allow an extra 25 pages per party with which to respond to extra material from the evidentiary decisions.

The chamber adjourned the proceedings. As counsel attempted to stand to make submissions, the president told them to sit down, as the floor was not open to parties and the judges departed from the courtroom. The proceedings in Case 002/01 are now scheduled to resume on October 9, 2013, for the hearing of closing statements.



***Update on Supreme Court Chamber Decision on Severance Appeals***

After the Trial Chamber had adjourned the proceedings for the day, the Supreme Court Chamber handed down a summary of its decision on the immediate appeals from the Co-Prosecutors and Nuon Chea against the Trial Chamber's second decision on Case 002 severance. While dismissing the appeals on their merits, the SCC did order that the evidentiary hearings in a second part of the severed trial, to be known as Case 002/02, must commence as soon as possible after the closing submissions in Case 002/01, which will be heard in October 2013. Additionally, the SCC ordered that this second trial must include charges laid out in the Case 002 related to S21, genocide, a worksite, and a cooperative. It also called for the consideration of the establishment of a second Trial Chamber panel to hear and adjudicate this second trial.

The full summary of the Supreme Court decision may be found on the ECCC website at [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-07-23%2017:14/E284\\_4\\_7\\_1\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-07-23%2017:14/E284_4_7_1_EN.PDF).