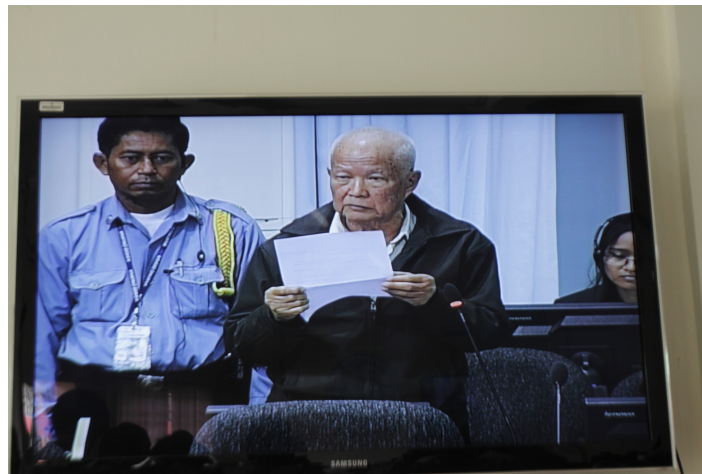


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“They Shall Be Heard”

By Christine Evans, Northwestern University School of Law, LL.M. (International Human Rights), 2011



Khieu Samphan in the ECCC courtroom on the fourth day of initial hearings in Trial 002

Called “one of the most successful and ordered procedural hearings that I have done” by Co-Prosecutor Andrew Cayley, the initial hearings in Trial 002 at the ECCC came to a close today in the same way that they started – with spirited, and at times tense, debate.

At issue today was the Trial Chamber’s provisional list of witnesses, civil parties, and experts who will be called to testify during the upcoming trial of the senior Khmer Rouge leaders Nuon Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan. All four accused were present in the courtroom as the hearings began, with only Ieng Sary exiting the courtroom toward the end of the public session. For the first time in the initial hearings, Nuon Chea remained in the courtroom for the duration of the Thursday’s proceedings, holding true to his promise to return and participate when matters involving his case were before the court.

The public also continued to attend the hearings to the end. Although the court session started with a fair number of empty seats in the public gallery, more students soon arrived, nearly filling it to capacity.

The Court's Instructions on Objections to the Proposed Witness List

President Nonn called the session to order slightly after 9 a.m. and reiterated the court's instructions from Wednesday regarding the witness list discussion. Stating again that the list was only tentative and that none of the witnesses, civil parties, and experts had as yet been rejected, he requested that the parties limit their comments as far as possible only to the individuals contained in the list. He also reminded them that this list contains witnesses, civil parties, and experts for the first phases of the trial, the topics of which the court had outlined on Monday.

Judge Dame Sylvia Cartwright then provided further instructions for the day's discussion. First, she stated that the Trial Chamber had not yet made a final decision whether certain experts on the list should instead be classified solely as witnesses. She advised the parties that the court was fully aware of their arguments on this subject from their written submissions and that they were not to repeat these arguments during today's hearings. Second, she reminded the parties that they must refer to the witnesses, civil parties, and experts on the list solely by the pseudonyms that the court has provided.

Next, Judge Cartwright explained that the Trial Chamber would continue to review the whole list of witnesses, civil parties, and experts during the trial proceedings and will add to it as the court determines is required. Given the need to expedite the trial, she cautioned that the Trial Chamber will need to limit the number of additional witnesses it calls. If a party believes it is essential that a particular individual be added to the list prior to trial, she continued, the party should not announce this request in open court but rather should submit a written request to the court by 5 July 2011. She revised this instruction slightly as to the civil parties, stating that, due to the additional civil parties recently allowed by the Pre-Trial Chamber, the civil party lawyers would be given the opportunity to add to the witness list at a later date and that there was no need to mention this issue or add names during the discussion today.

President Nonn concluded the court's preliminary remarks by advising the parties that it would be unlikely that the court would continue to Friday as the oral arguments had been completed on schedule on Wednesday.

Before the start of the witness list discussion, Khieu Samphan's national co-lawyer, Dr. Sa Sovan, requested leave for his client to address the court briefly. President Nonn asked Samphan directly on what topic he planned to speak. Samphan replied that he wished to speak personally on his own witness list. The court immediately denied the request.

Seemingly confused by the abrupt response, Samphan remained standing for a moment until Sovan apparently advised him to sit down. Sovan then attempted to clarify what his client wanted; he stated that Samphan wished to speak only on the witness list and not to discuss any other topic.

President Nonn responded that the court had already decided that Samphan would not be allowed to speak at this time, but that, when it was his turn in the order of the hearings, he may then address the court. "That is your right and your client's right," he stated. Then, with a final reminder to the parties to use the pseudonyms provided during their comments today, he

requested the co-prosecutor begin the discussion on the tentative list of witnesses, civil parties, and experts.

Co-Prosecutors' Observations on the Proposed Witness List

National Co-Prosecutor Chea Leang stated that, after reviewing the tentative witness list, the co-prosecutor's office objects to only one witness on the list – TCW482 – and requests that this witness be removed. Leang then requested a closed session in order to offer arguments on this objection.

After conferring with the other judges, President Nonn responded that the court had taken note of the request and would notify the co-prosecutor of the court's decision in due course, as other parties may also wish to proceed with certain arguments in a closed session.

International Deputy Co-Prosecutor William Smith continued the observations of the co-prosecutors' office by reminding the court that the prosecutor bears the onus of proof in a criminal trial. For this reason, he informed the court, the co-prosecutors plan to submit in writing a request for 15 additional prosecution witnesses by the 5 July deadline. He also stated that the co-prosecutors took note of the court's statement that it will provide opportunity as the trial proceeds for parties to offer additional witnesses. He mentioned this statement, he said, because it has been the experience in the previous trial and other hearings that some witnesses may not be able to attend hearings, while others may have forgetful memories or may be reluctant to talk, requiring other witnesses to fill the gap.

Nuon Chea's Team Addresses the Investigation Controversy

Upon the conclusion of the co-prosecutors' comments, the court passed the floor to the defense. Given the grievances aired by the defense, especially Nuon Chea's team, on this subject earlier in the week, it was not surprising that this part of the witness list discussion led to debate and disagreement between the parties themselves and between the parties and the court.

Nuon Chea's international co-lawyer Victor Koppe began the observations on the witness list for his client by launching into a condemnation of the judicial investigative process at the ECCC, attempting to finish the speech his colleague had begun at the start of the initial hearings on Monday. Koppe told the court that soon after being appointed as Nuon Chea's lawyers, the defense team filed a request with the investigating judges to be present at the examination of all witnesses. Although the ECCC Internal Rules do not require that defense be allowed at these examinations, Koppe and his colleagues made this request for two reasons: (1) to exercise the accused's right, under international and Cambodian law, to cross-examine all witnesses; and (2) to avoid the need to interview or examine all witnesses at trial, guaranteeing a speedy, effective and efficient trial. Koppe reported that the investigating judges denied this request, stating that the ability of the defense to confront the witnesses at trial provided an adequate remedy for this request. The investigating judges then went further, Koppe claimed, by prohibiting the defense from speaking to any witnesses themselves, reminding the defense team that it is a criminal act to bring pressure on the witnesses.

After speaking with Nuon Chea, Koppe said, the co-lawyers then made a number of specific investigative requests. “If not allowed to do our own investigation,” Koppe stated, “it would be up to the investigating judges to do it for us. Koppe reported that these investigative requests related to four specific areas that they believed were not being adequately investigated by the co-investigating judges:

1. The role of Vietnam during 1975 to 1979 and before and after the period of Democratic Kampuchea and the effect that this role had on decisions made by the leaders of Democratic Kampuchea;
2. The disastrous consequences of the horrendous U.S. bombings – whether they created a food crisis, what were the consequences on the Cambodian people and whether the government of Democratic Kampuchea would have been able to do anything to reverse these effects;
3. The rogue commanders in the Khmer Rouge, especially in the Eastern Zone over which the leaders in Phnom Penh did not have centralized power; and
4. The veracity of the Trial 001 testimony of Kaing Guek Eav, AKA Duch regarding Nuon Chea’s role at Khmer Rouge S-21 Security Center.

Koppe maintained that Nuon Chea and his defense team made these requests for investigative actions in the hope that many of these issues would not need to be raised during the trial. My client is an old man, he said, and he has no interest in a lengthy trial. Additionally, Koppe asserted that Nuon Chea wants the tribunal to be able to ascertain the truth, and not only what can be read in schoolbooks in the United States or Vietnam, but “historical truth.” In other words, he asserted, Nuon Chea wants “a proper and fair trial and not a show trial” as occurred in 1979.

The response by the co-investigating judges to these requests, however, was not encouraging, Koppe averred. Duch’s testimony was not examined, leaders in the Eastern Zone were not interviewed, the issue of Vietnam was not addressed. Koppe then went on to “explain for the public” why he was raising the investigation issue at this time, by offering the example of one proffered defense witness who had not been included by the court on the tentative witness list. Before moving on to explain why this witness was important, Koppe first criticized the court’s requirement that he speak of these witnesses only by pseudonym, stating that these proceedings are public and the public has a right to know who will testify in court. Koppe indulged the court, however, and gave the witness the name “Mr. X.” He then proceeded, however, to provide such extensive details about Mr. X and his role during the time of Democratic Kampuchea that it quickly became clear that Mr. X is Pen Sovan, the first Prime Minister of the People’s Republic of Kampuchea after the fall of the Khmer Rouge regime.

Deputy Co-Prosecutor Smith quickly rose to object. Smith stated that, while he understands Koppe’s desire to hold these hearings publicly, the judges, out of caution and concern for the witnesses, had instructed the parties to use only pseudonyms in today’s hearings. Smith argued that it was not appropriate to call a witness “Mr. X” and then bring out all details about this person so that he is easily identified. He requested the court to remind all of the lawyers that they must not identify witnesses today.

President Nonn responded by reminding Koppe that the witness list is only tentative and that, if he believes other witnesses are needed in the interest, he must submit this request in writing. President Nonn also agreed with Smith’s observations, stating that any observation that leads to

the identity of any witness violates the witness protection measures set in place by the court and required under international standards. He instructed Koppe to stop providing details about Mr. X and to move along on his comments to the witness list.

Koppe began his comments again, stating that he would say no more about Mr. X. He related that, in response to Nuon Chea's request, the co-investigating judges refused to even interview the witnesses submitted, saying it was not necessary. Nuon Chea was shocked, Koppe maintained, and believed that the investigating judges were only interested in exposing inculpatory evidence, not anything that could help the defense. Koppe then started to recount a statement by an Australian policeman - whom Koppe named - who had been involved in some way in the investigation.

Deputy Co-Prosecutor again interrupted with an objection, stating that the fairness of the investigative process is not at issue today. While assuring the defense that the prosecution also wants these issues to be discussed publicly, he stated that, as the managers of this case, the Trial Chamber has the right to manage the schedule as it wishes. Turning to the judges, Smith admonished, "You will lose control of this trial if people are allowed to make speeches and not confine themselves to the agenda you have set."

After conferring with the other judges, President Nonn reported the court's decision to stop the comments by Koppe, as his refusal to heed the instructions of the court to limit his comments to the issue at hand and not to mention the identities of witnesses interrupts the court's proceedings. Koppe asked if this decision meant that Nuon Chea's defense team was not allowed to speak on the selection of the witness list, asserting that his client had waited four days for him to make this presentation.

Appearing irritated, President Nonn interrupted Koppe and informed him that he had already been instructed that Nuon Chea may submit additional witness requests in writing. President Nonn then said that if Koppe had no other observations, the court would give the floor to the next party. Koppe resumed his seat without responding, and President Nonn called on the defense team for Ieng Sary to present its comments.

Ieng Sary's Defense Observations on the Proposed Witness List

Ieng Sary's international co-lawyer Michael Karnavas raised the defense's objection to witness TCE44, stating that the reasons for the objection had already been provided in writing. He also requested that the court provide the list of future topics for the trial as soon as possible to assist the parties with evaluating the current witness list. He also asked the co-prosecutors to provide at least a "courtesy list" of the additional 15 witnesses it planned to request.

Karnavas then made a comment related to Smith's and Koppe's comments about holding witness hearings publicly, maintaining that it would be "a fundamental flaw if the list of witnesses were revealed before the witness appears in court." Urging caution, he asserted that the public would gain nothing from knowing the witnesses beforehand, but that public knowledge of the witness list could endanger the witnesses and cause problems for the trial overall.

Regarding the court's refusal to allow Khieu Samphan to speak earlier in the day, Karnavas urged the court to reconsider their decision. He cited Article 14(a) of the ICCPR as upholding the accused's right to defense through himself or through others.

President Nonn seemed to be put on the defensive by Karnavas' comments and rushed to explain that the Trial Chamber had not said that Khieu Samphan would never be allowed to speak, but rather that, in the interest of order, he would need to wait for his turn.

No Comment from Ieng Thirith's Team on Proposed Witness List

As Ieng Thirith's international co-lawyer Diana Ellis had previously requested the court to rearrange the hearing schedule to ensure she could attend the discussion of the witness list, it was rather surprising when her co-counsel Phat Pouv Seang stated that they had no comments on the tentative list and quickly resumed his seat. The court, however, moved just as quickly to call on the defense team for Khieu Samphan, allowing Samphan himself to present his observations on the tentative witness list.

Khieu Samphan Speaks

Samphan began his comments by greeting the court, the parties, and the public and giving his "sincere salute" to the monks sitting in the public gallery, whom he looked toward often while he spoke. Declaring the trial an important moment for himself and his fellow Cambodians, he stated that he had been waiting for this moment for a long time. He continued, "I am very fortunate I am healthy at this time. As long as I am as healthy as I am today, I will work to the best of my ability and from the bottom of my heart to assist the work of this court... [and] ascertain the truth to the best of my ability."

Turning to the tentative witness list, Samphan said he wanted to make it known to the public that he had observed that the majority of the witnesses on the provisional list belong to the prosecution. Even some of the witnesses originally proposed by his team, he asserted, have now become prosecution, or inculpatory, rather than exculpatory witnesses. Stating that his key witnesses will help his "honesty [to] be revealed," Samphan requested the Trial Chamber to reconsider his witnesses. "They shall be heard. I did not say should – I said shall," he declared. Samphan stated that he would make his request for additional witnesses in writing at a later date. He closed by looking at his fellow Cambodians and the monks in the public gallery, where there was little visible reaction to Samphan's speech.

Civil Party Observations on the Proposed Witness List

The court then passed the floor to the civil parties. Civil Party Lead Co-Lawyer Pich Ang began the civil parties' comments by also paying respects to the monks in the gallery, whom the parties seemed to have noticed for the first time, despite their bright orange robes and placement in the front row all week. He then yielded the floor to his co-lead Elisabeth Simonneau Fort. Fort presented comments on only one witness –TCW608, stating that the witness's status must now be changed to that of civil party in light of the recent Pre-Trial Chamber decision.

Civil party lawyer Martine Jacquin then presented observations on two witnesses – TC348, whose status should now be a civil party, and TC531, whose civil party status has not been determined. Jacquin informed the court that TC 531 would only participate if civil party status was granted. She concluded her statements by strongly urging the court that the identities of the civil parties not be made public before the trials for the protection of privacy and for the individuals' personal safety.

Finally, civil party lawyer Silke Studzinsky completed the remarks for the civil parties by stating that she wished to make remarks on the witness list related to two specific policies of Democratic Kampuchea that will be addressed at the trial – the policy on the regulation of marriage and the “enemy policy.” Studzinsky began to explain that the policy on the regulation of marriage was different from other policies during the Khmer Rouge regime and was loudly interrupted by Michael Karnavas, who had been standing for a while without recognition, stating, “I wish to be heard.”

The court acknowledged Karnavas and told Studzinsky to stand down. Karnavas said that he objected to Studzinsky's comments as this was not the appropriate time for this speech. While acknowledging that civil parties have an important role, he still maintained, “They don't get exceptions; they must follow the rules like everyone else.”

Sa Sovan then informed the court that he also objected to Studzinsky's comments, chiding her to focus on the four accused in court and “not on the regime itself.”

In response to the objections, President Nonn advised Studzinsky to follow the directions of the Trial Chamber when discussing the witnesses and informing her that all other comments outside of these instructions will not be allowed.

Studzinsky replied that she believes she should be allowed to give some context to her comments on the specific witnesses. Stating the numbers of the three witnesses she wished to address, Studzinsky then stated that, while she would not object to the witnesses, she needed to explain the policy so that the court is aware of why she did not think these witnesses are sufficient. She stopped then, distracted by the judges conferring on the bench.

President Nonn again reprimanded Studzinsky. “I had hoped you would follow the example of the two lead co-lawyers,” he said. Warning her again to follow the instructions of the court, he gave her one last chance to be precise and direct.

Studzinsky then continued, leaning on the podium and with a look of frustration. She stated that two witnesses, TCW 126 and TCW604, would not be able to provide evidence on the marriage regulation policy for the entire time period of 1975-79 that the court's mandate covers. As to a third witness, TCW707, she said that the witness would not be representative of the majority of those affected by the policy. As Studzinsky began to request that the court consider including certain evidence at trial, Karnavas again abruptly stood and objected.

Karnavas stated that, while he did not wish to be “disputatious,” he would object “each and every time one of us does not abide by the rules.” Indicating the court's explicit instructions regarding

the need for written submissions by parties to request additional witnesses, he called it an abuse of the court's generosity to make these types of speeches.

The court decided that Studzinsky would not be allowed to make any further comments. Speaking for the court, Judge Cartwright stated that the civil parties are led by the lead co-lawyers, who must manage the representation of the consolidated civil party group. She then asked Studzinsky, in light of the civil parties' role to "support the prosecution during this trial," to state directly whether she accepts or objects to one or more of the witnesses mentioned. Studzinsky indicated that she accepted all three witnesses, to which Judge Cartwright responded, "Given that all three were proposed by the prosecution, that is a very appropriate indication."

After the judges conferred for a few minutes, Ieng Sary's co-lawyer Ang Udom requested that his client be allowed to return to the holding cell and again participate remotely due to his back problems. The court allowed the request and requested the audiovisual officers to ensure that the equipment was working in the holding cell so that Sary may still participate.

President Nonn then announced that, with the completion of the civil parties' observations on the tentative witness list, the public hearing section of the initial hearings in Trial 002 had come to an end. After a brief adjournment, the court would reconvene to continue the hearings *in camera*, or as a closed session, as requested by the co-prosecutors.

Disagreement and Debate Close the Day

Before the court could be adjourned, however, Michael Karnavas again stood and was recognized by the court. He explained that it was his understanding that time would be given at the end of the hearings to discuss additional matters. He requested to be allowed to make a brief statement before the adjournment to raise three additional matters, which he believed had bearing on the jurisdiction of the court and that Ieng Sary's team thought should have been scheduled for oral arguments.

President Nonn requested Karnavas clarify the three issues he would like to discuss. Karnavas responded that these issues are: (1) the applicability of international law, (2) the applicability and application of command responsibility, and (3) the application of crimes against humanity. He contended that he believed these three topics are jurisdictional issues, even though they may go to the "contours of the law," and therefore his team would like the opportunity to address these issues either in this hearing or in an additional initial hearing.

Victor Koppe, lawyer for Nuon Chea, then informed the court that he also had an additional matter to discuss before adjournment. Stating that it had been his understanding that the parties would have an opportunity to publicly debate the witness list, he requested the court to provide clarification on ECCC Internal Rule 80 *bis*, which requires the Trial Chamber to "consider the lists of potential witnesses and experts submitted by the parties in accordance with" the Internal Rules. Koppe asked the court to provide guidance on the word "consider" and to advise whether another hearing would be scheduled for oral arguments on the parties' proposals of specific additional witnesses.

Civil Party Lead Co-Lawyer Fort also made known the civil parties' desire for another initial hearing on the witness list and on other legal issues, requesting the court to advise whether they would schedule a hearing and on what date they expected it would be set.

Finally, International Deputy Co-Prosecutor Smith voiced his support for the request of another initial hearing, urging that as much of the hearing be as public as possible. Smith also asked that as many of the issues as possible be handled before trial commences, so that the trial can run smoothly.

Judge Jean-Marc Lavergne then questioned Michael Karnavas on the issues he mentioned earlier, asking whether these are issues that have been addressed without written submissions or whether these are entirely new issues. Karnavas responded that his team had filed written submissions on all of these topics. He then argued that, under Internal Rule 89 1 (a) and (b), these topics encompass the sort of issues that need to be resolved before trial.

Turning to a new topic, Karnavas then addressed the issue of extended joint criminal enterprise (JCE 3), a specific mode of liability under which an accused could be held liable for all foreseeable crimes committed by any participant in the enterprise. The Trial Chamber had previously issued a 68-page decision, he explained, finding JCE 3 could not apply to these proceedings because it did not rise to the level of customary international law during the time period (1975-79) that is covered by the court's temporal jurisdiction. Karnavas then claimed that the prosecution was "delaying the process" by requesting the court to seek further guidance from *amici*, or experts. Stating that parties need to have notice and certainty of the issues to be covered in trial, he urged the court to make a decision on this issue as early as possible.

William Smith responded to Karnavas' comments, agreeing that these issues need to be decided as soon as possible. In reply to the comment that the prosecution was delaying the process, however, Smith stated the co-prosecutors had been as prompt or maybe even more prompt as every other party in filing submissions and responses. Characterizing the defense submissions, especially those of Ieng Sary's team as "absolutely voluminous," Smith stated that the co-prosecutors had done nothing to delay the process.

Karnavas quickly jumped to his own defense stating that he was concerned about the impression Smith's comments about the number of defense filings would leave on the public. "I am entitled to represent my client," he declared, stating that he wanted to be diligent in advocating for Ieng Sary. Rather, he asserted, it is the prosecution who is not diligent by filing the "prejudicial, untimely" JCE 3 motion. Stating that he believed the motion should be dismissed outright, he requested the court to make its decision on the JCE 3 issue as quickly as possible, so that the parties definitively know if JCE 3 applies to the case and so that he can effectively represent his client.

Following this heated exchange, the court adjourned for a brief recess, bringing to a close the public portion of the initial hearing in Trial 002. It is expected that the substantive trial in this case will begin in August or September. Whether the court will heed the parties' call for additional hearings before the start of the trial, however, remains to be seen.