Defense Teams Argue for Hearing of Trial in Case 002 in Its Entirety, Severance of Case against Khieu Samphan

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On Wednesday, February 20, 2013, the Extraordinary Chambers in the Courts of Cambodia heard a second day of arguments concerning how it should proceed in the trial of senior Khmer Rouge leaders Nuon Chea, Ieng Sary and Khieu Samphan.[2] The trial has effectively been on hold since the Supreme Court Chamber ruled that the manner in which the Trial Chamber had severed the overall case against them — known as Case 002 — into smaller trials covering discrete charges was invalid and that the Trial Chamber had to reconsider the question of scope in its entirety.

Today all defense teams put their proposals for the way forward before the Court, sparking contentious debate in the courtroom. Both Mr. Chea and Mr. Sary's defense teams argued that in fact, the Trial Chamber should hear Case 002 in its entirety, in stark contrast with the Office of the Co-Prosecutors' (OCP) suggestion that the Trial Chamber continue to use the scope of the initial trial but with S-21 added to its purview. The Khieu Samphan Defense Team, meanwhile, suggested that perhaps it should not be the subject matters severed but rather the persons tried, arguing that the case against Mr. Samphan be separated from those of the two less healthy co-accused persons.

The long hearing day was enlivened by occasional flashes of temper from some of the counsel and use of a wide range of creative analogies. Most amusingly, the OCP accused the Nuon Chea Defense Team of committing the "mother of all flip-flops" in reversing its initial support for

[1] Cambodia Tribunal Monitor's daily blog posts on the ECCC are written according to the personal observations of
[2] Cambodia Tribunal Monitor's blog post concerning the first day of arguments may be accessed at http://www.cambodiatribunal.org/blog/2013/02/trial-against-senior-khmer-rouge-leaders-should-include-crimes-s-21-prosecution-argues.

severance of Case 002, which that team leapt on, counter-accusing the OCP of the "grandfather of all flip-flops" in initially attempting to put the entire Democratic Kampuchea regime on trial in its Case 002 introductory submission and now seeking to reduce the Case 002 trial to only a single, smaller trial.

Nuon Chea Defense Team Requests Hearing of the Whole Case

Trial Chamber President Nil Nonn opened the trial this morning before an audience of approximately 300 villagers from Kampong Chhnang and Takeo provinces, many of whom appeared to have been born during or before the DK period. He noted that the parties would be required to address not only questions outlined in the initial memorandum from the Trial Chamber on the way forward, but additional questions that had been put to the parties in a memorandum from the Trial Chamber circulated yesterday.[3]

International Co-Counsel for Nuon Chea Victor Koppe took the floor to offer the first of the defense team's comments. He began by addressing the arguments put forward by the OCP and civil party co-lawyers during the hearing on Monday, February 18, 2013. Noting that the Nuon Chea Defense Team had initially supported the Severance Order as a trial management measure, Mr. Koppe declared that his team now wished to argue that Case 002 not be severed but rather be tried in its entirety. While it might seem odd that they now sought to argue that their client should be tried for more crimes rather than less, Mr. Koppe said, it needed to be recognized that the Closing Order was highly complex and condemned a regime and nearly an entire ideology.

Mr. Chea "believes in what he did and why he did it," the defense counsel went on. Presenting his defense would enable Mr. Chea to explain his actions to the public. "This trial is Nuon Chea's only opportunity to present his defense to the allegations in the Closing Order … [and] a fuller version of the historical truth," Mr. Koppe said. A full Case 002 trial would be the only way Mr. Chea could advance a full legal defense, he continued.

Mr. Koppe explained that Mr. Chea did not deny participating in the decision to evacuate Phnom Penh; indeed, he was "unrepentant for having taken it" to restore a country and economy devastated by war. Evacuating people from the cities during the DK period needs to be judged as a whole and not in a series of "artificial, component parts," the counsel asserted.

The judicial investigation in Case 002 failed to adequately consider questions of fact vital to a defense in this case, Mr. Koppe said. In particular, he contended, it did not adequately address the living conditions in Cambodia prior to 1975 or the involvement of foreign powers. The scope of the limited Case 002/1 restricts the Nuon Chea Defense Team's ability to present fully the defense that the program Mr. Chea had implemented with the senior Khmer Rouge leaders intended to ensure Cambodia's economic security and territorial integrity.

[3] This memorandum has the document number E264.

In practice, Mr. Koppe continued, it was difficult to separate witness testimony from matters within the purview of Case 002/1 and the rest of Case 002. Often, he said, there were "indirect references to cooperatives or security centers" without the defense being afforded the opportunity to put these matters into context, explain their function, and explain Mr. Chea's role in relation to them, as they were deemed to be "beyond the scope" of the trial. This was not only inconsistent with Mr. Chea's ability to present a full defense but also a poor way to present the truth, he asserted. What the Court heard as a result was "a series of fragments supposedly relevant to Case 002/1 in some way but incomplete as a description of what really happened."

Furthermore, Mr. Koppe argued, it would be difficult for Mr. Chea to believe he would be judged impartially in subsequent trials if he were already convicted for a first trial. Noting the suggestion of the Supreme Court Chamber that a second Trial Chamber panel be appointed; he stated his team agreed with the OCP and civil party co-lawyers' arguments that this was not feasible. Indeed, he said, he was of the view that perhaps this was understood by the Supreme Court Chamber and was intended to be a message that no further trials in Case 002 were realistic.

If there were more representative charges in this first, and perhaps only, trial, the counsel continued, these charges needed to put forward a full theory of what happened during the DK period. However, he asserted that the OCP's proposal to include S-21 and Tuol Po Chrey did not meet the necessary representativeness.

While the Nuon Chea Defense Team agreed with the OCP as to the relevant law on representativeness, it wished to emphasize the importance of one of those factors: the fundamental theme of the case. This case needed to consider the "big picture"; the OCP's proposal failed to do this as it missed two DK themes, Mr. Koppe said. Further, he contended, adding S-21 would be a poor way to make the trial more representative.

The missing themes in the Nuon Chea Defense Team's view are:

- The essence of what the senior leaders of the Khmer Rouge tried to do: Mr. Koppe noted that the leaders had sought to secure rapid development of Cambodia through a great leap forward and extermination of enemies by whatever means necessary. However, the OCP proposal focused much more on the second rather than first part.
- The crime that defined the Khmer Rouge in the public mind: genocide.

The Closing Order had concluded that Mr. Chea "probably" committed genocide, Mr. Koppe stated, commonly referred to as "the crime of crimes." This is one of the lasting issues of the Khmer Rouge period and is regularly associated with Cambodia. Indeed, he noted, the entity that founded the Documentation Center of Cambodia, which in turn collected much of the information for this trial, was Yale University's Genocide Studies Center.

The genocide claim in Cambodia was, however, regularly contested by the experts, the counsel said. Ultimately, the genocide question went to the heart of how the DK period and Mr. Chea are perceived, and particularly, whether the Khmer Rouge's actions were well-intentioned plans that had gone terribly wrong, or whether they had discriminatory intentions from the beginning. These questions went to the heart of Case 002, Mr. Koppe said.

The subject of S-21 deals only with the reeducation of enemies, Mr. Koppe continued; it only incidentally addresses the targeting of groups. Thus, S-21 is possibly the "least representative crime site in the Closing Order" insofar as the targeting of enemies was concerned because, as the Closing Order said, S-21 was a "unique" security center.

Reviewing the Closing Order showed that S-21 was "fundamentally a tool of internal political purges," Mr. Koppe stated, noting that 81 percent of known detainees had been members of either the Revolutionary Army of Kampuchea (RAK) or of the Communist Party of Kampuchea (CPK). He contended that the OCP's view that S-21 was the heart of Case 002 was a misstatement of the reality.

In addition, Mr. Koppe agreed with the Trial Chamber, the fact that S-21 had already been adjudicated before the Trial Chamber was a good reason for it not to be adjudicated again. If the facts relating to S-21 were to be tried again, he said, there would be a real question as to whether the Trial Chamber would be able to impartially consider these facts, especially given concerns about the credibility of Kaing Guek Eav *alias* Duch. While acknowledging that the Nuon Chea Defense Team's applications in this respect had been rejected previously, he argued that this does not mean there was not possible bias, even if it does not rise to the level required by the ECCC Internal Rules for resultant action.

As for the participation of civil parties in Case 002, Mr. Koppe said that contrary to the civil party co-lawyers' claims, reparations and indeed, civil party status, are available only to those civil parties injured by the crimes that the Court adjudicated. Of the nearly 4,000 civil parties in Case 002, no more than 1,166 civil parties would be addressed under the previous scope of Case 002/1, which would only have represented one in four victims. Several groups of victims, including the Cham and the alleged victims of forced marriage, would have been excluded. The civil party co-lawyers could not "have their cake and eat it too," Mr. Koppe said. They could not support the OCP's proposed new scope for the case on the one hand, and then on the other, pretend that they were not cutting off a significant number of civil parties from access to justice.

While S-21 was both "public" and "famous" and therefore important in this way, Mr. Koppe asserted that this was not the test in telling the story of the DK or in assessing the conduct and responsibility of Mr. Chea or the claims of many of the civil parties.

Significantly, the counsel stated, the Trial Chamber's objective is "certainly not to structure its trials in ways it would think would be most likely to lead to a conviction." The Chamber is to judge the allegations in the Closing Order as presented to it by a different judicial authority, he said, asserting that it would be a serious failure of the Chamber not to attempt to properly try the conduct of the accused but to move as quickly as possible to a guilty verdict.

It is ironic, Mr. Koppe said, that the OCP seeks to add only S-21, which is known as the "Tuol Sleng Genocide Museum," and which was established by other former Khmer Rouge leaders. S-21 was used as a propaganda tool to prove genocide had occurred when it had not, he contended. If the Trial Chamber accepted the inclusion of S-21, it would be used "one last time" as a "rubber stamp" by those who still remained "at the helm of this tribunal," he stated.

Mr. Koppe said that the benefits of proceeding before the trial scope is set out are outweighed by the cost. It would cause "significant confusion," he argued, as witnesses would have to be recalled and there would likely be repetitive objections throughout that testimony.

Perhaps the reason for the delay the trial is now facing due to scope, the counsel suggested, arises from the trial moving too quickly at the outset. The certainty of a decided scope would be worth a few lost trial days, he argued and stated that the Nuon Chea Defense Team proposes:

- No witnesses should be called until the Trial Chamber has determined the ongoing scope of the trial. If necessary, it could first issue a decision and indicate that the reasoning was to follow.
- No witness should initially be heard who could speak to evidence that would have been outside the original scope should be called. This would give the parties some time to prepare for new matters included in the scope of the trial.

Views of the Nuon Chea Defense Team on Issues Put to All Parties

At this point, the defense counsel moved to an issue-by-issue consideration of matters set out in the Trial Chamber's initial memorandum. He first addressed Issue 6, concerning the number of additional witnesses, experts, and civil parties and supporting documents that would be required for any proposed new trial scope and the relevant timelines. If S-21 were included, Mr. Koppe said, there would need to be a "far more searching examination" of what happened there. In Case 001, Duch pled guilty, and as such, there was not much debate about what actually happened there. In addition, the judicial investigators refused to consider the presence of enemy spies during the DK period, he argued, though there was some evidence of extrajudicial killings of such spies.

Mr. Koppe noted that the Nuon Chea Defense Team was not yet in a position to give an indication on the precise volume of new documents and witnesses necessary. The team assumed that this was only a request to give a preliminary indication with respect to the volume of evidence.

On Issue 7 — that is, the prospect of the immediate commencement of hearing in Case 002/2 following the conclusion of evidentiary hearings in Case 002/1 (and following a short recess for preparation) — Mr. Koppe expressed the view that the likely overlap between Case 002/1 and any subsequent trial would make it impossible to proceed with a subsequent trial before the judgment in Case 002/1 would be issued. In light of the initial scope and evidence presented in Case 002/1 already, the Trial Chamber would issue a judgment on many matters of general relevance across Case 002, such as the communication and military structure. It would seem under such a proposal, parties would be required to do all the pre-trial preparation work for a

Case 002/2, but the Chamber would then at some point issue a ruling of hundreds of pages with fundamental implications for such a trial.

The Nuon Chea Defense Team had no comments to make in relation to the eighth issue, namely any prejudice caused by the lack of a "concrete timetable" for later trials in Case 002.

In relation to the last issue that the Trial Chamber had initially raised and addressed only to the defense teams, on prejudice to the defense, Mr. Koppe said that the obvious answer was that the defense teams had not prepared to answer all allegations in the Closing Order. It would, however, be necessary that the Nuon Chea Defense Team be able to recall witnesses if necessary to question them on other issues.

Ieng Sary Defense Team Strenuously Criticizes Supreme Court Chamber and Dismisses a Smaller Representative Trial as "Justice à la Carte"

International Co-Counsel for Ieng Sary Michael Karnavas took the floor at this point, calling Mr. Koppe's presentation, with which he agreed almost in its entirety, "splendid" and "marvelous." He then took the opportunity to cite at length from U.S. Supreme Court Justice Antonin Scalia, who once wrote:

> Some judges believe that their duty is, quite simply, to give the text its most natural meaning, in the context of related provisions of course, and applying the usual canons of textual interpretation, without assessing the desirability of the consequences that meaning produces. On the other extreme are judges who believe it their duty to give the test whatever permissible meaning may produce the desirable results.

The ECCC's Supreme Court Chamber fit into the latter category, Mr. Karnavas said. It had displayed a "paucity of meaningful authority" to justify its position. Now the Trial Chamber, as an inferior court, was bound to follow the Supreme Court Chamber's directives. These included a requirement that the Trial Chamber act *ultra vires*, that is, outside its judicial power. In particular, it seemed the Supreme Court Chamber sought to "transform the ECCC" into the International Criminal Tribunal for the former Yugoslavia (ICTY) by simply following its rules and case law, even though these were devoid of connection to the civil law system. Additionally, he asserted, the Supreme Court Chamber seemed to ask the Trial Chamber to engage in, as former ICTY prosecutor Carla del Ponte once called it, "justice *à la carte*."

Is the Trial Chamber still required to prepare a plan for subsequent Case 002 trials or not? Mr. Karnavas queried. If not, then the Trial Chamber is in effect dismissing the remaining counts and disregarding its judicial responsibilities. Mr. Karnavas entreated the Trial Chamber to look at the relevant ICTY rule that the OCP had requested the Chamber to consider in terms of representativeness. This rule, Mr. Karnavas said, was not "rocket science"; it was designed to focus on dismissing portions of the indictment and was fashioned to assist the ICTY with its Completion Strategy in shutting down on schedule. Indeed, he said, Ms. del Ponte described it as a "mechanism to move the process ahead."

It was "rather fanciful" to say that this rule went to severance, Mr. Karnavas stressed. "It goes to dismissal!" This was significant, because if the Trial Chamber is to consider dismissal, it is incumbent on the Trial Chamber to consider dismissal of charges in a representative way.

The OCP seemed to suggest that reasonable representativeness could be read into the rule, Mr. Karnavas continued. And while he applauded the OCP for trying to give parties an opportunity to be heard, he asserted that the parties had been heard.

The average age of a Cambodian male is 60 years, Mr. Karnavas said next. He recounted that the OCP was mandated to prepare the introductory submission in this case from 2006 but had continued to expand the indictment much further, including, for example, the genocide of the Chams and forced marriages and sex crimes. At the time the introductory submission was first drafted, Mr. Sary was between 81 and 83 years old; today, he is 87 or 88. Which part of this did the OCP not know? Mr. Karnavas inquired. Were they "babes in the woods?" These are highly experienced international prosecutors who knew that at the very minimum, the trial would take four years, he concluded

Case 002 was severed in the only way it could have been, the defense counsel continued; however, now the Supreme Court Chamber was asking the Trial Chamber either to explain the way forward in terms only of manageability or have a "mini trial" of Case 002. The Supreme Court Chamber had put forward suggestions about how to go forward, Mr. Karnavas said, including a second Trial Chamber panel. However, these suggestions were derived from the ICTY's *Mladić* decision and were uncreative; the ICTY had much more extensive resources at its disposal, including multiple experienced trial panels.

Additionally, he asserted, it was "ridiculous" for the Trial Chamber to enter a finding on matters that it had not heard, by recognizing that all civil parties were entitled to reparations when the relevant facts connected to their claims had not been heard. "How do you get [to this conclusion] by law?" Mr. Karnavas challenged, stating that he also failed to see how it was possible that the civil party co-lawyers were now contemplating abandoning the claims of some civil parties.

Mr. Karnavas noted that the OCP were now suggesting that S-21 would be a good proxy crime site for all of Case 002. What about the rest of the Closing Order? he pressed. The prosecution had also noted, however, that there was still a possibility for future trials; this meant, Mr. Karnavas said, that the "sword of Damocles" would continue hanging over the accused persons' heads. This aside, if future trials were indeed a possibility, there needed to be a plan for them, and there needed to be the relevant funding in place now. The Ieng Sary Defense Team would press and appeal for this if necessary.

Noting that the Trial Chamber had foreshadowed requiring two to three weeks to develop a plan for the way forward in light of the Supreme Court Chamber

decision, the defense counsel contended that this is an ambitious timeline by which to produce a plan both for a single "buffet style, *à la carte*" representative trial, as well as a plan for a series of trials that would satisfy the parties, the civil parties, the public, and the donors. This situation was a "logistical nightmare." As such, the only way forward, Mr. Karnavas said, was to be "more intellectually honest" and just say that the Trial Chamber would try the entire case.

The Supreme Court Chamber judgment was "a bit schizophrenic," Mr. Karnavas continued, with apologies to that chamber. In proposing these two contrasting possibilities, it seemed that the Supreme Court Chamber wanted a quick, representative trial so that the Court could "close shop and declare victory." This all begged the question of whether there was a presumption of innocence, he stated; there was also a question of certainty, with the accused persons left with possible future trials dangling in the air. The OCP bandied about the need for the trial to arrive at "reconciliation" and the "historical truths," he said, yet the involvement of foreign states during the DK period were excluded from the indictment.

After a brief mid-morning break, Mr. Karanvas spent some moments looking at the relevant portions of the ICTY Rules and Procedure of Evidence, a report to the United Nations Security Council, and the *Prosecutor v. Stanišić and Simatović*, noting that a difference in the ECCC from the ICTY was that in the ECCC, the Trial Chamber did not have the discretion to dismiss charges contained in the Closing Order. Comparing the two courts was like comparing apples and pears, he said.

Mr. Karnavas also noted that on December 14, 2012, the Supreme Court Chamber ruled, in respect of Ieng Thirith, that the OCP did not have the power to ask for discontinuance of a criminal action once it had been initiated and the Court could do so only for a specific reason stated in the law.

Responses from the Ieng Sary Defense Team on Specific Issues Raised by the Trial Chamber
Turning to the issue the Trial Chamber had put forward in its initial memorandum, Mr. Karnavas began with Issue 1, concerning the likelihood of all Case 002 charges being tried while the accused persons were still alive or competent. The defense counsel queried the OCP's "disingenuousness" in saying that only S-21 needed to be added to ensure representativeness, when considerations such as the age of the defendants existed even when the OCP first crafted the introductory submissions.

Moving to the second issue, concerning the parties' preferences as between having any timely verdict or a broader array of charges at the risk of no verdict at all, Mr. Karnavas said his team's position was that Case 002 should be tried in its entirety. They believed that with creativity, the Trial Chamber could find ways to reduce the overall witness list. This would also end lengthy discussions concerning what was within the scope of the trial and enable the defense to know which witnesses would actually be called. The Trial Chamber should order the OCP, Mr. Karnavas said, to create a list of witnesses and documents that they believed would prove their case in respect of the entire Closing Order.

As to the third question — views on the scope of Case 002 in light of the trial's advanced state and lengthy delays due to the physical frailty of all accused — Mr. Karnavas said his team

believed the entire case should have been tried. Other sections of Case 002 should not simply be "parked" in the "stratosphere," when everyone knew that there would likely be no more trials.

Regarding Issue 4, additional matters to be included in a new scope of Case 002/1, Mr. Karnavas said this question seemed to suggest that what the OCP proposed (namely, merely including S-21 in Case 002/1's now-annulled scope) met the criteria of representativeness. However, in the Ieng Sary Defense Team's view, what the OCP presented was not representative of the Closing Order. It was for the Trial Chamber to decide what an appropriate scope would be.

Concerning Issue 6, which related to the number of additional witnesses, experts, and civil parties and supporting documents that would be required for any proposed new trial scope and the relevant timelines, Mr. Karnavas said his team believed some witnesses would need to be recalled for further questioning. For the meantime, however, none should be called until the question of the scope was resolved. Mr. Karnavas also felt that the OCP's initial appeals to the Trial Chamber's scope had not been timely and thus should never have been entertained.

Next, the defense counsel addressed Issue 7, on the immediate commencement of a hearing in Case 002/2 following the conclusion of evidentiary hearings in Case 002/1 (and following a short recess for preparation). In theory, this proposal was feasible, Mr. Karnavas said, since it was one Closing Order. Certainly, there were complications, however. In particular, there was the "realistic possibility" that there would not be any funding.

As for Issue 8, namely any prejudice caused by the lack of a "concrete timetable" for later trials in Case 002, Mr. Karnavas denied having "suffered any anticipatory anxiety" or "angst." He had not "lost any sleep" and needed no "tranquilizers"; his team proceeded as they normally would have. This did not mean that others had not been prejudiced; for instance, the OCP said that it affected how it would have presented their case. At the same time, it could prejudice the Ieng Sary Defense Team in the future depending on the plan for future cases. It would have been preferable for the Trial Chamber to have come up with a "boilerplate" plan at the outset upon which the parties could have commented.

In the Ieng Sary Defense Team's view, the annulment of the Severance Order would have resulted in a more expeditious approach towards the entire Case 002 going forward. At the ICTY, Mr. Karnavas said, the Trial Chamber often directed the prosecution as to how much time it was permitted to take in preparing its case. At the ICTY, the representativeness rule enabled the prosecution to cut away parts of its case. This was the prosecution's discretion, but the Trial Chamber was able to control the management of the trial so that the case was not prolonged. The onus was on the OCP here, Mr. Karnavas argued; essentially, the OCP developed the Closing Order, and therefore it was their responsibility to develop a way forward.

Finally, Mr. Karnavas said the "path of least resistance" to ensure "justice for all" was to have a targeted case for the entire Case 002. It was the OCP who pressed forward with designing an enormous Case 002, despite knowing the life span of average Cambodians, and despite Mr. Sary already outliving this by 20 years and having lived a difficult life in the jungle.

The president directed Mr. Karnavas back to Issue 6 on new witnesses and evidence. Mr. Karnavas said his team was not proposing any new witnesses or evidence. It was for the prosecution to propose this, he state, and the Ieng Sary Defense Team was not prepared to make any submissions on this.

Khieu Samphan is Healthy and Cannot Be Treated like Other Accused, His Counsel Argues

International Co-Counsel for Khieu Samphan Arthur Vercken took the floor. He started by noting that he would attempt not to cover the same ground as the Nuon Chea and Ieng Sary Defense Teams but that he had reached a different conclusion, as Mr. Samphan was not in the same position as Mr. Chea and Mr. Sary with respect to his health.

Concerning Issue 1, he thought the Trial Chamber wanted to reach some kind of "package deal" on this regarding the health of all defendants. However, Mr. Samphan is not going to die, the counsel said, noting that his client is "in fairly good health," notwithstanding his recent hospitalization. Not only is Mr. Samphan in good health and fit to stand trial, he has every interest in being tried as quickly as possible, Mr. Vercken contended. As he seeks acquittal from the totality of the Closing Order, Mr. Samphan feels that the sooner he is tried, the sooner he can potentially be acquitted and return to live out the remainder of his life with his family in peace.

The Trial Chamber and the OCP kept telling everyone that time was short and the accused would die, Mr. Vercken continued. Due to such a hurry, the Trial Chamber suggested that the accused persons would be judged "several times over." This did not "tally with" Mr. Samphan's position. Whether Mr. Samphan chose a succession of mini-trials or a more representative first trial, Mr. Samphan's position was the same. He is younger. His health has made it possible to attend 90 percent of court hearings over the past one and a half years. He is "very much exposed in the shop window," moreover, as he was the only one who sat at the accused's bench morning and afternoon, day in and day out.

Judge Claudia Fenz had noted on Monday, Mr. Vercken recounted, the lengthy timelines in the Duch case, in which there was one accused, who accepted the facts, and only one crime site. Under those circumstances, the final verdict was delivered in a year and a half.

It was not possible to discuss studying evidence in a Case 002/2 trial while the foundation of Case 002/1 was proposed to be used for subsequent trials, as this would violate the rights of all parties. A low estimate would still suggest there would need to be at least three years more before Mr. Samphan would receive justice. This was a considerable length of time.

Therefore, Mr. Vercken was of the view that the fine words about severance accelerating the procedure were "imaginary." Whatever the Trial Chamber decided, Mr. Samphan would be prejudiced. The Severance Order did not protect Mr. Samphan's right to a trial within a reasonable time, the counsel argued; severance lengthened the procedure. Deciding to have a trial on the entire Closing Order at the outset would have been the best solution. However, this still would have prejudiced Mr. Samphan.

Since the trial began, the defense had been "caught in a state of uncertainty." The dimensions of the trial were variable and unclear, Mr. Vercken asserted; the Trial Chamber had, in its various

decisions about severance over a year and a half, "left the doors perpetually open." Even though there was a Closing Order, the defense still did not know the scope of the trial.

Not defining the boundaries of the trial encouraged Mr. Samphan to keep silent as he did not know what to expect, Mr. Vercken continued. In the interests of speed, the Trial Chamber had contributed to "gagging the accused." There was no other way to interpret the Trial Chamber's requirements to submit a final memorandum on applicable law in the middle of the trial that would now need to be revised and to limit their final submissions to 100 pages that covered approximately 50 witnesses and 5,000 documents. This was a "ludicrous" "joke," he said.

Mr. Vercken was also certain that the Trial Chamber would be prepared to limit its time to plead in court. Rather than choosing between two options, the Khieu Samphan Defense Team was more interested in rules that were permanent. They wanted a clear timetable that was respected and wanted respect for their rights.

At this point, Trial Chamber President Nil Nonn intervened, sternly and repeatedly advising Mr. Vercken that the Chamber had given very clear guidelines. The president said that Mr. Vercken was now deviating from the agenda and subject of the hearing. The president then adjourned the hearings for lunch and instructed Mr. Vercken to revise his submissions to conform to the appropriate approach and present them after the break.

Position of Khieu Samphan Defense Team Concerning Issues Raised by Trial Chamber

Following the lunch break, the president ceded the floor again to Mr. Vercken, though not before warning him to respond directly to the issues that the Trial Chamber had asked the parties to address. Mr. Vercken acknowledged this, and added by way of brief preamble that Mr. Samphan felt "neither sick nor moribund," and thus the issue of health should not be put forward to justify a breach of Mr. Samphan's rights.

Concerning Issue 6, that is the number of additional witnesses, experts, and civil parties and supporting documents, Mr. Vercken first assumed that the only issue on the table was the potential addition of S-21. Mr. Vercken said that, as in the past, the Khieu Samphan Defense Team did not have any witnesses they wished to call in relation to S-21. However, they reserved their right to make additions to this.

Regarding Issue 7, on the immediate commencement of hearing in Case 002/2 following the conclusion of evidentiary hearings in Case 002/1 (and following a short recess for preparation), Mr. Vercken said he did not believe this would be wise, for reasons already discussed.

On Issue 8, that is, whether prejudice was caused by the lack of a "concrete timetable" for later trials in Case 002, Mr. Vercken said he believed the issue was not the absence of a timetable and

the "meticulous day-by-day accounting" associated with it. All the estimates of hearing lengths were a "secret pudding cooked" by the OCP. The problem ran much deeper than the absence of a timetable. The issue could not be addressed without extrapolating in the manner in which Mr. Vercken had discussed in the morning. What was most significant was instead "whether or not the accused know how they are being tried and why they are being tried."

Finally, with respect to Issue 9 — that is, the impact of annulment of the Severance Order on defense rights and recommendations as to appropriate remedies — Mr. Vercken said he addressed this issue already in the morning. With respect to Mr. Samphan, whatever decision was taken, his right to a timely and fair trial had already been violated; he was fit to stand trial and was thus unconcerned by "the need for expeditiousness."

By way of compensation, it could be possible for the case against Mr. Samphan to be severed, such that he would be judged for the entire Closing Order on his own. This would mean that if the other accused encountered health problems making it impossible for the trials against them to continue, the Trial Chamber could nevertheless continue with the trial against Mr. Samphan.

Mr. Vercken also added, dramatically, that his team would shortly be filing a request that Mr. Samphan be released and placed under house arrest. The parties would not be "out of this for [at least] the next three or four years." This would allow Mr. Samphan, "at his age, to calmly await your verdict."

Further Comments from Khieu Samphan's National Co-Counsel

National Co-Counsel for Khieu Samphan Kong Sam Onn took the floor to supplement Mr. Vercken's comments. He said that at this stage, the Supreme Court Chamber's decision meant that the parties were required to "virtually start the trial anew." Two issues in particular impacted on Mr. Samphan as a result. The first was Mr. Samphan's presumption of innocence; when certain facts were to be "cherry-picked for trial" whereas others were put to one side, there seemed to be an imputation before the trial even began that the ones that had been cherry-picked were facts of which the accused were guilty.

In addition, Mr. Samphan's right to have a fair and expeditious trial was also compromised. Regardless of the option selected by the Trial Chamber, Mr. Samphan's right in this respect would continue to be violated, Mr. Sam Onn stressed. When the other accused were not able to participate in the trial, Mr. Samphan had to wait in the ECCC Detention Facility, in violation of his right to a fair trial. Whatever option was chosen would not impact upon Mr. Samphan's right to exercise his right to a fair trial. One approach might not be applicable to all accused in this instance. The co-accused persons were not at fault for their advanced age. The question was how such proceedings had dragged on so far. The fact that the trials started so long after the crimes were committed was not the fault of the accused. The OCP should have factored all this in.

At this point, the president intervened to advise that these matters had already been raised this morning. He "sincerely hoped" that parties would have taken the floor to raise matters that were "directly connected" to the issues the Trial Chamber had raised in its memorandum. Mr. Sam Onn acknowledged this but said that his team was trying to give a "fuller response" on these issues and not simple yes or no answers. The Khieu Samphan Defense Team did not support any

ongoing severance of Case 002, he said. There was no need to skip to try certain facts in light of the advanced age of the accused. This approach was arguably improper.

Regarding Issue 4 in particular, namely additional matters to be included in a new scope of Case 002/1, Mr. Sam Onn said that if the Trial Chamber accepted S-21 as part of the scope, the Khieu Samphan Defense Team would require additional time to prepare for the debate on this matter.

As for Issue 6 (the number of additional witnesses, experts, and civil parties and supporting documents that would be required for any proposed new trial scope and the relevant timelines), Mr. Sam Onn said that if the OCP proposed new witnesses and documents, the defense reserved the right to do the same after reviewing the proposal of the OCP.

On Issue 7, that is, the immediate commencement of hearing in Case 002/2 following the conclusion of evidentiary hearings in Case 002/1 (and following a short recess for preparation), Mr. Sam Onn said that this was connected to Issue 9, concerning any prejudice to defense rights. Mr. Samphan's presence to attend the proceedings was almost permanent. Ha had not waived his direct presence to participate in the proceedings. As other co-accused persons were not able to be present, Mr. Samphan had to wait at the ECCC Detention Facility in clear violation of his rights. If this continued, Mr. Samphan's rights would continue to be violated.

Postponement of the proceedings certainly impacted on Mr. Samphan's time; thus, Mr. Sam Onn stated, echoing Mr. Vercken, the Khieu Samphan Defense Team requested the release of their client. At this point, the president intervened again, stating with a smile that Mr. Sam Onn appeared to "wander far away" from the point of today's proceedings. He needed to address the possibility of extending the scope of the trial. Mr. Sam Onn said that his team could not indicate the exact timing that would be needed to extend the trial, as this depended on the lists produced by the OCP.

The president then outlined the two options that the Supreme Court Chamber had given it to proceed. He sought the Khieu Samphan Defense Team's position, for the avoidance of any doubt, on these options so that the Chamber could be in a better position to examine the remaining facts. Mr. Sam Onn complied, advising that in his team's view, the best solution was to sever Mr. Samphan's case from the others.

This prompted Judge Jean-Marc Lavergne to ask the Khieu Samphan Defense Team about the precise timing of this request. Mr. Vercken asked the bench whether it was necessary to formalize a request for severance at this point. They were, at this stage, simply raising the possible consequences of the Supreme Court Chamber decision on a further trial to illustrate the utmost urgency of the situation. In view of the circumstances, the severance of Mr. Samphan's trial was "certainly a possibility" they envisaged.

OCP Responds, Criticizing Nuon Chea Defense for "Mother of All Flip-Flops"
With this, the president ceded the floor to the OCP for its response. International Assistant Co-Prosecutor Dale Lysak commenced by noting that some of the issues the defense raised were "surprising" and new. However, the OCP had sought to identify where there were points of agreement and disagreement with the defense. Points on which the OCP and the defense agreed, he said, were:

- Not to return to the terms of the original Severance Order; and
- That there would be only one trial.

The disagreements were:

- What should be included in the one trial; and
- How long the one trial should be.

Focusing on the disagreements, Mr. Lysak first focused on what should be included in the trial, noting that the Nuon Chea Defense Team's request for there now to be only one trial the "mother of all flip-flops," given that it previously described the Severance Order as "without a doubt the most sensible decision" the Chamber had ever issued. The Ieng Sary Defense Team exhibited a similar change of heart, the prosecutor added.

It was not difficult to understand why the defense teams were requesting only one trial, Mr. Lysak said. It could be assumed that they had understood from the Supreme Court Chamber decision that there needed to be representativeness. Perhaps the defense teams now thought their "next best option was to create as much chaos as they can, as much delay as they can" and seek a trial that would not be concluded while their clients remained fit.

Mr. Lysak noted that in the Chamber's initial Severance Order, it had stated that it severed the first trial in order:

- To consider the roles and responsibilities of the accused in relation to all policies outlined in the Closing Order;
- To provide a foundation for a more detailed examination of factual allegations against the accused; and
- To ensure issues in the first trial enabled an examination of the international criminal law mode of liability of joint criminal enterprise.

Mr. Lysak recounted that the Trial Chamber said that the accused were required to confront all allegations contained in the indictment in Case 002 and that the first trial would be providing a foundation for all later trials. This was relevant, he said, as a reminder of why the first trial proceeded as it did, especially as Mr. Koppe had complained about this. Everyone knew that the first trial would proceed by building the foundation for all trials. A meeting with the Trial Chamber's Senior Legal Officer suggested that this phase would take one year. It was therefore unfair for the defense teams now to complain. It was always understood that the first trial would address foundational issues.

As such, the Court was now in a position to proceed by adding additional crimes and without the "nightmare situations" the defense suggested would occur. The OCP submitted that what must happen now was that the Trial Chamber had to decide what additional crimes needed to be added to the trial.

Before Mr. Lysak could continue, the president interjected and adjourned the hearing for the afternoon break. Following this adjournment, Mr. Lysak again took the floor. He said that the Court was in no way in a position as to be unable to proceed. This was because the first trial was intended to build a foundation which would support all crimes.

As to representativeness and Mr. Koppe's comments that it did not accurately represent the revolution Mr. Chea and others were trying to achieve, Mr. Lysak said that this failed to address the relevant test. The Nuon Chea Defense Team had complained all along that it was a political trial and now seemed to want to turn it into one, focusing on questions of politics. Representativeness did not mean that the trial should be a forum on CPK policies. What was important was fair representativeness of the criminal charges of the indictment. OCP advanced S-21 in this regard because S-21 was a particularly important prison to which people were sent from all over the country, was in a mile of where the accused were located, and which directly reported to the accused.

Concerning the defense arguments that S-21 was not enough, Mr. Lysak said that OCP disagreed with this and believed that S-21 was sufficiently representative. He noted that what the Supreme Court Chamber required was to make the trial reasonably representative. It was impossible to make the trial perfectly representative. Unfortunately, this implied that it was impossible to include everything in the Closing Order. While "painful," this was "the reality that we all face."

If, however, the Trial Chamber agreed with the defense that S-21 was not enough, it could pursue other options other than trying the entire Case 002, Mr. Lysak continued. For example, the OCP had previously proposed additional sites. One site which the Trial Chamber could look at, he said, was the Tram Kok cooperatives. This site was relevant because:

- It demonstrated how the policies of the revolution were implemented, since the Tram Kok cooperatives were recognized as one of three model districts of the DK.
- The allegations connected to the Tram Kok cooperatives were fairly broad. As noted in the Closing Order, they concerned:
    - The influx of "new people";
    - Forced labor, cooperatives, and lack of freedoms;
    - Lack of food, starvation and health problems;
    - Forced marriages;
    - Treatment of enemies and the Kraing Ta Chan security center;

- Treatment of Lon Nol officials, Chams, Vietnamese, and the Kampuchea Krom groups; and
- Buddhism and disrobing of monks.

If the Trial Chamber believed it needed to go beyond S-21, the OCP was happy to expeditiously develop a plan for the trial of that crime site.

Regarding additional witnesses and documents, Mr. Lysak noted that the defense teams were unable to respond precisely on the number required, despite this question having been asked of the defense teams as early as August 2012 in the event that S-21 were to be added to the trial. Lengthy communications between the parties resulted in a document[4] which outlined the parties' responses. In this document, Mr. Lyask said, the Khieu Samphan Defense Team had said it would not request any new witnesses or documents, while the Nuon Chea Defense Team had said it would require 31 new witnesses.

As for the Ieng Sary Defense Team, Mr. Karnavas focused his comments on an attack of the Supreme Court Chamber decision, Mr. Lysak continued. This was not productive, and the OCP would not waste any time apportioning blame for this situation. Additionally, the argument from the Ieng Sary Defense Team that the Supreme Court Chamber was requesting the Trial Chamber to act *ultra vires* did not merit a response.

The ECCC's Internal Rules contained a requirement that severance be in the interests of justice, Mr. Lysak said. The Supreme Court Chamber had now interpreted this rule with reference to the ICTY's rule. This provided guidance for the interpretation of the ECCC's rule.

Concerning Mr. Karnavas's request for certainty as to the treatment of any claims upon severance, Mr. Lysak said that this was not part of the authority under the Internal Rules. For clarity, what the OCP was proposing was that the Court severed, rather than dismissed, some of the crimes and charges. Unless the Trial Chamber continued to persist with the idea of having a series of trials, the Supreme Court Chamber did not require the Trial Chamber to produce a plan. This did not mean the severed charges should not be addressed. The OCP's position was that if the Trial Chamber pursued only one trial, the severed charges should be stayed, and the Trial Chamber could make a later decision on how these charges should be considered.

The parties could not discount the fact that when judgment was reached in the first trial, two of the accused persons might not be fit to proceed but one might remain healthy to proceed in future trials. It would seem that an appropriate time to consider the treatment of severed charges would be immediately after the issuance of a judgment in the first trial.

Regarding the Khieu Samphan Defense Team's comments, Mr. Lysak said, the most telling statement was that whatever approach was taken, they would be prejudiced. Thus, it seemed the Khieu Samphan Defense Team had declined to give the Court much guidance on the relevant issues. The prosecutor also noted that while that team was complaining that the trial was taking too long, they were at the same time asking for more time to address the possibility of further evidence for S-21, and to question their character witnesses. They could not have it both ways.

[4] This document has the document number E236.

Several other irrelevant matters were raised, Mr. Lysak said, most particularly the suggestion that the case against Mr. Samphan be severed and that he be released and placed under house arrest.

Civil Party Co-Lawyers Respond to Defense Comments

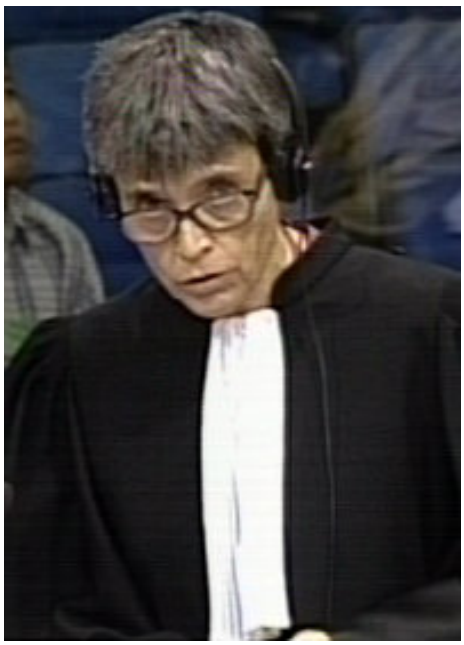
At this juncture, National Lead Co-Lawyer for the civil parties Pich Ang began the civil party co-lawyers' response. Regarding the argument that the ECCC needed to discover relevant historical truths, Mr. Ang stated that this did not mean that the Court had to discover the entire history of Cambodia. Any suggestion that severance would not reflect history was not appropriate.

Concerning the potential severance of the case against Mr. Samphan, Mr. Ang believed that the Trial Chamber may have reasonable grounds on which to decide this. Additionally, if he understood Mr. Karnavas's comments correctly in relation to the civil party co-lawyers' representation of their clients, Mr. Ang said that it was not Mr. Karnavas's place to question this.

Next, the civil party co-lawyer turned to Mr. Koppe's challenge as to whether S-21 was representative of the crimes in the Closing Order. He stressed that the prisoners in that security center were from "all walks of life" and "all corners of the country." It also could not be assumed that facts that had already been adjudicated could not be considered again in later trials.

If the trial dragged on for 10 years or so, the parties ran the risk of not having any verdict at all, which would call into question why the ECCC was established at all. Civil parties participated in the proceedings to claim justice for them. Even if one of the accused died by the time a verdict was issued, the civil parties were able to achieve some justice at least in part.

The Trial Chamber enjoyed discretion as to whether to sever the case or not. Turning to the question of reparations and Mr. Koppe's suggestion that they could not have their cake and eat it too, Mr. Ang said that the civil parties had only one slice of cake and had to share it.



International Lead Co-Lawyer for the civil parties Elisabeth Simonneau Fort took the floor at this juncture. She began by saying that the "extraordinary" position of the Supreme Court Chamber seemed to be eliciting equally extraordinary positions from the defense teams. Chief among these was the suggestion that the Trial Chamber needed to look at the entire trial when it had previously said that severance was the best option. She also thought the Khieu Samphan Defense Team was in a particularly difficult position since apparently neither option put forward by the Supreme Court Chamber was good for it.

Ms. Simonneau Fort said that, with respect to the comments on the need for an expeditious trial, she did not understand which option this concern supported. She also

added that expeditiousness was a right not only of the accused but the civil parties also.

The addition of S-21 was a request which was 16 months old. Thus, this proposal did not prejudice anyone as everyone had prepared their files taking this possibility into account.

The International Lead Co-Lawyer was also "delighted" to hear the comments of the defence counsels concerning civil parties. It was not their place to do so. Moreover, Ms. Simonneau Fort had asserted on Monday, February 18, that the civil parties could never be separated. She did not hear any legal arguments to the contrary today.

Finally, there appeared to be some understanding about mini-trials, single trials, multiple trials, big trials. Ms. Simonneau Fort found the term mini-trial "regrettable." However, the point which she sought to make was that under civil law, the Chamber was seized of all of the facts, and legally it was impossible to dismiss other facts. Neither the Chamber nor prosecution could say that there would be only one trial. They were only in a position to bring about a severance. This did not "remove any charges from the file." Thus, the parties could not speak of a "single trial" but only a "first trial followed by others." Before doing so, the Chamber had to provide a timetable for this.

Thus, the civil party co-lawyers sought severance with a first representative trial, not a mini-trial. It requested the Trial Chamber to plan for future trials, and believed that all legal aspects should be maintained, as severance under civil law did not permit picking and choosing of crimes.

Nuon Chea Defense Team Counter-Accuses OCP of the Grandfather of all Flip-Flops

The president gave the floor to the defense teams for any brief closing remarks. Mr. Koppe stated that he might need approximately 10 minutes. He noted, at first, that an old Spanish proverb said that a wise man changes his mind; a fool never will. However, he did not feel that the Nuon Chea Defense Team had really changed its mind. The Nuon Chea Defense Team had indeed applauded the decision to sever Case 002 in October 2011. However, Mr. Chea had stated very early in the trial that he felt the proceedings were "only the body of the crocodile was to be discussed, not its head or its tail, which are an important part of its daily activities."

The Nuon Chea Defense Team has not committed the "mother of all flip-flops," Mr. Koppe asserted; rather, it was the OCP who was the "grandfather of all flip-flops" by initially trying to put the entire DK regime on trial. National Co-Counsel for Nuon Chea Son Arun could be heard chuckling heartily at this point. Mr. Chea felt curtailed, Mr. Koppe continued, which was what the team had tried to communicate this morning.

Next week, during the ECCC's recess, Mr. Koppe stated, he would return to hear a judgment in a Rwandan genocide case. Time and time again, genocide was asserted to be the most serious accusation of a crime someone could make. However, he did not hear the OCP make any comment in relation to this crime. It was not enough to say that S-21 was representative of the Closing Order. It was not representative, he said, because for example, to his knowledge, no Chams were ever incarcerated at S-21.

The defense teams were now being accused of causing chaos and bringing about delay, Mr. Koppe stated. This was not what the defense team sought to do; they wanted, instead, to secure an opportunity for their client to say what he wanted to say. Only the three accused were most affected by the prolonging of the Court's procedures, he concluded.

Ieng Sary Defense Team Again Cautions Against "Parking" All Remaining Charges
Mr. Karnavas said that his team disagreed that there be one trial that was a sampling of the Closing Order. The OCP sought to suggest that there would only be one trial, and Mr. Karnavas asked whether it would be in the interests of justice to dismiss everything else, or alternatively, to potentially put the accused through "the meat grinder" of another trial at a later point.

The OCP mischaracterized the Ieng Sary Defense Team in saying that it had changed its position, Mr. Karnavas asserted. He noted that the team had at first given only conditional support to the OCP's request for reconsideration of severance. His team agreed to the Trial Chamber's support for severance, however only conditionally. In light of the change of circumstances, namely the different direction from the Supreme Court Chamber that this was an adversarial process like that of the ICTY, the Ieng Sary Defense Team was entitled to change its opinion.

The OCP had originally had Stephen Heder assist in drafting the introductory submission. It then "embedded him" in the Office of the Co-Investigating Judges to essentially confirm his own introductory submission. Mr. Karnavas was "literally shocked" to hear the OCP wax eloquently on the Trial Chamber's rejection of the OCP's motion for reconsideration. It seemed, in that rejection, that the Trial Chamber had produced a reasoned decision, which the OCP quoted at length.

The Trial Chamber was not permitted to "park the remainder of the Closing Order." If there were to be more trials after the first one, there was a need for a plan. If there was no such plan, the Ieng Sary Defense Team would certainly file an appeal. It could not present such a plan one year after the close of evidence. Mr. Karnavas closed by sincerely thanking the Trial Chamber for permitting the parties to make these submissions.

Khieu Samphan Defense Team Underscores Their Client Requires Different Treatment
Mr. Vercken noted, at this point, that he was not sure whether there had been a lack of understanding or bad faith, but the Khieu Samphan Defense Team's understanding was that if the Trial Chamber chose the first option put forward by the Supreme Court Chamber, this would also be valid if the Chamber chose the second option. That is, the Chamber was not permitted not to clearly define the circumstances and facts under which Mr. Samphan would be tried based on the fact that he would die, which was not the case. Mr. Samphan would see through the remainder of the Closing Order. This is why Mr. Vercken spoke of "false choices, fictitious alternatives." Mr. Vercken was not trying to devise the "ideal solution" but defend Mr. Samphan and draw the Trial Chamber's attention to the prejudice to which Mr. Samphan was subjected. With that in mind, the Khieu Samphan Defense Team hoped its position was understood.

The inclusion of S-21 was only a matter for the Trial Chamber to decide, he said; thus, Mr. Lysak's comments were not well founded. Regarding the postponement of character witnesses,

Mr. Vercken said the OCP took them for fools, eliciting a smile from Mr. Lysak. The defense was not here to allow Mr. Samphan to be "lynched and pilloried," but to defend him.

The president adjourned the hearing for the day. Hearings at the ECCC will resume at 9 a.m. on Thursday, February 21, 2013, with a discussion of additional questions the Chamber has raised in a supplementary memorandum on the question of severance.