



### **Parties Debate Upcoming Hearings and Proposed Expansion of Trial**

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On Thursday, February 20, 2013, parties in the first trial of senior Khmer Rouge leaders before the Extraordinary Chambers in the Courts of Cambodia (ECCC) debated proposals on the ongoing schedule for the trial and the potential inclusion of Khmer Rouge security center S-21 or Tuol Sleng into its scope. The scope of this first trial, known as Case 002/1, had been severed by the Trial Chamber from a larger case against Nuon Chea, Ieng Sary, and Khieu Samphan known as Case 002. Its scope included general foundational topics and two phases of forced movements of the population. However, on February 8, 2013, the Supreme Court Chamber invalidated this severed scope, grinding the trial proceedings to a sudden halt.

Today marked the third day in which the Trial Chamber heard parties' comments how to proceed in light of that ruling.<sup>2</sup> Parties have taken dramatically different positions on this matter. The Office of the Co-Prosecutors (OCP) suggested pursuit of a first representative trial that followed the previous Case 002/1 scope but with the addition of S-21 as a crime site. The civil party co-lawyers favored proceeding with all of Case 002, though if this were inappropriate, it would support the OCP's proposal. Two defense teams also argued that the trial should be expanded to all of Case 002. Mr. Samphan's team, meanwhile, argued that his trial should be severed from

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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

<sup>2</sup> Cambodia Tribunal Monitor's daily blog posts concerning the first two hearing days may be accessed at <http://www.cambodiatribunal.org/blog/2013/02/trial-against-senior-khmer-rouge-leaders-should-include-crimes-s-21-prosecution-argues> (February 18, 2013) and <http://www.cambodiatribunal.org/blog/2013/02/defense-teams-argue-hearing-entire-case-002-severance-case-against-khieu-samphan> (February 20, 2013).

that of the other co-accused as he is in better health and should not be disadvantaged by constant delays arising from their health problems.

The Trial Chamber gave indications Thursday that it may favor the OCP's proposal to include S-21, since it required parties to make detailed comments on it, as well as on the scheduling of upcoming hearings. A key point of disagreement between the parties concerned whether the Trial Chamber is able to proceed to hear previously scheduled witnesses, including two journalists scheduled as expert witnesses, Philip Short and Elizabeth Becker.

### ***Preliminary Matters and Outline for Today's Discussion***

Approximately 100 villagers from Kampong Chhnang province were in the public gallery today, with most appearing to have been born during or before the Democratic Kampuchea (DK) period. Taking the floor first, Trial Chamber President Nil Nonn cautioned that all parties should be brief and direct in their comments and meted out restrictive time allocations. Trial Chamber Greffier Duch Phary advised that all parties to the proceedings were present but for Mr. Sary, who was participating from his holding cell due to health reasons, and Mr. Chea, who was resting in the ECCC Detention Facility following his recent discharge from the hospital.

The president provided the parties with an outline for today's discussion. He noted in particular that there was a proposal to include S-21 within the hearing scope, which would entail adding a number of Closing Order paragraphs to the scope of the trial.<sup>3</sup> Today's discussions concerned a second Trial Chamber memorandum issued in relation to the Supreme Court Chamber's decision on February 19, 2013.<sup>4</sup> This memorandum requested the parties to give comments on a range of supplementary issues. That memorandum contained three topics:<sup>5</sup>

- **Topic 1** related to additional Closing Order paragraphs that the Trial Chamber has identified might be relevant if the scope of the trial were expanded.
- **Topic 2** was the proposed schedule for immediate, ongoing hearings in view of the following issues:
  1. Health of the co-accused;
  2. Availability of a Trial Chamber decision on severance in approximately two to three weeks;
  3. The limited schedules of expert witnesses Philip Short and Elizabeth Becker, who are scheduled for upcoming testimony and may not be available if not heard now; and
  4. Hearing of testimony from a number of witnesses who had already been scheduled prior to the issuance of a decision on severance.
- **Topic 3** focused on OCP's proposal for the addition of S-21. The Trial Chamber raised a number of issues in this respect:
  1. Projections on additional witnesses, documents, and hearing days required, and the possible inclusion of Prey Sar (S-24) security center;

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<sup>3</sup> The Closing Order may be accessed at <http://www.eccc.gov.kh/document/court/14888> (in Khmer), <http://www.eccc.gov.kh/en/documents/court/closing-order> (in English), and <http://www.eccc.gov.kh/fr/document/court/ordonnance-de-cl%C3%B4ture-dans-le-dossier-002> (in French).

<sup>4</sup> This memorandum has the document number E264.

<sup>5</sup> The following matters were not so numbered in the Trial Chamber memorandum but have been numbered for this blog post in this manner for reasons of clarity and ease of reference.

2. Willingness of co-accused persons to waive their right to be present at future hearings; and
3. Whether Case 001 transcripts would be included in the documentation, and if so, whether their inclusion would be contested by the defense.

***Comments from the Office of the Co-Prosecutors***

International Assistant Co-Prosecutor Dale Lysak took the floor at this point, turning first to Topic 1, on the relevant Closing Order paragraphs that would need to be added. In addition to core paragraphs on S-21 in the Closing Order, which are numbered from 415 to 475, other paragraphs that would need to be added to the trial scope in relation to S-21 were:

- Paragraphs 178 to 204, which deal with the joint criminal enterprise policy on security centers, and killing of enemies through purges;
- Paragraphs 916 to 974, which relate to Mr. Chea's participation in security centers and executions including at S-21;
- Paragraphs 1048 to 1089, which relate to Mr. Sary's participation in security centers and executions including at S-21; and
- Paragraphs 1172 to 1190, which relate to Mr. Samphan's participation in security centers and executions including at S-21.

Mr. Lysak noted that some paragraphs stipulated by the Trial Chamber as needing to be added would not need to be so added, including 975 to 977, as the Chamber had in fact already included them.<sup>6</sup> However, the following paragraphs would need to be added:

- Paragraphs 150 to 155, addressing the qualification of armed conflict;
- Paragraphs 1480 to 1484 and 1487 to 1488, on legal elements or characteristics of grave breaches of the Geneva Conventions;
- Paragraphs 1491 to 1493, which relate to S-21; and
- Paragraphs 1498 to 1510 and 1515 to 1520, the relevance of which Mr. Lysak did not specify.



The prosecutor noted that, contrary to the Trial Chamber's view, the OCP felt that paragraphs 1485 and 1486 did not need to be included as they related to Au Kanseng security center and military incursions into Vietnam, which would be outside the proposed trial scope.

On the impact of adding these paragraphs to the witnesses and evidence needed to be heard by the Chamber, Mr. Lysak denied that there would be a significant impact. The evidence that the Trial Chamber would require to adjudicate the issues was either already before

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<sup>6</sup> The relevant document has the document number E124/7.3.

the Chamber or would be heard from remaining witnesses whom the Chamber had already planned to hear in Case 002/1 before the issues on severance arose. He also outlined various specific reasons why there would not be a significant impact, including that some of the Closing Order paragraphs echoed or overlapped with paragraphs already before the Chamber; addressed facts already before the Chamber, such as Standing and Central Committee meetings; and the testimony of Duch.

At this point, the prosecutor noted that many aspects of the commencement of an armed conflict between the DK and Vietnam had already been put before the Chamber in relation to other matters. In all, over 5,000 documents had already been put before the Chamber and assigned E3 documentary evidence numbers, of which 694 related to the armed conflict. Mr. Lysak also stipulated that there would not need to be new witnesses called in relation to the armed conflict. Many had already testified, and two already-scheduled upcoming military structure witnesses would be able to address relevant matters.

Next, Mr. Lysak sought to make a number of logistical suggestions. In particular, he said that the Trial Chamber typically reviewed Closing Order paragraphs to check which documents needed to be assigned an E3 number. The OCP had already undertaken this process in their preparation, with the OCP document list already including every document cited in the Closing Order. Thus, the Chamber could, if necessary, rely on OCP's preparations in this regard.

There were inaudible comments from the president at this point. The president then said into the microphone that the OCP had been given 40 minutes in its time allocation to discuss all topics in its memorandum. He asked the prosecutor to comment on the Closing Order paragraphs set out in its memorandum that the Trial Chamber felt would be relevant. Mr. Lysak explained that the first topic was complex and this discussion had related to why the OCP believed certain paragraphs to be relevant. However, he would move Topic 2, concerning the proposed schedule for immediate, ongoing hearings. In this regard, the OCP's comments were as follows:

1. **Health of the co-accused:** Mr. Lysak said medical experts could only advise on the fitness of an accused at the time of examination. Thus, while their testimony was a consideration, there was no need to delay the trial in order to hear it.
2. **Availability of a Trial Chamber decision on severance in approximately two to three weeks:** The prosecutor did not address this question.
3. **The limited schedules of expert witnesses Philip Short and Elizabeth Becker, who are scheduled for upcoming testimony and may not be available if not heard now:** Mr. Lysak said the OCP had understood that Mr. Short was scheduled to arrive on March 4, 2013.
4. **Hearing of testimony from a number of witnesses who had already been scheduled prior to the issuance of a decision on severance:** The OCP believed that postponement of their testimony was unnecessary. The Trial Chamber should begin hearing witness testimony as soon as possible. In particular, the Trial Chamber had specified that questioning of Mr. Short and Ms. Becker could deal with all issues in the Closing Order on which they were able to testify. Expert David Chandler had already been examined in this way. As for two other witnesses, TCW 724 and TCW 794, Mr. Lysak was surprised their names had been on the list, since the OCP had previously suggested these witnesses

need not be heard and no parties had objected. He was thus unsure whether their inclusion was an oversight or the Chamber had other reasons to hear them. If TCW 724 was heard, his advanced age would mean that he could be examined on the full scope.

On Topic 3, concerning the proposal to include S-21 in the scope, these were the OCP's positions:

1. **Projections on additional witnesses, documents, and hearing days required, and the possible inclusion of Prey Sar (S-24) security center:** The prosecutor confirmed there would be approximately 250 documents including prisoner lists and witness statements, an increase from a previous estimate of around 200 documents. Prey Sar (S-24) was not part of the OCP's proposal for inclusion into the scope.
2. **Willingness of co-accused persons to waive their right to be present at future hearings:** The health of the accused was a concern for all, but this remained true for all aspects of the trial. If the accused were unable to participate in the trial for health reasons, the Court could not complete any part of the trial. Adding S-21 would not fundamentally change the scenario. "We simply do not know how long" the accused could participate, Mr. Lysak said. However, it was necessary to make the trial more representative.
3. **Whether Case 001 transcripts would be included in the documentation, and if so, whether their inclusion would be contested by the defense:** The OCP's time estimates concerning S-21 did not impact whether or not the inclusion of Case 001 transcripts would be contested. He noted that the Trial Chamber was of the view that no witnesses from Case 001 needed to be heard because it could rely on transcripts and written statements. However, the OCP believed that a minimum number of witnesses needed to be heard, namely Kaing Guek Eav *alias* Duch and four others. Of course, it remained true that the Trial Chamber could rely on other witnesses (except where they related to the acts and conducts of the accused) where these statements were cumulative of other allegations relating to S-21.

This prompted Judge Claudia Fenz, who was replacing Judge Silvia Cartwright, to ask the OCP a follow-up question concerning the medical experts. She said that it might be possible that the



medical experts might say the co-accused persons were available for only half a day. She asked about the impact of this on the possible prolongation of the trial. Mr. Lysak responded that this situation was conceivable. However, it was very unlikely that even if the medical experts did say this, they could specify a long-term time frame within which these conditions would need to persist. Thus, their opinions, while interesting, would not be determinative on the issue of the prolongation of the trial.

The president asked the prosecutor to specifically address its initial proposal that it would require 11 additional hearing days in order to witnesses related to S-21, and the possibility that a document hearing might be held. In particular, President Nonn wanted to know whether the OCP stood by its 11-day

estimate, or whether the hearing days might spiral out to, for example, 30 hearing days. Mr. Lysak said that the 11 additional hearing days related to the OCP's questioning of five witnesses including Duch. The OCP would require a hearing related to the 200 to 250 documents. However, these documents were the same type as those already presented and thus the document hearing would not take long, one day at most, and more likely half a day. Additional hearing days might be added if there were "legitimate witness proposals" from the defense teams that the Trial Chamber accepted.

***Civil Party Co-Lawyers Propose Severance Decision be Issued Urgently***

International co-lawyer for the civil parties Lyma Nguyen opened the comments for the civil parties. She began with Topic 2, concerning the proposed schedule for immediate, ongoing hearings, prefacing that two issues were relevant in this regard:

- What prejudice would arise if witnesses were heard before the scope was known?
- What would be the effect of scheduling witnesses before a severance order?

The second issue related to undesirability and logistical issues, she said. Expert witnesses resided overseas and Ms. Becker had been rescheduled four times. These expert witnesses are critical, Ms. Nguyen asserted; it would be disappointing if the opportunity to hear them was lost.

Concerning Topic 2, issue 4, on the hearing of testimony from a number of witnesses who had already been scheduled prior to the issuance of a decision on severance, Ms. Nguyen argued that the experts were able to testify on all aspects of Case 002, as the OCP had stated. The prejudice caused by scheduling the experts earlier would be reduced. However, as the focal areas about which the experts were to testify remained unknown, there would be some prejudice. Thus, the civil party co-lawyers requested advance notice from the Trial Chamber as soon as it had come to a determination on severance, with a full reasoned decision following.

This proposed way forward was not ideal, Ms. Nguyen acknowledged, but was the best solution in all the circumstances. It would ensure that there would be reduction of uncertainty, focused examination of expert witnesses, no undue delay, and no need for recall of witnesses. This should also apply to any character witnesses whom the Chamber proposed to call and who might also be able to give factual testimony.

International Lead Co-Lawyer for the civil parties Elisabeth Simonneau Fort then took the floor and turned to Topic 3. She provided the following answers on those points:

1. **Projections on additional witnesses, documents, and hearing days required, and the possible inclusion of Prey Sar (S-24) security center:** On the "famous 11 days," Ms. Simonneau Fort said that she had no problems with this. The civil party co-lawyers felt it would be important to hear some civil parties, out of respect for them and considering what they could add to the Court's factual understanding. She suggested that perhaps two to three could be added. They could propose these witnesses at short notice. This would require, at a minimum, three hearing days.
2. **Willingness of co-accused persons to waive their right to be present at future hearings:** Ms. Simonneau Fort said that this was not relevant to the civil parties.



3. **Whether Case 001 transcripts would be included in the documentation, and if so, whether their inclusion would be contested by the defense:** The civil party co-lawyer requested a right to comment on this matter at a later stage once it heard the defense teams' and OCP's positions.

At this point, the Trial Chamber adjourned for the mid-morning break.

#### *Nuon Chea Defense Team Offers Its Comments*

After the break, International Co-Counsel for Nuon Chea Victor Koppe took the floor. He advised that they did not have any specific submissions on Topic 1, concerning Closing Order paragraphs to be added to the trial.

As for Topic 2, on the immediate schedule for upcoming hearings, Mr. Koppe reiterated that as he said on Wednesday, February 20, 2013, his team believed no new witnesses should be heard until the scope had been determined, to give the parties time to adjust the focus of their questions. In particular, he did not believe that there should be testimony from Mr. Short, Ms. Becker, or any other witnesses mentioned in the Trial Chamber memorandum.

With respect to the possibility of Mr. Short and Ms. Becker not being able to return if they were to be rescheduled, his team sought clarification on why this was so, for instance, whether it owed to the experts being "fed up" with the case. He also noted that next week had long been scheduled as a court recess period.



Concerning Topic 2, Issue 1 on the health of the co-accused, Mr. Koppe agreed with Mr. Lysak that experts could only testify on the current health of the co-accused persons and not how their health would develop. Mr. Chea was getting better, the defense counsel said. Mentioning his earlier comments that Mr. Chea was "approaching death," he noted that indeed, everyone was, but the pace of this had slowed down considerably for Mr. Chea, who hoped to recover to the point to be well enough to participate fully in the trial.

Turning to Topic 3, on the expansion of the trial to S-21, Mr. Koppe advised as follows:

1. **Projections on additional witnesses, documents, and hearing days required, and the possible inclusion of Prey Sar (S-24) security center:** The Nuon Chea Defense Team had previously proposed calling 31 witnesses in relation to S-21. It was currently reviewing this list and might reduce it, but the team could not advise the Trial Chamber on this issue at present, as they only had limited time to speak to Mr. Chea on this matter when he was returned to the ECCC Detention Facility.
2. **Willingness of co-accused persons to waive their right to be present at future hearings:** Mr. Koppe indicated Mr. Chea had issued some waivers while hospitalized and

might be open to doing so in future, but his team would need to address this matter if and when it arose.

3. **Whether Case 001 transcripts would be included in the documentation, and if so, whether their inclusion would be contested by the defense:** Whether the inclusion of Case 001 transcripts would be contested depended on the particular evidence contained in those transcripts. The Nuon Chea Defense Team would object to their inclusion if necessary.

### *Ieng Sary Defense Team's Comments*

International Co-Counsel for Ieng Sary Michael Karnavas took the floor next. He first considered Topic 2, on the immediate scheduling of hearings. He advised as follows:

1. **Health of the co-accused:** The medical reports needed to be seen first. Until then, the Ieng Sary Defense Team believed the Trial Chamber was not in a position to fully address this issue, particularly since the Supreme Court Chamber had identified health issues of the co-accused persons as one of the factors to be addressed by the Trial Chamber in any new severance order.
2. **Availability of a Trial Chamber decision on severance in approximately two to three weeks:** The Ieng Sary Defense Team regarded this time period as “highly ambitious,” since they believed that whatever option was chosen, there was a need to develop a plan for ongoing trials. More likely, it would take perhaps a month. The Ieng Sary Defense Team sought a reasoned decision before anything else. Issuing a decision was easy; it was the reasoning behind a decision or the “supposed lack thereof” that had put the Chamber in this position at all. Thus, issuing an initial decision with reasons to follow was “not such a good idea.”
3. **The limited schedules of expert witnesses Philip Short and Elizabeth Becker, who are scheduled for upcoming testimony and may not be available if not heard now:** These people were “journalists that wrote books. They’re not experts.” Whatever these people would testify on should be based on what they knew and not what they had read or to which they had added their “spin.” With respect to Ms. Becker, it was “widely known” that she came to Cambodia often, seemed to enjoy her visits, and had ties to NGOs in Cambodia. Given the profile of the trial and the possibility that their testimony might boost book sales, Ms. Becker and Mr. Short would be likely to come. The main point now was “to get this right,” and not to worry about the scheduling of Ms. Becker, Mr. Short, or any other witness. It was not possible for the Trial Chamber to both hear evidence and draft a decision. The defense counsel qualified that he meant no offense to the “no doubt very bright” legal officers supporting the Trial Chamber’s work.
4. **Hearing of testimony from a number of witnesses who had already been scheduled prior to the issuance of a decision on severance:** It made “no sense” to call some witnesses now and potentially call them back later, Mr. Karnavas said. This would be a “logistical nightmare.” Moreover, there was a need for the Chamber to consider the Court’s real difficulties in paying its “most important staff, the national staff, on a timely basis.” Mr. Karnavas also suggested that after next week’s recess, the Chamber could regroup and begin hearing the entire Case 002. This would mean no time was wasted, and the Trial Chamber would not even need to issue a decision in response to the Supreme Court Chamber’s decision because the Trial Chamber had “unfettered discretion” with



respect to the entire Closing Order. It was for the OCP to put forward a list of witnesses and documents for the entire case. This also meant that there would be no need to “jettison” and “abandon” civil parties after the great lengths to which they had to go in order to be admitted in the first place.

Concerning Topic 3 — that is, the expansion of the trial to S-21 — the views of the Ieng Sary Defense Team was as follows:

1. **Projections on additional witnesses, documents, and hearing days required, and the possible inclusion of Prey Sar (S-24) security center:** Prefacing his comments on this point, Mr. Karnavas referred to the American author Mark Twain, who once said, “There are statistics, there are damned statistics, and then there are lies.” Numbers were malleable, Mr. Karnavas said. The OCP’s estimate of 11 days might easily balloon to 11 weeks, for instance. The Trial Chamber surely did not fail to consider this in its calculations on extension of the hearing. Surely they had considered this estimate might be “a wee bit too short.” Projections like this were “known unknowns,” he said, borrowing a phrase from former U.S. Defense Secretary Donald Rumsfeld.
2. **Willingness of co-accused persons to waive their right to be present at future hearings:** The Ieng Sary Defense Team had been “loud ... clear ... [and] consistent” on this, Mr. Karnavas said. Mr. Sary did not wish to waive his right to be present. There might be some exceptions, but Mr. Sary was as much entitled to this as someone who was “robust ... able ... and young.” This right had to be granted to Mr. Sary if the tribunal is to meet its obligations.
3. **Whether Case 001 transcripts would be included in the documentation, and if so, whether their inclusion would be contested by the defense:** Mr. Karnavas agreed that his team would contest anything that the OCP would seek to bring in to Case 002 from Case 001. It was not by “serendipity” that Mr. Karnavas had already asked the OCP on Monday, February 18 if the OCP intended to admit transcripts. The Trial Chamber also asked this, and the OCP never really answered. OCP would need to follow procedures consistent with international principles, and his team would contest any evidence being admitted that would breach Mr. Sary’s right to confrontation, “period.”



### ***Khieu Samphan Defense Team’s Comments***

The floor was ceded to International Co-Counsel for Khieu Samphan Arthur Vercken. He noted at first that his team would not go over ground other defense teams had raised where his team agreed with their views. Turning to Topic 2, concerning the immediate schedule of the upcoming hearings, Mr. Vercken commented as follows:

1. **Health of the co-accused:** Mr. Vercken was mindful of health issues and the fact that Mr. Samphan was in good health and entitled to an expeditious trial. He was also mindful

that the Chamber “might be tempted” to persist with a choice between two options, but this all amounted to the same thing from the Khieu Samphan Defense Team’s perspective: a succession of trials. Thus the Trial Chamber was required to set out a plan for them and how it would address the relevant legal and technical issues.

2. **Availability of a Trial Chamber decision on severance in approximately two to three weeks:** Mr. Vercken did not add any comments on this issue.
3. **The limited schedules of expert witnesses Philip Short and Elizabeth Becker, who are scheduled for upcoming testimony and may not be available if not heard now:** Mr. Vercken did not add any comments on this issue.
4. **Hearing of testimony from a number of witnesses who had already been scheduled prior to the issuance of a decision on severance:** The “wise course of action,” Mr. Vercken said, was not to hear witnesses until the Trial Chamber had given a “complete, reasoned, and executive decision” on its actions moving forward. It was not reasonable at an early stage to give an unreasoned decision, as this was what the Supreme Court Chamber criticized, he said, echoing Mr. Karnavas’s comments. Doing so might lead the Trial Chamber to act in a manner contrary to the directors of the Supreme Court Chamber. Mr. Vercken also challenged that Mr. Chandler had been permitted to testify on the entire scope of Case 002. He recalled that when Mr. Chandler testified, Judge Cartwright had advised him of the scope of Case 002/1 so that he could focus his comments on matters within the scope. Similarly, in a January memorandum issued by the Trial Chamber, the defense counsel said that when advising of the schedule of the hearing of Mr. Short and Ms. Becker, the Chamber had encouraged parties to limit their questions for these experts to the scope of Case 002/1.

Moving on to the OCP proposal to add S-21 to the scope, Mr. Vercken stated the following:

1. **Projections on additional witnesses, documents, and hearing days required, and the possible inclusion of Prey Sar (S-24) security center:** Mr. Vercken referred to his comments on February 20 that he did not know how OCP’s time estimates were determined and whether it included time for the defense.
2. **Willingness of co-accused persons to waive their right to be present at future hearings:** Mr. Vercken answered no in this respect.
3. **Whether Case 001 transcripts would be included in the documentation, and if so, whether their inclusion would be contested by the defense:** Like his defense colleagues, the Khieu Samphan Defense Team would contest their inclusion if necessary.

#### ***Prosecution and Civil Party Co-Lawyers Contest Some of the Defense Teams’ Comments***

Mr. Lysak took the floor again at this point. Beginning with the matter of health issues, Mr. Lysak expressed his appreciation for Mr. Koppe’s candor on this point. It was, indeed, “refreshing to hear respectful and clear submissions coming from his chair in the courtroom,” even if the OCP disagreed on their substance. He also said that he hoped that Mr. Koppe’s views that had led him to change the Nuon Chea Defense Team’s position on severance in Case 002 would also apply to its determinations in relation to the witness list it would propose for S-21.

The OCP disagreed with the defense submissions concerning the plan for upcoming hearings. Since Mr. Short and Ms. Becker were authorized to speak on all issues, there was no reason to

delay their testimony, Mr. Lysak said. Specifically responding to Mr. Vercken's comments, he noted that the Trial Chamber had only "encouraged" parties to focus their questions on Case 002/1 and had not limited their questions to this. Both Mr. Short and Ms. Becker were important "foundation witnesses," providing good foundational information upon which the Court could rely in its consideration of all crimes.

Finally, the prosecutor turned to Mr. Karnavas's criticisms of the OCP time estimates. He noted that Mr. Karnavas had frequently requested time estimates from the OCP, but when the OCP offered them, the defense counsel criticized them and did not offer counter proposals. Determination of time required was within the Trial Chamber's scope. Also, the OCP's time estimates had proven to date to be "quite accurate."

Ms. Nguyen then took the floor. She said that it was not very useful for Mr. Karnavas to speculate on the willingness or otherwise of expert witnesses' willingness to come and give testimony. Ms. Nguyen said that the Court was now in a "position of compromise," and all parties needed to balance their needs. This included the need for civil parties to have a judgment. As to Mr. Vercken's comments on the scope of the expert witnesses' testimony, Ms. Nguyen echoed Mr. Lysak's comments that the Trial Chamber only encouraged and did not in fact limit parties to questioning the experts on Case 002/1. The civil party co-lawyer also said it was very hard for them to accept comments such as Mr. Karnavas's promise to object to everything that would be adduced in relation to Case 001.

Ms. Simonneau Fort added that the Trial Chamber had already addressed the possible use of Case 001 transcripts in the context of Case 002. If the defense teams wished to raise further objections now, those objections had to go above and beyond and could not simply address, once more, matters on which the Trial Chamber had already ruled.

### ***Defense Teams Respond to the Prosecution and Civil Party Co-Lawyers***

At this point, Mr. Koppe only added that the Nuon Chea Defense Team appreciated the words of the OCP. Next, Mr. Karnavas said that he would speak slowly since "perhaps some is being lost even in the English language to the English speakers." When proposing that the Trial Chamber could resume hearings on March 4, Mr. Karnavas said, this was on the basis that the Chamber could do so by hearing all of Case 002. Mr. Karnavas then clarified, in relation to Ms. Nguyen's comments, that the Trial Chamber had "unfettered discretion" to try the entirety of Case 002. If the Chamber chose not to do so, it would need to select either of the two options articulated by the Supreme Court Chamber: that is, opt for a series of trials or only one representative trial. Unlike the Anglo-Saxon system, it was not open to the Trial Chamber to simply dismiss charges, he stated.

Concerning his statement that he would object to everything, Mr. Karnavas responded tritely, "Gee, what are defense lawyers supposed to do?" He was at the Court above all as Mr. Sary's champion, to ensure that Mr. Sary would receive a fair trial and protection of his corollary rights, he reminded the court. It was unreasonable to expect Mr. Sary to simply accept the admission of transcripts in Case 001 when Duch had pleaded guilty when this suited his trial strategy, and Mr. Karnavas said he should "lose his [practicing] license" should he simply concede an issue like this.

How could the “parking” of the rest of the Closing Order be justified, and expeditiousness also be afforded? Mr. Karnavas challenged. At this juncture, the president interjected, requesting Mr. Karnavas to slow down and reply only to the specific matters raised by the OCP and civil party co-lawyers in their rebuttal comments. If Mr. Karnavas were to give a full reply, it might be too lengthy, he said. Mr. Karnavas clarified that he was responding to Ms. Nguyen’s rebuttal.

The path of least resistance, Mr. Karnavas said, was for the OCP to adopt a “focused approach” that would permit it to find a way to try all of Case 002 expeditiously. Concerning Ms. Simonneau Fort’s rebuttal, Mr. Karnavas said that if the circumstances required a legal or procedural objection, the Ieng Sary Defense Team would not hesitate to file submissions and would not readdress matters on which the Chamber had already ruled.

Mr. Vercken added two clarifications. First, concerning Mr. Short and Ms. Becker’s testimony, the defense counsel said that it was clear the OCP and civil party co-lawyers were saying that the Trial Chamber’s guidance was only to encourage focus on the subject of the trial. However, this failed to acknowledge that through the memorandum in question, the Trial Chamber had reduced its sitting days from four to three days a week. Advising the parties to focus on the currently defined trial and diminishing the sitting days “very obviously” reduced the questions to the former Case 002/1 trial. Parties should stop focusing on “semantics” and word play, he stated.

Second, Mr. Vercken suggested that the civil party co-lawyers were “feigning and claiming” the Trial Chamber had already resolved its position on the admissibility of evidence from Case 001. The Trial Chamber had articulated the applicable standard, but the defense team’s duty was to verify whether those criteria were satisfied at the point at which the OCP proposed documents to be adduced in relation to S-21, Mr. Vercken concluded.

#### ***Indications from the Trial Chamber on Next Steps***

The Trial Chamber judges to huddle in conference for several minutes, with Judge Jean-Marc Lavergne stooping forward to hear comments from his colleagues, in particular Judge Fenz. Upon resuming their seats, the judges busied themselves with other matters. After a moment, the president expressed his thanks to all parties for their views. He advised that the Chamber would render a reasoned decision in due course regarding the scope of Case 002 to be heard for the first stage, with respect to the Supreme Court Chamber’s decision. It would incorporate all submissions and views of the parties concerned.

Regarding the scheduling of Mr. Short, Ms. Becker, and other witnesses, the Chamber would specify the dates of their testimony by Friday, February 22, 2013, before its broader decision on severance. The Trial Chamber first needed to hear the views of all parties on this matter. The president then adjourned the hearings for the day at the earlier time of 12 p.m.

Medical fitness hearings have been scheduled for all three co-accused persons for mid-March 2013. It is uncertain whether there will be any hearings in the ECCC Trial Chamber prior to this date. The court’s schedule will now depend on the Chamber’s decision on the scheduling of upcoming witnesses, which the president said would be communicated to the parties in due course.

