



Examination of Nuon Chea's Fitness to Stand Trial, and Renewed Discussion of Case 002 Severance

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Hearings resumed at the Extraordinary Chambers in the Courts of Cambodia (ECCC) today, in the wake of a translators' strike that brought hearings to a halt over a period that was marked with the death of accused person and former Khmer Rouge-era foreign minister Ieng Sary. During the morning, the spotlight was on the physical and mental health of accused person Nuon Chea. The afternoon sessions featured a further discussion between the parties and the Trial Chamber bench concerning the appropriate scope for the first Case 002 trial moving forward, following a Supreme Court Chamber decision invalidating the initial trial's scope and in the context of today's comments concerning Mr. Chea's health.²

Outline of the Hearing

Some 200 villagers from Takeo province were in the public gallery today. Many among this group appeared to have been born during or before the Democratic Kampuchea (DK) period. Opening the hearings for the day, Trial Chamber President Nil Nonn advised that it would feature two separate sessions:

- A hearing on Nuon Chea's health and fitness based on a medical report recently submitted by the ECCC's appointed medical experts;³ and

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

² The Trial Chamber heard three days' worth of submissions from the parties on the question of the severance of trial scope in February 2013. Cambodia Tribunal Monitor's daily blog posts on these 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), <http://www.cambodiatribunal.org/blog/2013/02/defense-teams-argue-hearing-entire-case-002-severance-case-against-khieu-samphan> (February 20), and <http://www.cambodiatribunal.org/blog/2013/02/parties-debate-upcoming-hearings-and-proposed-expansion-trial> (February 21).

³ This report has the document number E256.

- A hearing this afternoon and potentially the following morning, if necessary, concerning the impact of the experts' report on the severance of Case 002, with a Trial Chamber decision on severance to be rendered in due course.

Trial Chamber Greffier Duch Phary then reported that all parties were present to the proceedings except for Mr. Chea, who was participating in the hearing from his holding cell. There was no indication as to why accused person Khieu Samphan was not present, although this was presumably because the hearing concerning Mr. Chea's fitness was not relevant to him. The president did, however, indicate that Mr. Chea was participating in the hearings from his holding cell because of health concerns. Given the advice of his ECCC treating doctor that Mr. Chea had high blood pressure and was unable to sit for long periods without feeling dizzy, the Chamber had determined this to be appropriate.

Next, the president provided a more detailed outline for the first part of today's hearing concerning the expert report on Mr. Chea's health. He began with a brief snapshot of the relevant ECCC procedural history concerning this matter, the key events of which are as follows:

- **June 13, 2011:** Experts advised that Mr. Chea's health and fitness to stand trial needed to be reviewed and assessed by them.
- **August 31, 2011:** A hearing was held to discuss Mr. Chea's health and fitness.
- **November 15, 2011:** The Trial Chamber ruled that Mr. Chea was fit to stand trial.⁴ The experts then appointed the experts be reappointed to review Mr. Chea's health and fitness since Mr. Chea has often requested to be excused from the courtroom and observe the proceedings from his holding cell.
- **December 18, 2012:** Prof. John Campbell, Dr. Seena Fazel, and Dr. Huot Lina were appointed to assess both Mr. Chea's and the late Mr. Sary's fitness to stand trial and health generally. The parties were to file their submissions in this regard by January 21, 2013. Today's hearing focuses on Mr. Chea alone, given Mr. Sary's passing.

As for the matters which the parties had requested the experts consider, the president noted that the Nuon Chea Defense Team had highlighted seven matters, namely Mr. Chea's:

1. Dizziness and fatigue;
2. Problems reading, since Mr. Chea had reported not being able to read beyond six lines;
3. Eyesight problems;
4. Short term memory issues;
5. Problems concentrating and with time orientation;
6. Urinary issues, in particular, irregular urination;
7. Uneasiness moving his head.

Additionally, the Office of the Co-Prosecutors (OCP) had also asked the Chamber to examine the mental and physical fitness of Mr. Chea.⁵

⁴ This ruling has the document number E115/3.

⁵ This request has the document number E256/3.

Following these requests, the Trial Chamber requested through the Witness/Expert Support Unit to reappoint the experts Prof. Campbell, Dr. Fazel, and Dr. Lina to examine Mr. Chea. However, due to Dr. Lina's unavailability, only Prof. Campbell and Dr. Fazel were ultimately appointed. The report they subsequently prepared, in the Trial Chamber's view, included sufficient information so as to enable a ruling on the condition of Mr. Chea.

According to the Internal Rules, the president continued, the hearing on Mr. Chea's physical and mental health was to be conducted in public as much as possible, although he added that being mindful of Mr. Chea's rights, if his team wished to request that some part of the hearing be in closed session, they should duly file a request in writing. President Nonn then took the opportunity to query the Nuon Chea Defense Team as to this possibility. International Co-Counsel for Nuon Chea Victor Koppe agreed that the hearing should be in public in principle, although owing to this, his team might not be very specific about certain medical problems.

The president then advised that the Chamber would begin the questioning of the medical experts, to be followed by the Nuon Chea Defense Team, the OCP, and finally, the Lead Co-Lawyers for the civil parties.

Medical Experts Prof. John Campbell and Dr. Seena Fazel Take the Stand

After this prelude, medical experts Prof. John Campbell and Dr. Seena Fazel took the stand, sitting next to one another. The president then began with some questions eliciting brief biographical details from the experts. Under this questioning, Prof. Campbell advised that he is 67, is a New Zealander, resides in Dunedin, and serves as a professor of medicine at the University of Otago and Dunedin Hospital. He confirmed that he had testified before the ECCC on three previous occasions.

Dr. Fazel advised that he is 44, a British national, lives in Oxford, and serves as a forensic psychologist based at the University of Oxford and local hospitals in Oxford. He confirmed that he has also testified before the ECCC on a number of occasions. The president then explained that the reason he had referred to the experts' previous testimony was to avoid lengthy questioning concerning their biographical details and relevant expertise.

Trial Chamber Greffier Matteo Crippa administered an oath to the two experts. The president advised them that either of them could respond to questions put to them generally, unless the question specified a respondent. He then handed the floor to Judge Silvia Cartwright. She began with a review of the experts' prior examination of Mr. Chea. Prof. Campbell agreed, when questioned, that he had twice examined Mr. Chea, having issued a first report on the accused person's health on June 13, 2011. His most recent report, co-prepared by Dr. Fazel, was dated March 20, 2013. Dr. Fazel indicated that, for his part, he had not examined Mr. Chea prior to the examination earlier this month.

Judge Cartwright noted that the medical report covered two main areas: Mr. Chea's physical health, and his mental health and cognitive aptitude. She sought to deal with each in turn.

Mr. Chea's Physical Health

Concerning Mr. Chea's physical health, Judge Cartwright outlined — with occasional confirmation from the experts — that the accused person was born on July 7, 1926, and was therefore 86 years old. She also noted that according to his previous reports, Mr. Chea had chronic heart disease, hypertension, was being treated for heart failure, but had a stable heart condition.

The judge then asked the experts what previous reports they had looked at in assessing Mr. Chea's health and mental fitness. Prof. Campbell advised that these included previous reports from Mr. Chea's doctors, and reports from his treating hospital. These led the experts to conclude that Mr. Chea was a "frail" man due mostly to his age but also his daily inactivity. This inactivity caused Mr. Chea had become weaker, lacking muscle strength and therefore finding daily tasks difficult to complete. However, Mr. Chea's condition had not significantly deteriorated since Prof. Campbell had last examined him and advised that he was fit to stand trial, the professor said.



Regarding Mr. Chea's respiratory situation, Prof. Campbell said that the accused person had fully recovered from bronchitis. However, the importance of bronchitis was that because of Mr. Chea's low physical reserve, this meant that he was prone to regularly contracting illnesses such as this. It also meant he would be more prone to delirium. People were more susceptible to episodes of delirium as they aged, and Mr. Chea appeared to have suffered such an episode during his bout of bronchitis. That said, Prof. Campbell was of the view that Mr. Chea had fully recovered. Following a whispered comment from Dr. Fazel, Prof. Campbell added that episodes of delirium normally last only a few days in any case.

In terms of Mr. Chea's cerebrovascular health, Judge Cartwright noted that Mr. Chea had suffered a stroke in 1995, and inquired as to whether this had an ongoing impact on his health. Prof. Campbell responded that Mr. Chea was left with a right sided weakness, although this was only mildly evident now. Instead, Mr. Chea's current weakness was, he again stressed, due to inactivity. Prof. Campbell also confirmed that cognition is normally affected by strokes if the stroke either affects the outer area of the brain, or if multiple strokes are suffered. However, there was no evidence of either of these situations in the case of Mr. Chea.

Mr. Chea's dizziness covered a multitude of conditions, Prof. Campbell advised next. He felt it was mostly due to Mr. Chea's unsteadiness when standing, although noting there could also be an inner ear problem. Having said this, an inner ear problem would normally also be associated with a jerking of the eyes, and there was no evidence of this in Mr. Chea's case.

Concerning Mr. Chea's musculoskeletal issues, Prof. Campbell noted that Mr. Chea had a long history of back problems due mostly to wear and tear between his vertebrae and spinal discs. However, there was no evidence of nerve compression with is sometimes associated with these conditions. Thus, Prof. Campbell advised that Mr. Chea's condition be treated by adjustments to his manner of sitting, and with minor analgesics. The professor also noted that his diagnosis in this respect was confirmed by an examination of relevant x-rays.

Next, Prof. Campbell advised that Mr. Chea's suffering of constipation was also a symptom of his inactivity, which elicited an audible giggle from several audience members. Turning to Mr. Chea's vision, the medical expert noted that Mr. Chea had bilateral cataracts which resulted in insufficient light getting through. Prof. Campbell could not speak to whether this issue related to issues behind Mr. Chea's retinas, advising that an ophthalmologist would need to be engaged for this task. The impact on Mr. Chea's eyesight, in the experts' assessment, was that the accused person was able to read newspaper headlines but not the usual body text print. Thus, Mr. Chea would require documents at the ECCC to be in large print or recorded for him. Removal of Mr. Chea's cataracts had evidently been considered, Prof. Campbell added, but were not proceeded with. However, nothing physically prevented such surgery from taking place.

Finally, Mr. Chea's fatigue was evidence, Prof. Campbell said. However, he felt that this condition could be addressed through a program of exercise, as previously mentioned, so as to increase Mr. Chea's physical reserve.

In short, the experts' recommendations concerning Mr. Chea's physical health were as follows:

1. Use the holding cell as necessary.
2. Institute a program of physical exercise under the support of the ECCC detention facility staff so as to increase Mr. Chea's muscle bulk and prevent further increases in Mr. Chea's physical frailty.
3. Maintain the current regime of cardiovascular medication.
4. Closely monitor Mr. Chea's constipation issues.
5. Manage Mr. Chea's back pain through his seating conditions and the administration of minor analgesics.
6. Provide Mr. Chea with large print or recorded material or read material to him.
7. Maintain hearing length, as there was no need to shorten them.
8. Since Mr. Chea finds transportation to the ECCC courtroom tiring, arrange to transport Mr. Chea to the courtroom early enough so that he would have time to recover before the hearing. In addition, have paracetamol available in the event of any resultant back pain.

Asked for his overall prognosis on Mr. Chea's physical condition, Prof. Campbell indicated that it would be difficult to say, "as life is very difficult at 86" and minor illnesses would have a disproportionate effect. Nevertheless, when pressed, Prof. Campbell said that his prognosis would have to be very "limited, guarded." One question people asked when carrying out such assessments was whether they would be surprised if the person in question was not alive in six months. In Mr. Chea's case, the professor concluded, he would not be surprised.

Mr. Chea's Mental Health and Cognitive Impairment

Judge Cartwright then shifted her focus to Dr. Fazel and the subject of Mr. Chea's mental health and cognitive impairment. Dr. Fazel confirmed that the experts had reviewed all prior reports available and interviewed persons, medical or otherwise, who assisted Mr. Chea regularly. In particular, they interviewed one of his treating physicians who had known Mr. Chea for one year, and a staff member at the ECCC detention facility who had known Mr. Chea for two years. They also interviewed Mr. Chea himself, focusing on issues of Mr. Chea's memory, understanding, and concentration. Indeed, two days of the three day examination focused on Mr. Chea's mental health. As part of the examination, the experts included some standardized screening tests for cognitive impairment, which assisted in the assessment as adjunct and guiding tools.

Dr. Fazel considered the results of the three forms of evidence in turn. Beginning with the interviews, he noted that the information received from interviewees was that Mr. Chea's memory was very good. He could recall items, people, and facts going back some time. The interviewees did not feel Mr. Chea's condition in this respect was deteriorating. His concentration was also reportedly good, and he was able to listen to the radio in his detention cell for long periods. In addition, there was no evidence of depression or mood issues.

Concerning the experts' review of relevant medical and clinical records, Judge Cartwright noted that Mr. Chea had not previously been directly assessed by a psychiatrist, and that an attempt to do so in 2009 was thwarted when Mr. Chea refused to participate in an assessment to be conducted by two psychiatrists. However, based on a paper review, these psychiatrists had concluded that there was no evidence that Mr. Chea suffered a mental disorder. A French physician, Prof. LaFont of France, had also noted that there was no evidence that Mr. Chea suffered dementia. Additionally, a Cambodian neurologist who examined Mr. Chea's memory and cognitive function in February 2011 had not found evidence of impairment to either his memory or cognition.

Dr. Fazel noted that he and Prof. Campbell had, on this occasion, assessed Mr. Chea in three sessions: a session from 10.10 a.m. to 11.55 a.m. on March 18; a 20 minute session in the afternoon on March 18; and a session from 9.30 a.m. to 11.50 a.m. on March 19. Mr. Chea concentrated well during those three interviews, the doctor said. He responded clearly to questions, did not tire, and was open and cooperative. The doctor noted that Mr. Chea had been lying in bed during these examinations.



In questioning Mr. Chea, the experts had focused on Mr. Chea's short term memory (that is, memory of events from a few hours to a few minutes ago), long term memory, and mood. With

respect to his memory, Dr. Fazel noted that both Mr. Chea's short term and long term memory seemed to be well preserved. Indeed, the accused person was able to recall events from his childhood, school years, career, DK period and post DK period. In addition, he was able to recall events which had occurred on the day of his interviews with the two experts, for example what he had for lunch. He also undertook some specific memory tests.

The experts concluded that both areas of Mr. Chea's memory were preserved, with one exception. That is, Dr. Fazel noted that Mr. Chea was not very precise when recalling the exact names of some family members. However, the doctor did not pursue this line of questioning in detail, and was also of the view that this situation may have owed to the accused person's lack of interest or contact with these people.

On the subject of Mr. Chea's mood, Dr. Fazel reported that he had asked interviewees about this. Further, Mr. Chea did not complain about mood symptoms and his sleep pattern also appeared unchanged. During the interviews, he laughed and became upset at the appropriate times. In medical terminology, this meant that his mood was "reactive": that is, normal and appropriate.

As previously mentioned, the experts also administered a series of adjunct tests. These cognitive tests, the results of which were consistent with the experts' clinical exams and interviews, and prior reports concerning Mr. Chea's mental health, were as follows:

1. **Mini Mental State Examination (MMSE).** This exam had been considered by Prof. Campbell in his examination of the accused person in 2011, and had been administered by Dr. Ros Sina,⁶ a Cambodian neurologist. The two experts repeated this examination on this occasion. Dr. Fazel noted that this examination screens for cognitive impairment, and that during his most recent assessment, Mr. Chea scored 28 out of a possible 30 points on the MMSE. By way of explanation, Dr. Fazel advised that a score of 23 or less was considered indicative of cognitive impairment and would normally warrant further examination. A result above this would be considered normal, and a result of 28 was a good score for a person of age 86. Dr. Fazel also noted that this test considered both memory and concentration and that the accused person performed well on both counts. The doctor indicated that he would not place any importance on the fact that Mr. Chea's score decreased from a perfect score of 30 in 2011 to 28, as normal day-to-day variation could be expected. He also noted that Mr. Chea's most recent score was very satisfactory given the accused person's physical limitations, such as his poor eyesight.
2. **Montreal Cognitive Assessment (MoCA).** Dr. Fazel explained that this was a series of three tests considering a person's attention and testing attention in different ways. Mr. Chea scored 5 out of a possible 6 points on the MoCA. The doctor opined that this was a good score, particularly in the context of there being a concentration test in the MMSE on which Mr. Chea had also scored well. Thus, the conclusion was that Mr. Chea had "good, high levels" of concentration.
3. **Frontal Assessment Battery Screening Measure (FAB).** Regarding this test, Prof. Campbell explained that the frontal lobe in a person's brain relates to their initiative, drive, and ambition. This was not tested well through the MMSE, and as such, the experts

⁶ The spelling of this name was unclear in the English audio channel.

administered the FAB in order to test these matters. Mr. Chea did not exhibit any impairment on any of these fronts.

4. ***Strugar* Case Criteria and the Competency to Stand Trial Assessment Instrument (CAI).** Finally, the experts considered the CAI, which is an instrument which focuses on the criteria for fitness to stand trial elaborated in the International Criminal Tribunal for the former Yugoslavia *Strugar* case. The experts drew on the outlines of the CAI when determining Mr. Chea's fitness to stand trial, as it detailed some of the examinable criteria. They used the CAI as an adjunct set of questions with the focus remaining on the *Strugar* criteria. Based on this assessment, Dr. Fazel advised that the experts' findings were as follows:
- Mr. Chea understood the difference between a guilty and not guilty verdict. He believed he was not guilty, repeatedly denying the charges against him.
 - Mr. Chea had a basic understanding of the charges against him. For instance, he said he was accused of genocide and war crimes, and that the Khmer Rouge was often accused of committing crimes against humanity. Mr. Chea also said that genocide constituted the killing of one's own race, and that torture included beating, impairment, and maltreatment. When questioned about forced evacuations, he said that they had to move people from one place to another, and when asked about persecution, that there was no killing or torturing of people. In summary, the experts felt Mr. Chea was able to follow the course of the proceedings.
 - Mr. Chea did not have any problems understanding the questions the experts had put to him, and gave consistent and coherent answers.
 - Mr. Chea showed an understanding of the Court's process, including the role of the judges and the final issuance of a collective decision.
 - The experts thought that Mr. Chea understood the evidence in the case, and could discuss defenses he was going to raise.
 - Mr. Chea would be able to understand written material in the case if it was read out to him or enlarged, the experts said. They noted that one of their interviews was two hours and 20 minutes in length and that, given Mr. Chea's condition during that interview, he would be able to concentrate over the length of court sessions.
 - Mr. Chea did have the capacity to cooperate and work with his lawyers. He could name his national co-counsel and explain that his lawyers were helping him. Thus, the experts found he would be able to instruct counsel.
 - The experts felt that Mr. Chea clearly understood the consequences of the possible trial findings. Specifically, he understood that life imprisonment was a possible outcome, but that capital punishment was not, since it was not part of national law. He also understood that he would be released if found not guilty.
 - Mr. Chea was able to testify. He understood that he would receive questions from both his team and the OCP, and that the Court was trying to find the truth. He also emphasized that he would be willing to testify.

In short, the experts found that Mr. Chea's mental health and cognitive function were good, and that he had a reasonable level of cognitive function. He began to add a comment "However," but then checked himself and stopped speaking. The president then adjourned the hearing for the mid-morning break.

After the break, Dr. Fazel added that Mr. Chea should not have any problems concentrating for more than 90 minutes given that Mr. Chea was able to concentrate throughout a two and a half hour interview. This prompted Prof. Campbell to add that there was a link to Mr. Chea's physical health in this respect, and that good physical reserve could boost Mr. Chea's mental health.



Nuon Chea Defense Team Questions the Medical Experts

The floor was ceded to Mr. Koppe. He first sought to question the experts concerning the degree of fatigue caused by Mr. Chea's transport from his detention cell to his holding cell, which was what seemed to worry their client most. He noted that the experts had not examined Mr. Chea after such an experience and asked them to comment on it. Prof. Campbell said that Mr. Chea's physical frailty meant that even everyday tasks were a struggle. Thus, they suggested that this move occur 15 to 30 minutes before the start of a hearing so that he

would be able to recover by the start of the hearing.

Mr. Koppe clarified that he was interested in whether Mr. Chea would need to have been examined directly after such an experience. Prof. Campbell denied that this would make a difference, noting that in any case, Mr. Chea was not subject to a great deal of physical activity in such an episode, with the activity involved being a transfer from a stretcher.

Concerning Mr. Chea's mental ability to participate and specifically his capacity to concentrate during proceedings, Dr. Fazel stated that a more active level of participation (such as answering questions) would require a higher degree of concentration than more passive participation (such as listening to witness testimony). The experts felt that as Mr. Chea was able to concentrate quite well during active interviews, including two interviews on the same day, this was a clear sign that the accused person could concentrate all day in a less demanding task of listening to court proceedings. Prof. Campbell agreed that when one was passive, it was easier for one's mind to wander regardless of one's mental state. Mr. Koppe quipped that indeed, this happened to him all the time.

Next, Mr. Koppe sought the experts' opinion on his team's proposal that a video link be stored at Mr. Chea's prison cell if he felt unable to move from his prison cell to the holding cell. Prof. Campbell acknowledged that this was a possibility but that its disadvantage would be that Mr. Chea would be further away from his counsel, which might make it more difficult for him to interact with them.

On Mr. Chea's short term memory, Mr. Koppe queried whether Mr. Chea's bout of bronchitis could have affected his short term memory. By way of denial, Prof. Campbell referred to Mr. Chea's episode of delirium at this time but noted that delirium clears, and that it appeared to have done so in Mr. Chea's case. Mr. Koppe also stated at this point that it was the observation of Mr. Chea's defense team — who had worked with him for five years — that his short term memory had declined. For example, he would repeatedly ask his case manager about the court schedule. Dr. Fazel said that the experts' view was that Mr. Chea had a normal decline in memory owing to the ageing process. They did not believe that the decline was of such severity as to warrant clinical concern or labeling as early dementia. However, there would be continued decline consistent with an 86 year old man.

This prompted the defense counsel to query the significance of Mr. Chea believing that he was going to die during his bronchitis episode, and his summoning his family to his bedside at that time in order to say goodbye. Specifically, Mr. Koppe queried whether this "near death experience" would have any impact on Mr. Chea's mental health. Prof. Campbell said that the impact was confined to that particular episode. Mr. Chea had trouble breathing at that time, and this could sometimes bring on a feeling of "impending doom," the expert added.

Finally, Mr. Koppe asked why Dr. Fazel had said "However" at the end of his concluding remarks and then paused, asking what remarks he intended to add. Dr. Fazel said that these were the comments Prof. Campbell made after the mid-morning break, namely that there was a beneficial relationship between physical and mental health.

Next, National Co-Counsel for Nuon Chea Son Arun took the floor. He first asked the experts whether they questioned Mr. Chea on areas other than his past experiences. As an elderly person himself and not as an expert, Mr. Arun said, it was his personal experience that elderly people tended to remember past experiences better than nearer ones. Dr. Fazel confirmed that the experts had asked Mr. Chea to remember three objects after a lapse of a day. Their clinical review also led them to believe that Mr. Chea had good recall of short term events. He could, for example, recall questions even when they were long. Dr. Fazel did note that Mr. Chea might forget matters not of particular interest to him, but felt that this was something many people experienced anyway.

As for Mr. Chea's physical fitness, Mr. Arun queried whether the experts had reviewed any documents which indicated that Mr. Chea had fallen down in the bathroom prior to being admitted to hospital, which Mr. Arun described as a contributing factor in his hospital admission. Prof. Campbell confirmed this, and again stated that this was due to Mr. Chea being off his feet for such a long time and lying flat on his back for so long. His condition was called "water-skier's syndrome" involving leaning backward when standing. This could only be corrected by someone qualified in physical rehabilitation.

Again stressing that he was not a doctor, Mr. Arun stated that Mr. Chea's health appeared to have worsened after the bronchitis and that there were some bruises around his waist. Prof. Campbell said that there was no evidence of lasting physical damage from Mr. Chea's having fallen down in the bathroom, although it would certainly have affected the accused person's confidence. Mr. Arun disagreed, noting that the bruises remained. He also felt that, after visiting

Mr. Chea in the detention facility, Mr. Chea reported of lower back pain and dizziness. Prof. Campbell said that there was no evidence of recent damage. Mr. Chea did have back pain but this appeared to stem from longstanding conditions.

The defense counsel stressed that the reason for his questions were because his team was concerned with Mr. Chea's health. This prompted an objection from International Assistant Co-Prosecutor Dale Lysak, who said that Mr. Arun's questions at times approached giving testimony himself. Mr. Arun responded passionately that at this point, the parties did not genuinely know whether Mr. Chea was fit to stand trial, and this was the reason for his questions.

The president nevertheless sustained the prosecutor's objection and cautioned Mr. Arun not to give his own testimony and instead merely put questions to the experts on behalf of his client. Mr. Arun then stated that while he was ambivalent about whether the experts' report and their answers today provided sufficient information, he nonetheless had no further questions.

Clarifications from the Prosecution

Next, National Assistant Co-Prosecutor Seng Bunkheang opened questioning on the part of the OCP, asking the expert to expound on the difference between acute and chronic bronchitis. Prof. Campbell said that acute bronchitis followed on from a viral infection, and that the sufferer would cough up sputum and would require treatment with antibiotics. Chronic bronchitis on the other hand afflicted smokers and could not be resolved fully. There was no evidence of chronic bronchitis in Mr. Chea's case.

Mr. Bunkheang then noted that December was the coolest month in Cambodia and asked whether this could affect Mr. Chea's health. Prof. Campbell responded that he imagined that cool weather for Phnom Penh was not very cool, asking what kind of temperatures were involved. Dr. Fazel could be heard remarking that this was around 30 degrees. Prof. Campbell said that he could not comment on the impact of lower temperatures but that what was perhaps more important was that Mr. Chea be immunized for influenza.

The prosecutor asked whether the experts observed any difference in Mr. Chea when he was lying down and when sitting up. Prof. Campbell advised that they only really saw Mr. Chea when he was lying down and it was an effort for him to sit up. However, he added that Mr. Chea was able to move around as required in order for the experts to conduct their physical examination. Dr. Fazel could be heard whispering to Prof. Campbell at this point, suggesting that the professor be explicit and stipulate that Mr. Chea did sit up.

Mr. Bunkheang next sought comments regarding Mr. Chea's over 30 year history of hypertension. Prof. Campbell said that Mr. Chea's high blood pressure was well controlled, and when examined, was read to be 135 over 70. Mr. Bunkheang asked how such a blood pressure level could be characterized. Prof. Campbell answered that this was a very satisfactory blood pressure for someone of Mr. Chea's age.

Overall, Prof. Campbell stated, Mr. Chea was "more frail" than during the 2011 examination, but he felt this was due primarily to his inactivity. The expert specified that there was no obvious deterioration in Mr. Chea's heart, lung, cerebrovascular, or kidney function.

Mr. then rose to continue OCP's questioning. He first focused on the comparison of results as between the 2011 and 2013 MMSEs. First, he asked whether either expert was present during the administration of the 2011 test. Dr. Fazel denied this, noting that the test was carried out by someone else. Mr. Lysak then asked Prof. Campbell whether he had seen the detailed results or simply the test score. The expert responded that he had seen only the score but that it would not be significant in this case as the examiner would not have modified the paper considering there was a perfect score. Mr. Lysak noted that this was because he could recall Prof. Campbell having previously queried the proper administration of a previous MMSE. Prof. Campbell then emphasized, echoing Dr. Fazel's earlier remarks, that he would place no significance on the score decreasing from 30 to 28.



As to Mr. Chea's eyesight, Mr. Lysak noted that his own father happened to have macular degeneration and used a magnifying glass to read documents. He asked whether this could be of use in Mr. Chea's case. Prof. Campbell said that this was less likely to be useful in the case of someone with cataracts, but could be tried.

Regarding Mr. Chea's cardiovascular condition, Mr. Lysak asked whether the experts had reviewed the reports of Dr. Antoine LaFont, the director of interventional cardiology at the Georges Pompidou Hospital in Paris, who examined Mr. Chea in October 2007 and subsequently reviewed his cardiovascular health every six months until 2010. He then sought to read some experts from these reports, beginning with the first,⁷ in which Dr. LaFont noted Mr. Chea's blood pressure was 125 over 80, and there was no evidence of cardiovascular functional issues such as angina or palpitation. He described Mr. Chea's hypertension as "ancient" and that Mr. Chea suffered from a "stability of pathologies." In another report, Dr. LaFont described Mr. Chea's condition as "stable" and noted there had been a little improvement in his "general health condition."

After this prelude, Mr. Lysak asked Prof. Campbell whether Mr. Chea's condition was relatively stable as compared to his 2007 condition, or whether it had degenerated or otherwise changed. Prof. Campbell said that a physical examination did not reveal any changes. Dr. LaFont had used other examinations, including echocardiography, which the experts did not use and which might reveal subtle changes. There was no clinical evidence of deterioration, Prof. Campbell continued, but there was likely to have been subtle deterioration since 2007. An echocardiogram could be repeated but there did not appear to be any evidence indicating that it should be.

⁷ This report has the document number D24/7.

Turning to the issue of life expectancy, Mr. Lysak asked the experts to explain what they meant by “inter-current illness”. Prof. Campbell said that this meant any illness which was not a chronic one, such as influenza, bronchitis, or a bladder infection. Given Mr. Chea’s current illness, these inter-current illnesses might affect Mr. Chea much more than the ordinary person. Prof. Campbell was not aware, when queried, as to whether Mr. Chea had been vaccinated against influenza.

The prosecutor then asked Prof. Campbell what objective facts he relied on in suggesting that he would not be surprised if Mr. Chea was dead in six months. Prof. Campbell replied that the six month period should not be taken too literally, and prognoses could not easily be made. The six month question was something such experts regularly asked themselves. It was impossible to say whether Mr. Chea would be alive in six months. Mr. Lysak asked if there was a reason Prof. Campbell had not put the six month figure into the report. Prof. Campbell stressed that he was not giving Mr. Chea a six month life expectancy but merely sought to highlight that at 86 years of age, “life is precarious”. He then suggested the prosecutor move on from the six month issue when asked a further question about this matter.

Duly doing so, Mr. Lysak asked about Prof. Campbell’s recommendations for managing Mr. Chea’s health. Prof. Campbell reiterated that he recommended a program of physical therapy, which would increase Mr. Chea’s physical reserves. However, he stressed that Mr. Chea needed to be willing to participate in such a program.

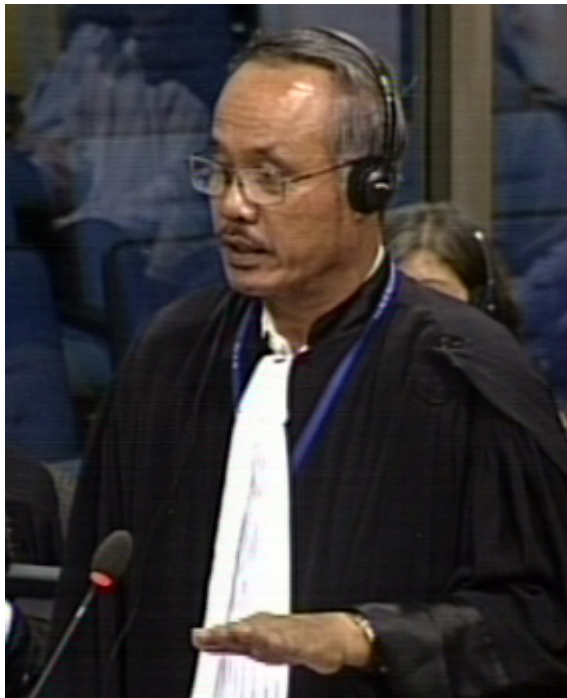
Returning to the subject of life expectancy, Mr. Lysak asked Prof. Campbell whether he had any expertise in this subject given that he was a geriatrician, and whether he was familiar with life tables. Prof. Campbell agreed that he was, but said that they were of limited relevance when dealing with a subject with co-morbidities. Mr. Lysak then advised that he had life tables prepared both by the U.S. and New Zealand governments. Before addressing this, the president ceded the floor to Mr. Koppe, noting first that perhaps these matters strayed far from the point of the medical report. Mr. Koppe noted that as a Cambodian national, these reports were of limited relevance, and he believed that the medical experts would state that they were unable to comment intelligibly on these reports.

Mr. Lysak requested leave to ask a few more questions which he thought would demonstrate the relevance of these documents. He first noted that, while he appreciated Prof. Campbell’s comments on the six month period, he hoped the expert could appreciate that this comment would be picked up and highlighted. He then asked Prof. Campbell whether he was aware of the life expectancy of an 86 year old New Zealander. At this juncture, Mr. Koppe said that he had raised an objection and would like the Chamber to rule on it. This prompted a brief conference between the Trial Chamber judges. The president then advised that Mr. Koppe’s question was sustained.

The prosecutor then asked Prof. Campbell whether he had taken into account the estimated life expectancy of 86 year olds when noting that he would not be surprised if Mr. Chea was dead in six months. Prof. Campbell said that such estimates did not apply to individuals and there was a

need to move away from the six month figure. The president noted, at this point, that this question appeared to be repetitive and to have already been answered by the experts.

The president then asked the parties for their time estimates for closing statements. Both the Nuon Chea Defense Team and the OCP indicated that their closing remarks, if any, would be very brief. National Lead Co-Lawyer for the civil parties Pich Ang advised that they might require 25 minutes to question the experts and a brief time for their closing statements. The president then adjourned the hearing for lunch ten minutes past the usual adjournment time.



Chamber's Decision on Khieu Samphan's Waiver of His Right to Participate

Before returning to the subject of Mr. Chea's health, the president first advised that it had recently received a waiver from Khieu Samphan to participate in this afternoon's proceedings concerning the severance of the trial, in light of his feeling fatigued. He then permitted Mr. Samphan to return to the ECCC detention facility.

Civil Party Co-Lawyers Question Medical Experts

At this stage, national co-lawyer for the civil parties Hong Kimsuon took the floor to resume questioning of the medical experts. He first asked the experts to give their views as between the differences of Mr. Chea being present in the courtroom versus participating from his holding cell. Dr. Fazel indicated that he was unsure the experts could comment on this. Medically, the experts felt there

was no reason why Mr. Chea could not be present in the holding cell. Prof. Campbell said that Mr. Chea was much more comfortable lying flat and that would be difficult to achieve in the courtroom. As to whether Mr. Chea would be helped in the courtroom physically since this would permit him to be more active, Prof. Campbell said that he could not see how this would improve the situation.

Next, Mr. Kimsuon focused on Prof. Campbell's comment that Mr. Chea preferred to lie down and that this encouraged him not to be active. Once again, Mr. Kimsuon asked whether bringing Mr. Chea into the courtroom would increase his activity. Prof. Campbell denied this and explained that Mr. Chea needed an exercise program when the court was not in session. Continuing in this vein, the civil party lawyer asked whether lying down or sitting up would be best for Mr. Chea's health. Prof. Campbell said that Mr. Chea much preferred lying down and it would be difficult to get him to do otherwise.

Regarding whether the experts had done anything to encourage Mr. Chea to be more active, Prof. Campbell denied this as he was not Mr. Chea's treating physician. However, he reiterated that he recommended Mr. Chea undertake a sustained exercise program to increase his muscle strength.

He also denied, when asked by Mr. Kimsuon, having discussed with Mr. Chea the possibility of being given massages.

Mr. Kimsuon queried whether the experts were recommending that Mr. Chea be able to remain in the courtroom for 90 minutes. Prof. Campbell agreed and said that this was the experts' feeling based on having examined Mr. Chea for more than 90 minutes. The civil party lawyer then focused on the experts' comment, in their report, that while Mr. Chea said he would be willing to sit in the courtroom, he feared being physically unable to do this as he might feel dizzy, and might wish to testify from the detention center via video link. Asked about the implications of Mr. Chea feeling dizzy, Dr. Fazel said that a number of remedies might be appropriate here: allowing him a period of rest, administering paracetamol, and moving Mr. Chea with care and special attention to his back pain.

International Lead Co-Lawyer for the civil parties Elisabeth Simonneau Fort took over the questioning at this point. She first turned to the subject of Mr. Chea's cataracts and the possibility of an operation to remove these cataracts. She asked why such an operation had not been performed. Prof. Campbell said that this option was considered but there was no evidence to the experts as to why this was not carried out. He also noted that recovery from such surgery would take some time, so perhaps the more practical option was to read documents to him and record them so they would be available on tape for the accused person. The decision on whether cataract surgery was for an ophthalmologist, Prof. Campbell added.

The experts confirmed, as prompted, that in drafting their report, there were no points of disagreement between them as to the conclusions and recommendations. Ms. Simonneau Fort then asked the experts to expound more fully on their reasons for Mr. Chea participating from the holding cell and not the courtroom. Prof. Campbell said that this owed to Mr. Chea likely having to sit in court, which he might find uncomfortable. However, if Mr. Chea were able to lie in court, this should not be a problem. Dr. Fazel said that there was one further consideration: namely, that the holding cell permitted immediate medical support such as the provision of pain relief.

The president then advised that the session on the medical experts' report on Mr. Chea's fitness to stand trial and thus the session concerning Mr. Chea's health was at an end. He then thanked and dismissed the experts with a smile.

Final Comments Concerning Expert Testimony on Nuon Chea's Health

Following the departure of the experts, Mr. Arun was given the floor to give concluding remarks on the subject of Mr. Chea's health. Based on the experts' report and testimony, Mr. Chea said it was clear that Mr. Chea suffered from many ailments, including hypertension, inflammation of the respiratory system, back pain, and dizziness. His physical strength had also deteriorated in line with the experts' oral testimony. In light of such conditions, even if Mr. Chea were brought to trial in the holding cell, Mr. Arun asserted that Mr. Chea's participation would be meaningless and he would be unable to follow anything at all.

If appropriate, Mr. Arun continued, Mr. Chea should be placed under treatment until such time as he would be able to participate in the proceedings once more. He therefore requested Mr.

Chea be referred to hospital to enable treatment of his various ailments. If his ailments continued in accordance with the current state, Mr. Chea would be unable to hear or concentrate properly.

Relaying the OCP's point of view, Mr. Lysak first sought to respond to Mr. Arun's assertions, which he said were "inconsistent" with the experts' testimony. For instance, while Mr. Chea had a history of hypertension, his current blood pressure appeared to be under control. The respiratory conditions Mr. Chea had suffered relating to his bronchitis no longer existed. Prof. Campbell had also testified that other physical ailments could be remedied with physical therapy. It was unclear what Mr. Chea should be treated for.

The relevant question here, Mr. Lysak said, was what had changed since Mr. Chea had last been examined. Mr. Chea's condition remained stable, he said. There was "simply no change in his physical condition" that would warrant a change to the Court's previous fitness decision. What had changed was that Mr. Chea had now been fully evaluated for his mental health. This verified Mr. Chea's fitness to stand trial from a mental perspective as well as the physical perspective.

Mr. Kimsuon, for the civil party Lead Co-Lawyers, said that the civil parties and the accused persons themselves had waited a long time for justice to be done. The experts' report was comprehensive and appropriate, and the Nuon Chea Defense Team's rejection of it was "groundless and unsubstantiated", he said. Similarly, that team's suggestion that Mr. Chea should refrain from participating in hearings until he had received treatment was also "utterly unsubstantiated." Deterioration of Mr. Chea's reading capacity was not unusual for someone of his age. Thus, the civil parties requested the Court proceed with its schedule so that the trial could progress smoothly.

Ms. Simonneau Fort added that she supported both the OCP's and Mr. Kimsuon's remarks. She too stressed that the experts had agreed Mr. Chea was fit to stand trial. While Mr. Chea was elderly, his physical condition was stable and indeed, he wanted to stand trial. Like Mr. Kimsuon, she also stressed that the civil parties wanted the proceedings to continue expeditiously and as uninterruptedly as possible. In order to avoid interruption, it may be necessary for Mr. Chea to be brought to his holding cell and not be kept in the ECCC detention facility. Finally, she noted that Mr. Chea could also be brought to the courtroom for everyone to see him at the beginning of proceedings, so that everyone would be fully aware that he was present and participating.

Briefly responding to the civil party co-lawyers' comments, Mr. Arun reiterated that while he was not a treating doctor, he did visit Mr. Chea on a near daily basis. While the doctors had not elaborated on this, Mr. Chea's back pain was severe, and when he sat, he would get dizzy quickly. Mr. Chea suggested that perhaps another expert be engaged so that an appropriate treatment plan could be initiated. Everyone was indeed waiting for justice, but the trial also needed to be fair. If Mr. Chea's health improved, he would be responsive to questions. Mr. Arun too wanted to hear the truth and hear Mr. Chea testify. Treatment programs for Mr. Chea's health could enable this to occur.

Impact of Experts' Testimony on Trial Chamber's Upcoming Decision to Sever Case 002

After the mid-afternoon break, the president noted that, as foreshadowed, the Trial Chamber now wished to hear the parties' comments concerning the impact of the experts' testimony concerning Mr. Chea on severance. Mr. Koppe indicated that the impact of the experts' testimony in the event of ongoing severance of the trial had a high "we have to cross that bridge when we get there" quality to it. That is, they would have to see what Mr. Chea's condition would be at that time as to whether he was in a position to follow the proceedings from his holding cell. His team simply hoped that the Trial Chamber's decision would soon be rendered and that the Chamber continued to see his client fit to stand trial.

National Co-Counsel for Khieu Samphan Kong Sam Onn advised that his team did not have any position concerning severance; they neither supported nor opposed it. However, practically, his team could see that Mr. Samphan's interests would be damaged if severance would tend to delay or prolong the proceedings. His team had already requested that Mr. Samphan be provisionally released so as to ensure that his rights be properly exercised.

International Co-Prosecutor Andrew Cayley then took the floor. He advised that, while frail, Mr. Chea was mentally and physically fit to stand trial, but of course the Trial Chamber would be fit to stand trial. As such, the OCP was of the view that the Trial Chamber should adopt the option of holding a smaller, representative trial. The OCP maintained that including the S-21 crime site to the original scope the Trial Chamber had defined for Case 002/1 would fit the criterion of representativeness. Reading from that judgment, he noted that this approach would optimize the expedience of a judgment in the shortest possible time.

In response, Judge Cartwright noted that the OCP had emphasized, in its comments on February 18, 2013, that adding S-21 would satisfy the representativeness. She noted, in particular, that the OCP had mentioned at that time that adding S-21 would not only add additional counts of crimes against humanity but would also add counts of grave breaches of the Geneva Conventions, three witnesses, and 200 documents. The judge asked Mr. Cayley how the OCP intended to establish the existence of an international armed conflict — a precondition to the establishment of grave breaches or other war crimes — with only three witnesses who were all situated at S-21.

Mr. Cayley noted that the OCP had addressed this issue in February but would address it again, ceding the floor to Mr. Lysak. The latter advised that the most compelling evidence establishing the existence of the armed conflict were documents already in evidence in Case 002/1, including reports and telegrams regularly sent to the leaders in Phnom Penh reporting on the armed conflict; Standing Committee minutes and minutes of other meetings where the conflict with Vietnam were discussed; and speeches by the leaders themselves referring to the existence of such a conflict. This documentary evidence was quite overwhelming. In addition, he said, a number of upcoming military witnesses were also involved and able to testify on the existence of an international armed conflict.

Judge Cartwright noted that she had read the relevant submissions, however in the Case 001 trial of Kaing Guek Eav *alias* Duch, there was extensive oral testimony, since the relevant documents had not been very specific about the timeframe of that conflict. She also recalled that the Trial Chamber had Nyan Chanda testify for a considerable amount of time on this point. She was

therefore skeptical of the OCP's estimates of the necessary time required to establish the existence of an armed conflict.

Mr. Lysak responded that, if the Trial Chamber were willing to hear a document presentation from the OCP on the relevant documents, these documents would be overwhelming in establishing the existence of the conflict. Regarding Mr. Chanda, Mr. Lysak did not believe it necessary to call an expert witness to testify on the matter.

National Lead Co-Lawyer for the civil parties Pich Ang then took the floor, asserting first that separation of the cases between Mr. Chea and Mr. Samphan was not warranted. In addition, the civil parties urged the Trial Chamber to proceed expeditiously. They did not want the proceedings to cover only a small portion of the facts. Instead, they asked for the trial to be as comprehensive as possible so that justice could be done. They also supported the various mechanisms which might be available to Mr. Chea to improve his health and consequently be in a position to "tell the truth" to the Cambodian people.

Ms. Simonneau Fort added that once more, the Chamber and the parties were in a position of having to find some balance between representativeness and expeditiousness. Regarding severance, she stressed that the Lead Co-Lawyers for the civil parties were not opposed to severance so long as it was done on a factual basis and was sufficiently representativeness, in light of there not being any likely subsequent trials. She disagreed with severing Case 002 based on legal characterization of the facts. Neither was it desirable to sever the case based on personal jurisdiction. Instead, and as Mr. Ang said, Mr. Chea and Mr. Samphan should remained joined in a single trial.

The civil party lawyer considered it unfortunate that the death of the accused might spell the end of the tribunal. Death had been hanging over the Court for 10 years. Death was inherent in the trial. However, there should not be a significant focus on time limits such as three months, six months, presumably in referring to the issue of life expectancy which had been discussed earlier. If death was to come about, she said that it was important to underscore that the proceedings were what was stated in the courtroom. It would remain important. Reading everywhere that the trial would be a failure, she wished to place an emphasis on this point. Seeing the trial as a failure because of the death of the accused would be an affront to the civil parties. There were other meaningful things happening in the trial.

Questions from Judge Jean-Marc Lavergne

Judge Jean-Marc Lavergne then advised that he had a number of questions for the parties to better understand their positions. First, he noted that Mr. Arun give remarks which appeared to suggest that Mr. Chea was unfit to stand trial, while Mr. Koppe seemed to suggest that fitness was not an issue at this point but might be a bridge that needed to be crossed later. He queried whether there was some dissonance between the national and international sides of the Nuon Chea Defense Team.

Before Mr. Koppe was given the floor to respond, the Trial Chamber judges at this point huddled in brief conference. It appeared that Judge Lavergne was discussing a point with the judges and Judge Cartwright in particular. Mr. Koppe then simply advised that the Nuon Chea Defense

Team was never disharmonious. This prompted the judge to inquire as to their position again, and whether they were “singing from two hymn sheets.” Mr. Koppe said they were not, and that the judge could ask again, but would not get another answer.

Turning to Mr. Samphan, the judge noted that Mr. Sam Onn had referred to the filing of an application on behalf of Mr. Samphan, but that he had not seen such an application. He then asked Mr. Sam Onn to clarify their position, and specifically, whether their application for the release of Mr. Samphan was linked to an application for severance and whether or not they intended to apply for this. Mr. Sam Onn advised that his team had not received any Trial Chamber decision concerning the ongoing severance of Case 002. As such, his team’s application for release of Mr. Samphan did not have a clear basis yet. That is, any basis for a possible prejudicial effect of severance on Mr. Samphan would depend on the nature of the severance of Case 002. Severance, Mr. Sam Onn continued, could be considered either where there was a conflict of interest in the present case or where severance would be in the interests of justice. There was no conflict of interest at present.

Next, Judge Lavergne turned to Mr. Ang’s comments. He noted that he was unclear whether Mr. Ang preferred severance or a single trial on all of the charges. He also noted that Ms. Simonneau Fort noted that they would ultimately be in favor of severance. However, it was unclear to the judge, if this was the case, how the Lead Co-Lawyers for the civil parties wished to sever the case.

Responding first, Mr. Ang advised that the Lead Co-Lawyers were not requesting a single trial of all facts, and a single judgment on all of those facts. Instead, they preferred a first trial be concluded in a fairly appropriate time, and endorsed the OCP’s proposal in this respect. In addition, the Lead Co-Lawyers suggested there then be another section of the trial on additional charges, specifically forced marriage, forced labor, and the experiences of other victims. By way of clarification, Mr. Ang advised that they would support an initial trial as defined by the upcoming decision on severance, and a subsequent trial on other facts.

Ms. Simonneau Fort endorsed Mr. Ang’s comments on severance. She also stressed, once again, that the legal characterization of facts could only be carried out at the end of the trial and it could not serve as the basis for the severance of the trial. The Lead Co-Lawyers had never diverted from its previous position which was one of endorsement for the OCP’s position.

The judge then noted that most parties seemed in favor of severance, and that the Supreme Court Chamber had asked the Trial Chamber to discuss with the parties the prospect of future Case 002 trials. A number of possibilities were before the Chamber, he said, namely:

- A second trial could be heard once a Case 002/1 judgment had been issued and even once it had become definitive (that is, presumably after an appeal decision were issued in its regard);
- A second trial could be heard following an initial severance of Case 002/1 and while the Trial Chamber was drafting a verdict for that trial; and
- A second trial could be heard under a second Trial Chamber panel.

He noted that the OCP had not been in favor of the first option, since a verdict in Case 002/1 would be able to serve as the basis for judged and adjudicated facts. It was also necessary to consider paragraph 51 of the Supreme Court Chamber's decision,⁸ he said, according to which proceeding with several trials judged by a single bench of judges could lead to a certain number of difficulties, including a bias on the part of the judges.

Noting that the Nuon Chea Defense Team was not in favor of severance, the judge first ceded the floor to Mr. Koppe to respond on this matter. The defense counsel said his team had taken the firm position that one big trial was preferable. One of the most important reasons for this, he said, was indeed the Supreme Court Chamber's position that a series of trial might pose problems in terms of creating a bias among the Trial Chamber judges. He also noted that much, if not all of the media coverage on the death of Ieng Sary mentioned the word "genocide," although this charge was not included among the Trial Chamber's initial scope of Case 002/1 or in the OCP's proposal for a revised scope. In addition, Mr. Koppe continued, given that the experts were unable to speculate on Mr. Chea's life expectancy, this testimony would seem to reinforce the appeal of a single comprehensive trial.

Mr. Sam Onn was then given the floor to give his comments, if any, on the desirability of adding the charge of genocide to the scope. Mr. Sam Onn responded that severance should not be undertaken as this might indeed lead to pre-judgment, echoing Mr. Koppe's remarks in this regard.

For the OCP's part, Mr. Cayley advised that holding a second trial before a judgment were issued in the first posed a real problem which Mr. Cayley was unsure how to address, given the possibility of common facts being relevant to both files and needing to be adjudicated in the first trial's judgment. As for the establishment of a second Trial Chamber panel, Mr. Cayley said he believed it was "highly unlikely" this would work, given the known funding issues of the ECCC and the need to recruit judges for it. All the parties had to accept that this trial would likely be the last and only trial of the senior leaders, and that adding S-21 would add to its representativeness.

While it would be important to add a genocide charge, Mr. Cayley continued, the majority of Khmer Rouge victims were Khmer people and they were never characterized as victims of genocide. Instead, and for legal reasons the Chamber knew well, the only victims put forward as victims of genocide were the Vietnamese and the Cham.

Echoing Mr. Cayley's comments, Ms. Simonneau Fort agreed that a second Trial Chamber panel would not be feasible. As for the possibility of a second trial, the civil party lawyer said she could not comment on this as she had not yet consulted the civil parties on this matter. However, once again, she reiterated her point concerning the appropriate timing for the legal characterization of the facts.

⁸ The Supreme Court Chamber's decision may be accessed at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-02-11%2018:26/E163_5_1_13_KH.PDF (in Khmer), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-02-11_18:23/E163_5_1_13_EN-1.PDF (in English), and http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-03-05%2015:34/E163_5_1_13_FR.pdf (in French). Cambodia Trial Monitor's commentary on this ruling may be accessed at <http://www.cambodiatribunal.org/blog/2013/02/expert-legal-commentary-supreme-court-chamber-invalidates-case-002-severance>.

Mr. Ang added that the Lead Co-Lawyers for the civil parties feared that if another hearing were conducted while the current Trial Chamber judges were writing the judgment in the present case, this would not be conducive to the handling of the entire Case 002, as the Lead Co-Lawyers would fear that a judgment would not be rendered expeditiously enough in Case 002. Accordingly, they wanted the Trial Chamber judges to hear the evidence in the case and then adjourn to render a judgment in a timely manner, presumably instead of hearing evidence in a second case alongside also rendering said judgment.

At this juncture, the Trial Chamber judges convened briefly. President then advised that the scheduled hearings for the day had come to an end. He then advised that the Trial Chamber would announce a brief decision concerning Mr. Chea's fitness to stand trial this Friday, March 29, 2013.



Swearing in of a New ECCC Investigator

Additionally, the president advised, the Chamber wished to administer a ceremony in order to swear in a new investigator. He proceeded to carry out the latter at this juncture. The new investigator, who had been appropriately accredited, was then brought into the courtroom.

The president then proceeded to read *Prakas No. 40* issued by the Ministry of Justice and signed by Ang Vong Vathana, the Minister of Justice. This document outlined that according to the Constitution of the Kingdom of Cambodia and other relevant regulations, the government had decided to swear in the new investigator.⁹ The new investigator started work at the ECCC on March 9, 2013. Under direction from the president and with assistance from Mr. Phary, she duly read the relevant oath and then signed it as required. After this, the hearings were adjourned for the day.

Hearings in the ECCC will resume at 9 a.m. on Friday, March 29, 2013, with the delivery of the Trial Chamber's judgment concerning the possible severance of Case 002 in the wake of the Supreme Court Chamber decision invalidating the original scope determined for Case 002/1.

⁹ The name of the new investigator was unclear in the English translation.