



Michael Karnavas, international counsel for Ieng Sary, took center stage at Thursday's ECCC hearings with "exuberant" arguments on fair trial rights.

Do Not Call it a "Mini-Trial": Objections to Documents and Arguments over Video-Link Testimony Consume Thursday's Hearings Case 002 Hearings

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On Thursday, March 15, 2012, the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) continued trial proceedings in Case 002 against accused Nuon Chea, Ieng Sary and Khieu Samphan. Scheduled for the morning session were the replies of the defense teams to the responses to their objections to specific pieces of documentary evidence by the prosecution and civil parties. Following the completion of oral arguments concerning evidentiary issues, the Chamber planned to hear arguments related to the proposed testimony via video link of Khmer Rouge researcher and expert witness, Professor Ben Kiernan. The planned return to the hearing of testimony and other substantive evidence was a welcome development for court observers and audience members, many of whom had struggled to understand and remain interested in the repetitive and technical legal arguments raised by the parties during recent oral arguments on evidentiary issues.

Nuon Chea Reply to Responses to its Objections to Documents

Andrew Ianuzzi began the day's proceedings by providing the Nuon Chea defense's reply to party responses to its objections on certain documents. Mr. Ianuzzi argued that despite the "attractive" arguments made by the prosecution on the need to explore in depth the alleged "joint criminal enterprise" (JCE), they are not persuasive regarding the scope of evidence that should be admitted. He argued that simply invoking JCE is not a "magic word[]" that allows the use of all evidence, noting that JCE is but one of many modes of liability operative at the international level and is as broad, or narrow, as the relative charging document. Thus, Mr. Ianuzzi stated, in the wake of the Trial Chamber's severance order, the scope of the relevant JCE is limited to population transfer issues in Case 002, Trial 1.

Mr. Ianuzzi also argued that much of the documentary evidence submitted by the ECCC Office of the Co-Prosecutor (OCP) was created with the intention of prosecuting the accused in Case 002 and thus Nuon Chea should be afforded the opportunity to challenge such evidence through cross-examination.

As for the use of the phrase "mini-trial," Mr. Ianuzzi commented that this has become the commonly used short-form for Case 002, Trial 1 and therefore is not a negative or loaded term. He also commented on the use of witness names in open court, noting that it does nothing to prejudice proceedings or endanger anyone for the defense to state the names of witnesses of whom it had already publically and openly sought the testimony, including such people as Henry Kissinger and various Cambodian government officials.

Mr. Ianuzzi also noted that the defense had not abandoned its argument that the Documentation Center of Cambodia (DC-Cam) is a biased institution against the defense.

He then responded to submissions by the civil parties that evidence should be presumed admissible because it was collected by professional judges from the Office of the Co-Investigating Judges (OCIJ). Mr. Ianuzzi argued that the OCIJ is a "manifestly biased institution," especially during the tenure of the previous International Co-Investigating Judges (Judge Lemonde and Judge Blunk). He then reminded the Chamber of the previous controversy surrounding alleged statements made by Judge Lemonde that he had preferred that his investigators seek inculpatory evidence against Case 002 accused.

Mr. Ianuzzi then stated that this completed his reply submission, and after conferring with his "arrogant Dutch friend" (counsel Michiel Pestman),¹ he ceded the floor to the Ieng Sary defense.

Ieng Sary Reply

Ieng Sary defense counsel Michael Karnavas then took the floor and began his submission by "confess[ing]" that he had erred in his arguments regarding two documents and ceding that the

¹ Mr. Ianuzzi's reference to Mr. Pestman as "arrogant" was a tongue-in-cheek reference to a recent statement by Cambodian Prime Minister Hun Sen, in which he referred to Mr. Pestman by that term. The Prime Minister's comment was prompted by a complaint filed against him in domestic court by the Nuon Chea defense team, as well as applications to the Trial Chamber seeking condemnation of statements the Prime Minister allegedly made in which he opined on the guilt of Nuon Chea for murder and genocide.

prosecution had rightly pointed out this error in its response. Following this admission, however, Mr. Karnavas completely shifted gears and was in rare form while delivering his reply to the arguments of the prosecution and civil parties.

Mr. Karnavas began by stating that international prosecution counsel Dale Lysak had given a “brilliant” presentation during his portion of the prosecution’s submission but then characterized Mr. Lysak’s submissions as “testifying and giving closing arguments.” He then argued that Mr. Lysak had misstated the situation regarding the use of certain evidence, especially in light of the fact that the Trial Chamber had already heard Case 001. He argued that the defense was concerned with the fact that the same Trial Chamber is hearing Case 002 and reminded the Chamber of the accused’s rights to a “fresh trial.”

Regarding the arguments made by the prosecution and civil parties that claimed that the ECCC employs a civil law-based evidentiary system favoring admission, Mr. Karnavas said, “I have a news flash for everybody, we are not in France, arguing that the ECCC is instead a truly hybrid court with a mix of staff and procedure.

Mr. Karnavas appeared zealous in his applications and apparently began to speak too fast for the court interpreters to follow. Over the English audio channel, Chamber President Nil Nonn could be heard chuckling loudly as he interrupted Mr. Karnavas and asked him to slow down. In response, Mr. Karnavas admitted that his submissions were perhaps too “exuberant,” and he promised to endeavor to slow down, despite his concerns about time constraints.

Next, Mr. Karnavas cited the Case 002 severance order and quoted the Chamber as instructing civil parties that the nature of evidentiary hearings in the first trial would be “limited.” He also argued that the severance order had required the prosecution to substantially edit its proposed evidentiary annexes, which it failed to do.

Mr. Karnavas then gave an overview of the concept of evidentiary relevance and argued that the prosecution has submitted evidence outside this regime. He also refuted the argument that “professional judges” are able to sift through documents and mentally exclude that which is improper, by reading out statements made by judges themselves expressing doubts that they are truly successful at excluding from their deliberations improper or overly prejudicial evidentiary sources, especially in cases with large case files.

As for previous testimony of witnesses, Mr. Karnavas gave a detailed explanation of the process of ICTY usage of transcripts and requested that the Chamber limit the use of Duch’s testimony in Case 001 in order to prevent prejudice to the defense rights to cross-examine adverse witnesses. He also argued that if other witnesses, such as experts, testified in Case 001, such testimony should not be admitted to the case file in Case 002, Trial 1, solely on this basis because this would prejudice defense rights to cross-examination. Indeed, Mr. Karnavas submitted, it was “virtually impossible to divine” why many Case 001 documents were proffered by the prosecution for use in Case 002.



Khieu Samphan's international counsel Anta Guisse defended her team's objections to documents on relevancy grounds.

Khieu Samphan Reply

After the completion of Mr. Karnavas' submissions, counsel Kong Sam On submitted the reply of the Khieu Samphan defense to the arguments of the prosecution and civil parties. He first noted that the defense only objects to documents it deems irrelevant and not to all documents proffered by the prosecution and civil parties. He then made some additional observations before turning the floor over to his international colleague, Anta Guisse.

Ms. Guisse argued that the defense teams were not attempting to prevent evidence from coming in but rather to abide by the strictures of the Trial Chamber's severance order when objecting on relevancy grounds. She further argued that the decisions of the Trial Chamber regarding severance appear to "run counter" to the presentations by the prosecution during the previous days and asserted that there are "at least" 317 documents in the annexes submitted by the prosecution that are not relevant to Case 002, Trial 1. Ms. Guisse also submitted additional comments on the proper scope of evidence for Case 002, Trial 1.

Ieng Sary Retires to Courtroom Holding Cell at Usual Hour

Following the completion of the final reply by the defense teams, the Chamber prepared to take its regular morning break. At this point, counsel for Ieng Sary rose and submitted Ieng Sary's usual request to be excused from the courtroom for the remainder of the day's proceedings and be permitted to remain in the holding cell to participate via audio-visual link. As has become customary, Chamber President Nil Nonn granted this request, contingent upon receipt of a signed waiver from the Ieng Sary defense.



Citing his client's health as a concern, Michiel Pestman requested the court schedule the testimony of particularly important witnesses for morning sessions in order to preserve Nuon Chea's right to confront witnesses against him.

Submissions by Nuon Chea Defense Regarding Fitness and Witness Cross-Examination

Following the break, the Nuon Chea defense was given the floor to make submissions regarding their concerns about Nuon Chea's ability to confront Case 001 accused Duch when he testifies. Counsel Michiel Pestman first observed that Duch is a key witness generally in Case 002 but argued that Duch will not be able to testify in depth regarding Case 002, Trial 1 specifically. Nonetheless, Mr. Pestman argued that Duch remains a key witness who is particularly important to Nuon Chea's defense and submitted that Nuon Chea desires to confront Duch directly in court and will not waive his right to be present. However, if Nuon Chea testifies during the morning session portion of the day Duch testifies, Mr. Pestman submitted that Nuon Chea's right to confrontation will be compromised. He "stressed" that the courtroom holding cells "are not the magical solution" to problems of confrontation and participation. Mr. Pestman argued that an accused cannot effectively participate from the holding cell and submitted that this dilemma can be easily solved by the Chamber hearing particularly important witnesses, including Duch, during morning sessions.

Mr. Pestman then informed the Chamber that it can "safely assume" that Nuon Chea's physical condition anytime he returns to the holding cell precludes him from effectively participating in his own defense. He concluded by submitting that Nuon Chea is unfit to participate in the afternoon sessions, especially when he has been questioned during the morning session, and requested that the Chamber alter the schedule accordingly.

Response of Prosecution

International Co-Prosecutor Dale Lysak responded with several comments on the Nuon Chea defense submission. First, he noted that the parties were informed quite some time in advance that Duch would testify and of the time allotted for this testimony. Second, Mr. Lysak contended that Mr. Pestman had mischaracterized the topics to which Duch will testify, saying that Duch has knowledge relevant to the command structures of the Communist Party of Kampuchea (CPK). Third, Mr. Lysak noted the extensive previous hearings on the issue of Nuon Chea's fitness to stand trial and reminded the Chamber that all experts concluded Nuon Chea is fit to stand trial, which has since been confirmed by Nuon Chea's role in Case 002 thus far. Finally, Mr. Lysak recalled that Nuon Chea has already participated in full-day sessions on occasion and

stated that the prosecution's position is that the schedule should not be altered until such time as an accused is found too sick to continue by a medical doctor.

The civil parties supported the position of the prosecution and voiced their concerns that if a precedent is set with Duch as a witness, this could lead to problems and delays in the future.

Mr. Pestman responded by stating that the defense was not seeking a ruling that Nuon Chea is unfit to stand trial but was simply informing the Chamber of a likely issue that would arise in the future.

Observations of Ieng Sary Defense

The floor was then given to Ieng Sary defense counsel Michael Karnavas to make some observations on the issue of presence of accused during testimony. Mr. Karnavas first accused the prosecution of hypocrisy when it argued that the holding cell is a suitable alternative method of "participation" of an accused. He reminded the Chamber that during opening arguments International Co-Prosecutor Andrew Cayley had argued that the accused should remain in the courtroom, questioning "how in God's name" could an accused take and give instruction to counsel from the holding cell. Thus, Mr. Karnavas argued, the prosecution should be held to its previous assertions, and the Chamber should recognize that an accused cannot participate effectively from the holding cell during critical hearings. During this submission, Mr. Karnavas also noted that the Chamber recently denied Ieng Sary's request to retire to the holding cell for much the same reasons, as the Chamber had stated that Ieng Sary had to remain present to hear specific allegations against him read aloud from the Closing Order in the courtroom.

Mr. Karnavas then discussed international jurisprudence on the issue, which he asserted can be viewed to draw a line between physical presence in the courtroom and other methods of participation. He concluded by reminding the Chamber that it has required a written "waiver" of the right to be present in the courtroom any time the accused sought to be excused. Mr. Karnavas stated that the accused "want to be here [and] want to be fresh" during the examination of key witnesses. He concluded by reminding the Chamber of the importance of basic trial rights of the accused.

Prosecution Reiterates Demand for Medical Evidence

Prosecution counsel Dale Lysak then responded to clarify the prosecution's position. He noted that the defense counsel often complain of lawyers "testifying" during submissions and stated that the Chamber should not rely on the assertions of counsel regarding the capabilities of Nuon Chea. Instead, he asserted, the Chamber should objectively rely on medical opinions concerning the capabilities of Nuon Chea moving forward and reminded the Chamber that evaluative medical experts had previously concluded that Nuon Chea retains mental capacities comparable to those of a 25-year old.

Chamber Proposes to Hear Entirety of Duch Testimony Prior to Nuon Chea Testimony

The Chamber then deliberated briefly in the courtroom before Judge Sylvia Cartwright clarified a few points concerning the hearing to be conducted the following week. Judge Cartwright stated that the Chamber proposed to hear the testimony of Duch first, beginning the following Monday morning, until conclusion, before Nuon Chea is questioned. She then sought commentary from

the parties, also inquiring whether the Nuon Chea counsel would like the opportunity to request additional breaks to facilitate the participation of Nuon Chea.

The Nuon Chea defense responded that it would be acceptable to hear Duch's testimony first to ensure Nuon Chea's active participation. This proposal was also agreeable to the Ieng Sary defense and prosecution. Thus, it appears that Duch will take the stand on Monday, March 19, and testify for the entire day.



Professor Ben Kiernan (right) gives a certificate of appreciation to Kang Ritheary, currently a defense lawyer for Case 001 accused Kaing Guek Eav alias Duch, in this 1995 photo. (Documentation Center of Cambodia)

Issues Related to Testimony of Expert Witness Ben Kiernan

The Chamber then turned to the subject of the scheduled testimony of expert Ben Kiernan. The defense teams had previously raised concerns regarding the prosecution's previous contacts with Professor Kiernan and the prosecution's request that he testify via video link.

Prosecution Request for Video-Link Testimony of Witness Ben Kiernan

Prosecution counsel Chan Dara Reasmey responded to the defense's concerns. First, he noted that the Chamber itself had delegated authority to the prosecution to contact Prof. Kiernan and that subsequently, all correspondence between the prosecution and Prof. Kiernan was placed on the case file and thus available to all parties.

Regarding the request for the use of video-link testimony to hear Prof. Kiernan's testimony, Chan Dara Reasmey submitted that this means is the sole mechanism practicable to obtain this testimony. He explained that the prosecution also preferred live, in-person testimony, but Prof. Kiernan had indicated that there was no way he could take time away from his professional responsibilities to travel to Cambodia. Thus, he argued, the requirements have been met for the Chamber to grant the use of video-link testimony for Prof. Kiernan and provided the Chamber with an overview of international jurisprudence relevant to the use of video-link testimony.

International prosecution counsel Vincent De Wilde d'Estmael then provided an overview of the reasons why Prof. Kiernan's testimony should be heard and a general summary of the reasons why Prof. Kiernan could not travel to Cambodia presently to testify. He summed up by stating that use of video-link technology is the only way to obtain testimony of Prof. Kiernan in a timely manner.

At this point, the Chamber announced the morning adjournment for lunch. Prior to the adjournment, counsel Michael Karnavas rose and informed the Chamber that the defense parties had not yet received the document sent to the ECCC by Prof. Kiernan outlining the reasons why he could not travel to Cambodia to testify in person. He then requested that the Chamber order that such document be provided to the defense teams during the lunch break.

Nuon Chea Retires to the Holding Cell at Usual Hour

This submission was followed by the regular request by the Nuon Chea defense that Nuon Chea be permitted to retire to the holding cell for the afternoon session. This was granted, as per usual, by the Chamber President, who reminded the defense to submit a written waiver form. The Chamber then adjourned for lunch.



Counsel Vincent De Wilde d'Estmael defended the prosecution's request to have Professor Kiernan testify via video-link from the United States.

Prosecution Continues Submissions Regarding Witness Ben Kiernan

Following the lunch break, Mr. De Wilde d'Estmael continued his submission and provided additional arguments based on international law and the use of video-link testimony. He argued that it would not prejudice fundamental rights of any accused to allow video link testimony, and

he noted that over time using technology in this fashion has become well accepted at many courts.

Following these submissions, he presented additional arguments regarding the defense requests to receive various materials from Prof. Kiernan that were the basis of his research, including notes, audio recordings and other documents. Mr. De Wilde d'Estmael argued that it would be unnecessary and burdensome for the Chamber to require Prof. Kiernan to hand over his massive research catalogue related to his work on Khmer Rouge issues. He argued further that Prof. Kiernan is being called as a duly qualified expert and as such, it is his knowledge and expertise that is sought and not his research documents themselves. Indeed, Prof. Kiernan had already provided the ECCC with various documents. Furthermore, Mr. De Wilde d'Estmael argued that it is key to remember that Prof. Kiernan is an expert because as such, it is less important for the accused and judges to assess his demeanor and veracity during testimony than for a factual witness.

Civil Party Submission Regarding Witness Ben Kiernan

After Mr. De Wilde d'Estmael completed the prosecution's submissions, the civil parties made some brief supportive remarks. Civil party co-lead lawyer Elisabeth Simonneau-Fort reiterated that Prof. Kiernan's testimony is important and stated that she would like to hear the defense arguments as to why Prof. Kiernan should not testify over the video link when this is the only practical means to obtain his testimony. Following the submissions of the civil parties, the Chamber took its regular afternoon break.

Chamber Extends Hearings for Day and Forbids use of Term "Mini-Trial"

Following the break, Chamber President Nil Nonn informed the parties that the day's proceedings would likely extend beyond the usual 4 p.m. end time, due to the need to conclude discussions related to Prof. Kiernan's proposed testimony. Judge Sylvia Cartwright then made an observation on behalf of the Trial Chamber on the issue of the use of the phrase "mini-trial" to refer to Case 002, Trial 1. She stated that the Chamber agreed with the prosecution assertion that the phrase "mini-trial" is an inappropriate term to refer to Case 002, Trial 1 in light of the need for "precise, appropriate and unemotional" language in a courtroom setting. She also noted that the phrase improperly connotes that somehow the charges at issue in Case 002, Trial 1 are not incredibly grave. Thus, she instructed the parties that they may not use this term moving forward.

Defense Submissions Regarding Witness Ben Kiernan

Mr. Karnavas then took the floor and informed the Chamber that he would provide the "lion's share" of the defense submissions. He also noted that during the break, the defense teams had been provided with the requested documentation submitted by Prof. Kiernan to the ECCC.

Regarding the issue of objections to additional documents from Prof. Kiernan, Mr. Karnavas stated that the defense had only learned of these documents at the last minute, leading to their request to receive such documents. He also argued that it is necessary to request the documents Prof. Kiernan used to form his conclusions in his writing because, often in Prof. Kiernan's books and articles, no authority is cited for his assertions. Furthermore, he stated that the prosecution and civil parties, whom he stated repeat "whatever the prosecution says," evinced a knee-jerk reaction of opposing the defense's request that the Trial Chamber ask Prof. Kiernan to provide

the Court with documents forming the foundation for his research. Mr. Karnavas stated that he was confused at this reaction because in his opinion, there is no harm in asking Prof. Kiernan to provide his research notes and documents. He stated that Prof. Kiernan is free to decline to provide such documents, but in Mr. Karnavas' home jurisdiction (the United States), it is favored to simply ask parties for documents that may be relevant.

Next, Mr. Karnavas stated the defense's arguments objecting to the use of Prof. Kiernan's testimony via video-link. In these submissions, Mr. Karnavas stated that the defense acknowledges academics of Prof. Kiernan's caliber are quite busy but argued that Prof. Kiernan's statement to the Chamber amounts to no more than a "laundry list" of obligations without any specific dates.

Mr. Karnavas stated that Prof. Kiernan is best characterized as a "prosecution witness" and the defense teams had originally been told that Prof. Kiernan would testify in person. He also argued that due to his past associations, Prof. Kiernan is clearly an advocate for the prosecution and thus, it is important that the defense be allowed to cross-examine him thoroughly. Mr. Karnavas stated that the defense teams had identified no less than 50 topics on which the prosecution sought to question Prof. Kiernan. Thus, Prof. Kiernan is a critical witness who must be subjected to cross-examination

As for practicality and timing concerns, Mr. Karnavas argued that it was too early in the trial proceedings to resort to video-testimony for Prof. Kiernan, stating that it is "not yet midnight" for his testimony. He also argued that for Prof. Kiernan, it was not an issue of him being unable to travel to Cambodia to testify in person but rather a matter of Prof. Kiernan being unwilling to do so. Accordingly, Mr. Karnavas maintained, the Chamber should wait and press Prof. Kiernan to come in person to deliver his testimony.

Regarding the practicality of questioning Prof. Kiernan via video-link, Mr. Karnavas noted the time difference between Cambodia and the United States, where Prof. Kiernan lives, and stated that it would prejudice the parties to question Mr. Kiernan late at night in the United States. He also stated that the testimony of Prof. Kiernan is too important to allow video-link testimony and thus it would prejudice the defense teams. He requested that the Chamber instead call Cambodian-based Khmer Rouge researcher Craig Etcheson to testify on the topics selected for Prof. Kiernan currently and the Chamber should then call Prof. Kiernan to testify in-person in 2013.

Mr. Karnavas summarized that it is imperative that the defense question Prof. Kiernan directly and not solely through a video-link. He requested that the Chamber wait to call Prof. Kiernan as a witness until he can actually travel to Cambodia. Otherwise, Mr. Karnavas stated that the defense teams were willing to travel to the United States to interview Prof. Kiernan in person if need be.

The Khieu Samphan and Nuon Chea defense teams added their support to the submissions of Mr. Karnavas for the Ieng Sary defense following the completion of his submissions.

The Chamber then adjourned proceedings for the week. Case 002, Trial 1 will continue on Monday, March 19, with the much-anticipated testimony of Kaing Guek Eav *alias* Duch.