



Accused Nuon Chea Seeks Opportunity to Refute Genocide Allegations

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Accused Nuon Chea, on the heels of a Prosecution appeal,¹ is challenging the Trial Chamber of the Extraordinary Chamber in the Courts of Cambodia's second effort to sever the massive Case 002 indictment against surviving senior Khmer Rouge leaders for the purpose of holding sequential mini-trials and reaching a swift first judgment.² Unlike the Prosecution, which supports the purpose of severance and the scope of truncated Case 002/01 with the addition of one more crime site, the Defense argues that only a single trial on all charges in the indictment—and most importantly the genocide allegations—will protect Nuon Chea's fundamental right to defend himself against wrongful allegations.

In February 2013, the Supreme Court Chamber (SCC) annulled a series of Trial Chamber decisions severing the subject matter of Case 002 and limiting the scope of charges addressed in the first of an envisioned series of trials. The SCC directed the Trial Chamber to provide adequate reasoning demonstrating the “interests of justice” in severing after taking into account the views of the parties and balancing “all parties’ respective interests” against “all relevant factors.” If the Trial Chamber then decided to re-sever, it was required to determine if more than one trial would be feasible, in particular due to the fragile health of the octogenarian accused. If additional trials are not feasible, the Trial Chamber was obligated to consider if the Case 002/01 mini-trial—ongoing for 18 months with evidentiary hearings near completion—is reasonably representative of the totality of the charges in the indictment. If future trials are feasible, the Trial Chamber was obligated to provide a tangible plan for adjudicating the remainder of the charges.³

After hearing the views of all the parties, the Trial Chamber issued a new severance decision, rejecting both the Defense Teams' first-time requests to proceed with the entirety of the charges and the Prosecution's long-standing request to add crimes at the S-21 security center and confirming the existing scope of Case 002/01: crimes related to the forced transfer of the population of Phnom Penh beginning on April 17, 1975; the subsequent forced transfer of hundreds of thousands of Cambodians between late 1975 and 1977; and related crimes against humanity including the Tuol Po Chrey execution site.

On appeal, the Nuon Chea Team argues that the Trial Chamber did not comply fully with the preconditions for re-severance set forth by the SCC because it failed to take Defense views into consideration and to articulate a plan sufficient “to resolve the legal and practical impediments to

¹ See Cambodia Tribunal Monitor Expert Commentary on Legal Filings: *Co-Prosecutors Appeal Trial Chamber Severance Decision, Again* (May 16, 2013), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

² Immediate Appeal Against Trial Chamber's Second Decision on Severance and Response to Co-Prosecutors' Second Severance Appeal (May 27, 2013) [hereinafter Immediate Appeal].

³ Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, ¶¶ 48-50 (Feb. 8, 2013). See also Expert Commentary on Legal Filings, Supreme Court Chamber Invalidates Case 002 Severance (Feb. 12, 2013), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

holding sequential trials.” Fundamentally, the Team argues that the Trial Chamber did not place adequate weight on the harm that severance causes to Nuon Chea’s fair trial rights.

The Trial Chamber did not explain how Nuon Chea's interest in presenting a defence or confronting the evidence against him is protected in the context of a severed trial, nor why the managerial benefits of severance outweigh the costs. Nor did it consider whether a second panel of the Trial Chamber was required, whether it was possible, or how the Chamber would ‘safeguard’ against its own bias if such a panel were not constituted.⁴

According to the Nuon Chea Team, severance “hinders [Nuon Chea’s] ability to mount a full and effective defense” because the policies of the Khmer Rouge, and Nuon Chea’s alleged criminal intent, must be assessed “holistically” as “a larger effort to restore order to a country and economy devastated by war, and independence to a people placed for so many years under the foreign occupying and colonial powers.” As one example, the Team argues that the criminality of forced transfer in 1975 depends “on an assessment of the ‘objectives, manner of implementation and effects’ of the transfer,” including the expected and actual “effectiveness” of the cooperatives in which the evacuees lived after deportation as food production and distribution centers.⁵ This example does not seem particularly compelling, as much of the relevant testimony at trial, and in particular the victim impact testimony heard during the last two weeks that was uniquely unrestricted temporally, has emphasized the starvation conditions imposed on survivors sent to cooperatives.⁶

The Team notes that the Prosecution and the Trial Chamber have both recognized the need to bring in evidence of conduct and policies falling outside the subject matter of Case 002/01 and argues that their efforts to fashion limited exceptions have “caused a continuing violation of Nuon Chea’s ability to confront the witnesses against him.” For example, the Prosecution seeks the admission of numerous witness statements into evidence in lieu of oral testimony, and the Trial Chamber has allowed oral questioning on overarching issues such as the roles of the accused both prior and during the Democratic Kampuchea regime and the regime’s administrative, communication, and military structure. The Team claims that “[d]etailed cross-examination ... would have been beyond the scope of Case 002/01 as well as a poor strategic use of the defence’s allotted time” and notes that these witnesses will anyway need to be reheard if additional trials are held, negating the supposed efficacy of severance.⁷

For these reasons, the Nuon Chea team asks the SCC to order the Trial Chamber to hold one trial on the totality of the indictment (Closing Order). However, should the SCC find that severance is appropriate, the Team argues similarly that the Trial Chamber abused its discretion by failing to formulate a reasonably representative trial in Case 002/01: “Nuon Chea’s right to present a full and effective defence and his right to confront the evidence against him can be protected only by

⁴ See Immediate Appeal, *supra* note 2, ¶¶ 9-11, 21, 23-24.

⁵ See *id.* ¶¶ 12-15.

⁶ See, e.g., Mary Kozlovski, “If You Tell Them, You Will Be Killed”: Civil Parties’ Stories Heard, CTM Trial Blog (June 4, 2013), at <http://www.cambodiatribunal.org/blog/2013/06/%E2%80%9Cif-you-tell-them-you-will-be-killed%E2%80%9D-civil-parties%E2%80%99-stories-heard>.

⁷ See Immediate Appeal, *supra* note 2, ¶¶ 18-19.

a trial which captures all of the major themes and alleged policies of Democratic Kampuchea[,]” including “at a minimum” genocide charges “and a cross-section of the allegations concerning cooperatives and worksites.”⁸

The Team argues that the genocide allegation in particular must be addressed because it is both the most notorious charge and also the one that most “wrongfully” characterizes both the Khmer Rouge and Nuon Chea’s leadership role within the group. Although the appellation “genocidal” is controversial among scholars, the term “encapsulates” the public’s perception of the regime and “goes to the heart of the most important and elusive question to be confronted at this Tribunal: what was the essence of the Khmer Rouge revolution?” Despite the fact that the genocide allegations address only the regime’s treatment of Cham Muslim and Vietnamese groups, they “are a microcosm of this supposed [murderous] Khmer Rouge policy toward all those they are alleged to have deemed impure.”

The phenomenon charged as ‘genocide’ in the Closing Order is ... not alleged to have been a discriminatory sideshow to a socialist revolution unfolding in parallel. It is alleged to be emblematic of the socialist revolution's supposed effort to eliminate groups deemed to fall outside of its preferred class category. Only the legal qualification is different, since genocide applies to national and ethnic but not political or economic groups.⁹

As an example of a recent high-profile characterization of the regime as “genocidal,” the Nuon Chea Team highlights the Cambodian National Assembly’s speedy passage of a law criminalizing Khmer Rouge “genocide” denial after an opposition lawmaker was quoted alleging that evidence of mass torture and murder of prisoners at the S-21 security center (now preserved as part of the Tuol Sleng “Genocide” Museum) was fabricated by the Vietnamese.¹⁰

Finally, the Nuon Chea Team argues that the Trial Chamber appropriately rejected the Prosecution request to include crimes at the S-21 security center in Case 002/01. According to the Defence, S-21 is in no way representative of the charges in the Case 002 Closing Order (or even those related to security centers generally), as most S-21 victims were purged cadre, the site of the crimes is limited to Phnom Penh, the crimes do not cover the full period of the regime’s existence, and S-21 has “nothing at all to do with” the alleged fundamental purpose of the regime to “implement rapid socialist revolution in Cambodia through a ‘great leap forward’ and to defend the Party against internal and external enemies, by whatever means necessary.”¹¹

There is, however, a great deal of evidence that Nuon Chea was directly involved in the crimes that took place at S-21. To this the Team responds, “The interests of justice are not co-extensive with the interest of the prosecution in securing convictions.”

Including S-21 within the scope of Case 002/01 because it is alleged to be

⁸ See *id.* ¶¶ 31-33, 48-55.

⁹ See *id.* ¶¶ 38-46.

¹⁰ See generally Addendum to Immediate Appeal Against Trial Chamber’s Second Decision on Severance (May 30, 2013).

¹¹ See Immediate Appeal, *supra* note 2, ¶¶ 57-70.

uncommonly connected to Nuon Chea would constitute a deliberate choice to distort the record in Case 002 so as to over-emphasize the role of party leaders and obscure the role of tens of thousands of ordinary Cambodians and party cadres. That would be a failure of this Court's effort to 'ascertain the truth' and a distortion of the historical narrative.¹²

The Nuon Chea team, like the Trial Chamber, further emphasizes that S-21 was the sole subject of the Court's first trial and thus revisiting the allegations will in no way expand the representativeness of the proceedings. Moreover, they disagree with the Prosecution that the S-21 charges could be addressed expeditiously with a small number of additional witnesses, as they intend to call numerous persons to challenge the credibility of key Prosecution witness Kaing Guek Eav *alias* Duch (the former head of S-21 who was convicted in Case 001), to refute the evidence of Nuon Chea's leadership role, to deny the discriminatory treatment of Vietnamese prisoners, and to "establish that S-21 detainees were legitimate military targets" by employing legal justifications of "military necessity" used by the United States Government justifying extrajudicial killing "causing large-scale civilian casualties on an ongoing and regular basis."¹³

With Nuon Chea's health reportedly failing—at least to the extent that he has not been physically present in the courtroom since February—and Case 002/01 (if limited to forced evacuation crimes) supposedly weeks from final evidentiary hearings, these new defense arguments unfortunately appear to have arrived too late to enlarge the scope of evidence heard in Case 002/01 and instead smack of a last-minute effort to avoid judgment.

Concomitantly, last week Nuon Chea—responding to survivors' eloquent and compelling descriptions of the harms they suffered during the regime—for possibly the first time accepted moral, but not legal, responsibility for victims' suffering:

I am responsible for what happened during the period of Democratic Kampuchea. I am not evading my responsibility. I am bearing the responsibility from my heart. I am being frank with you. In my capacity as a member of Democratic Kampuchea I accept the responsibility. ... I feel remorseful for the crimes that were committed intentionally or unintentionally, whether I knew about it or not I take the responsibility morally. I need to emphasize, and on this occasion let me express, my sincere condolences to the loss of your family members.¹⁴

¹² See *id.* ¶ 70 (emphasis in original).

¹³ See *id.* ¶¶ 72-83.

¹⁴ Quoted in Lauren Crothers, "Nuon Chea Expresses Rare Remorse for Victims of KR," THE CAMBODIA DAILY, May 31, 2013.