

Accused Nuon Chea Argues Severance Is Inconsistent with His Right to Confrontation

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July 10, 2013

Extraordinary Chambers in the Courts of Cambodia (ECCC) accused Nuon Chea has filed supplemental arguments challenging the Trial Chamber’s second severance of the Case 002 indictment as a violation of his right to confront the evidence against him. Both the Nuon Chea team and the Prosecutors have appealed the Chamber’s renewed effort to reach speedy judgment on a limited number of allegations before, in theory, proceeding with additional trials on remaining charges.¹ While the Prosecution seeks to add one additional crime site to the Case 002/01 trial, Nuon Chea is arguing that only a single trial on all charges in the indictment can protect his fundamental fair trial rights.²

The Nuon Chea team’s May severance appeal noted that both the Prosecution and the Trial Chamber had recognized the need to bring in evidence of conduct and policies falling outside the subject matter of Case 002/01 and argued that difficulties in “defining hermetically discrete sections” of the indictment had “caused a continuing violation of Nuon Chea’s ability to confront the witnesses against him.”³ Last week the team asked the Supreme Court Chamber to consider additional examples of this problem, alleging “new evidence of the Trial Chamber’s likely intention to make findings of fact in Case 002/01 based on evidence to which the Defence has not been given an opportunity to respond.”⁴

The full Case 002 indictment names five countrywide criminal policies for which the former senior Khmer Rouge leaders are accused of joint criminal responsibility. In severing the charges, the Trial Chamber decided to “separate the [Case 002] proceedings . . . into a number of discrete cases that incorporate particular factual allegations and legal issues.”⁵ Case 002/01 was intended to address “the roles and responsibilities of the Accused in relation to all [five] policies relevant to the entire Indictment”; however, only the policy relating to two large-scale population transfers was to receive “detailed factual consideration.”⁶ For this reason, throughout trial the

¹ For background on the severance of Case 002, *see, e.g.*, Expert Commentary on Legal Filings, *Trial Chamber Case 002 Severance Decision Upholds Status Quo* (April 30, 2013) & *Supreme Court Chamber Invalidates Case 002 Severance* (Feb. 13, 2013), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

² *See* Expert Commentary on Legal Filings, *Accused Nuon Chea Seeks Opportunity to Refute Genocide Allegations* (June 10, 2013) & *Co-Prosecutors Appeal Trial Chamber Severance Decision, Again* (May 16, 2013), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

³ Immediate Appeal Against Trial Chamber’s Second Decision on Severance and Response to Co-Prosecutors’ Second Severance Appeal, ¶ 18 (May 27, 2013) [hereinafter Nuon Chea Appeal].

⁴ Addendum to Reply to OCP Response to Nuon Chea’s Immediate Appeal Against Trial Chamber’s Second Decision on Severance, ¶ 18 (July 3, 2013) [hereinafter Nuon Chea Addendum].

⁵ Severance Order Pursuant to Internal Rule 89ter, ¶ 2 (Sept. 22, 2011) [hereinafter Severance Order].

⁶ Decision on Co-Prosecutors’ Request for Reconsideration of the Terms of the Trial Chamber’s Severance Order (E124/2) and Related Motions and Annexes, ¶ 11 (Oct. 18, 2011). *See also* Severance Order, ¶¶ 1, 5, *supra* note 5. A year later the Trial Chamber added an example of the policy of targeting enemies—the Tuol Po Chrey execution site—to the Case 002/01 charges. *See* Notification of Decision on Co-Prosecutors’ Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163) and Deadline for Submission of Applicable Law Portion of Closing Briefs, ¶ 3 (Oct. 8, 2012).

questioning of ordinary witnesses on the remaining policies has been restricted, with occasionally uneven results due to the close relationship between the charges.⁷

The Nuon Chea team argues that the clear, if sometimes wavering, line distinguishing the charges in Case 002/01 from the rest of the indictment is being blurred by the admission of documents addressing facts falling outside the understood scope of the case, including “hundreds” of witness statements admitted with no explanation as to their relevance.⁸ Although the team is for the first time raising this argument as an objection to the fairness of severance, it has repeatedly challenged the Prosecutors’ and Civil Parties’ efforts to admit large numbers of documents—and in particular over a thousand witness statements *in lieu* of oral testimony—as a violation of the accused’s right to confrontation.⁹ In its new filing, the Nuon Chea team claims that discussions at recent document hearings demonstrate that documents, including witness statements, are being admitted despite the fact that they contain unlitigated information falling outside the understood scope of Case 002/01 and that this information will inevitably be relied on in reaching a verdict.

In late June, document hearings were held concerning the alleged joint criminal enterprise (JCE) among the senior Khmer Rouge leaders comprising the five overarching policies. With the exception of forced movement and the targeting of enemies at one execution site—the charges at issue in Case 002/01—the parties were told to address only the existence of the JCE policies and not their implementation, as this is the subject of contingent future trials. For example, in overruling a challenge from the Khieu Samphan team on the relevance of a document, Judge Lavergne emphasized that the document in question did not address policy implementation: “It is indeed implementation on the ground – or in the field [–] that should not be part of the presentation of key documents as part of this trial.”¹⁰

Subsequently, both Defense teams objected that the Civil Parties were presenting witness statements that improperly addressed the implementation of policies on the ground. The Prosecution then argued that, according to the jurisprudence of international tribunals, both the existence and the evolution of a policy may be proved by reports from the ground, including facts showing a policy’s widespread implementation.¹¹

In response, the Khieu Samphan team argued in part:

We have before us today, in very concrete terms, a situation in which the Co-Prosecutors and the civil party lead co-lawyers are telling you that we cannot talk about the ... policies that do not concern Case 002/1 without talking about

⁷ See, e.g., Nuon Chea Appeal, *supra* note 3, ¶ 12 (arguing that “the experience of the Case 002/01 trial has demonstrated that the allegations in the Closing Order are too closely related to permit meaningful separation into distinct trials”).

⁸ Nuon Chea Addendum, *supra* note 4, ¶ 7.

⁹ See, e.g., Objections to Requests to Put Before the Chamber Written Statements and Transcripts (Apr. 26, 2013); Expert Commentary on Legal Filings, *Defense Challenges Admission of 1350 Witness Statements In Lieu of Oral Testimony* (Nov. 19, 2012), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

¹⁰ Trial Transcript—Case 002, at 10 (June 25, 2013).

¹¹ Nuon Chea Addendum, *supra* note 4, ¶ 9 (quoting the unofficial June 26, 2013 transcript). The official transcript from this day is not yet publicly available.

implementation on the ground. What does that mean legally speaking? It means that you are authorizing, in one way or the other, the presentation of the evidence, in this case, on policies that are not concerned by Case 002/1, which means that a certain number of pieces of evidence that should not be the subject of this trial, 002/1, are brought before you, and we are supposed to respond to those issues even when we do not have any evidence brought before this Chamber through witnesses who are giving evidence before this Chamber. And we have not been able to cross-examine them on this evidence. And in the few pages that are allotted to us for the Closing Arguments, we will not be able to do so.¹²

Judge Cartwright dismissed the objection:

The Chamber acknowledges that documents which parties may wish to emphasize during the course on this hearing on key documents may contain information that tends to point both to the existence or development of a policy and to its implementation. However, the Chamber wishes to emphasize that the parties have the right to comment on any aspect of the documents that have been referred to during this hearing, as to their relevance and probative value, and the Chamber will make those determinations in the course of its verdict. It is necessary, however, to emphasize that Case 002/01 includes only — includes policies only insofar as they exist or have been developed and that the implementation of policies other than the evacuation of the cities is irrelevant to that case.¹³

The Nuon Chea team argues that by allowing witness statements discussing implementation of policies falling outside of the scope of Case 002/01 to be presented (and apparently finding them admissible), the Chamber has already “conceded their relevance.” Moreover, the team agrees with the Prosecution that “there is total interaction between the [existence of a] policy itself and its application” and argues that for this reason the Trial Chamber’s attempt to separate discussion of the existence of the five criminal policies from discussion of their implementation has failed in practice, making the current form of severance unworkable:¹⁴

If ‘facts on the ground, lower down the line,’ are part of the offer of proof in relation to the existence of policies outside the scope of Case 002/01, then the Chamber is either being urged to make those findings on the basis of an incomplete record or there was never any significance in severance to begin with. Neither the Co-Prosecutors nor the Trial Chamber have ever succeeded in explaining which ‘facts on the ground’ are relevant to the ‘existence’ of JCE policies and hence within the scope of Case 002/01, which are not, and why.¹⁵

The Nuon Chea team suggests that the Trial Chamber could have chosen to limit policy evidence

¹² *Id.* ¶ 10 (quoting the unofficial June 26, 2013 transcript). The Khieu Samphan team has repeatedly objected to the format of the “key document” hearings. *See, e.g.*, Expert Commentary on Legal Filings, *Accused Khieu Samphan Alleges Lack of Opportunity for Adversarial Debate on Documentary Evidence* (June 17, 2013), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

¹³ Nuon Chea Addendum, *supra* note 4, ¶ 12 (quoting the unofficial June 26, 2013 transcript).

¹⁴ *Id.* ¶¶ 13, 15.

¹⁵ *Id.* ¶ 17.

to direct evidence of the decisions and conduct of the Communist Party of Kampuchea leadership or it could have decided that evidence of policies outside the scope of Case 002/01 was entirely inadmissible. “The Chamber cannot, however, decide to call no witnesses, prohibit the parties from examining any witness who is called in relation to ‘facts on the ground’, and then rely on the evidence which has been put before it, haphazardly and for no clear purpose, to make sweeping conclusions about a supposed ‘policy’ set by the CPK” without violating the right of the accused to confront the evidence against them.¹⁶

The team is asking the Supreme Court Chamber to consider its submission as new evidence of the unfairness of severance. However, its underlying objection is a fresh take on a longstanding allegation – the lack of fairness of admitting large numbers of documents and especially witness statements that have not been the subject of adversarial argument. A Supreme Court Chamber decision on the second severance appeal is expected within the next month.

¹⁶ *Id.* ¶¶ 19-20.