



Opening Day of ECCC Case 002 Trial Proceedings
Day 1 of Prosecution's Opening Statement
Randle C. DeFalco¹

Introduction

On November 21, 2011, the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) began the long-awaited trial portion of the Court's premier second case (Case 002). In this case, the three remaining accused,² Nuon Chea, Ieng Sary and Khieu Samphan, are the most senior former Khmer Rouge leaders still alive.

The Court grounds were abuzz with anticipation leading up to the opening of the initial trial hearing, reserved for the Prosecution's opening statement. When the morning session finally began, the courtroom audience gallery was packed with civil parties, Buddhist monks, international news media personnel, students, embassy officials and various Cambodian civil society representatives.

The historic proceedings got off to a shaky start, with the Civil Party Co-Lead Lawyer's microphone system malfunctioning during discussion of some preliminary administrative matters. For several minutes court technicians attempted to resolve the issue, but eventually the Trial Chamber simply moved on without the procedural step of the Civil Party Co-Lead Lawyer formally requesting recognition of his international colleagues. The audience was clearly impatient with the delays and the coincidence that technical problems specifically plagued the microphones of the Civil Party Lawyers invited metaphorical comparisons to the muting of the Civil Parties as a collective voice that many victim rights advocates allege has taken place at the Court.

After the brief technical delay, the Trial Chamber recounted the topics to be covered in the initial³ Case 002 trial, including:

- A. The Historical Background of the Khmer Rouge;
- B. The Structure of the Democratic Kampuchea (DK)⁴ Government;
- C. The Role of Each Accused in the DK Government;
- D. Policies of the DK Government;
- E. Factual Allegations Against the Accused Related to Phases I and II of the Forced Population Movements in DK; and
- F. The Specific Crimes against Humanity of Murder, Extermination, Persecution, Forced Transfer and Enforced Disappearances.

¹ Legal Consultant to the Khmer Rouge Fair Trial Project of the Documentation Center of Cambodia (DC-Cam).

² A fourth accused, Ieng Thirith, a former Khmer Rouge minister and the wife of accused Ieng Sary, was recently declared unfit to stand trial, predicated on her diagnosis of dementia caused by Alzheimer's disease. Ieng Thirith has been ordered unconditionally released by the Trial Chamber and the Supreme Court Chamber is currently seized of the Prosecution's appeal against the lack of conditions required by the order.

³ The Trial Chamber ordered the division of Case 002, pursuant to ECCC Internal Rule 89*ter*, into a series of separate trials focusing on specific topics. The first trial will establish general facts related to the role of the accused in the Khmer Rouge and will adjudicate crimes alleged to have taken place within the context of the first two mass forced population transfers that took place shortly after the Khmer Rouge took power in Cambodia on April 17, 1975.

⁴ Shortly after taking power, the Khmer Rouge renamed Cambodia "DK."

The Chamber also noted that it has reserved the right to address “other subjects,” if it deems such explorations necessary, but did not elaborate on what factors the judges will take into account when considering whether to exercise this power. This continues to leave the precise scope of the first Case 002 trial unknown and leaves both parties before the Court and observers without any guidance moving forward into the trial.

Preliminary Objections of the Defense Teams Regarding Judge Cartwright

After the Chamber recounted the preliminary information pertinent to Case 002, but before the Prosecution could begin its opening statement, the Defense teams for Ieng Sary and Nuon Chea interjected and raised some preliminary objections. Nuon Chea’s International Defense Lawyer Michiel Pestman notified the Chamber that the Defense had earlier in the morning submitted an application to the Chamber requesting the resignation of Trial Chamber Judge Sylvia Cartwright, predicated on evidence that she participated in ex-parte meetings with ECCC International Co-Prosecutor Andrew Cayley and United Nations Under-Secretary for Legal Affairs Patricia O’Brien during Ms. O’Brien’s recent visit to Cambodia. Mr. Pestman argued that such meetings create the appearance of impropriety and thus, demand Judge Cartwright’s resignation pursuant to ECCC Internal Rule 35 and Article 557 of the Cambodian Code of Criminal Procedure. Mr. Pestman argued that until the issue is resolved, alternate International Trial Chamber Judge Kathinka Lahuis should replace Judge Cartwright on the bench.

The Ieng Sary defense team joined in Nuon Chea’s challenge, but took a less drastic tact by requesting the relief of an investigation into any ex-parte meetings that may have occurred involving Judge Cartwright pursuant to Rule 35, rather than requesting Judge Cartwright’s immediate resignation. Ieng Sary’s International Defense Lawyer Michael Karnavas argued that any ex-parte meetings between a Trial Chamber judge and a representative of the Prosecution creates the inference that the Prosecution may enjoy special “privileges” that the Defense teams do not enjoy. This argument fits well with previous submissions by the Ieng Sary Defense team, which have consistently argued that the ECCC has failed to abide by the fundamental fair trial requirement of “equality of arms” between all parties before the Court, by failing to afford the Defense with the same resources available to other parties, principally the Prosecution. Mr. Karnavas argued that at the very least, Judge Cartwright should provide an explanation for why she met with Mr. Cayley ex-parte. Mr. Karnavas also requested that the minutes of these meetings be provided to all Defense teams before the ECCC immediately.

The Trial Chamber acknowledged that it is currently seized of the Defense submissions, but held that all issues raised therein would be addressed separately and did not directly impact the delivery of an opening statement by the Prosecution. The Trial Chamber stated that it rejects “any attempt to halt proceedings” and would thus hear submissions on no issues other than opening statements. Following the Chamber’s decision, Mr. Karnavas requested an opportunity to deliver a statement prepared by Ieng Sary to the Court. The audience perked up noticeably at the possibility that Ieng Sary might make a statement in open Court, as recently his Defense team informed the Trial Chamber that Ieng Sary would not testify at his trial. The judges however, dismissed the request and ruled that Ieng Sary must wait to issue any statements, as the day’s proceedings were exclusively dedicated to the Prosecution’s opening submission.

The Prosecution’s Overall Case 002 Narrative: DK as a Slave State

After these initial issues were addressed, the floor was turned over to the Prosecution to begin its opening statement. The Trial Chamber ordered previously that opening statements for the

first Case 002 trial may cover all topics and crimes covered in the closing order indicting the accused⁵ and are not limited by the Chamber's severance order.

The initial portion of the Prosecution's opening statement was delivered by National Co-Prosecutor Chea Leang. Ms. Chea framed the Prosecution's case within the overall conceptualization of DK as a slave state, wherein every aspect of civilian life, down to the smallest minutiae, was dictated by the Khmer Rouge central command. The Prosecution further argued that the crimes committed within this "slave state" rank among the worst horrors in modern history and resulted in a "staggering" death toll, estimated at between 1.7 and 2.2 million deaths, or nearly one quarter of the entire population of Cambodia at the time.

As part of this larger enslavement narrative, during the first day of its opening statement, the Prosecution covered the topics of the forced evacuation of Phnom Penh and other cities, living conditions at cooperatives and worksites, the creation of a nation-wide system of Security Centers, forced marriage and associated sexual crimes including rape, persecution of Buddhists, genocidal acts committed against Cambodia's Cham Muslim minority group and ethnic Vietnamese-Cambodians and atrocities committed against Vietnamese civilians during incursions by Khmer Rouge troops into Vietnam.

Background and Forced Evacuation of Cambodia's Cities

The Prosecution began its statement on the specific crimes committed by the Khmer Rouge with a graphic description of the forced evacuations of Cambodia's urban centers. These evacuations occurred in two massive waves which followed shortly after the Khmer Rouge seized power on April 17, 1975 and resulted in the forced relocation to rural areas of Cambodia's entire city populations. Ms. Chea stated that the Prosecution will demonstrate that the Khmer Rouge seized cities swollen with civil war refugees that were already facing a looming humanitarian crisis and that thereafter elected to reject offers of humanitarian aid from the international community. Ms. Chea also described how civilians in the cities were initially optimistic that peace had finally come to Cambodia, only to have their hopes shattered by a ruthless regime that immediately forced them out of their homes and into the countryside without providing any of the basic provisions necessary for survival. The Prosecution submitted that Khmer Rouge expert Ben Kiernan has estimated that 10,000 people died during the initial forced evacuations and also noted that Ieng Sary himself even admitted in a 1977 interview that 2,000 to 3,000 people died during the evacuations. The Prosecution also stated that the Khmer Rouge leadership purposefully lied by announcing that former Lon Nol regime soldiers and officials, other than seven specified high-level "traitors" would be spared if they came forward and surrendered. Those who did come forward were in fact, summarily executed, pursuant to the orders of the DK leadership according to the Prosecution.

Living Conditions at Worksites and Cooperatives

The Prosecution's next topic of discussion was the living conditions at worksites and cooperatives throughout DK. Ms. Chea argued that the evidence demonstrates that "all aspects of life" in DK were placed under the control of the senior Khmer Rouge leadership, turning the entire country into an "open air prison." The Prosecution further alleged that the DK central government was "specifically aware" and "in control of" specific Case 002 crimes sites where conditions were especially harsh. Despite this alleged knowledge of the suffering and death of thousands of civilians attributable to overwork, lack of hygiene and starvation, the Prosecution alleges that the leaders continually increased agricultural production quotas without any regard to the massive human cost such increases necessarily entailed.

⁵ The ECCC follows civil law procedures, wherein judges conduct an investigation upon receipt of an initial submission by the Prosecution. When the investigation is completed, the Investigating Judges issue a closing order indicting or releasing the suspects (termed "charged persons" prior to the issuance of the closing order).

After the Prosecutions opening remarks concerning worksites and cooperatives, the Trial Chamber ordered the regular morning session break at 10:30 am.

Ieng Sary's Request to be Excused from the Courtroom

Following the break, Ieng Sary requested through his lawyers to be excused from the courtroom and allowed to participate remotely via the Court's audio-visual technology because of back pains. The Chamber rejected this request, stating that it was of the utmost importance that each accused directly hear and acknowledge the charges facing them.

Ieng Sary was visibly upset that his request was denied and appeared agitated. The Chamber however, quickly moved on and allowed the Prosecution to continue its opening statement. The distraction proved to be far from over though, as numerous guards and court personnel proceeded to attempt to manipulate Ieng Sary's specialized chair⁶ with little success.

In a strange twist, as the court's numerous highly trained personnel attended to Ieng Sary's back problems and malfunctioning specialized chair, the Prosecution discussed the total disregard the Khmer Rouge regime had shown for anyone it perceived as old, weak or sickly.

The Second Forced Transfer to the Northwest Zone

Following her remarks concerning the complete denial of medical care in DK, Ms. Chea turned to specific accounts of brutality, starvation and degradation resulting from the second massive forced population transfer of hundreds of thousands of civilians to DK's Northwest Zone.⁷ According to the Prosecution, this transfer resulted in especially enormous suffering among victims, as the Zone was not prepared for the massive population influx. Starvation was especially prevalent in the Northwest Zone and the Prosecution related grisly eyewitness accounts of mass starvation and even incidents of cannibalism. The Prosecution also alleged that civilians transferred to the Northwest Zone were considered "expendable" by the Khmer Rouge leadership, because they were mostly former city dwellers, who were distrusted by the regime.

Persecution of Buddhists

The Prosecution next discussed its view of the alleged persecution of Buddhists in DK, which the Prosecution described as "systematic" throughout the nation. The Prosecution recounted various witness accounts and provided examples of Khmer Rouge propaganda slogans which portrayed Buddhism as the pointless worship of "concrete" statues and monks as lazy people who lived off the labor of the rest of society. The Prosecution stated that monks were forced to disrobe under threat of execution, while religious sites, such as temples, were desecrated and transformed into storage facilities, prisons or even execution sites.

Forced Marriage and Associated Sexual Crimes

Forced marriage was the next topic addressed by the Prosecution. Ms. Chea stated that the forced marriage policies of the Khmer Rouge affected "hundreds of thousands" of Cambodians, who suffered severe physical and psychological harm. Forced marriage was also portrayed as one aspect of the Prosecution's conceptualization of DK as a slave state. As one aspect of the forced marriage policy, the Prosecution alleged that women were given as "reward" brides to injured Khmer Rouge soldiers, who were allowed to select their brides

⁶ Court-appointed expert geriatrician Physician John Campbell previously recommended that Ieng Sary be provided with a specialized chair, due to his bad back and overall poor health and the Chamber adopted this recommendation.

⁷ The Khmer Rouge reorganized DK into a series of Zones, which replaced the previous system of provinces. The Northwest Zone was comprised largely of what is now Battambang province which borders Thailand.

from women designated by the regime. The Prosecution noted that the Khmer Rouge allegedly required couples to consummate forced marriages and often monitored sexual relations between arranged couples. This amounted to numerous instances of rape within the context of forced marriage in DK according to the Prosecution. Conversely, couples who engaged in romantic relationships outside of sanctioned marriages arranged by the Khmer Rouge were considered to be guilty of “immorality” crimes by the Khmer Rouge. According to the Prosecution, these victims were routinely imprisoned or even killed, simply for loving one another without approval.

Security Centers and Execution Sites

Following forced marriage, the Prosecution turned to nationwide system of Security Centers and execution sites created by the Khmer Rouge in DK. The Prosecution argued that torture and execution were already standard Khmer Rouge practices well before April of 1975 and simply escalated when the regime seized power over the entire country. According to the Prosecution, more than 200 Security Centers were quickly established in DK once the Khmer Rouge seized power. The Prosecution argued that the security policies of the Khmer Rouge were both extremely harsh and completely irrational, as individuals accused of petty crimes or even related to a “potential enemy” were routinely arrested, tortured and/or executed, without any consideration of whether any evidence whatsoever existed suggesting that the victim had committed an actual offense. DK Security Centers were places of hard labor, abuse, torture, general inhumane conditions and mass extrajudicial executions. The Prosecution provided specific examples of abuse, torture and executions at Security Centers in graphic detail, driving home the horrors committed in DK’s prisons to the court audience.

Genocide of the Cham and Ethnic Vietnamese

The Prosecution also outlined its view of genocide charges against the accused predicated on the targeted destruction of Cambodia’s Cham Muslim and ethnic Vietnamese communities. The Prosecution stated that the Khmer Rouge leadership aimed to eliminate all ethnic differences within Cambodia and in doing so, planned to completely eliminate the Chams and ethnic Vietnamese groups.

Genocide of Cham Muslims

The Prosecution outlined the case of genocide against the Cham Muslims in detail, including specific allegations that the accused themselves issued genocidal edicts during the DK period by ordering local authorities to destroy the Cham people as a group. This included allegations that the Khmer Rouge leadership took careful steps to identify and execute Cham people and also that Cham communities were subjected to instances of mass summary executions based solely on their individual identities as Cham Muslims. Ms. Chea also noted that Cham Muslims died at a much higher rate than other Cambodians during the DK period according to demographic studies.

Genocide of Ethnic Vietnamese-Cambodians

Along with Cham Muslims, the Prosecution also alleged that ethnic Vietnamese-Cambodians were victims of genocide at the hands of the Khmer Rouge in DK. The Prosecution noted that ethnic Vietnamese populations had lived in specific, well-defined areas within Cambodia for a long time and that these areas were common knowledge in 1975. The Prosecution specifically mentioned Case 002 crimes sites in Prey Veng and Svay Rieng as specific areas where genocidal acts were committed against Vietnamese-Cambodians in DK. The Prosecution alleged that the general Khmer Rouge policy was to simply kill all ethnic Vietnamese people as quickly as possible. The Khmer Rouge leadership also referred to all perceived Vietnamese people utilizing the derogatory term “*youn*.” Moreover, according to the Prosecution, the DK leadership ordered that children of mixed marriages between Khmer and Vietnamese-

Cambodians were to be classified according to maternal identity. The leadership ordered that if the mother of a mixed-ethnicity child was Vietnamese, then the child must be executed because the child had suckled from the Vietnamese mother and thereby been infected by her ethnic impurity.

Attacks against Vietnamese Civilians during Incursions into Vietnam

The Prosecution also discussed atrocities committed against Vietnamese civilians during the armed conflict which took place between DK and Vietnam. The Prosecution alleged that numerous Vietnamese civilians were captured during cross-border raids and thereafter imprisoned, brutalized and eventually executed. The Prosecution stated that these acts amounted to war crimes, in the form of Grave Breaches of the Geneva Conventions of 1949.

The Purge of the East Zone in 1978

The fighting along Cambodia's border with Vietnam was also related to a massive purge of DK's East Zone which took place in 1978. The Prosecution stated that the DK leadership became suspicious of the East Zone's loyalty in 1977 and thereafter ordered a massive purge of the Zone. This purge began in 1978 and ultimately claimed 100,000 to 250,000 lives, making the purge possibly the single largest instance of mass executions committed during the DK period. It is the Prosecution's contention that the Khmer Rouge leaders, including the accused, stated that the CIA was operating throughout the East Zone and therefore no person living there was above suspicion, especially Khmer Rouge cadres. The accused were thus involved and had full knowledge of the purge according to the Prosecution, making them directly responsible. The Prosecution stated that these purges were of such a scale that they required a high level of planning and organization. For example, the Prosecution related one witness account which described how a large number of ox-carts were used to bring people to execution sites because the number of planned victims was so large. The Prosecution also specifically stated that it will present witness testimony establishing that accused Nuon Chea directly participated in the purge of the East Zone.

Concluding Legal Remarks of the National Co-Prosecutor

National Co-Prosecutor Chea Leang concluded her remarks by summarizing the crimes the accused are charged with, including crimes against humanity, genocide and war crimes. Specifically, Ms. Chea alleged that the accused were all intimately involved in the commission of genocide against Cham Muslims and ethnic Vietnamese-Cambodians as well as the perpetration of a widespread and systematic attack on Cambodia's civilian population, satisfying the *chapeau* requirements necessary for crimes against humanity charges to be applicable. This attack allegedly caused 1.7 to 2.2 million deaths and was committed on political and/or ethnic grounds, as the Khmer Rouge leadership considered all civilians or non-Khmer Cambodians as potential internal enemies. Finally, the Prosecution argued that the evidence will establish that the accused are responsible for the commission of various war crimes in connection with the armed conflict between DK and Vietnam.

Ms. Chea stated that the evidence demonstrates that "there can be no doubt that the accused were the driving force" behind the Khmer Rouge's policies and thus bear individual responsibility for each crime charged in the closing order and that the Prosecution would pursue these crimes to realize a "small measure of justice" for the millions of victims of the Khmer Rouge. Ms. Chea then turned the floor over to her international counterpart Andrew Cayley.

Statement of International Co-Prosecutor Andrew Cayley

International Co-Prosecutor Andrew Cayley took the floor to make observations and discuss the specific roles and responsibility of the accused in Case 002. Mr. Cayley stated that the

very existence of Case 002 rests on the principle that “individual human beings are the touchstone of value” and basic rights of individuals are inviolable. Mr. Cayley also stated that the horrors of the DK period demonstrate the criminality of prioritizing the needs of the state over the basic needs of the people. In the blind pursuit of radical revolutionary goals, Mr. Cayley alleged that the accused, along with the rest of the Khmer Rouge leadership, “took from the people everything that makes life worth living.” Mr. Cayley argued that “the scope of the catastrophe unleashed” by the accused on Cambodia has “no equal in the modern era.”

Regarding the specifics of Case 002, Mr. Cayley summarized the Prosecution’s general view of the joint criminal enterprise (JCE) it alleges the accused were members of during the DK period. This JCE covered five general topics, including:

1. enforced evacuation;
2. enslavement at worksites and cooperatives of the civilian population;
3. use of violence to smash perceive enemies;
4. persecution of Buddhists, Cham Muslims, ethnic Vietnamese and other minority groups; and
5. the use of forced marriage to spur population growth.

Mr. Cayley then provided a brief history of the Cambodian communist movement, outlining the biographies of each accused to highlight their close association with each other and deceased Khmer Rouge leader Saloth Sar aka Pol Pot. Mr. Cayley also argued that the long history of the movements that evolved into the Khmer Rouge and the longtime association of the accused with each other and other high level Khmer Rouge leaders demonstrate the carefully planned, premeditated nature of the crimes committed during the DK period.

Mr. Cayley then provided brief biographical sketches of each of the three Case 002 accused to support the Prosecution’s argument that all of the accused were integral members of the DK leadership who had full knowledge of the crimes committed throughout the DK period. The day ended shortly after Mr. Cayley provided the Prosecution’s overview of Khieu Samphan’s roles in the Khmer Rouge movement and DK government, which appeared to cause Mr. Khieu serious consternation and prompted him to speak with his counsel several times. In the days to come, one can surmise that the precise nature of Mr. Khieu’s apparent disagreement with the Prosecution’s characterization of his role may be provided by Khieu Samphan’s lawyers in their opening statement.

The opening remarks of the Prosecution will conclude on Tuesday, November 22 and be followed by a half-day opening statement by one accused’s Defense team, although currently it is unclear which team will provide their opening statement first.

Conclusion

Overall, the Prosecution laid out what appears to be a comprehensive case against the Case 002 accused. The narrative of DK as a slave state serves as a powerful common thread, which can stitch various crimes and Khmer Rouge policies together into a coherent overall narrative which connects the accused to all crimes alleged in the closing order. Additionally, the Prosecution’s use of audio-visual aids throughout the opening statement thus far helped to maintain the interest of spectators and humanize the suffering abstracted in often confusing and highly technical legal concepts. While the day appears to have been a good resumption of Trial 002, the submissions of the Defense teams for Nuon Chea and Ieng Sary challenging Judge Cartwright served as a reminder of the controversies still facing the Court.