

KRT UPDATE: COUNTDOWN TO CASE 002/02



“....We have no substantive position on the scope of the next trial as we acknowledge that the charges in a criminal trial are usually not selected by the defendant.”

- Victor Koppe, International Defense Counsel for Nuon Chea

I. BACKGROUND

On the 20th of December 2013, Trial Chamber President Nil Nonn issued a memorandum concluding that proceeding with the existing panel of judges to oversee the proceedings for Case 002/02 would prove more expeditious than appointing a whole new bench, though he acknowledged reservations about the legality of either approach.¹ Heeding the Supreme Court Chamber’s direction that evidentiary hearings in Case 002/02 should begin as soon as possible after the closing statement of Case 002/01, President Nil Nonn released a tentative Workplan on 24 December 2013, asking the parties to prepare their submissions on the scope for Case 002/02.²

In response to this Workplan, the Khieu Samphan Defense team filed a written submission on 5 January 2014 that asked the Chamber to wait until the final verdict is reached in Case 002/01 before beginning the proceedings in the second trial.³ The Office of Co-Prosecutors, the Defense team for Nuon Chea, and the Civil Party Lawyers all contested this submission.

On 7 February 2014, The Trial Chamber issued a memo⁴ to schedule a Trial Management Meeting (**TMM**) on 11 February 2014. The meeting was called to address two points: the general response to Khieu Samphan’s Defense team’s submission on postponing Case 002/02 proceedings until the final verdict,⁵ and the response to parties’ submissions on scope for Case 002/02.⁶

II. RESPONSES TO KS TEAM’S 31 JANUARY SUBMISSION ON WAITING TO START 002/02 TILL VERDICT

Khieu Sampan's Defence Team filed written submissions on 31 January 2014 that called for the commencement of Case 002/02 to begin only following the delivery of a final verdict (including appeals) for Case 002/01.⁷ At the commencement of the TMM, President Nil Nonn explained that the Khieu Sampan team had argued that on the basis of *res judicata* and legal certainty, Case 002/01 should be conclusively settled before 002/02 begins. *Res judicata* refers to the legal principle that bars parties from litigating on the same claim after a final decision on the merits of that claim has already been decided in a previous trial.⁸ Khieu Sampan's lawyers, International Defense counsel Arthur Vercken and national counsel Kong Sam Onn, have repeatedly stated that beginning the case before the verdict would jeopardize their client's right to a fair trial, as the linkages and evidence brought before the Chamber in Case 002/01 have not been legally established.

In response, the Office of Co-Prosecutors maintained that following the Khieu Sampan team plan would cause undue delay of the trial, a claim supported by the Civil Parties. Both parties also cited the 7 February 2014 Trial Chamber decision⁹ that state 002/01 and 002/02 were not separate cases.¹⁰ International counsel for Nuon Chea, Victor Koppe, disagreed with the OCP and CPCLs' argument that the Case 002 trials ought to be considered separate trials, but also did not support the Khieu Sampan team request.

A. NUON CHEA DEFENSE TEAM RESPONSE

During oral submissions on 11 February 2014, Mr. Victor Koppe argued that contrary to the Trial Chamber's definition of severance, Cases 002/01 and 002/02 were two different trials since each had its own defined scope and verdict. Thus Nuon Chea's Defence expressed empathy with Khieu Sampan team's position on waiting for the verdict to begin trial, but ultimately concluded that Case 002/02 should start as soon as possible to avoid further delay and ensure Nuon Chea is granted his right to an expeditious proceeding.¹¹ Nuon Chea, according to Mr. Victor Koppe, wishes to defend himself of the serious allegations of Case 002/02, and feared waiting for the verdict would prove too late.

B. OFFICE OF CO-PROSECUTORS' RESPONSE

Generally, the OCP stressed, beginning Case 002/01 now would not have an impact on the fairness of the trial proceedings. National Co-Prosecutor Seng Bunkheang submitted that all evidence admitted in Case 002/01 should be used in Case 002/01 in order to further expedite proceedings, arguing that there is no legal basis for the delay in proceedings given that the *res judicata* principle does not apply because the Trial Chamber has ruled both cases are part of the same trial proceedings.¹²

International Co-Prosecutor Nicholas Koumjian further argued the appeals process for Case 002/01 would likely take up to one and a half years, meaning that Case 002/02 would only start in 2016. Allowing the appeal and the trial to run simultaneously would expedite the proceedings extensively.

C. CIVIL PARTY LAWYERS' RESPONSE

The Civil Parties Lead Co Lawyers adopted a similar stance to the Co-Prosecutors in rejecting the Defense Team of Khieu Samphan's submissions, stating that there is no legal basis or regulations as per the Internal Rules for the request. National Civil Party Lawyer Ven Pov emphasized that delaying the proceedings does not save time or resources, nor does it protect the interests of the Accused or the rights of Civil Parties waiting for judgment.

| D. | KHIEU | SAMPHAN | DEFENSE | TEAM | RESPONSE |
|----|-------|---------|---------|------|----------|
|----|-------|---------|---------|------|----------|

The Defense team for Khieu Samphan countered the other parties' rejection of their submission on timing for Case 002/02. International lawyer for Khieu Samphan Arthur Vercken questioned the Trial Chamber's plan to use Case 002/01 as a foundational framework for Case 002/02, pointing out that this would not be possible until case 002/01 has become *res judicata*, allowing later evidence to become cumulative.¹³

Furthermore, Vercken argued explicitly against the reasoning that the second trial should begin quickly given the failing health of the Co-Accused, pointing out that Khieu Samphan's health was not deteriorating as notably as Nuon Chea's status. Vercken stressed that their client is in good health, and wanted to be tried in accordance to the law.¹⁴

III. ARGUMENTS ON SCOPE

Prior to the TMM, Parties submitted to the Court their proposals¹⁵ for the Scope of Case 002/02.¹⁶ Parties tailored their proposals around the Supreme Court Chamber's 25 November directive¹⁷, which ordered Case 002/02 to include charges related to s21, a worksite, a cooperative and genocide.

Generally, the OCP reasserted their position on specific sites and events they believe to be representative of all charged crimes. Nuon Chea's Defense team urged the second trial to begin immediately, agreeing with the basic charges before the Chamber. The team also asked for the opportunity to adduce further evidence for support even if it is outside the scope of the case. The Civil Parties sought to expand the charges of forced marriage and treatment of Buddhists to a nationwide scope for Case 002/02, and urged the Court to consider including more worksites and security centers in order to allow victims to have more of a voice. Khieu Samphan's team again stressed the necessity of waiting until a final verdict is released and argued that reducing crime sites and events would prove detrimental to their client's fair trial rights.

A. NUON CHEA TEAM ORAL RESPONSE

With regard to the scope of Case 002/02, Counsel Koppe requested the Trial Chamber to

include the charges the Supreme Court mandated in its 25 November decision.¹⁸ Again, Koppe expressed Nuon Chea's desire to defend himself of all major charges remaining in Case 002/02. Additionally, Koppe voiced concerns on the ability to defend his client with a full range of exculpatory evidence, which was limited in Case 002/01 given the narrow scope. The counsel argued that, pending the constraints or expansion of scope decision by the Trial Chamber, they should be allowed to adduce additional evidence or witnesses in order to properly defend Nuon Chea of the charges.

Koppe objected to the inclusion of S21, a required charge of Case 002/02 as mandated by the Supreme Court Chamber in its 25 November 2013 order.¹⁹ He pointed out that the conclusion of the Trial Chamber in Case 01 was based on shaky evidence. The Counsel cited a number of questions with regards to the evidence utilized in the Case against Duch, including the revised S21 prisoners list by DC CAM, which authenticity had never been verified. Koppe also raised some points from Case 001's decision that he argued indicated "doubts" regarding whether the Chamber could "impartially judge allegations" concerning the security center.²⁰ The Civil Parties and OCP dismissed Nuon Chea's team outright, saying the Supreme Court Chamber has already mandated the inclusion of S21.

B. KHIEU SAMPHAN TEAM ORAL RESPONSE

Khieu Samphan's National Defense Counsel Kong Sam Onn again argued the final judgment of Case 002/01 should be settled before Case 002/02 begins. Clarifying their position on scope for Case 002/02, Khieu Samphan's Defense contended that severance thus far has extended rather than expedited Case 002, which is why Case 002/02 should include all remaining charges. Furthermore, the team held, the Trial Chamber's decisions of how the Court should proceed should be based on law, not on the supposed failing health of the accused or financial stability. Counsel Kong Sam Onn declared that funding was not adequate legal reasoning for speeding up the trial at the expense of the Co-Accused, and in the case the court cannot proceed due to funding, his client's case should be dropped.

C. CIVIL PARTIES ORAL RESPONSE

While supporting the OCP's scope proposal on expediting the proceedings for Case 002/02 and accepting evidence already before the Court,²¹ the civil parties sought the expansion of sites²² related to forced marriage and treatment of the Buddhist to a nationwide scope and not limited to specific crime sites, along with specific additions to include more victims' voices.²³ The Civil Party lawyers adamantly opposed dropping any charges or criminal events because, they argued, it would impact the pursuit of justice, the rights of victims, and principles of Cambodian Criminal Law, which prevent courts from dropping charges.²⁴ International Civil Party Lawyer Beini Ye, who represented the Civil Parties in this portion of the proceedings, urged the Trial Chamber to remain flexible on the potential addition of further segments to the case, emphasizing that victims' rights must be respected.

Specifically in response to Nuon Chea Defense's claim that charges related to S21 ought to be dropped, Ms. Beini Ye argued that the inclusion of S21 in Case 002/02 was already decided by the Supreme Court Chamber, which should render the Defense's arguments invalid.²⁵

D. OCP ORAL RESPONSE

The Prosecution's submission on the scope of Case 002/02 urged expediency given the age of the Accused and the victims, asking the Chamber to hasten the proceedings and finish the remaining charges of Case 002 in this second trial. As per the Supreme Court Chamber's 25 November order,²⁶ which requested Case 002/02 to comprise charges related to S21, a worksite, a cooperative and genocide, the OCP had picked a reduced but representative number of crime sites and events.²⁷ Furthermore, Prosecutor Nicolas Koumjian reminded the Parties that the ECCC is labeled an Extraordinary Court because it is a temporary court with the mandate to complete its work, arguing expediency is paramount.

The OCP maintained that dealing with a representative albeit reduced number of crime sites is still an appropriate way of achieving justice for victims, though noted there are distinct legal methods of dealing with dropping charges in different systems. Koumjian recognized that in the domestic courts of Cambodia, the principle of legality applies, in which all crimes in the Closing Order must be ruled upon. However, he pointed out that the Supreme Court Chamber quoted the German criminal code rule 154.A²⁸ which rules that crimes that are "not particularly significant" can be dropped. Co-Prosecutor Koumjian used this line of reasoning to argue against the Civil Parties' claim that including all the remaining crime sites and events will guarantee more victims justice. Given that Civil Party participation is not on an individual but rather a collective basis, as per the ECCC founding rules²⁹, the Prosecutor held that limiting charges would not impact civil party participation.

The OCP maintained that if all evidence in 002/01 is accepted into the case file of 002/02 as indicated in the Trial Chamber's 7 February Decision,³⁰ the second trial could be completed in a mere 1-1.5 years, as the first case already dealt with the difficult task of linking the Accused to a joint criminal enterprise.

IV. TRIAL MANAGEMENT ISSUES

Translation did not prove to be a significant issue during the TMM. However, a number of audio system problems occurred during Arthur Vercken's discussion on postponing Case 002/02.

V. ATTENDANCE

Accused Noun Chea's lawyers announced that the Accused "[had] no intention to participate in today's hearing" and was thus absent.³¹ International Civil Party Lead Co-Lawyer Ms. Simonneau-Fort was also absent due to personal reasons. She was replaced by Civil Party Lawyer Beini Ye.

Throughout the day, approximately 20 civil parties followed the meeting from the courtroom and public gallery. At the morning session, 150 students from Royal University of Law and Economics (RULE) and 257 students from Pursat observed the hearing and at the last session of the meeting, approximately 80 villagers from Kampong Thom were present in the public gallery.

Unless specified otherwise,

- the documents cited in this report pertain to *The Case of Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan* before the ECCC;
- the quotes are based on the personal notes of the trial monitors during the proceedings;
- the figures in the *Public Attendance* section of the report are only approximations; and
- photos are courtesy of the ECCC.

Glossary of Terms

| | |
|-------------------|---|
| Case 001 | <i>The Case of Kaing Guek Eav alias “Duch”</i> (Case No. 001/18-07-2007-ECCC) |
| Case 002 | <i>The Case of Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan</i> (Case No. 002/19-09-2007-ECCC) |
| CPC | Code of Criminal Procedure of the Kingdom of Cambodia (2007) |
| CPK | Communist Party of Kampuchea |
| CPLCL | Civil Party Lead Co-Lawyer |
| DK | Democratic Kampuchea |
| ECCC | Extraordinary Chambers in the Courts of Cambodia (also referred to as the Khmer Rouge Tribunal or “KRT”) |
| ECCC Law | Law on the Establishment of the ECCC, as amended (2004) |
| ERN | Evidence Reference Number (the page number of each piece of documentary evidence in the Case File) |
| FUNK | National United Front of Kampuchea |
| GRUNK | Royal Government of National Union of Kampuchea |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| ICTR | International Criminal Tribunal for Rwanda |
| ICJ | International Criminal Tribunal for the former Yugoslavia |
| AIJI | TRIAL MONITORING |
| AST - WEST CENTER | Internal Rules of the ECCC Rev. 8 (2011) |
| IR | Internal Rules of the ECCC Rev. 8 (2011) |
| KR | Khmer Rouge |
| OCIJ | Office of the Co-Investigating Judges |
| OCP | Office of the Co-Prosecutors of the ECCC |
| RAK | Revolutionary Army of Kampuchea |
| VSS | Victims Support Section |
| WESU | Witness and Expert Support Unit |

* AIJI is a collaborative project between the East-West Center, in Honolulu, and the War Crimes Studies Center, University of California, Berkeley. Since 2003, the two Centers have been collaborating on projects relating to the establishment of justice initiatives and capacity-building programs in the human rights sector in South-East Asia. The Program has been funded by the Open Society Foundation, the Foreign Commonwealth Office of the British Embassy in Phnom Penh, and the Embassy of Switzerland in Bangkok.

This issue of KRT TRIAL MONITOR was authored by Gemma Chew, Yumna Arif, Borany Bon, Chhayrath Tan, and Francisca Gilmore, as part of AIJI's KRT Trial Monitoring and Community Outreach Program. KRT TRIAL MONITOR reports on Case 002 are available at <www.krtmonitor.org>, and at the websites of the [East-West Center](#) and the [War Crimes Studies Center](#).

¹ President of the Trial Chamber. "President's Memorandum on the Proposal to Appoint a Second Panel of the Trial Chamber to Try the Remaining Charges in Case 002" (20 December 2013) E301/4. Par. 4, 7. [hereinafter **PRESIDENT MEMO**].

² PRESIDENT MEMO.

³ Nuon Chea Defense Team. "Nuon Chea's Response To Trial Chamber's Request For Submissions Concerning The Scope Of Case 002/02" (31 January 2014). E301/5/4 [hereinafter, **NC SCOPE**]. par. 2

⁴ President Trial Chamber. "Adversarial hearing prior to commencement of evidentiary hearing in Case 002/02 (11 February 2014)" (7 February 2014), E301/9.

⁵ Khieu Samphan Defense Counsel's Submission re Scope of Case 002/02 (waiting for English translation) [hereinafter **KS SCOPE**].

⁶ Submissions: NC SCOPE; Office of Co-Prosecutors. "Co-Prosecutors' Submission re Scope of Case 002/02" (31 January 2014). E301/5/1 [hereinafter **OCP SCOPE**]; Civil Party lawyers. "Civil Parties' Submission re Scope of Case 002/02" (31 January 2014). E301/5/3 [hereinafter **CP SCOPE**]; KS SCOPE.

⁷ KS SCOPE.

⁸ Garner, Bryan A., and Henry Campbell Black. *Black's law dictionary*. St. Paul, MN: Thomson/West, 2004.

⁹ President of the Trial Chamber. "Trial Chamber memorandum entitled "Clarification regarding the use of evidence and the procedure for recalling witnesses, civil parties and experts from Case 002/01 in Case 002/02" (7 February 2014). E302/5 [hereinafter **TC MEMO ON EVIDENCE**].

¹⁰ TC MEMO ON EVIDENCE.

¹¹ NUON CHEA'S RESPONSE. par. 13.

¹² Trial Chamber. "Co-Prosecutors' submission regarding the use of evidence and procedure for recall of witnesses from case 002/01 in Case 002/02" (15 January 2014). E302.

¹³ Garner, Bryan A., and Henry Campbell Black. *Black's law dictionary*. St. Paul, MN: Thomson/West, 2004.

¹⁴ Countering this, Defence Counsel Mr. Son Arun emphasized that it is becoming more difficult to obtain evidence and meaningful participation from the Accused. He highlighted the deteriorating health and condition of Mr. Nuon Chea as reasoning to begin the second case with haste.

¹⁵ NC, KS, CP, OCP SCOPE.

¹⁶ KS SCOPE.

¹⁷ Supreme Court Chamber. "Decision on Immediate Appeals against Trial Chamber's Decision on Severance of Case 002" (25 November 2013). E284/4/8 [hereinafter **SCC DECISION**]. President of Supreme Court Chamber Kong Srim ordered that evidentiary hearing for Case 002/02 begin as soon as possible, and they comprise at minimum charges related to S-21, a worksite, a cooperative, and genocide.

¹⁸ NC SCOPE.

¹⁹ SCC Decision.

²⁰ Trial Chamber. Transcript of Trial Proceedings (5 December 2013). E1/239.1. Page 44. Lines 11-13.

²¹ OCP submitted scope of Case 002/02 and trial schedule "Co-prosecutors' submission regarding the scope of Case 002/02 and trial schedule with Annex A". (5 December 2013). E301/2.

²² CP SCOPE.

²³ CP SCOPE. Specifically, in their submission, the Civil Parties asked the Chamber to consider the following: (a) forced marriage and rape within the context of forced marriage: para. 842-861, (b) Treatment of Buddhists: para. 740-743, (c) Trapeang Thma Dam Worksite: para. 323-350, (d) North Zone Security Centre: para. 572-588, (e) Koh Kyang Security Centre: 516-534; and (f) forced transfer phase 3 and related purges: para. 283-301.

²⁴ *The Constitution of Kingdom of Cambodia*. Phnom Penh, 1993.

²⁵ See The Case 002/02 shall comprise at minimum the charges related to S-21, a worksite, a cooperative, and genocide, “Decision on Immediate Appeals against Trial Chamber’s Second Decision on Severance of Case 002”. (25 November 2013). (E284/4/8).

²⁶ SCC DECISION.

²⁷ Office of Co-Prosecutors. “Co-Prosecutors’ Submission regarding the scope of Case 002/02 and Trial Schedule with Annex A” (5 December 2013). E301/2.

²⁸ Bohlander, Michael. *The German criminal code: a modern English translation*. Hart Publishing, 2008.

²⁹ **ECCC Law.**

³⁰ Trial Chamber. “Trial Chamber memorandum entitled “Clarification regarding the use of evidence and the procedure for recalling witnesses, civil parties and experts from Case 002/01 in Case 002/02” (7 February 2014). E302/5.

³¹ Trial Chamber. Transcript of Trial Proceedings (5 December 2013). E1/239.1. Lines 22-23.