

# KRT TRIAL MONITOR

Case 002 ■ Issue No. 71 ■ Hearing on Closing Statements Week 2 ■ 21-25 October 2013



Case of Nuon Chea and Khieu Samphan

Asian International Justice Initiative (AIJI), a project of East-West Center and UC Berkeley War Crimes Studies Center \*

*Was a single mass gravesite discovered? No. Were sites thought to be graves ever unearthed or examined? No. Was a single corpse or skeleton ever located? The answer is no. Were bone fragments ever tested? Do we even know if they were human bone fragments? No. Without physical evidence of a single murder, how can there be evidence beyond reasonable doubt? The answer is no, there is not.*

- Victor Koppe, International Counsel for Nuon Chea

## I. OVERVIEW

This week saw the conclusion of Closing Statements from the Prosecution and the Nuon Chea Defense team. On Monday afternoon, the OCP requested a life sentence for both Accused. However, both Defense teams continued to plead the innocence of their clients, and asked the Chamber to acquit them due to the lack of evidence to prove guilt beyond reasonable doubt. Both Defense teams also claimed numerous violations of fair trial rights, with particular emphasis on the principle of equality of arms between the Parties. Proceedings generally went smoothly, with little need for intervention from the Chamber. The Khieu Samphan Defense team will conclude its Closing Statements on Monday next week.

## II. PROSECUTION STATEMENTS

On Monday, International Prosecutor William Smith took the floor in order to conclude the Prosecution's Closing Statements. Following his presentation on Friday, the Prosecutor gave a brief conclusion of how the Party center exercised power during the DK period. This was followed by the presentation of arguments on the role and "true character" of the Accused and their individual contributions to the policies charged in the indictment. Smith then handed over to his colleague Chea Leang to conclude the Prosecution statements with the sentence requested by the OCP—life for both Nuon Chea and Khieu Samphan.

### A. Role and Character of Nuon Chea

William Smith commenced the Prosecution's discussion of Nuon Chea's role and character by asking, "[W]ho is Nuon Chea? Is he a normal man who loved his country or a cruel and barbaric man who taunted those around him?" The Prosecutor answered:

Nuon Chea is an extremist, who is willing to illegally kill others to achieve both his and the CPK vision. He was extreme when he was Brother Number Two in the 70s and, judging by his statements during the trial and his defense, he remains the same extremist today.

The Prosecutor then proceeded to address the arguments put by the Defense throughout the course of the trial, and those contained in their closing briefs. Smith outlined that in the closing briefs, Nuon Chea asserted that he was not an intellectual, had no executive power, and was only in charge of educating cadres on Party policy. The Prosecutor then questioned how Nuon Chea could claim that intellectual limitations prevented him from playing a role in CPK policy when he freely admitted that he was responsible for teaching CPK policy. Smith also raised the fact that Nuon Chea had studied law at a prestigious Thai university, was fluent in three languages, sat across from top leaders from China and Vietnam and had prepared the original Party statute for the communist movement in Cambodia. Contrary to Nuon Chea's claim that he was not head of the Party with Pol Pot, the Prosecution showed an interview with Thet Sambath where Nuon Chea admitted that he and Pol Pot were known as "Brother Number One and Two."

Addressing Nuon Chea's claim that he was only in the legislative body and was not involved with the executive, the Prosecution presented evidence which suggested that the DK did not have a functioning legislative body at all. In an interview with Thet Sambath, Nuon Chea stated, "there was nothing to debate, because there were no laws to pass." The Prosecution presented additional clips of interviews with Thet Sambath in support of their argument that, prior to being indicted in the Court, Nuon Chea had intended to lie during the proceedings and did so. In an interview, Nuon Chea told Thet Sambath:

If they ask me in Court who killed the people, I will say I was in charge of the legislative body and education. The killing was the problem of the government administration which was Pol Pot and Son Sen. If they ask me again, I will say it started with Kissinger.

After directly challenging each of the Defense arguments, the Prosecution presented a range of evidence which they argued proved that Nuon Chea played a key role in the CPK and was responsible for the military, S-21 and, at one stage, even served as acting Prime Minister.<sup>1</sup> The Prosecution concluded its arguments by showing an interview with a BBC reporter where Nuon Chea, in response to the threat of prosecution stated, "[if] they have evidence to convict me, then that is fine. I am 76 years old, if they jail me for 20 years I will be 96." Nuon Chea was then seen laughing on camera.

## **B. Role and Character of Khieu Samphan**

Addressing the role and character of Khieu Samphan, Prosecutor Smith commenced with the same question, "[W]ho is Khieu Samphan?" Smith attacked the Defense argument that Khieu Samphan had "accidentally" fallen into the CPK, "but was blissfully unaware of its policies." Addressing the argument with skepticism, Smith stated that Khieu Samphan had asked the Court to believe that he held positions in the highest bodies of DK, lived with Pol Pot, but had no idea about crimes and mass enslavement of bodies until 1979. He added that, if that were true, then Khieu Samphan must be "the only man in Cambodia who knew nothing, saw nothing and heard nothing."

The Prosecutor argued that Khieu Samphan was a "skillful and manipulative leader, an educated man with a thirst for absolute power." Turning to his attendance at Standing Committee meetings, the Prosecution argued that, contrary to the Defense figure of four per cent, Khieu Samphan attended 84 per cent of Standing Committee meetings.<sup>2</sup> Through his

role as the Head of State in the DK regime, member of the Party center and full rights member of the Standing Committee, Smith argued that Khieu Samphan took part in the planning, implementaton and oversight of the crimes charged, and was inseparable from the other party leaders.<sup>3</sup>

### **C. Joint Criminal Enterprise (JCE) and Alternative Modes of Responsibility**

In relation to the mode of responsibility applicable to the Accused, the Prosecution argued that the second, systemic form of JCE is the most proper form of classification of legal guilt for the Accused. Smith said that both Nuon Chea and Khieu Samphan, along with the other top leaders in the DK Party center, contributed to a common criminal plan and bear responsibility for their participation in the JCE. The systemic form of JCE (JCE II) provides for liability where individuals contribute to the maintenance of a criminal system. However, the OCP also argued that the first, basic form of JCE is equally applicable (JCE I). The basic form of JCE applies when an individual intentionally acts with others to commit crimes pursuant to a common plan.<sup>4</sup> The objective elements for JCE I and II are the same. However, JCE II requires an additional element regarding the intention of the Accused person, who must be aware of the system of ill treatment. The OCP also pleaded—in the alternative—planning, instigating, aiding and abetting each crime charged in the indictment.

The OCP contended that, not only did the Accused participate in a JCE, they had also actively enabled the CPK “enslavement system.” Smith cited specific public and private statements where both Khieu Samphan and Nuon Chea indicated their knowledge of the forced labor system, poor living conditions, or otherwise implicated themselves in the regime’s intent to enslave the population at large, as well as their endorsement of the policy to kill enemies. The Prosecutor also stated that the alleged positions of the Accused within the DK leadership were evidence of their knowledge and participation in the enslavement, particularly pointing at Khieu Samphan’s position as the Minister of Commerce and Nuon Chea as the Deputy Secretary of CPK.<sup>5</sup>

### **D. Contributions of the Accused to the Crimes**

The OCP began the segment on the contributions of the Accused to the crimes alleged in Case 002/01 with a discussion of the concept of democratic centralism. This was followed by an explanation of the involvement of each of the Accused in the evacuation of Phnom Penh; the second forced transfer; the targeting of New People, Khmer Republic officials and soldiers; and their general role in what the OCP described as the “slave state” of Cambodia under the CPK.

The cornerstone of Smith’s argument related to the CPK leadership model of “democratic centralism,” described by Expert Witness David Chandler as the unanimous and hierarchical decision making of the CPK.<sup>6</sup> Smith argued that democratic centralism connects Khieu Samphan and Nuon Chea to the common purpose of the JCE with which the KR leaders are accused. Smith highlighted evidence placing both men at planning committees for the the major crimes within the scope of Case 002/01, indicating their agreement with Party policy, given the nature of unanimous decision making of the CPK structure. The Prosecutor continued to rely on the argument of democratic centralism and the Accused’s endorsements of policies to contend that the decision to target and purge Lon Nol officials was one made collectively by the Party center.

Particularly for Nuon Chea, Smith relied on two speeches made in January 1977. Smith quoted Nuon Chea, “One we took them, 100 we took them, 1,000 we took them, until we fought for and seized people from Phnom Penh, too. The line of drying up the people from the enemy was very correct.”<sup>7</sup> He also placed the Accused at a CPK leadership meeting

where the decision was made to evacuate Phnom Penh and other cities.<sup>8</sup> Smith asserted that there was no legitimate basis under international law which permitted the CPK to evacuate Phnom Penh or any city in Cambodia, given the inhumane conditions imposed on people during the movement. The lack of provision of food, transportation, water, shelter, and medical assistance during the evacuation, Smith argued, was deliberate and knowingly endorsed by the Accused.<sup>9</sup> He argued that the Accused knew about horrific conditions when planning the second forced transfer of New People to the North and Northwest Zones.<sup>10</sup> The Prosecutor contended that the CPK hierarchy remained highly cognizant of the poor conditions facing those being transferred, but knowingly gave the order to move them regardless.<sup>11</sup>

#### **E. Arguments on Sentencing**

Before the Prosecutors presented the request for sentencing, Nuon Chea was brought from the holding cell to the courtroom. The OCP argued that both the Accused bear responsibility for each of the crimes charged in Case 002/01, and requested a life sentence for both Nuon Chea and Khieu Samphan. Moreover, the OCP saw no grounds to reduce the sentence given the intransigent behaviour of the Accused and lack of remorse during the proceedings.

### **III. NUON CHEA DEFENSE ARGUMENTS**

The Defense lawyers focused their rebuttal on challenging claims made by the Prosecution concerning the supposed malicious criminal intent of CPK policies. They attempted to paint Nuon Chea as an unintellectual man who only had responsibility for legislative affairs and the education of cadres. The Defense reinforced their argument that the forced transfer of the population and the establishment of cooperatives and worksites was done out of economic necessity and was not criminal in itself. Further, they continued to deny the existence of a CPK policy that targeted “New People” or officials of the Khmer Republic regime. They also vehemently denied the OCP’s recurrent claim that the KR leadership intended to establish a “slave state.” The term “slave state,” Victor Koppe declared, is a crude tool used by the Prosecution to confuse the public and the Chamber, oversimplifying the facts of the case.<sup>12</sup> Even if crimes did occur during the two population movements, the Nuon Chea Defense argued that rogue Zone Leaders committed them without authorization from the Party center.

#### **A. Role and Character of Nuon Chea**

Addressing the Court on Nuon Chea’s character, counsel Son Arun depicted a man who intended to free Cambodia through radical sociopolitical reform and class struggle. He added that Nuon Chea only ever acted out of good will for his country and had attempted to abolish the entrenched social system as a whole, not specifically smash people in it. Moreover, the Defense contended that the Prosecution had overstated Nuon Chea’s role as Deputy Secretary of the Party, extending his power to several unrelated positions—including roles within the Ministry of Social Affairs, the People’s Representative Assembly, supervisor of the Zones, and acting CPK Prime Minister from 1976-1977. Responding to the OCP allegations that Nuon Chea had supervised S21, Son Arun countered that the OCP based its argument on confessions containing annotations supposedly made by Nuon Chea. Counsel again presented evidence Nuon Chea reviewed only 25 of the 4,189 confessions, illustrating his limited capacity to supervise the security center.

#### **B. The Evacuation of Phnom Penh was a Lawful Part of Economic Policy**

The Nuon Chea Defense conceded that Nuon Chea was involved in the plan to evacuate Phnom Penh. However, Koppe argued that, due to a range of circumstances prevailing at the time, the evacuation was a necessary part of a lawful economic policy. The Defense

argued US bombing had destroyed rice production and infrastructure to such an extent that, by 1973, a large proportion of the rural population had abandoned the rice fields and fled to the cities. He added that, contrary to the OCP's claim, the intention of the policy was not to create a slave state but rather to increase agricultural production for the well being of the Cambodian people.

#### **C. No CPK Policy to Target Former Lon Nol Officials and Soldiers**

Koppe argued that the Prosecution had failed to establish the existence of a nationwide CPK policy to target and smash all former Khmer Republic officials and soldiers. He contended that it was impossible for such a policy to have existed prior to May 1975, citing lack of evidence to prove that executions occurred in the liberated zones, such as Kampong Cham and Udong.<sup>13</sup> Moreover, Koppe claimed that only a few high ranking officials were killed during the evacuation of Phnom Penh and added that the official CPK policy was to arrest and re-educate Khmer Republic officials, not to kill them.

The Defense found further evidence that no policy existed to target former Lon Nol officials given the fact that no witness personally saw executions, only testifying that groups were segregated. The Defense also disputed the claim that Lon Nol soldiers were killed at S-21, highlighting evidence that showed that only two per cent of those killed were from the former regime. Furthermore, Koppe argued that 75 per cent of the Prosecution's evidence concerned alleged executions that were a result of clashes between troops from the Northwest and Central Zone in 1977 and 1978.

The Defense claimed that the Prosecution's assumption that the KR targeted and systematically murdered Khmer Republic officials originated with Francois Ponchaud, who himself acknowledged that his conclusion was based on a small number of findings. According to the Defense, the concept of systematic smashing was then picked up and repeated by other KR experts, including Philip Short. Koppe criticized the OCP's reliance on Short due to the fact that he never visited Cambodia before 1993, did not speak Khmer, and based his findings largely on secondary sources of information. Koppe asserted that a large proportion of academic work on the KR period had been conducted on a speculative basis.

#### **D. No Evidence to Prove Events at Tuol Po Chrey Occurred**

In relation to the events alleged to have occurred at Tuol Po Chrey, Koppe argued that the evidence is insufficient to prove beyond reasonable doubt that the executions ever took place. The OCP's evidence, according to Koppe, was unreliable, inconsistent, or otherwise inconclusive. On the lack of reliability of witnesses, the Defense pointed to inconsistencies in OCIJ interviews, particularly Witnesses Pe Chuy Chip Se and Lev Lam.<sup>14</sup> The Defense also highlighted the fact that no witness testified that they actually saw executions take place at Tuol Po Chrey. Pointing to a dearth of evidence including unspecified bone fragments, shell casings, metal artefacts and clothes, the Defense concluded that there was insufficient evidence to prove beyond reasonable doubt that the massacre had ever happened.

The Defense took issue with the Prosecution's use of Thet Sambath's film "One Day at Tuol Po Chrey," which they claimed was taken out of context.<sup>15</sup> In support of this argument, Koppe presented a video clip where Nuon Chea stated that only the top leaders of the Lon Nol regime were to be smashed. Accordingly, because witness testimony established that the soldiers who were segregated were only normal ranking soldiers, Koppe held that their alleged executions were not intended or planned by CPK leaders.

#### **E. Zone Leaders were Responsible for the Second Population Movement & Crimes During Evacuation of Phnom Penh**

After reminding the Court that Nuon Chea had admitted to being involved in the first movement of the population, Son Arun proceeded to outline that: a) Nuon Chea did not know about the second population movement; and b) the CPK Party center never ordered the second population movement at all. In order to explain how the second population movement came to pass without any such orders from the CPK, Koppe claimed that the Zone Leaders had ordered the second population movement without the authorization of the Party Center. Pointing to several examples where Zone Leaders and cadres acted in direct opposition to Party policy, the Defense asserted that even if every decision was decided and endorsed by all members of the Party Center, it is evident that not all policies were enforced directly. Particularly, Koppe pointed to Witnesses Sao Phin and Ros Nhim as evidence of rogue Zone leaders who made discretionary choices resulting in harm to the Cambodian people. The Defense also claimed that the Prosecutors mischaracterized the power hierarchy and leadership structure of the CPK, resulting in an oversimplification of the CPK concept of democratic centralism.

Addressing allegation of crimes perpetrated during the evacuation of Phnom Penh, Son Arun adopted a similar argument. The Defense lawyer claimed that the Party Center did not have effective control over the four Zone Military units that conquered Phnom Penh. Moreover, the Defense contended that even if crimes were perpetrated, they were not in accordance with orders from the Party Center. Drawing on examples where witnesses such as Lay Bony testified that they were evacuated to places with more plentiful food supplies, the Defense argued that the intention was to feed the population and any instances of killings must have been isolated cases undertaken by local cadres.<sup>16</sup> Furthermore, the Defense relied on reports from witnesses in the city citing hostility between the different Zone cadres as they entered Phnom Penh, illustrating how, despite CPK instructions for order, Zone cadres often acted in their best interest. Specifically referring to the crimes alleged at Tuol Po Chrey, the Defense alluded to the possibility that Zone leader Ros Nhim ordered the massacre without authorization from the Party Center.

#### **F. No CPK Policy of Targeting “New People” Existed**

Nuon Chea’s Defense Team rebutted the OCP’s claim that the inhabitants of cities or “New People” were persecuted because they were perceived to be political enemies. After reading out a number of quotes taken from CPK propaganda, Koppe argued that the CPK policy was to treat “New People” the same as peasants and workers. Although the Defense conceded that there may have been instances of discrimination by “Base People” against “New People,” Koppe argued that there were many witnesses and Civil Parties who testified that they were welcomed to cooperatives by Base People who offered food and shelter.

#### **G. Joint Criminal Enterprise and Lack of Common Criminal Intent**

In relation to Joint Criminal Enterprise, the Defense argued that there is insufficient proof to show that Nuon Chea had the intent to commit a common criminal plan. Although the Accused conceded that he was in the Party Center, counsel Son Arun argued that the Prosecution had attempted to “infuse” the CPK with criminal intent rather than address the complicated question of whether Nuon Chea had intentionally committed the criminal acts with which he is charged.<sup>17</sup> Son Arun called the Prosecution’s attempt a “simplistic shortcut” and claimed that the Prosecution had failed to prove the existence of a centralised criminal policy, and had relied on secondary sources and foreign academics in order to show the intent of CPK policy—in other words, what was in the mind of Nuon Chea at the time. The Defense added that Nuon Chea acknowledged responsibility for the evacuation of Phnom Penh, but he only learned of the second population movement after it took place. He asked

the Chamber what motive Nuon Chea would have to lie, given he already admitted to having a role in the first population movement.

#### **H. Ideological Attack on Communism**

Referencing the war crimes trial held in Japan post-World War II, Victor Koppe suggested to the Court that the proceedings were an exercise in victor's justice. He claimed that Cambodia had clearly been on the "wrong side" of the Cold War, and that these proceedings embodied a perfect vehicle to punish the ideology of Communism rather than a few individuals. Koppe argued the Prosecution's case was predicated on the notion of the DK as an inherently illegal regime, ignoring the political, ideological, and historical factors that made the regime popular at the time. Koppe asked the Prosecutors what, if any, system of cooperatives they would find legal, suggesting that Communism as a political and belief structure was Nuon Chea's real crime in this case.

#### **I. Defense' Plea**

The Defense concluded their Closing Statement's by asking to Chamber to acquit Nuon Chea of all the charges. Given the unreliability of documents and witnesses, the lack of clear common criminal purpose, and the absence of real evidence connecting Nuon Chea to the stated crimes, Son Arun argued that there is insufficient evidence to establish Nuon Chea's guilt beyond reasonable doubt and the Chamber has no other choice but to acquit Nuon Chea of all the charges.

### **IV. KHIEU SAMPHAN DEFENSE ARGUMENTS**

Defense counsel Arthur Vercken commenced Khieu Samphan's closing statement with an endorsement of the arguments presented by the Nuon Chea Defense Team. Defense counsels Vercken and Anta Guisse focused on the lack of original documentary evidence presented by the Prosecution and the historical context of the KR regime. Similar to the Nuon Chea Defense, they also argued that Zone Leaders acted autonomously in defiance of CPK policy directives. Vercken also tried to show how the Prosecution consistently referred to facts outside the scope of Case 002/01 in an effort to prove the crimes alleged. Counsel Kong Sam Onn commenced his discussion on the role and character of the Accused, and will conclude the Closing Statements next week.

#### **1. Role and Character of Accused Khieu Samphan**

Counsel Kong Sam Onn discussed the personal character of Khieu Samphan, who was described by witnesses and Civil Parties as gentle, moderate, honest, intellectual and clean. The lawyer also quoted Khieu Samphan's wife, So Socheat, who testified that Khieu Samphan has been a good husband for over 30 years and she continues to trust him fully.<sup>18</sup> Furthermore, the Defense attempted to distance Khieu Samphan from the other members of the CPK leadership, adding that he was never a "party hardliner." Given his status as an intellectual, Khieu Samphan was not a typical CPK member, distancing him from the central decision-making body. Reiterating previous Defense arguments, Kong Sam Onn framed Khieu Samphan as a man who was used by the Party Center due to his popularity with the public, but never held any actual power.

#### **2. Lack of Original Documentary Evidence**

Vercken highlighted the fact that, over the course of two years of trial, only two original documents (Revolutionary Flag propaganda magazines) were presented to the Court. According to Vercken, the lack of original evidence supports the Defense argument that the

Chamber is placing undue reliance on evidence from secondary, rather than primary, sources. Guisse criticized the fact that Parties had not been assured of the chain of custody of the documents, particularly unverified or unauthenticated documents from DC-Cam. Vercken stated, “[W]e have a right to be concerned about the probative level of documents” and asked the Chamber to carefully analyze the probative value of secondary sources of evidence before reaching a verdict.

### **3. Importance of Historical Context**

In contrast with the Prosecution’s depiction of the KR as an inherently evil enterprise, Defense counsel Anta Guisse argued that KR policy could not be properly understood without discussing the historical context. Guisse painted a dreary picture of an economically devastated Cambodia prior to the rise of the KR and urged the Chamber to consider the five years of warfare in rural Cambodia leading up to 17 April 1975. According to the Khieu Samphan Defense, the agricultural devastation in Cambodia was a major influence on the decision to evacuate. Guisse quoted a report from US Foreign Aid that described Cambodia as a country that was forced “to transform its swords into hoes.” The CPK leaders considered it as the only way to rebuild the economy and feed the population. Guisse also argued that, contrary to the Prosecution’s version of events, bombing in Phnom Penh had not ceased in April 1975. She quoted testimony from Al Rockoff, Sydney Schanberg, and the testimony of several other witnesses in support of her arguments. The Defense argued that this reasoning justified both evacuations, which were part and parcel of a “policy designed to find a solution,” a fact only understood when looking at the years of war and destruction before the KR took power.

### **4. Zone Leaders Acted Independently in Defiance of Party Center Orders**

In response to the Prosecution’s position that the Party Center governed KR cadre absolutely, Guisse highlighted the unpredictable way the CPK policies were carried out by the Zones, both during the two population movements and in relation to living conditions in the cooperatives. The Defense referenced reports which showed that Zone armies had acted independently, supporting the argument that autonomous Zones often defied Party policy and acted with “latitude” in their implementation of Party orders. Guisse also reminded the Chamber of Heder’s testimony, during which he stated that local cadre often hid the severity of conditions in cooperatives when leaders visited. Guisse also quoted Philip Short, who concluded that the goals of the KR were not negative in themselves, but the system did not function correctly. Zone leaders and their local cadre were responsible for using food “as a means of control,” a fact which the leaders were often ignorant of. Guisse asserted that there was ample evidence to conclude that the criminal plan the Prosecution described, in which the KR leaders planned to discriminate against New People and enslave the Cambodian population, was not a concrete plan at all. Given that central policy, which bore no intention to discriminate against New People, was not even carried out uniformly, Guisse contended that the Prosecution failed to present clear proof of JCE.

### **5. Evidence and Facts Raised by OCP are Outside the Scope of Case 002/01**

On Friday, Vercken commenced his Closing Statements with a vehement attack on the Prosecution. After displaying the Trial Chamber decision outlining the scope of Case 002/01, Vercken proceeded to attack the Prosecution’s Closing Brief and statements for presenting evidence and arguments that were outside the scope defined by the Chamber. The Defense lawyer was particularly critical of the Prosecution’s use of the term “slave state,” given that the Chamber is not seized of enslavement charges across the entire country, but only the two population movements and the events alleged to have occurred at Tuol Po Chrey. The Khieu Samphan Defense contended that, although the Chamber is free to change the legal

characterization, the facts to be considered are limited to the pre-determined scope of Case 002/01. Accordingly, the Defense argued that facts related to cooperatives and worksites, which are outside the scope of Case 002/01 and have not been tested by the Defense, cannot be used by the Prosecution to prove JCE and crimes against humanity. (See also III.B.2.)

## **V.      LEGAL AND PROCEDURAL ISSUES**

Legal and procedural issues this week largely stemmed from Defense claims of fair trial rights violations by the Chamber and the proceedings generally. Both Nuon Chea and Khieu Samphan's Defense teams highlighted problems with judicial independence, equality of arms, the right to call witnesses, and a multitude of other internationally recognized fair trial rights.

### **A.      Fair Trial Rights of Nuon Chea**

On Tuesday, Koppe commenced the presentation of closing arguments for the Nuon Chea Defense. Koppe focused primarily on the fair trial rights of his client. He outlined a number of examples in support of the Defense' claim, including the flawed OCIJ investigation, numerous procedural irregularities, political interference and control, and a lack of procedural fairness during the evidentiary hearings. He concluded his submission with a quote from Nuon Chea which he considered to accurately reflect the Defense' thoughts about the trial. He quoted, "only the body of the crocodile is on trial here, not the head or the body."

#### **1.      Judicial Independence and Impartiality**

Prior to delving into the details of his argument, Koppe stated emphatically, "the underlying thread is that no one in this Court is interested in ascertaining the truth." He added that the people who founded the Court thought they already knew who was responsible and the purpose of the Court was to punish those people they "had already decided were guilty." "For a trial to be fair, the investigation it rests upon must also be fair and impartial."

##### **a.      Flawed OCIJ Investigation**

In relation to the investigation of Case 002, Koppe asserted that the Co-Investigating Judges did not only "make a series of bad decisions," but that the whole process was "seriously flawed." The Defense lawyer pointed to comments made by former OCIJ investigator Wayne Bastin that Judge Marcel Lemonde had instructed the OCIJ staff to search only for inculpatory evidence. This, Koppe contended, was proof that the Co-Investigating Judges were not impartial investigators looking for inculpatory and exculpatory evidence, but were in fact "auxillary prosecutors." Koppe also alleged that numerous irregularities had shrouded the investigation, including the failure of investigators to employ basic investigatory methods and safeguards. Concluding his arguments on the investigation, the Defense counsel attacked the Closing Order. Koppe argued that the Closing Order makes assertions of facts based on uncorroborated evidence, and is unduly reliant on the testimony of Duch. The Defense also highlighted the secrecy of the investigation and the lack of Defense involvement during the investigation stage.

##### **b.      Presumption of Innocence and Political interference**

Koppe argued that the Cambodian Government's "pervasive control" over the proceedings bears directly on Nuon Chea's right to a fair trial. He admonished the Chamber for its failure to prevent the government from interfering in the proceedings and condemning assertions of

guilt made by Prime Minister Hun Sen in relation to Nuon Chea. Moreover, the Defense also raised issues of potential witness intimidation that the Chamber refused to investigate.

#### **c. Victor's Justice**

Koppe stated emphatically that the trial reflected, “a showcase of conclusions that everyone wanted to be included from the day it was started.” He asserted that the leaders of the current Cambodian government, the United States, and France all have an interest in punishing the Cambodian communists as harshly as possible in order to legitimize their victory in the war against communism. Drawing an analogy with the Tokyo Tribunal, Koppe argued that it is impossible for international ECCC judges, who are educated in capitalist societies, to remove deeply entrenched negativity towards communism itself. He added that the trial had not focused on facts, but embodied an assault on the ideology of communism.

### **2. Equality of Arms**

Raised on numerous occasions during the course of Case 002/01 by all Defense teams, Koppe also broached the principle of equality of arms.<sup>19</sup> Koppe alleged the Trial Chamber made rulings that were “consistently unfair, unreasoned, illogical and based on no relevant applicable law.” The Defense then outlined a number of Trial Chamber rulings that they argued had prevented the Nuon Chea Defense from presenting exculpatory evidence and reflected a “deeply ingrained bias in favor of the Prosecution.” Moreover, Koppe was particularly critical of the Chamber’s selection of experts and failure to call a number of witnesses that the Defense considered to be critical to their case.

#### **a. The Right to Call and Examine Witnesses and Experts**

In relation to the procedural fairness of the proceedings, Koppe stated that, “[I]n a Court of law, procedural fairness always matters.” Firstly, Koppe alleged that the Chamber only selected those experts whose opinions “complement[ed] the standard total view of the ECCC.” In support of this argument, Koppe compared two specific Trial Chamber experts—Elizabeth Becker and Philip Short, with Michael Vickery, whom the Defense had unsuccessfully sought as an expert during the trial. Koppe asked how it was possible that the Chamber refused to appoint Michael Vickery as an expert—a man who was an academic, fluent in spoken and written Khmer and had been in Cambodia since 1961. Instead, the Chamber had appointed Short and Becker as experts who are both British journalists with no Khmer language skills at all.<sup>20</sup> Koppe contended that the only shortcoming he could see of Vickery was that, in the words of Francois Ponchaud, “he was a communist.” Likewise, the Defense counsel argued, other experts proposed by the Defense and rejected by the Chamber, including Gareth Porter and William Shawcross, espoused a divergent view of the KR.

Moreover, the Defense argued that Nuon Chea was subjected to the same procedural unfairness in relation to the witnesses called by the Chamber. Koppe claimed that only four out of the 75 witnesses heard during Case 002/01 were requested by the Defense teams. Furthermore, Koppe argued, the Chamber consistently failed to summon witnesses that were crucial to the Defense’ theory of the case. These witnesses included Samdech Chea Sim, Ouk Bunchhoeun, Robert Lemkin and Samdech Heng Samrin. Koppe reiterated the Defense’ argument that Heng Samrin is the most important factual witness in relation to the evacuation of Phnom Penh and the events at Tuol Po Chrey. Despite receiving six written requests from the Defense team, the Chamber had refused to call him. Koppe said, “It follows that his appearance at this trial is a non-negotiable minimum requirement to Nuon Chea’s right to fair trial.”

**b. The Right to Procedural Fairness in the Proceedings**

Koppe also attacked what he termed the “constantly shifting” procedural rules applied by the Trial Chamber. He referred to a range of Trial Chamber rulings in support of his argument, including the admission of DC-Cam documents without verifying their authenticity, the admission of numerous out-of-court witness statements that could not be tested by the Defense, and the inability for the Defense to challenge the OCIJ interviews.<sup>21</sup> In relation to the testimony of Stephen Heder, the Nuon Chea Defense was particularly critical of the Trial Chamber. Koppe claimed that the Chamber had failed to address the nature and extent of Stephen Heder’s role in the introductory submissions and the judicial investigation, and his “extraordinary influence over the proceedings.” Moreover, the Chamber had actively prevented the Defense from broaching the issues during their examination of Heder. Koppe concluded that all these factors combined led to the Defense’ conclusion that the Chamber had overwhelmingly chosen expedience over rigorousness in clear violation of the principle of equality of arms.

**B. Fair Trial Rights of Khieu Samphan**

Vercken appeared impassioned when he outlined how the Court had failed to uphold the fair trial rights of his client. He raised a number of fair trial rights that he argued were violated, including rights related to the principle of equality of arms, such as the right to adequate time and preparation to prepare a defense and the right to be informed of the nature and cause of the charges. The Defense lawyer’s frequent references to the “court of public opinion” also cast doubt over the impartiality of the Court—an issue raised by both Defense teams throughout the course of the trial.

**1. Equality of Arms**

The Defense team for Khieu Samphan particularly highlighted violations of their right to equality of arms. Vercken and Guisse both pointed at specific moments during the proceedings, including the lack of inclusion of pertinent documents, issues with translation, and instances where the scope of the trial was overstepped, when they believed the Chamber deprived their client of a fair trial.

**a. The Right to Procedural Fairness**

Addressing allegations of procedural unfairness during the trial, Vercken asked if it “scared” members of the public that the Chamber added 239 written statements to the case file four weeks before the final briefs were due, and that Khieu Samphan was not able to challenge the probative value of thousands of documents that “will be used to convict him.” He also mentioned several other examples in support of the argument that the Chamber had favored the Prosecution, including the fact that the Defense was not notified about a recent submission from the Prosecution. The President interrupted counsel Vercken three times during his closing statements, reminding him to stay within the scope of Case 002/01 and to abide by the “code of conduct.” Vercken responded to the President:

If you allow the Prosecution to plead points outside of the trial, why should I not be allowed to respond to them? What kind of justice is this that allows the Prosecution to say anything but prevents the Defense from speaking?

The fact that the President had allowed the Prosecution to present their final statements without interruption, despite the fact they had also ventured beyond the scope of Case 002/01, only strengthened Vercken’s assertion.

### **b. Right to be Informed of the Nature and Cause of the Charges**

The Khieu Samphan Defense presented two examples to show violation of their client's right to be informed of the nature and cause of the charges against him. The first relates to the Trial Chamber's decision to sever the case without consistently limiting Parties to the facts falling within the scope of Case 002/01 during the trial.<sup>22</sup> Referring satirically to his client as a "horrible henchman," Vercken argued that the Chamber allowed the scope of the trial to be modified with facts that were, according to its own decision, not supposed to be covered during the trial. With the Trial Chamber's decision on scope of the trial displaying on the screen, Vercken highlighted the ways the Prosecution had changed their factual and legal argumentation at the conclusion of the trial and had essentially asked the Chamber to find Khieu Samphan guilty based on facts that are outside the pre-determined scope.

Vercken described numerous examples where the Chamber prevented the Defense from venturing outside the scope when questioning witnesses and experts. However, in stark contrast, counsel Vercken recounted how the Chamber had allowed the Prosecution to plead the whole indictment at the conclusion of the trial. He added incredulously, "[W]e are not talking about the same trial here."

### **c. Right to Understand the Charges in a Language Understood & Right to Adequate Time and Facilities to Prepare a Defense**

Relevant to the right to understand the charges in a language understood and the right to adequate time and facilities to prepare a Defense, the Khieu Samphan Defense Team referred to the fact that the Khieu Samphan Defense was not provided with a French translation of the Prosecution's Closing Brief.<sup>23</sup> Vercken asked the Chamber judges if it kept them up at night to know that Khieu Samphan's lawyers could not read the Prosecution's arguments in a language they understand and had to wait until the last days of the trial in order to understand their arguments. The Defense team requested the postponement of Closing Statements until after the briefs were translated. However, this request was rejected by the Chamber, which, in August, advised all the Parties by written memorandum that they were only required to file Closing Briefs in one of the Court languages due to limitations in the Interpretation and Translation Unit. In an attempt to "balance the fairness and expeditiousness of the proceedings," two interpreters were provided to assist the Defense teams in the lead up to Closing Statements.<sup>24</sup>

The Chamber's ruling is consistent with a Supreme Court Chamber decision issued earlier this year, which confirmed that neither the ECCC rules nor international practice supports a right to trilingual translation of all documents, and further determined that the Khieu Samphan Defense Team is "collectively fluent in English, French and Khmer."<sup>25</sup> However, it is nonetheless arguable that the limited capacity of Khieu Samphan's Defense Team to read the Prosecution's Closing Briefs prior to Closing Statements placed the Defense at a disadvantage vis-à-vis the Prosecution.

## **2. Judicial Impartiality & the Presumption of Innocence**

Although the Defense Team did not specifically plead a violation of the presumption of innocence, Anta Guisse commenced her argument by stating emphatically, "convict them, convict them quickly before they die!" She then proceeded to argue that everyone, including the ECCC international donors, expected nothing other than a guilty verdict. In relation to judicial impartiality, the Defense counsel framed her argument as an appeal to the Chamber judges to set aside their bias and pre-conceived ideas about the KR. Guisse argued that the historical context was undeniably at the "heart of the trial." Building on this point, she

referred to the paradox of international criminal courts insofar as they seemingly bring the rights of the Accused to the fore but ultimately seek a symbolic result. She asked, "do you want to try a man or do you want to try history?"

## **VI. TRIAL MANAGEMENT**

The Chamber heard the conclusion of the OCP's Closing Statements on Monday and the two Defense Teams for the remainder of the week. The Khieu Samphan Defense will continue with its Closing Statement the following week. There were no proceedings on Wednesday due to the public holiday, Paris Peace Agreements Day.

### **A. Attendance**

Nuon Chea continued to observe proceedings from the holding cell throughout the week because of his health condition. However, on Monday, the President requested him to be brought to the courtroom to hear the sentencing request from the Prosecution. Khieu Samphan was present in the courtroom during all sessions.

**Civil Parties:** Between 20 to 30 Civil Parties from a range of provinces across Cambodia attended the proceedings daily, either in the courtroom or in the public gallery. Prior to the adjournment on Monday, the Trial Chamber officially recognized Ms. Elodie Dulac as a new Civil Party Lawyer. She will act as the international counterpart of National Civil Party Lawyer Sam Sokong.

**Parties:** Before the start of the proceedings on Monday, the Greffier informed the Chamber that CPLCL Pich Ang was absent. Pich Ang, however, arrived in the courtroom about twenty minutes later. All Parties were properly represented during the week.

#### **Attendance by the Public:**

<b>DATE</b>	<b>MORNING</b>	<b>AFTERNOON</b>
Monday 21/10/2013	<ul style="list-style-type: none"><li>▪ 300 villagers from Banteay Srey District, Siem Reap Province</li><li>▪ 35 foreign observers</li><li>▪ 35 law students from Royal University of Law and Economic (RULE)</li><li>▪ 3 monks</li></ul>	<ul style="list-style-type: none"><li>▪ 300 high school students from Pursat province</li><li>▪ 30 foreign observers</li></ul>
Tuesday 22/10/2013	<ul style="list-style-type: none"><li>▪ 150 students from Asia Europe University</li><li>▪ 56 notarial law students</li><li>▪ 20 foreign observers</li></ul>	<ul style="list-style-type: none"><li>▪ 35 Cambodians</li><li>▪ 10 foreign observers</li></ul>
Thursday 24/10/2013	<ul style="list-style-type: none"><li>▪ 150 students from Human Resource University, Phnom Penh</li><li>▪ 50 foreign observers</li></ul>	<ul style="list-style-type: none"><li>▪ 1 monk</li><li>▪ 200 students from RULE and Human Resource University, Phnom Penh</li><li>▪ 30 foreign observers</li></ul>
Friday 25/10/2013	<ul style="list-style-type: none"><li>▪ 300 high school students from Kandal province</li><li>▪ 35 law students from RULE</li><li>▪ 100 notarial law students</li><li>▪ 40 foreign observers</li></ul>	<ul style="list-style-type: none"><li>▪ 150 students from the National Youth Association of Takeo Province</li><li>▪ 35 students from RULE, Phnom Penh</li><li>▪ 35 foreigner observer</li></ul>

### **B. Time Management**

The Chamber managed the time well this week and tried to adhere to the pre-determined time allocation, while showing some flexibility. Before this week's adjournment, the President informed the Parties about the following week's schedule, and confirmed that Kong Sam Onn would have 15 minutes to conclude his closing arguments on Monday before rebuttals commenced.

#### **C. Courtroom Etiquette**

The public gallery was well organized and quiet throughout the week, with members of the public listening intently to the final statements in Case 002/01. In relation to etiquette in the courtroom, the President interrupted Vercken during his Closing Statements, after the Defense lawyer made several remarks about the Court and the "defection of the Commander" of the Prosecution.<sup>26</sup> The President held the view that Vercken had gone outside the scope of Case 002/01 and suggested that the Defense lawyer was offensive. (See also **V.B.1.A**).

#### **D. Translation and Technical Issues**

There were some minor translation and technical issues during the week, largely due to the fast paced speech of several of the lawyers, who were asked to slow down on a number of occasions to allow the Interpretation and Translation Unit to catch up. A minor technical issue occurred when Prosecutor Smith attempted to play a video clip of Nuon Chea and no Khmer translation appeared. This was resolved quickly and the clip was played once again.

#### **E. Time Table**

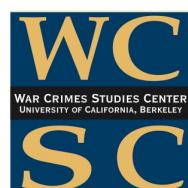
DATE	MORNING SESSION 1	MORNING SESSION 2	AFTERNOON SESSION 1	AFTERNOON SESSION 2	TOTAL HOURS IN SESSION
Monday 21/10/13	9:06-10:31	10:49-12:01	13:36-14:39	15:00-15:53	4 hours and 32 minutes
Tuesday 22/10/13	9:04-10:31	11:01-13:18	13:30-14:44	15:02-16:06	6 hours and 02 minutes
Thursday 24/10/13	9:02-10:30	10:54-11:53	13:31-14:39	15:01-15:32	4 hours and 04 minutes
Friday 25/10/13	9:02-10:32	10:51-12:01	13:31-14:39	15:01-16:59	4 hours and 45 minutes
Average number of hours in session					4 hours 51 minutes
Total number of hours this week					19 hours 25 minutes

**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
ICTY	International Criminal Tribunal for the former Yugoslavia
IR	Internal Rules of the ECCC Rev. 8 (2011)
KR	KR
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 is 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 Francisca Gilmore, Tobias Roemer, Borany Bon, Chhay Chhin, Melanie Hyde, Aviva Nababan, Noyel Ry, and Penelope Van Tuyl 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](http://www.krtmonitor.org)>, and at the websites of the [East-West Center](#) and the [War Crimes Studies Center](#).

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<sup>1</sup> The OCP relied on Thet Sambath interviews, when Nuon Chea told the journalist that he had received so many confessions from S-21 that he could not read them all, testimony of Duch and Ieng Sary who both confirmed that he was a member of the Military Committee, a speech he gave to the army in 1977 on behalf of the Military Committee, telegrams sent to Nuon Chea from Division 164, Standing Committee minutes that listed Nuon Chea as the Deputy Secretary, annotations Nuon Chea had allegedly made on S-21 confessions and the fact he had served as acting Prime Minister for one year between 1976 and 1977.

<sup>2</sup> This was based on the fact that Khieu Samphan was listed as present in 16/19 Minutes of Standing Committee meetings.

<sup>3</sup> The OCP elaborated on Khieu Samphan's role as the head of Office 870, responsibility for putting King Norodom Sihanouk under house arrest, notes of a meeting where Khieu Samphan had contemplated killing the King, an interview where the Accused had defended the KR regime and claimed that were it not for the KR, Cambodia would have fallen to the Vietnamese and that the little S-21 in Cambodia was nothing compared to the "giant S-21 over there in Cochinchina."

<sup>4</sup> The Pre-Trial Chamber found that the third extended form of JCE, which stretches to crimes committed that were a natural and foreseeable consequence of implementing the common design, did not exist during the temporal period of the ECCC. See Pre-Trial Chamber, Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010. Doc. D97/15/9.

<sup>5</sup> The OCP raised his position as Minister of Commerce, his knowledge and supervision of the large amount of rice being exported from Cambodia, party telegrams and Khieu Samphan's possible membership of Office 870, his signature on the order for evacuation of top KR leaders, public statements made on CPK radio, and Thet Sambath's "One Day at Tuol Po Chrey" in which Nuon Chea says about enemies, "they were killed and destroyed. If we had let them live the party line would have been hijacked. They were enemies of the people."

<sup>6</sup> For more on David Chandler's testimony, See CASE 002 KRT TRIAL MONITOR. Issue 28. Hearing on Evidence Week 23 (18-20 June 2012), and Issue 70 See CASE 002 KRT TRIAL MONITOR. Issue 70. Hearing on Evidence Week 63 (16-18 June 2013).

<sup>7</sup> The OCP relied on minutes from a meeting with visiting members of the Danish Community Party, and speeches and statements given by Khieu Samphan.

<sup>8</sup> The meeting occurred in early April 1974, supported by testimony of Pol Pot's bodyguard's Rochoem Ton (alias Phy Phuon). Rochoem Ton also testified to having seen Nuon Chea and Khieu Samphan at the meeting, asserting that Khieu Samphan and Nuon Chea wholeheartedly consented to the plan, adding their own endorsements.

<sup>9</sup> The Prosecutor quoted an interview given by Nuon Chea to Thet Sambath, stating he saw "haggard and weary" evacuees facing the "most difficult" of conditions.

<sup>10</sup> Smith quoted Expert Witness David Chandler, who argued that the second population transfer of people to the NW Zone constituted an effort by the CPK leadership to further define the Cambodian people between "us and them," or the Revolutionaries and their defeated urban foes.

<sup>11</sup> The OCP referred to minutes from a Standing Committee Meeting in August 1975, and a document entitled "Exam of Control and Implementation of Policy Line on Restoring Economy and Preparing to Develop Country in every Sector," which records the collective decision by Party Center to move 500,000 people to the Northwest Zone from Eastern areas. Smith pointed specifically to a reference in the document to "initiatives for state commerce," arguing that this necessarily meant the Ministry of Commerce (Khieu Samphan).

<sup>12</sup> Koppe noted the term only entered the Chamber lexicon during the testimony of Philip Short on 8 May 2013.

<sup>13</sup> Both Witness Stephen Heder and Francois Ponchaud denied seeing any executions.

<sup>14</sup> See CASE 002 KRT TRIAL MONITOR. Issue No. 66, Hearing on Evidence Week 61 (1-4 July 2013).

<sup>15</sup> For discussion on Thet Sambath, See CASE 002 KRT TRIAL MONITOR. Issue No. 50, Hearing on Evidence Week 36 (21-24 January 2013).

<sup>16</sup> For Witness Lay Bony testimony, See CASE 002 KRT TRIAL MONITOR. Issue No. 41, Hearing on Evidence Week 45 (22-25 October 2013).

<sup>17</sup> "However, JCE II requires an additional element regarding the intention of the Accused person, who must be personally aware of the system of ill treatment and have the intent to further it." See Pre-Trial Chamber, Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010. **Doc. D97/15/9**, para 37-39.

<sup>18</sup> See CASE 002 KRT TRIAL MONITOR. Issue No. 63, Hearing on Evidence Week 61 (10-14 June 2013).

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<sup>19</sup> See for example, Nuon Chea Defense, “Reply to the OCP Response to List of Documents to be Put Before the Chamber During the First Mini-Trial,” 27 February 2012, Doc. E131/1/14/1.

<sup>20</sup> For the testimony of Philip Short, See CASE 002 KRT TRIAL MONITOR. Issue No 59, Hearing on Evidence Week 54 (6-10 May 2013).

<sup>21</sup> Other examples cited by the Defense included the prohibition on the use of documents to impeach witnesses, despite it being acceptable international and Cambodian practice; the ruling to allow the Civil Parties to review statements before testifying, making it impossible for the Defense to test the memory of events they had experienced more than 35 years ago preventing the Defense from challenging OCIJ interviews, despite informing them during the pre-trial phase, that they would be permitted to raise the issues during the trial; and preventing the Defense from asking questions about the investigation or the methodology used by Stephen Heder.

<sup>22</sup> For detailed analysis on the inconsistent application of the Severance Order, see KRT Monitor, Case 002/01 Highlights: Severance Order: <http://krtmonitor.org/2013/10/15/case-00201-highlights-severance-order/>.

<sup>23</sup> See Internal Rule 21(1)(d).

<sup>24</sup> See Trial Chamber Memorandum, 22 August 2013, Doc. E295/4.

<sup>25</sup> See Article 35 of ECCC Law, which provides the free assistance of an interpreter. See also Supreme Court Chamber Decision on Request by the Defence for KHIEU Samphan for Trilingual Notification of the Supreme Court Chamber’s Decisions, 30 April 2013, Doc. E163/5/15, paras 4, and Pre-Trial Chamber Decision on Khieu Samphan’s Appeal Against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, Doc. A190/I/20.

<sup>26</sup> Vercken was presumably referring to International Prosecutor Andrew Cayley, who resigned two weeks prior to Closing Statements.