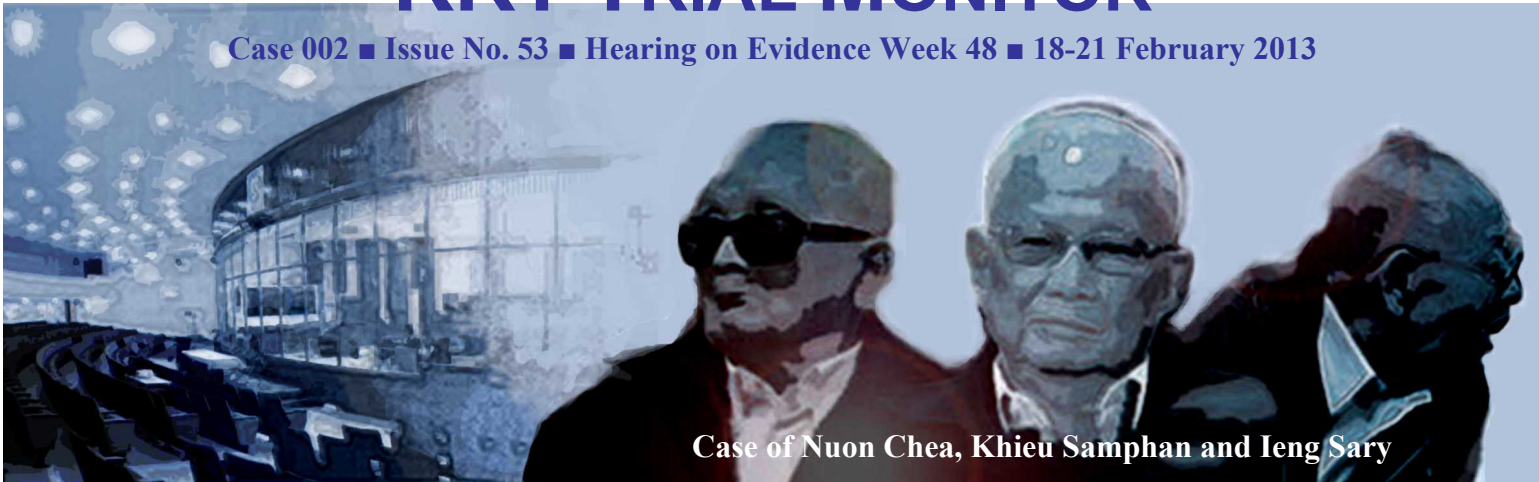


KRT TRIAL MONITOR

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Case of Nuon Chea, Khieu Samphan and Ieng Sary

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

*I think there's an old Spanish proverb that says,
"A wise man changes his mind, a fool never will."*

- Victor Koppe

I. OVERVIEW

On 8 February 2013, the Supreme Court Chamber (**SCC**) rendered a decision declaring the Severance of Case 002 invalid.¹ To comply with the SCC decision, and to guide the Trial Chamber in formulating a decision on how to further proceed in Case 002, the Trial Chamber devoted this week to hearing the Parties' responses to the questions it posted in Memoranda dated 12 February² and 19 February.³

II. LEGAL AND PROCEDURAL ISSUES

Early this month, acting on an immediate appeal filed by the OCP, the Supreme Court Chamber rendered a decision concerning the Trial Chamber's decision which had partially denied a request to expand the scope of the first trial in Case 002. The Supreme Court Chamber overturned the Trial Chamber's decision on the grounds that the original severance of Case 002 in September 2011,⁴ and related subsequent decisions,⁵ had lacked clarity and reasoning. The Court also ruled that the Trial Chamber had failed to give the Parties sufficient opportunity to be heard before the Court had severed Case 002 and defined the scope of Case 002/01.⁶

The Supreme Court Chamber recognized that the decision to sever the proceedings into more expeditions segments was likely triggered by concerns about the scale and complexity of Case 002, and the deteriorating health conditions of the Accused. However, these concerns did not outweigh the requirement that the Trial Chamber make such a decision in a clear and reasoned fashion, with sufficient time for the Parties to be heard beforehand. The Supreme Court Chamber ruled that the Trial Chamber's original order was invalid, but stated that the Trial Chamber remained empowered to reassess a mode of severance for Case 002, after inviting submissions from the Parties, and taking into consideration all relevant factors and legitimate interests.

A. The Trial Chamber's 12 February Memorandum

As a consequence of the SCC decision, the Trial Chamber scheduled hearings this week for the Parties to address the issues enumerated in the Trial Chamber's 12 February Memorandum.

The OCP and Civil Parties were asked to address the following:

1. "[T]he concern that the entirety of the charges in the Case 002 Closing Order are unlikely to be able to be tried within the Accused's likely lifespan or before they become unfit to stand trial."
2. Whether they "prefer the Chamber to attempt to try a broader array of charges and factual allegations in Case 002" or to proceed with a more limited array of charges and factual allegations, "thereby increasing the likelihood that a verdict can be rendered."
3. Whether they still oppose the Trial Chamber's definition of the scope of its first trial as expressed in the Severance Order and related decisions.
4. If they maintain their request to expand the scope of Case 002/01, and whether this request is limited to the addition of factual allegations related to S-21 and District 12, or a broader range of factual allegations and charges is necessary to ensure reasonable representation.

The Trial Chamber requested that all the Parties comment on the following matters:

1. A Trial Chamber proposal to proceed to hear expert Elizabeth Becker, who was scheduled to begin testifying on 18 February, and all other individuals imminently scheduled to appear before the Chamber "on the basis of the scope of the trial as defined in the Severance Order and related decisions."
2. The number of documents, witnesses, experts and Civil Parties required in support of or in rebuttal to any extension of the scope of Case 002/01, and the time needed to prepare them.
3. Whether the Trial Chamber may proceed with the hearing of the evidence in Case 002/02 after the conclusion of the hearing of evidence in Case 002/01, following a judicial recess for the Parties to prepare for the next trial segment and for the Trial Chamber to draft the partial verdict on Case 002/01.
4. Whether prejudice has resulted to the Parties from the "lack of a concrete timetable" for later trials in Case 002.

Finally, the Trial Chamber asked all the Defense Teams to address the following:

1. The impact of the annulment of the severance of Case 002 on the right of the Accused to a fair and expeditious trial and proposed measures to avoid or remedy any prejudice to the Accused.

B. Comments of the OCP

The Prosecution maintained that severing Case 002 is still in the best interest of justice, given that it is "highly unlikely" and "intangibly remote" that the three Accused can face trial

for all charges in Case 002 while still alive and/or fit to stand trial. They believe that the current trial, Case 002/01, will be the only trial; therefore, Trial 01 must be “reasonably representative” of the entire indictment in the Closing Order. In order to make the Severance Order “reasonably representative,” the OCP proposes the addition of the crime site Security Center S-21.

International Prosecutor Andrew Cayley outlined his argument based on the eight factors of “reasonable representativeness” established through ICTY case law.⁷ He argued that the addition of S-21 would make Case 002/01 significantly more representative of the types, classification, and nature of crimes in the original indictment. This would be accomplished by adding four charges of crimes against humanity (enslavement, imprisonment, torture, and other inhumane acts through attacks on human dignity), four unique grave breaches of the Geneva Conventions (willfully causing great suffering, willfully depriving a prisoner of war the right to a fair trial, unlawful deportation of civilians, and unlawful confinement of civilians), and by addressing three, as opposed to just one, criminal policies identified as part of Joint Criminal Enterprise (JCE) in the Closing Order. S-21 would also make Case 002/01 more “geographically reflective” of the crimes in the original indictment since victims from every corner and zone of Cambodia were tortured and executed at S-21. The mass number of S-21 victims, 12,272, is more reflective of the scale of crimes. Additionally, the fact that both internal and external enemies were imprisoned at S-21 makes the crime site more representative of the different categories of victims during the DK regime. S-21 is also more representative of the entire DK period since it was operational from October 1975 to 7 January 1979. Finally, S-21 reflects “the heart” and fundamental nature of the case: arrests, torture, and murder at security centers.

C. Comments of the Civil Parties

National CPLCL, Pich Ang, expressed that the Civil Parties would like for a verdict to be rendered while the Accused are still alive and fit to stand trial. Taking into account the health and age of the Accused, as well as the financial constraints of the Court, the Civil Parties wished to proceed with a severed trial that ends within a reasonable time. They concurred with the Prosecution’s submission to include S-21, and said that they consider its addition “very appropriate.”

International CPLCL, Elisabeth Simonneau-Fort, also used Monday’s hearing to discuss three additional concerns of the Civil Parties. First, Simonneau-Fort took issue with the Trial Chamber’s “unfounded” exclusion of the crimes of genocide and persecution based on religious grounds from the Severance Order.⁸ According to Simonneau-Fort, the Severance Orders can only apply to persons and facts, not to the judicial characterizations of crimes. Next, she sought the Chamber’s clear and unequivocal affirmation of the following sentence from Paragraph 8 of the 22 September 2011 Severance Order: “Limiting the scope of facts to be tried during the first trial accordingly has no impact on the nature of Civil Party participation at trial.” In other words, she wants to ensure that no Civil Parties are excluded as a result of a new severance order. Building on consolidated participation, Simonneau-Fort sought affirmation from the Chamber that a new severance order would not have an effect on the selective awarding of reparations. As she explained, “So long as the Civil Parties form a consolidated group, they are entitled to a collective reparation awarded to the entire group.”⁹ Accordingly, all Civil Parties must benefit from eventual reparations.

D. The Trial Chamber’s 19 February Memorandum

On 19 February, while sessions were suspended to allow the Defense Teams to consult with the Accused, the Trial Chamber issued another Memorandum, which requested that the Parties comment on the following additional matters:

1. The Trial Chamber will hear assessments of medical experts on the health condition of the Accused in mid-March 2013, and these may affect the determination of the scope of proceedings.
2. A written and reasoned decision on severance will very likely not be available in two official ECCC languages for another two to three weeks.
3. Philip Short and Elizabeth Becker are scheduled to testify in the subsequent trial weeks. If these experts are not heard as currently scheduled, it is likely that the Chamber will lose the ability to hear them at all.
4. Prior to a written severance decision, should hearing of witnesses be postponed, or may witnesses testify in relation to the scope of trial as understood by the Parties before the annulment of the Severance Order and related decisions?
5. In the event S-21 is included in the scope of the trial, the Trial Chamber sought confirmation from the OCP of the time required to hear five individuals¹⁰ and present approximately 200 documents. The OCP was also asked to clarify if they seek to include S-24 (Prey Sar) within this proposed extension.
6. The Chamber asked the Defense Teams to indicate if their clients' would be willing to waive their right to be present in the event the Accused were unable to attend proceedings and individuals whose testimonies were relevant to S-21 were called.
7. Whether the OCP's estimate of the time required for the conclusion of a new S-21 trial segment depends on the admission of transcripts from Case 001, and whether or not the Defense Teams will seek to contest the admission into evidence of Case 001 transcripts concerning S-21.

E. Comments of the Defense Teams

After cancelling proceedings on Tuesday to give the Defense Teams time to consult with their clients and consider the submissions of the OCP and Civil Parties, the Trial Chamber gave the floor to the Defense on Wednesday to respond to the matters raised in the Trial Chamber's 12 February and 19 February Memoranda.

1. Submissions of the Nuon Chea Defense

According to Victor Koppe, international counsel for Nuon Chea, the best course of action would be to not sever at all, and to hear the entire case instead. This, Counsel argued, would be the only way for Nuon Chea to advance his full legal defense. The Counsel stated that Nuon Chea believes in what he did and why he did it. This trial is Nuon Chea's only opportunity to explain his actions to the public and present "a fuller version of the historical truth." A limited scope restricts the Defense Team from fully demonstrating their defense that the program Nuon Chea and other senior KR leaders initiated was intended to ensure Cambodia's economic security and territorial integrity in the face of a humanitarian crisis and threat from at least two stronger militaries. With a severed case, Counsel argued, only fragments of testimonies could be heard. This produces a confusing and incomplete account of the DK era.

Koppe argued that it had been difficult to separate testimonies relating to matters within the scope of Case 002/1 from the rest of Case 002. There were "indirect references" to cooperatives and security centers. However, because these matters were not within the

scope of the first severed portion of trial, the Defense was not given the opportunity to put them into context, explain their functions, and explain Nuon Chea's role in them. Further, according to Koppe, it would be difficult for Nuon Chea to believe he would be judged impartially in subsequent trials if he were already convicted for a first trial.

He noted that the Closing Order concluded that Nuon Chea probably committed genocide. The Khmer Rouge period and Cambodia is usually associated with genocide, so in the minds of the public, Nuon Chea is guilty of genocide. "Yet genocide is one of the few crimes whose very occurrence is contested even by experts sought by Prosecution." Thus, continued Koppe, "Addressing and answering the question of whether it occurred would be a rare and tangible contribution by this Court to the historical narrative." The "genocide question," more than anything that happened at S-21, goes to the heart of the DK period, Counsel argued, and affects how Nuon Chea is perceived.

Koppe added that S-21, contrary to the submission of the OCP, is not representative of Case 002. Security Center S-21 deals with only one of the five alleged policies of DK: the re-education of enemies. Indeed, Koppe said, the Case 001 Closing Order is "explicit" that S-21 was "unique" in the network of security centers, given its direct links to the Central Committee and its role in the detention and execution of CPK cadres. Koppe argued, "Unique is the opposite of representative."

He also pointed out that, if the facts relating to S-21 were tried again, there would be questions on "whether this Chamber could impartially judge the same facts for a second time," especially in relation to testimony from Kaing Guek Eav *alias* Duch, whose credibility the Nuon Chea Defense has challenged. He noted that S-21 is famous, and the Chamber has already adjudicated that very serious crimes were committed there. However, "it will not succeed in telling the story of DK," as it does not "resonate" with a representative sample of victims. While S-21 seems easy to prove, because Duch has testified, and a judgment on Case 001 has already been issued, the objective of the Chamber is not to get a conviction. The job of the Trial Chamber, Koppe argued, is to judge the allegations in the Closing Order as presented by a different authority.

It would constitute a serious failure in that role if the Chamber were to decide not to assess the conduct of the Accused, but to move as quickly as possible to get a guilty verdict down on paper.

In regard to Civil Parties, Counsel noted that reparations and Civil Party status are available only to Civil Parties who are injured by the crimes adjudicated by the Court. Out of 4,000 Civil Parties in Case 002, only 1,166 Civil Parties will be "recognized in a final judgment and be possibly eligible for reparations," given the scope of Case 002/01. Thus, Koppe said, the Civil Party Lawyers cannot support the "very narrow version" of the Closing Order suggested by the OCP and "pretend that they are not cutting off the access of an overwhelming number of victims to justice."

Koppe also submitted that they are opposed to hearing previously scheduled witnesses prior to resolving these questions, because uncertainty about the scope of the trial would likely cause significant confusion. No witnesses should be heard until the Chamber issues a decision as to the scope of trial, although the Chamber could issue a disposition and proceed with hearing of evidence, with the reasoning that the decision would follow later. He also submitted that any witness whose testimony could touch on issues outside the current scope of Case 002/01 should be briefly delayed to allow the Parties to prepare.

In the event that Case 002/01 is extended to include S-21, Koppe indicated that this would likely trigger the Defense Team to seek to admit additional evidence. Counsel argued that a

“far more searching examination of what happened” in S-21 is needed and more evidence will be required to challenge Duch’s credibility. He indicated that the Defense can only give a preliminary answer on this matter, considering that they heard proposals from the OCP and Civil Parties less than 48 hours ago, and Nuon Chea had been confined in the hospital until the previous day and was, thus, not “easily consulted.”

On the issue of whether Case 002/02 can proceed while the judgment in Case 002/01 is being drafted, Koppe opined that this is “impossible” because of the “substantial overlap between Case 002/01 and any subsequent trials.” In particular, Counsel raised concerns about whether the judgment in Case 002/01 would constitute *res judicata*¹¹ and thus be fundamental to subsequent trials. Regarding the prejudice suffered by the Defense because of the SCC’s annulment of the Trial Chamber’s severance, Koppe stated that they questioned witnesses and introduced evidence on the assumption that they do not have to raise a defense against most charges in the Closing Order. However, this can be “easily remedied” as long as all the Parties are given adequate opportunity to present relevant evidence, including recall past witnesses, after the Chamber issues a decision on the severance of the case.

2. Submissions of the Ieng Sary Defense

International counsel for Ieng Sary, Michael Karnavas, was clear in stating that their Defense Team believes the Trial Chamber should try the entire case. Counsel argued that the SCC was requiring the Trial Chamber to act *ultra vires* (outside the scope of its power), and was seeking to “transform” the ECCC into the ICTY by citing and applying ICTY jurisprudence to justify a desired result. He argued that the Trial Chamber has no authority to “cherry-pick” parts of the Closing Order and, thereafter, “park” and leave rest in the “stratosphere.” He reminded the Chamber, “This system does not allow you to dismiss portions of the Closing Order. You must try the entire case.” Karnavas pointed out that the ICTY rule on representativeness (referenced by the OCP in its submissions) had been designed to focus on dismissing portions of the indictment. The Counsel said it was “rather fanciful” to say that this rule went to severance. “It goes to dismissal.”

He reminded the Trial Chamber that, according to a decision of the Supreme Court Chamber,¹² the grounds for terminating cases are limited to those found in the Criminal Procedure Code of Kingdom of Cambodia, as follows:

Article 7. Extinction of Criminal Actions

The reasons for dropping a charge in a criminal action are as follows:

1. The death of an accused person;
2. The expiration of the statute of limitations;
3. A general grant of amnesty;
4. Abrogation of the criminal law; or
5. The *res judicata*¹³

Karnavas recalled that their Defense Team had supported the manner in which the Trial Chamber severed the case, because it was very explicit that they were “doing discrete segments of the Closing Order, never saying that the rest goes away.” Counsel also argued that, contrary to what was indicated in the SCC decision, the Parties, including the OCP, had been heard: “We have been heard, maybe not initially, but have been heard.” Karnavas pointed out that the OCP had asked the Chamber to be mindful that the average lifespan of Cambodian males is 60 years old. When the OCP began preparing their Introductory Submission in 2006, Ieng Sary was at least 81 years old. However, despite the advanced age of the Accused, the OCP had continually expanded the introductory submission, filing supplementary submissions dealing with the North Zone, forced marriages, genocide against Chams, and sexual crimes. Given what the OCP included in its Introductory Submission,

Defense Counsel argued, the Trial Chamber had no choice: "The position you took was the correct position... it was severed in the only way it can be severed." Karnavas said that the SCC is currently giving the Trial Chamber a choice: continue what it is doing, but explain the plan's "manageability;" or have a "mini-trial." Karnavas recalled that the SCC gave some suggestions on how to proceed, including establishing a second Trial Chamber panel. However, these suggestions were derived from the ICTY's *Mladić* decision and "impossible" to carry out in the ECCC, because it did not have the ICTY's resources.

Karnavas also touched on the claims of the Civil Parties, saying that he is "wondering" if the Civil Parties were consulted as the Civil Party Lawyers were "jettisoning them and abandoning them by latching on to Prosecution's proposal." Agreeing with Koppe, he said it is "ridiculous" to suggest that the Trial Chamber can enter a legal finding on matters it had not heard.

He also pointed out that, while the OCP was proposing the inclusion of S-21 in the scope of the trial, it is unclear how other charges would be dealt with. Whether the Trial Chamber continues with how it has been proceeding, or decides to have a "more representative" trial, it will still need funding, logistics, and a concrete plan. He described drafting a plan that addresses all relevant interests as an "ambitious undertaking," and a "logistical nightmare." Thus, he said, the only way forward is to try the entire case. He argued that having a "mini-trial" raises some questions: Are the Accused not entitled to some certainty as to what will happen to the remainder of the case? Are they supposed to be held "dangling in air," not knowing whether they will be tried some more?

Karnavas pointed out that, "since the Supreme Court seems to be suggesting that this is an adversarial proceeding," the Prosecution has the burden of proof. He thus suggested that the Trial Chamber order the Prosecution to come up with a list of witnesses and documents that they believe will prove the case for the entire Closing Order. He informed the Chamber that the Defense Team does not wish to propose new witnesses or evidence, and will instead leave it to the Prosecution to present its case, since proceedings are "adversarial." However, he anticipated that some past witnesses might have to be recalled.

Counsel also addressed the issue of how soon the Trial Chamber could commence hearing evidence for Case 002/02 after the conclusion of presentation of evidence in Case 002/01. He opined that, since the Trial Chamber is only severing Case 002 (meaning it is a continuous trial being done in segments) it is "theoretically possible" for the Trial Chamber to give the Parties "some respite to regroup and to begin immediately with the other segments." Karnavas noted, however, that "there are complications" and the Parties would need to wait and see what the Trial Chamber's plan is. Further, he indicated that there is a "realistic possibility that there will not be any funding."

As to the prejudice suffered due to the nullification of the Severance Order, he stated that he had not "suffered from any anticipatory anxiety," had not lost sleep, nor did he need "tranquilizers to keep [his] heart still as to what will happen in 002/01." How the Defense Team might be prejudiced later, however, depends on how the Trial Chamber formulates its plan.

In conclusion, he stated that the annulment of the Severance Order would likely result in a more expeditious trial, by bringing greater certainty, and ensuring fewer procedural disputes in court. He reminded the Trial Chamber that it could exert its control over the flow of evidence and the tempo of trial, and decide how much time the OCP has to try the case.

The onus is on the Prosecution. They came up with this Closing Order. Let them come up with a plan on how to try the Closing Order at this stage... It is the Prosecutors who have risked the prolongation of this case by appealing your Honors' reasonable approach in trying to manage this unmanageable Closing Order, which they drafted knowing fully well the age of the Accused and knowing fully well that the average life span in Cambodia is 61, and my client had surpassed the lifespan at least by 20 years.

3. Submissions of the Khieu Samphan Defense

Arthur Vercken, international counsel for Khieu Samphan, informed the Court that their position is different from that of the other Defense Teams because the circumstances of Khieu Samphan's case are different. "Khieu Samphan is not going to die." He is in "fairly good health" and he wishes to be tried and be acquitted as quickly as possible so he can live the remainder of his life with his family.

Vercken estimated that it would take around three years before a verdict could be reached. Counsel pointed out that this is a "considerable length of time" to detain an 82 year old man who is presumed innocent. Thus, Vercken reasoned, the Defense Team will be prejudiced, regardless of whether the Trial Chamber opts for "mini-trials," or "for something that is more representative," or to judge the entire Closing Order. He submitted that the severance "excessively lengthened the procedure." Vercken observed that the Trial Chamber never took a final decision on the scope of the trial, and left "doors perpetually open." Counsel said that they are now given with two options on how to proceed: hear the case in segments or proceed with the entire case without severance. What the Defense Team really wants, he argued, are "Rules that are permanent, rather than fluctuating."

Vercken concurred with Koppe that S-21 should not be included in the scope of trial. The Counsel also said that they do not wish to propose any new witness relating to S-21, although the Defense was reserving its right to recall past witnesses. Vercken also believed that it would not be wise to move on to hearing evidence in Case 002/02 soon after the presentation of evidence in Case 002/01. Counsel finally expressed that they are not very concerned about "meticulous day-to-day accounting," but are more concerned with how they are being tried.

What really matters is whether or not the Accused know why they are being tried and how they are being tried. Although we have been running for a year and a half now, we haven't really known the answer to that question.

Counsel indicated that Khieu Samphan's right to a fair and speedy trial had already been violated. He thus proposed a "severance in persona," or "judging Khieu Samphan for the entire Closing Order on his own." This would mean that, whenever the other Accused encountered health problems that made it impossible for them to come to the courtroom, the Chamber would be able to concentrate on Khieu Samphan's trial. He also added that their Team will be submitting a request that the Accused be placed under house arrest so that he may "calmly await" the verdict.

National counsel Kong Sam Onn then took the floor and emphasized Khieu Samphan's right to be presumed innocent and to a fair and expeditious trial. Counsel said that Khieu Samphan's right to a speedy trial is violated each time proceedings are postponed due to the health condition of a co-Accused. He also questioned why the current case was taking place 38 years after the alleged crimes were committed. He proposed that Khieu Samphan be released on bail and that Khieu Samphan's case be severed from that of the other Accused.

a. Comments Relating to Hearing of Khieu Samphan's Character Witnesses

Upon the President's request for comments, Vercken moved for the postponement of the hearing of Khieu Samphan's character witnesses, TCW-665 and TCW-673, who were scheduled to commence testifying on 20 February 2013. According to Counsel, these witnesses would be able to testify on factual allegations against Khieu Samphan, and not merely on his character. When the Chamber gave the other Parties a chance to submit their comments on this matter, Karnavas said that once witnesses, including character witnesses, are called to the stand, all questions relevant to the case are "fair game." If the scope of the case is narrow, then the witness's testimony may be limited within the confines of this scope. However, as things now stand, nothing was limited. Thus, Karnavas argued, the Trial Chamber was required not to hear any witnesses until the severance issue was settled.

F. Responses by the OCP and Civil Parties to Comments of the Defense

In response to Defense submissions, International Prosecutor Dale Lysak observed that, while the OCP simply wanted to add the crime site of S-21 to the Severance Order, the Defense Teams generally wanted the Trial Chamber to try the entire case. He labeled Nuon Chea's submission as "the mother of all flip-flops," given that the Team previously said that the Severance Order is "without a doubt the most sensible decision to emerge from the ECCC." Lysak dismissed Koppe's submission as a delay tactic used to generate chaos and forestall a verdict until his client is no longer fit to stand trial. Lysak restated the reasons the OCP considers S-21 sufficiently representative, but he noted that, if the Trial Chamber disagrees, the OCP is prepared to also add the Tram Kok Cooperatives, which were considered model cooperatives of the DK regime.

With regard to the Ieng Sary Defense team submission, Lysak dismissed Karnavas' criticisms of the SCC decision, and submitted that, if the Trial Chamber proceeds to have one smaller representative trial, they are "not required to have a plan for other trials, because the assumption is that that prospect is intangibly remote." It follows that severed trials should be stayed until the Court issues its judgment on Case 002/01. Nevertheless, Lysak reassured the Trial Chamber that the OCP is not dismissing crimes or charges. They are simply staying those charges until the conclusion of Case 002/01, even though the OCP acknowledges that the likelihood of actually pursuing future trials is slim at best.

Finally, with regard to the Khieu Samphan team, Lysak called their position "a little fuzzy at times." The OCP said that the Defense simply complained about the prejudice they suffered, without giving the Court any guidance on how to proceed. He also said that the team acted hypocritically by complaining that the trial is not proceeding quickly enough, but then regularly making requests to delay the proceedings, such as asking to defer hearing character witness testimony. (See II.E.3.a.) Finally, Lysak stated that the OCP would respond to the team's request for bail and severance when and if they file a proper motion.

CPLCL Pich Ang, responding to Koppe's comment that a severed case will not reflect the full history of Cambodia, said that the "court is not mandated to find the entire history of Cambodia." He also stressed the importance of securing even one verdict to help victims heal wounds of the past and attain justice. He dismissed Koppe's comment that the CPLCL was supporting the OCP position at the expense of denying justice to some of their clients. As Pich Ang explained, "We, the Civil Parties have many people and we have one slice of cake we will share with each other, no matter how small it is." In response to Karnavas' comment that the Civil Party Lawyers were jettisoning or abandoning their clients, Pich Ang

said that the Civil Party Lawyers do not question the strategies of the Defense and, therefore, should not be questioned on theirs.

Simonneau-Fort called the positions of the Defense “extreme and extraordinary.” She said that both the Nuon Chea and Ieng Sary teams were trying to prolong the trial and delay a verdict until their clients are no longer fit to stand trial. She criticized the Khieu Samphan team for declining to put forth any solution. Like Pich Ang, Simonneau-Fort also dismissed observations that the CPLCL were “abandoning” and “sacrificing” their clients. Finally, she stressed that, regardless of which option it chooses, the Trial Chamber is required to create a timetable or calendar for future trials:

Severance does not make it possible, does not allow the Chamber to bring to a close the facts upon which the trial is founded... it is legally obliged to continue to try the remainder of the entire file unless an external event prevents it from doing so. So we cannot talk about a single trial. We have to say a first trial followed by others.

G. Comments of the OCP in Relation to the 19 February Memorandum

In the event that the Trial Chamber decides to add S-21 to the scope of the trial, the OCP announced that it anticipates calling five witnesses, including Duch. The OCP also anticipates presenting approximately 200-250 related documents, which would take around 11 hearing days. Counsel later revised his estimate to 16 days, taking into account potential Defense witnesses and proposals. As for whether his estimates depended on the admission of trial transcripts from Case 001, Lysak said that the quick answer is no. He added that the OCP will not be proposing any witness statements that go to the acts and conducts of the Accused, in accordance with the Trial Chamber’s decision in Document E96/7.¹⁴ The OCP would only be proposing witness statements that are cumulative of other issues heard from live witnesses in Court regarding S-21. He also reassured the Trial Chamber that he would not seek to add S-24 to the Severance Order.

Lysak then went through the relevant Closing Order paragraphs regarding S-21, grave breaches of the Geneva Conventions, and the existence of an armed conflict, to show that the addition of these paragraphs would not require significant new evidence beyond that already heard or scheduled to be heard before the Court.¹⁵

With regard to the issue of how to proceed with future witnesses, including experts Philip Short and Elizabeth Becker, Lysak requested that the Court resume witness testimony as soon as possible. In his opinion, the medical experts will not be able to predict how long the Accused will be fit to stand trial, and it is therefore impossible to predict how much time the Court has to complete proceedings. Therefore, their assessment should not be determinative of how to proceed with the hearings. Lysak also pointed to the 25 May 2012 memorandum in which the Trial Chamber authorized the Parties to examine expert witnesses, including Short and Becker, on the full scope of Case 002.¹⁶ He maintained that, because these experts can be examined on the full scope of Case 002, their testimony should proceed as scheduled.

Finally, with regard to witnesses TCW-724 and 794, Lysak expressed confusion, because at the trial management meeting in August 2012, all the Parties agreed that there was no need to hear from these witnesses. Nevertheless, if the Chamber insists on hearing from these individuals, Lysak suggested that they proceed to examine the witnesses on the full scope of Case 002, but within the same time limits that the Trial Chamber has already established.

H. Comments of the Civil Parties in Relation to the 19 February Memorandum

Civil Party Lawyer Lyma Nguyen supported hearing from expert witnesses Philip Short and Elizabeth Becker, because, as the OCP noted, the Trial Chamber has already authorized the Parties to question the experts on the entirety of Case 002. Nevertheless, she noted that there would be some prejudice for all the Parties, since they would not know the focal areas upon which the experts should be examined. Thus, the Civil Parties proposed that the Trial Chamber issue an advanced notice on the scope of Case 002, to be followed by their full and reasoned decision when it becomes available. While this solution is not ideal, there would be no delay, no prejudice arising from the uncertainty of the scope of examination, and future witnesses (including expert, factual and character witnesses) would not have to be recalled. Finally, if the Trial Chamber increases the scope of factual allegations, then the Civil Parties suggested revising time frames allocated to the Parties for witness examination.

Simonneau-Fort noted that the CPLCL would be proposing two or three Civil Parties and some additional documents regarding S-21, which would require a minimum of three additional hearing days.

I. Comments of the Defense Teams in Relation to the 19 February Memorandum

All the Defense Teams maintained that no witnesses, including Philip Short and Elizabeth Becker, should be called until the Trial Chamber issues a full and reasoned decision on the scope of the trial.

Koppe agreed with Lysak that the medical experts could only testify on whether the Accused are currently fit, and not on how their health would develop. He informed the Chamber that Nuon Chea is getting better and is hoping to recover enough to participate fully in the trial. While reiterating their position that S-21 should not be included in the scope of the trial, Counsel noted that they had previously come up with a list of 31 witnesses in relation to S-21. However, this number might be reduced. He indicated that he could not be more precise on this matter, since they have had limited time to confer with the Accused. Counsel said “it is not very likely” that Nuon Chea will waive his right to be present during the hearing of substantial S-21 witnesses. He nonetheless left this matter open to other possibilities, saying, “We will cross the bridge when we get there.” With regard to Case 001 transcripts, Koppe said that the Defense team’s actions will depend on what particular evidence is contained within the transcripts, and they “will object if necessary.”

Karnavas stated that the Ieng Sary Defense believes the Trial Chamber should await the testimonies of medical experts on the health condition of the Accused, so that the Chamber would be in a “better position to at least know their current condition and what is projected down the road.” He also pointed out that the SCC decision highlighted the health of the Accused as a factor that has to be addressed in the severance order. He also stressed that their Team wanted a reasoned decision before any action were taken, including hearing of Philip Short, Elizabeth Becker, or other witnesses. Karnavas further stated that Ieng Sary had no intention of waiving his right to be present during the hearing of future witnesses. As for whether or not the Defense would contest transcripts from Case 001, Karnavas said: “Yes, we will. We will be contesting that. In fact, we will be contesting everything that the Prosecutors may try to bring in from Case 001, either transcripts or testimonies.”

Vercken submitted that the argument that Becker and Short should be heard on the whole of the Closing Order was “ill-founded.” He recalled an 8 January 2013 memorandum in which the Trial Chamber told the Parties that the hearings for Short and Becker would only last four days. Thus, continued Vercken, the memorandum encouraged the Parties to limit their questions to points solely connected with the first trial in Case 002. As to whether or not

Khieu Samphan would waive his right to be present, Vercken said: “The answer is no, quite obviously.” On whether the Khieu Samphan Defense Team would contest transcripts from Case 001, he said, “The response is positive. Like the other teams, we will review the situation and where necessary raise objections.”

J. Reply of the OCP and Civil Parties

Lysak reiterated his opinion that the Trial Chamber should proceed with hearing the testimonies of Philip Short and Elizabeth Becker. He noted that both Short and Becker fall under the category of “foundation witnesses,” and would provide general, foundational information upon which the Court could consider all crimes. With respect to Vercken’s argument that the Court encouraged the Parties to focus their questions on matters within the first trial (Case 002/01), Lysak emphasized that the key word was “encourages” and that the Parties are nevertheless authorized to question expert witnesses about the entirety of Case 002.

Nguyen defended her proposition that the Court release an advanced notice on the scope of Case 002. She emphasized that the Court must balance efficiency and trial management needs with the rights of all the Parties, including the Civil Parties’ right to have a final verdict for Case 002. She also stated that the Civil Party Lawyers found it “extremely difficult” to see the logic in Karnavas’ submission that it would be most expeditious to try the whole of Case 002, while at the same time Karnavas indicated that they will contest the admission of documents from Case 001 relating to S-21. Simonneau-Fort followed up on this point by stating that if the Defense intends to launch objections against these documents, then the objections must go “above and beyond” the issues that the Trial Chamber has already ruled upon in Document E96/7.

III. TRIAL MANAGEMENT

This week, the Trial Chamber heard the Parties’ positions to enable it to better address matters relating to time management and legal and procedural issues, which arise as a consequence of the SCC decision on the severance of Case 002.

A. Attendance

Due to health reasons, Ieng Sary observed proceedings from the holding cell on Monday morning. He then waived his right to be present, both in the courtroom and the holding cell, beginning Monday afternoon, and continued to do so for the rest of the week’s proceedings. Nuon Chea was absent throughout the week. He was confined at the Khmer-Soviet Friendship Hospital until Monday morning, and took the remainder of the week to rest at the ECCC detention facilities. Through his counsel, Khieu Samphan stated that he did not intend to participate in Monday’s proceedings. However, Khieu Samphan was present the rest of the week.

Judges Attendance: This week, Judge Silvia Cartwright was absent from the courtroom, and was replaced by Reserve Judge Claudia Fenz.

Civil Party Attendance: Around 15 Civil Parties observed the proceedings on each day of the week. About 10 of them sat in the courtroom, while the rest observed from the main gallery.

Parties Attendance: All the Parties were properly represented in the courtroom.

Attendance by the Public:

DATE	MORNING	AFTERNOON
Monday 18/2/13	<ul style="list-style-type: none"> 400 students from six different high schools of Takeo Province 50 students, organized by Youth Resource Development Program 12 foreign observers 	<ul style="list-style-type: none"> 100 students from Chamroeun University Poly Technology 6 foreign observers
Wednesday 20/2/13	<ul style="list-style-type: none"> 150 villagers from Borey Cholsar District, Takeo Province 7 foreign observers 	<ul style="list-style-type: none"> 170 villagers from Samaki Meanchey, Kampong Chhnang Province 25 students from Department for Media and Communication (DMC) 4 foreign observers
Thursday 21/2/13	<ul style="list-style-type: none"> 250 villagers from Samaki Meanchey District, Kampong Chhnang Province 1 foreign observer 	(No court proceedings.)

B. Time Management

The Chamber postponed Tuesday's proceedings to give the Defense Teams time to consult with their clients before responding to the Trial Chamber's questions and the observations and proposals made by Prosecutors and Civil Party Lawyers.

Late in the afternoon on Thursday, 21 February, the Trial Chamber announced that it would hear expert testimony from Philip Short on the week commencing 4 March 2013, and Elizabeth Becker during the week commencing 11 March 2013.¹⁷ Both experts may be questioned on the entirety of Case 002 on areas within the knowledge of the experts, and the Parties were encouraged to focus their questions on areas relevant to the facts at issue in Case 002/01. The Trial Chamber will issue a fully reasoned decision on the severance of Case 002 after hearing testimonies from the medical experts who will review the health and fitness of Nuon Chea and Ieng Sary in March 2013.¹⁸

C. Courtroom Etiquette

The exchanges between the Parties this week in Court were quite animated. For instance, in response to criticisms on their position that no character witnesses should be heard at this stage, an impassioned Vercken responded:

You take us for fools! We are the Defense! We are not here to make sure that there is going to be a speedy conviction and to allow Khieu Samphan to be lynched and pilloried. We are here to defend him.

Additionally, Lysak referred to the seeming reversal of positions by the Nuon Chea Defense as the "mother of all flip-flops." (See II.F.) Koppe responded by recalling a proverb that says, "A wise man changes his mind, a fool never will." He added that the Nuon Chea Defense Team applauded the original severance in October 2011, before the Trial started. However, when trial began, Nuon Chea expressed that, in his opinion, this Court is unfair to him because only certain facts are to be adjudicated. "Only the body of the crocodile is to be discussed, not its head or tail."¹⁹ Koppe then said:

We are not the mother of flip-flops. As a matter of fact, I think the grandfathers of flip-flops are sitting opposite me because they are the ones who drafted the original introductory submissions on the basis of

which the Closing Order was drafted. It was them who thought it wise, in 2006-2007, to put the whole DK regime on trial. All the crimes, including genocide, came from the original pen from these grandfathers of flip-flop. And now, they want to reduce the trial to the forced transfer and S-21. Who is changing his mind here?

Nonetheless, Lysak thanked Koppe on Thursday for his candor regarding Nuon Chea's health and his willingness to review the list of 31 witnesses that his Team initially proposed. He added, "it is refreshing to hear respectful and clear submissions coming from his chair in the courtroom."

D. Translation and Technical Issues

The Parties tended to speak quickly when making their submissions this week. President Nil Nonn repeatedly instructed Lysak, Nguyen, and Karnavas to slow down and be mindful of the difficulties in translation. There were a few occasions when the audio equipment did not seem to be working properly. There was, for instance, no English and Khmer translation for around one minute when Judge Fenz was giving her observations on Thursday morning. This prompted President Nil Nonn to instruct the court officers to check the audio equipment.

E. Time Table

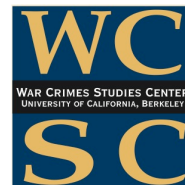
DATE	START	MORNING BREAK	LUNCH	AFTERNOON BREAK	RECESS	TOTAL HOURS IN SESSION
Monday 18/02/13	9:09	10:30-10:51	11:46-13:42	14:48-15:13	16:03	4 hours and 12 minutes
Wednesday 20/02/13	9:06	10:33-11:05	12:07-13:34	14:40-15:02	16:13	4 hours and 46 minutes
Thursday 21/02/13	9:06	10:42-10:49	12:03	-	-	2 hours and 50 minutes
Average number of hours in session				3 hours 56 minutes		
Total number of hours this week				11 hours 48 minutes		
Total number of hours, days, weeks at trial				683 hours 30 minutes		
157 TRIAL DAYS OVER 49 WEEKS						

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	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 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.

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¹ Supreme Court Chamber. “Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision Concerning the Scope of Case 002/01” (8 February 2013). E163/5/1/13 [hereinafter **SCC DECISION ON SCOPE OF CASE 002/01**]. Available at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-02-11%2018:23/E163_5_1_13_EN-1.PDF.

² Trial Chamber. “Memorandum – Trial Chamber: Directions to the parties in consequence of the Supreme Court Chamber’s Decision on Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision concerning the Scope of Case 002/01 (E163/5/1/13)” (12 February 2013). E163/5/1/13/1 [hereinafter **TC FIRST MEMORANDUM ON SCC DECISION ON SCOPE OF CASE 002/01**]. Available at http://www.eccc.gov.kh/sites/default/files/documents/court/2013-02-15%2010:28/E163_5_1_13_1_EN.PDF.

³ Trial Chamber. “Memorandum – Trial Chamber: “Supplementary questions to the parties following hearing of 18 February 2013 in consequence of the Supreme Court Chamber’s Decision on Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision concerning the Scope of Case 002/01 (E163/5/1/13)” (19 February 2013). E264 [hereinafter **TC SECOND MEMORANDUM ON SCC DECISION ON SCOPE OF CASE 002/01**]. Available at http://www.eccc.gov.kh/sites/default/files/documents/court/2013-02-20%2009:29/E264_EN.PDF.

⁴ See Trial Chamber. Severance Order Pursuant to Internal Rule 89ter (22 September 2011). E124 [hereinafter **SEVERANCE ORDER**]. “With respect to the first trial, namely Case 002/01, the Trial Chamber specified that its scope would be limited to: the history and structure of Democratic Kampuchea; the roles of the Co-Accused prior to and during the regime of Democratic Kampuchea; when their roles were assigned, what their responsibilities were, and the extent of their authority; the lines of communication; the movement of the population from Phnom Penh in 1975 (“Phase I”); the movement of the population from the Central (Old North), Southwest, West and East Zones from September 1975 to 1977 (“Phase 2”); and, five types of crimes against humanity (murder, extermination, persecution (except on religious grounds), forced transfer and forced disappearances), but only insofar as they pertain to Phase 1 and Phase 2.” SCC DECISION ON SCOPE OF CASE 002/01, para. 4, *citing* SEVERANCE ORDER, paras. 1, 5.

⁵ On 18 October 2011, the Trial Chamber rejected the OCP’s Request for Reconsideration, which sought for the Trial Chamber to reconsider and revise the Severance Order such that the scope of Case 002/01 include Phase 1 but exclude Phase 2, and add the following nine crime sites: the District 12 and Tuol Po Chrey execution sites; the S-21 security centre, including the purges of cadres from the New North, Central (Old North) and East Zones sent to S-21, but excluding the Prey Sar worksite; the North Zone, Kraing Ta Chan, and Au Kanseng security centres; the Kampong Chhnang Airport construction site; and, the Tram Kok cooperatives. SCC DECISION ON SCOPE OF CASE 002/01, para. 5, *citing* Decision on Co-Prosecutors’ Request for Reconsideration of the Terms of the Trial Chamber’s Severance Order (E124/2) and Related Motions and Annexes, E12417, IS October 2011. “On 8 October 2012, the Trial Chamber rendered the Impugned Decision, denying the [OCP’s] Request for Expansion with respect to District 12 and S-21, but granting the requested incorporation of Tuol Po Chrey, “insofar as they [...] occurred immediately after the evacuation of Phnom Penh [...], but not otherwise extending to killings that occurred between 1976 and 1977.” SCC DECISION ON SCOPE OF CASE 002/01, para. 7, *citing* Memorandum from Judge NIL Nonn, President of the Trial Chamber, entitled “Notification of Decision on Co-Prosecutors’ Request to Include Additional Crimes Sites within the Scope of Trial in Case 002/01 (E163) and deadline for submission of applicable law portion of Closing Briefs”, E163/S, 8 October 2012 [hereinafter **IMPUGNED DECISION**].

⁶ “The Trial Chamber’s issuance of the Severance Order and the Decision on Reconsideration on the basis of its erroneous interpretation of Rule 89ter of the Internal Rules has resulted in a violation of the parties’ right to a reasoned opinion and their right to be heard, as well as errors in the exercise of its discretion which have caused prejudice. The Trial Chamber’s failure to create a plan regarding the handling of the remaining cases to be tried in Case 002 has also caused prejudice.” SCC DECISION ON SCOPE OF CASE 002/01. Para. 48.

⁷ According to Rule 73bis(D) of the ICTY Rules of Procedure and Evidence, “After having heard the Prosecutor, the Trial Chamber, in the interest of a fair and expeditious trial, may invite the Prosecutor to reduce the number of counts charged in the indictment and may fix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, *including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes, are reasonably representative of the crimes charged.*” [Emphasis added]. “ICTY Internal Rules of Procedure and Evidence.” IT/32/Rev. 48. (19 November 2012). In addition to these six standards, Cayley argues that ICTY case law has also established two additional standards of reasonable representativeness: First, the severance order must be reasonably representative of the time period over which the alleged crimes took place. Second, the severance order must reflect the fundamental nature and theme of the original case file.

⁸ See Trial Chamber. “Severance Order Pursuant to Internal Rule 89ter” (22 September 2011). E124. Pars. 5-7. [hereinafter **SEVERANCE ORDER**]

⁹ Trial Chamber. Transcript of Trial Proceedings (18 February 2013). E1/171.1 [hereinafter **18 FEBRUARY TRANSCRIPT**]. Lines 9-11. 111.

¹⁰ These persons are Kaing Guek Eav, TCCP-21, TCW-540, TCW-698 and TCW-232.

¹¹ “*Latin-* a thing adjudicated. Once a lawsuit is decided, the same issue or an issue arising from the first issue cannot be contested again.” “The Law Dictionary: Featuring Black’s Law Dictionary Free Online Legal Dictionary 2nd Ed.” Accessed March 8, 2013. <http://thelawdictionary.org/res-judicata/>.

¹² Supreme Court Chamber. “Decision on Immediate Appeal Against the Trial Chamber’s Order to Unconditionally Release the Accused IENG Thirith” (14 December 2012). E138/1/10/1/5/7. Par. 38.

¹³ Kingdom of Cambodia. *Criminal Procedure Code of Kingdom of Cambodia* (2007). Available at: <http://www.oecd.org/site/adboecdanti-corruptioninitiative/46814242.pdf>.

¹⁴ See Trial Chamber. “Decision on Co-Prosecutors’ Rule 92 Submissions Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber” (20 June 2012). E96/7.

¹⁵ The OCP is proposing the addition of the following paragraphs from the Closing Order with regard to S-21 and the accused’s connection and knowledge of the crime site: 178-204; 916-974; 1048-1089; and 1172-1190. With regard to grave breaches and the existence of an armed conflict, the OCP proposes the following paragraphs: 150-155; 1480-1484; 1487-1488; 1491-1493; 1498-1510; and 1515-1520.

¹⁶ See Trial Chamber. “Updated information regarding scheduling of proposed experts” (25 May 2012). E172/24.

¹⁷ Khmer Rouge Tribunal (ECCC) (21 February 2013). *Facebook*. Accessed on 25 February 2013, <https://www.facebook.com/ktribunal/posts/10152118680502841>.

¹⁸ *Ibid.*

¹⁹ See CASE 002 KRT TRIAL MONITOR. Issue No. 13, Hearing on Evidence Week 8 (13-16 February 2012).