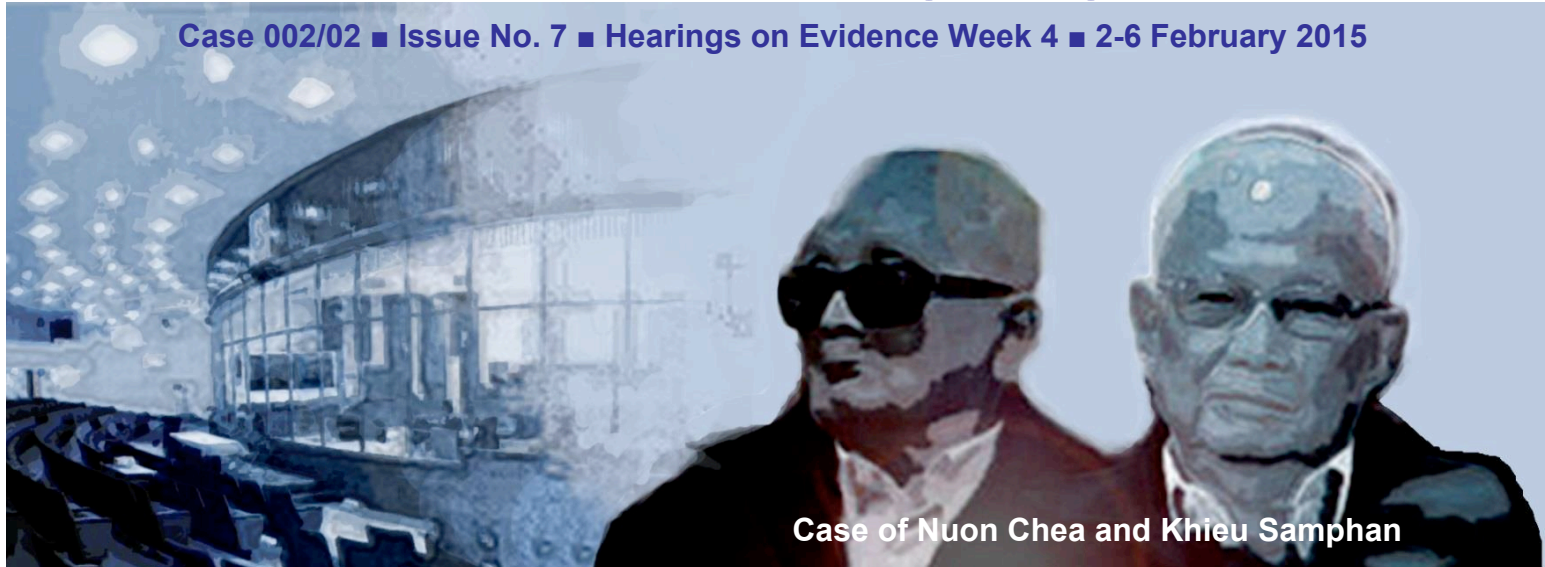


KRT TRIAL MONITOR

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Case of Nuon Chea and Khieu Samphan

Asian International Justice Initiative (AIJI), a project of East-West Center and the WSD Handa Center for Human Rights and International Justice at Stanford University (previously known as the UC Berkeley War Crimes Studies Center)

Whenever I try to recall my past experience, I could not sleep well. I imagine that I feel like I was back at Kraing Ta Chan, and I could only hear what I was told, that I should go and collect sugar palm juice, so I do not want to hear or want to say anything about my sufferings from that time.

- Civil Party Soy Sen

I. OVERVIEW

The Trial Chamber this week pushed ahead to advance proceedings, continuing to hear from two witnesses and a Civil Party on their experiences in Tram Kak District and Kraing Ta Chan Security Center. The first Witness quickly concluded her testimony after having provided the majority of it the week before, and the second Witness started and finished his testimony within a day, as scheduled. The Civil Party, however, required three days of examination rather than the scheduled two, due to lengthy examination by the judges, and also due to a late request from the Civil Party lawyers that any testimony concerning identification of former prison guards and cadres be conducted in private. This report summarizes the three sets of testimony heard this week, analyzes legal questions concerning the privacy or personal security of witnesses, and continues to track the Chamber's management of the trial in Case 002/02. In addition, this report reviews the recently published reasoning for the Judicial Administration Committee Special Panel's decision on Defense motions for disqualification of the Trial Chamber judges, as well as international Judge Rowan Downing's dissent from the majority opinion.

II. SUMMARY OF WITNESS AND CIVIL PARTY TESTIMONY

The Trial Chamber concluded the testimony of Ms. Cheang Srei Mom following her previous appearance on 29 January. The Chamber also heard the complete testimony of a second Witness, Mr. Keo Chandara, who discussed his detention at Kraing Ta Chan Security Center in March and April 1975, as well as his personal relationship with Southwest Zone Secretary Ta Mok. For the latter part of the week, from 4 to 6 February, the Parties examined Mr. Soy Sen, a Civil Party who was detained at Kraing Ta Chan from 1974 to 1979. The Civil Party was assigned a number of chores around the prison, and this relative level of freedom allowed him to witness a number of alleged crimes, which he discussed in his testimony this week.

A. Summary of Testimony by Witness Cheang Srei Mom

Ms. Cheang Srei Mom continued to testify as a witness on her experiences living in Tram Kak District under the DK regime.¹ Following her testimony from the week before,² questioning from the Defense Teams primarily examined her role in a children's unit, her forced marriage to a husband selected "by Angkar," and other aspects of life in a rural cooperative.

1. Remainder of Testimony on Life in Tram Kak Cooperative

Witness Cheang Srei Mom told the Chamber that she assigned to work as a teacher's assistant in a children's unit in 1976, and she occasionally taught basic spelling and the alphabet to children under a tree. The Witness also testified that no textbooks or publications were permitted for use. Her major roles as a teacher's assistant had little to do with teaching, however, as the Witness described feeding the children food and directing them to engage in labor. In response to questions on the structure and conditions of the children's unit, Ms. Cheang Srei Mom testified that Pon was the chief of the unit supervising everyone. The Witness also told the Chamber that there was a system of classifications in her cooperative, so that 'full-rights people' and 'candidate people' were separated into groups and received different treatment in labor, shelter, and rations. This divide worked its way even into the Witness' children's unit, as she was segregated during eating hours from 'full-rights' teachers and the unit chief, who dined together with the cook. The Witness also recalled how daily food rations in her cooperative were limited, but they were allowed to eat "freely and fully" on the 30th of every month. She testified, however, that some people became sick from eating too much on these days while others could no longer eat much and starved nonetheless.

Defense Counsel again put a number of questions to Ms. Cheang Srei Mom regarding her marriage. The Witness asserted that, before she got married, she was told to attend meetings to make commitments that she would follow whatever assignments 'Angkar' ordered. She stated she could oppose this "because we had given ourselves to Angkar." She also described how 'Angkar' organized all of the arrangements for the bare wedding ceremonies, so that no one could refuse marriage without putting oneself in danger. In the days following her marriage to her new husband, Try Touch, the Witness Cheang Srei Mom explained that her internal feelings were changing. 'Angkar' pre-arranged a house in which they were expected to consummate the marriage, and they were able to stay together and rest from labor for one or two weeks, before they were separated again into different units. She explained that she and her husband lived separately after the marriage, due to divergent labor assignments, but, as with days for eating more freely, they were allowed to meet on the 30th of every month.

2. Witness Demeanor and Credibility

In the short time she testified on the morning of February 2nd, Ms. Cheang Srei Mom provided clear responses without overstating her experiences. She consistently recognized there were some details that she had forgotten, or names of people she did not know. On some occasions, she began with a disclaimer that "I cannot recall it clearly because it happened so long ago," but then she would go on to provide a detailed, relevant response. Overall, the Witness' clear answers and forthcoming approach in responding to questions indicated self-confidence and credibility in her discussion of her experiences in the DK era.

B. Summary of Testimony by Witness Keo Chandara

A second witness, Mr. Keo Chandara, *alias* Yov, a former doctor from Takeo Province, testified on 2 and 4 February, and questioning especially centered on the details of his detention at Kraing Ta Chan Security Center (**KTC**) between March and April 1975.³ The Parties also sought further information on the Witness' connections to Ta Mok, Southwest Zone Secretary, and specifically how this relationship influenced the Witness' treatment during the DK period.

1. Personal Context, Arrest, and Interrogation

Mr. Keo Chandara was born in Takeo Province in 1942. He testified that, in 1970, he heard the plea from recently deposed Norodom Sihanouk to fight the new Lon Nol regime, and he joined the Khmer Rouge *maquis* as a medic. He clarified to Defense Counsel Victor Koppe, however, that he did not see himself as a Khmer Rouge revolutionary but as the “chief servant of the Democratic Kampuchea regime.” Mr. Koppe pressed the Witness to explicitly confirm or deny whether he treated Khmer Rouge cadres during this time, to which the Witness replied he would not be a doctor if he had refused. The Witness informed the international prosecutor that, at the time of his arrest in early 1975, he was told he was going to a “re-education center” to teach medical skills to “the upper echelon.” He testified that he felt shocked when he was arrested, detained initially for five days at Krabei Preay, and interrogated by “Ta Chhen” for 5 days at Krabei Prey on whether he was a CIA or KGB agent. He was subsequently detained for approximately 24 days at Kraing Ta Chan.

2. Experiences at Kraing Ta Chan Security Center

Keo Chandara testified that this detention there began in late March 1975 and continued until a few weeks after the Liberation of Phnom Penh on 17 April 1975. He stated that he saw a person who other prisoners – former Khmer Rouge cadres – identified as ‘Ta Chea’ visit the Security Center’s office in the days prior to the 17 April ‘Liberation’, but he later confirmed that this visiting official was 70 to 80 meters away from his detention building, and he only saw him through a gap in the wall. Regardless of his ability to see clearly from that distance and through such an obstacle, the Chamber must also balance the testimony concerning this visit with its temporal jurisdiction to only examine crimes and related events occurring after 17 April 1975.⁴

Under questioning by the OCP on the treatment of prisoners and conditions at the Security Center, the Witness graphically described the terror techniques used during interrogations, as well as the nature of killings. Despite the terrible images conveyed, the witness responded unflinching throughout this section of his testimony. He noted, “They did not take people through a court like in this Court. They just simply killed people.” The Witness recalled one occasion when he and other prisoners were forced to watch a female prisoner stripped naked during interrogation and tortured with pincers and acid. He testified that, when another prisoner failed to provide an answer to the interrogator’s question, the guards hung her on hooks inserted through her chin and cut her chest open to remove her liver and gallbladder. As the woman convulsed to death, the guards terrorized the prisoners by placing the woman’s organs on their foreheads. The Witness also reiterated practices previously detailed by Witness Meas Sokha such as the use of loudspeakers playing revolutionary songs to mask the sound of killings. Like Meas Sokha, Keo Chandara also recalled seeing two militiamen hit a child and baby against a tamarind tree until the baby died, while the mother was forced to watch. The Witness testified that, after the Vietnamese invasion in January 1979, he assisted monks to exhume over 10,000 skulls in eight “pits” at KTC. The Parties contested the exact number of skulls uncovered, and the Nuon Chea Defense suggested that the skulls might have been recovered not from a killing site at the security center but from a former graveyard that was documented there prior to 1975.

2. Relationship with Ta Mok

Keo Chandara’s personal relationship with Ta Mok became a central focus and distinguishing feature of his testimony. The Witness claimed that the former Secretary of DK’s Southwest Zone had been “good friends” with his mother prior to start of the Revolution. He recalled Ta Mok as a monk, known then as “Aja Ong Chhoeun,” who regularly visited his family home for lunch. The Witness later noted to Defense Counsel Kong Sam Onn that he “did not see Ta Mok as a cruel person at all.”⁵ Keo Chandara testified that, during his detention at Kraing Ta Chan in late April 1975, he saw Ta Mok arrive at the prison en route further South with the

chairman of District 105 (Tram Kok District). He testified that Ta Mok called on Ta Chhen, the prison chief, to inquire about “a doctor” imprisoned there, ordering that he be fed more and that when he returned from his business further South, he would come back to pick up the doctor to assist with some work on a radiography machine that required medical skills.⁶ Keo Chandara testified that, later that day, Ta Mok returned and freed him, just as he had planned. The Witness explained that he did not know Ta Mok’s exact position in the Zone, but he clarified that the word “Ta” generally signified a man of senior rank.⁷ After gaining his freedom from the prison, Keo Chandara claimed that Ta Mok advised him to rid his social status as a ‘petit bourgeoisie’ intellectual and to seek the status of a poor farmer to work “with them.” He said that Ta Mok asked about his mother before suggesting that he and his family move farther North within the Zone, so Keo Chandara and his family moved out of District 105 (Tram Kak District) to District 108 (present-day Roka Krau Commune, near Takeo city).

4. Witness Demeanor and Credibility

During his testimony, Keo Chandara repeatedly looked down to a blank piece of paper, but he generally remained attentive and spoke with confidence. The strange behavior with the paper initially raised concerns from both the President and Defense Counsel, but they were reassured after examining his paper during a break in proceedings and finding it was blank. The Witness’ lack of eye contact with Parties detracted somewhat from the authority of his testimony. In response to questions from Judge Fenz, the Witness also admitted that his memory has become far less reliable than it was five years ago when he spoke to OCIJ. He explained, “I lose some memory what happened in the past. And also recently, sometimes I forget the names of my children.”⁸ There was some dispute over his precise age, as he first stated he was born in 1942 but repeatedly referred to himself as an 80 year old. Throughout proceedings, however, the Witness actively informed the Chamber if a statement was based on a personal assumption or secondhand information. The Defense noted some discrepancies between his initial OCIJ interview and his testimony, yet the Witness acknowledged at the outset of proceedings that there were small errors in his interview that he would “correct” during his testimony; this admission strengthened rather than weakened the overall reliability of his testimony. When pushed on this, the Witness held his ground, appearing confident in his answers. For example, tense exchanges between Keo Chandara and Mr. Victor Koppe unfolded after Mr. Koppe expressed incredulity at the Witness’ arrest, interrogation, and detention in KTC, given his status as a revolutionary and connection to Ta Mok. When Mr. Koppe suggested that the Witness was never a prisoner of KTC, Keo Chandara vigorously refuted him, stating, “I understand that your understanding is not correct...I have a better understanding than yours. I know myself very well. You are not me.”

C. Summary of Testimony by Civil Party Soy Sen

Civil Party Soy Sen testified on Kraing Ta Chan Security Center over three days this week.⁹ He was a teenager when he was imprisoned there in 1974. During the DK period, Soy Sen, chose to go by his mother’s name, calling himself Khut Sen to avoid being associated with his biological father, who was targeted as a former district official during the Sihanouk era. When Soy Sen first arrived at KTC, he was shackled alongside other prisoners. However, he soon won the guards’ favor due to his ability to make sour sugar palm juice, and he was granted more freedom to move around KTC and complete chores. For this reason, the Civil Party provided valuable testimony on the living conditions in KTC, the use of torture and violence in the camp, the executions that occurred, and the differing roles of specific guards in the prison. The Chamber has postponed completion of Soy Sen’s testimony until a later date, depending on the need to recall him for an *in camera* session (see III.B). As such, he has not yet provided his ‘statement of impact’, which he is entitled to make as a Civil Party.

1. Living Conditions

Soy Sen described the living conditions for prisoners within KTC as “beyond our understanding” and “miserable.”¹⁰ He testified that prisoners were shackled to a long bar in two rows within the prison buildings. The prisoners were not released from the shackles around their legs when they needed to relieve themselves, so, instead, a coconut shell was passed up and down the line, any waste was then emptied into a shared bucket; the same coconut shell was shared and used for drinking water. A coconut shell was also used to distribute a small amount of rice to the prisoners. The Civil Party stated that this food was not enough and some people died of starvation. When these deaths occurred, the bodies were left in the shackles until evening, at which point the Civil Party was ordered to unshackle and move the corpse to “the pit.”

2. Interrogations and Executions

The Civil Party also described the processes of interrogation to the Chamber. Approximately ten days after his arrival, Soy Sen was interrogated and asked if he was connected to Prum San, or “anyone at Ang Ta Saom or anywhere else.”¹¹ After refuting the allegation, the interrogation was concluded and Soy Sen was allowed out to work in the fields the next morning. However, the Civil Party stated that “newcomers” or those alleged to have connections to the Lon Nol regime were tortured during interrogations.¹² He stated that guards used 60 to 70 centimeter bamboo clubs to beat prisoners, as well as pliers to hurt the nipples or breasts of female prisoners. The Civil Party also testified that prisoners were regularly deprived of food following interrogations.

During his time at KTC, the Civil Party was ordered to dig pits for graves and to open the external gate for the prisoners who were being let out for execution. The Civil Party testified that guards told these prisoners that they were being taken back to their cooperative, so some were “clapping and enjoying” as they were led out of the detention building.¹³ However, the prisoners were instead led to a pit where guards made them kneel, hit them in the back of the neck, and cut their throats. They then undressed the bodies and piled them into the pit. The Civil Party was ordered to gather their clothes for transport to nearby cooperatives. The Civil Party also testified that he witnessed the execution of two young children, approximately between the ages of four and six. While the Civil Party was climbing a tree collecting palm juice, he stated he heard a cracking sound and looked down to see the youngest child smashed against the palm tree and the elder child hit with a hoe. Guards then removed the gallbladders of the two children and hung them in the tree before dragging the children’s bodies to a pit.

3. Sexual Violence

Soy Sen described two different instances of sexual violence that he witnessed as a young prisoner at Kraing Ta Chan. In the first case, he explained how he was carrying water back to the compound when a guard (whom he later identified to the prosecutor as “Little Duch”) stopped him and told him to go to the South of the compound where he had just “done it.” Upon his arrival there, he found the corpses of two women from a mobile unit who had been raped and killed. There were M-79 bulletheads inserted into the vaginas of the two women. He was ordered to drag their bodies to the pit to be buried. When Soy Sen returned to the prison compound, the same guard let him back in and laughed while he asked him if he “saw something.” The Civil Party also testified that another woman was raped by a guard, although he later admitted he never saw evidence of it firsthand beyond guards’ flirting with her and touching her. He identified this victim as Meas Sarath, the sister of previous witness Meas Sokha, and questions on this topic prompted the Chamber to provide new procedural instructions on how to keep the names of rape victims anonymous during future testimony (see III.C). In response to questions on the rules regarding so-called “moral offenses,” Soy Sen explained that there were official procedures banning such acts, but that guards were immune from punishment due to their positions. He noted that prison chief Ta Ann regularly touched,

and flirted with female prisoners. He also testified on the arrival of two well-known movie stars who were married, Ms. Kim Nova and Mr. Nep Nom. The Civil Party explained that Nep Nom was taken away for execution immediately after their arrival, but that Kim Nova was brought to the prison's main office, and the guards flirted with and touched her for a few hours before sending her off for execution as well.

4. Identification of Specific Individuals and the Call for an *In Camera* Session

International prosecutor Vincent De Wilde D'Estmael questioned the Civil Party on the names and status of 'long-term' prisoners at Kraing Ta Chan. The Civil Party clarified that only four or five individuals enjoyed freedom of movement within the compound. He testified that this included prior witness Meas Sokha and his family, and Soy Sen also corroborated particular details in Meas Sokha's testimony.¹⁴ Furthermore, he substantiated Meas Sokha's familial ties within the prison, specifically that Meas Sokha's father died as a result of torture before the family's arrival in detention, that his mother (known as 'Grandmother Nhor') worked as a cook, and that his elder sister, Rath, was imprisoned and raped during the same time period. Soy Sen also confirmed the presence of a doctor – Witness Keo Chandara – at the prison in the weeks surrounding the April 1975 Liberation. He also testified that Ta Mok, who he knew as Ta 15, visited the prison multiple times. Furthermore, he described the messages that were exchanged between the prison and the District. Letters with red ink on the back indicated names of prisoners to be “smashed,” and executions were often carried out that day or the next.

In response to a number of specific questions from Mr. De Wilde and Judge Jean-Marc Lavergne, the Civil Party named specific guards and cadres, detailed their positions, and described his opinion of them. Soy Sen clarified that Ta Chhen was prison chief until after April 1975, when he was transferred to oversee Prison 204, and Ta Ann then took over the position. He identified “Little Duch” as the guard who assaulted the two women with M-79 bullets, and Sang, Sieng, Sim, and “Little Duch” as the guards who “smashed” the two children. The Civil Party noted that Sang and “Little Duch” were the “most wicked” of all the guards, and he described the fear that he lives in, as both of those individuals live freely and near to him in Takeo Province. Only after the end of the Judge's questioning prior to the 5 February lunch recess did the Civil Party lawyer's submit that Soy Sen had voiced fear over publicly identifying these individuals, and they subsequently requested a closed *in camera* session on such matters (see III.B).

III. LEGAL AND PROCEDURAL ISSUES

This week, Parties raised a number of objections concerning proper lines of questioning during Victor Koppe's examination of Civil Party Soy Sen. In addition, multiple privacy concerns were raised during the testimony of the same Civil Party. After he was questioned on the names of individual prison guards and other cadres, his lawyers asked that continued examination on that subject be conducted in an *in camera* session. The Civil Parties also inquired as to the Court's procedures to safeguard the privacy of an alleged rape victim after the Parties continued to utter her full name, even after Mr. Soy Sen testified he did not believe she had spoken publicly about the alleged rape after the DK period.

In addition to these courtroom procedural issues, this week the Court published the much anticipated reasoning for the decision of the Special Bench empaneled by the Judicial Administration Committee to rule on the Defense motions for disqualification of the Trial Chamber judges from Case 002/02; given the significance of the decision for Case 002/02, a summary and some analysis of the reasoned decision, and of the reasoned dissent by Judge Rowan Downing, are included in this section.

A. Repeated Objections to Victor Koppe’s Questioning of Soy Sen

Objections from the Parties were relatively scarce in the week’s earlier hearings, but the tenor changed with the examination of Civil Party Soy Sen by Victor Koppe on the morning of 6 February. The very first question he put to the Civil Party prompted an objection from the OCP concerning his use of repetitious questioning on issues already raised by other Parties or by the Judges. At least seven more objections were raised and sustained throughout the morning on grounds that Mr. Koppe was asking repetitive questions. Five other objections to questions were sustained on grounds that they asked the Civil Party to speculate on the reasons for others’ actions or decisions. The Civil Party lawyers and the international Co-Prosecutor also objected repeatedly when Mr. Koppe added unsubstantiated information or left out details in an “attempt to mislead” Soy Sen. For example, Mr. Koppe restated Soy Sen’s previous testimony on the fate of the two movie stars brought to Kraing Ta Chan, but counsel added that they were interrogated. Prosecutor Vincent de Wilde d’Estmael objected that he was misleading the Civil Party to encourage him to confirm a statement that he had never made. When the matter of interrogation was included in Mr. Koppe’s rephrased question, CPLCL Marie Guiraud objected once more. Ms. Guiraud also objected at another point to Mr. Koppe’s insinuations that this Civil Party and others who have testified thus far in Case 002/02 do not tell the truth. When the CPLCL, the Prosecutor, and the President all intervened in a separate line of Mr. Koppe’s questioning, Defense counsel asserted, “I’m being sabotaged here! Enough is enough, really.” Although the number of objections was higher than usual, the majority appeared well reasoned and substantiated, from the perspective of the AIJI trial monitors observing the proceedings. It appeared that many of the interruptions to Mr. Koppe’s examination of Soy Sen stemmed from clumsy errors in phrasing, which led to objectionable questions. Counsel’s questioning was also interrupted at least seven times by requests from Parties and the President that he provide reference numbers and ERN page references in all three official languages of the Court for any citation of documents, OCIJ interviews, or transcripts.

B. Request for *In Camera* Session to Protect Civil Party Soy Sen

On the morning of Thursday, February 5th, the international prosecutor and Judge Jean-Marc Lavergne examined Soy Sen on details concerning Kraing Ta Chan’s hierarchical structure and the names of perpetrators of crimes he witnessed at the prison (see II.C.4). Judge Lavergne pushed further, asking the Civil Party about the fates and current whereabouts of specific guards and cadres; he also asked if the Civil Party has had any contact with these individuals since the fall of DK. Soy Sen confirmed that Ta Chhen, the first chief of KTC, is still alive and living near the house of Ta Mok in Anlong Veng. He testified that he was once brought to meet Chhen in an interview arranged by a journalist, and Chhen told him that he had helped to protect him and considers him “his child,” telling him he would give him money “to do business.” Judge Lavergne understood this as an attempt to give the Civil Party “money to shut up.” The Civil Party then testified four former guards were still alive and residing within 10 kilometers of his home in Takeo Province. This included both “Little Duch” and Sang, the two prison guards whom he earlier called “the most wicked.” Soy Sen described recent encounters with Sang: the former cadre generally has tried to avoid contact, but he has also called him “Bong” (a Khmer honorific for “Brother”) and asked him multiple times to tell any investigators that he too was a prisoner at KTC. When Judge Lavergne asked Soy Sen if he was fearful specifically when OCIJ investigators came to visit his home, the Civil Party stated he felt threatened and that he was “still afraid as of now and even more afraid when [before] the Chamber.”

As Judge Lavergne concluded his questions before the lunch break, Civil Party lawyers arose to take note of Soy Sen’s fears and to ask for the afternoon session to be conducted in a private, *in camera* hearing. National CPLCL Pich Ang elaborated that the Civil Party had mentioned his fears of speaking publicly, and that he had just mentioned many names of surviving guards and cadres. Pich Ang stated, “From our observation, he may be afraid for his safety and security,” and he asked that any further discussion of names be conducted only in

closed hearings, according to provisions allowed for in the Internal Rules.¹⁵ Counsel for both defense teams objected that the request was untimely, coming only after the Civil Party had already discussed names in response to Judge Lavergne's lengthy questioning. Judge Fenz also explained that such an application must provide evidence that the life and health of he or his family would be in danger were he to continue to give further names. The Civil Party lawyers asked that they have the lunch break to formulate this official request, but when the afternoon session resumed, they requested that their presentation of this request be held *in camera*. The President agreed to this, had the audiovisual unit cut the feed, and the Thursday hearing's third session was therefore conducted privately (see IV.E). Upon the resumption of public hearings in the day's fourth session, Judge Fenz announced the ruling of the Chamber, noting that Internal Rule 29, which governs the use of protective measures for testimony, "foresees a report by the WESU, or the VSS, and additionally an assessment on the existence of a life and/or death threat."¹⁶ The Chamber decided to postpone its decision until it received these reports, but it barred any questions on the identification of KTC staff until after the decision has been taken. The Judge indicated that, if necessary, the Chamber will recall the Civil Party to discuss these matters privately or publicly, depending on its eventual decision. Both Defense teams noted that they wanted Soy Sen recalled and would plan to ask further questions to him at that point.

C. Procedures on the Identification of Victims of Sexual Violence During Testimony

As stated in the earlier summary of his testimony, Soy Sen identified a woman named Meas Sarath as a victim of an alleged rape by guards at Kraing Ta Chan. She identified Sarath, or "Rath," as the sister of a previous witness in the trial, Mr. Meas Sokha, and as the daughter of the woman they called "Grandmother Nhor." During his examination of the Civil Party, Mr. Victor Koppe asked if either Mr. Meas Sokha or "Grandmother Nhor" were aware of Rath's alleged rape. Soy Sen testified he was unsure, but he did not believe so. He also testified that Rath was now living in the United States, and he was unsure if she had ever spoken openly about the rape since the fall of DK. The international CPLCL Marie Guiraud rose to call for procedures to ensure the privacy of alleged victims of sexual violence. Ms. Guiraud noted that, in this case, the Civil Party had testified that he was unsure if the aforementioned person ever made a complaint, was known, or wanted to be known. She asked: "How can we cite people who have been victims during this period, who may not have ever been identified, or be open about their experiences?" The judges conferred for a few minutes, and Judge Fenz announced that there was nothing to be done with the case of Meas Sarath, as her name had already been publicly identified. However, the Judge also announced that, for future cases in which a victim of sexual violence is cited, Parties must pass the name of the person to be identified on a piece of paper to the person on the stand. If this leads to more questions beyond straightforward identification, the Chamber "will envisage for closed sessions." Judge Fenz noted this procedure corresponded with relevant Cambodian law.¹⁷

D. Reasons for Special Panel Decision and Dissent on Disqualification of Judges

On 1 February 2015, the Special Panel empaneled by the ECCC's Judicial Administration Committee publicly released the reasons for ruling against the Defense Teams' motions to disqualify Trial Chamber judges from hearing Case 002/02 due to alleged bias.¹⁸ The Special Panel unanimously dismissed the motion to disqualify Judge Claudia Fenz, and dismissed by majority, the application to dismiss Judges Nil Nonn, Ya Sokhan, Jean-Marc Lavergne and You Ottara, with Judge Downing dissenting.

1. Submissions

The original submissions that led to this Decision revolved around the severance of Case 002 into two "manageable" trials. The motions argued *inter alia* that the judges' findings in the Trial Chamber's Judgment in Case 002/01, prejudged, or predetermined the separate charges in

Case 002/02 and therefore gave rise to the appearance of bias. Rule 34(2) of the ECCC Internal Rules provides that any party may file an application for disqualification where the Judge has had any association, which might objectively give rise to the appearance of bias.¹⁹ The test, as established by the ECCC Supreme Court Chamber and other international precedents is whether “the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.”²⁰ All parties cited the European Court of Human Rights case of *Poppe v. the Netherlands*²¹ in determining the threshold for when prior judicial findings would indicate the appearance of bias. The Co-Prosecutors argued that there needed to be findings on “all relevant criteria constituting the criminal offence,” whereas the Defense argued that all that was required was a general view of the Accused’s criminality.²²

2. Majority Decision

Citing ECCC, European and international jurisprudence,²³ the majority of the Special Panel rejected the lower threshold, holding that the test was whether “findings in an earlier case evince attributing criminal responsibility in relation to charges in subsequent cases.”²⁴ At the core of this reasoning is the trust in professional judges to put aside previous findings and look solely at the evidence at hand.²⁵ The majority of the Special Bench found that the Case 002/01 Judgment did not meet this higher threshold for a number of reasons. First, the *mens rea*, evidence, and crime base for the charges in the two cases differed.²⁶ Second, the Judgment limited findings on the three policies to be examined in Case 002/02 to pre-1975, or historical background rather than detailed findings.²⁷ Third, the Judgment generally indicated that the judges understood their findings to be limited to Case 002/01.²⁸ Finally, “[a] reasonable observer would recognize that professional Judges are capable of trying successive cases involving related events and similar evidence.”²⁹

3. Dissenting Opinion

Judge Downing, in dissent, held that Trial Chamber judges who actively participated in Case 002/01 should be disqualified, as the Trial Chamber made findings in Case 002/01 which “evince the attribution of individual criminal responsibility to Nuon Chea and Khieu Samphan for crimes charged in Case 002/02”.³⁰ In particular, he disagreed with the Co-Prosecutor’s argument that the judges must have made findings on “all relevant criteria to constitute a criminal offence” in order to appear biased. The test remained, whether a reasonable observer, properly informed, would reasonably apprehend bias.³¹ Judge Downing distinguished the current case from disqualification cases in other international criminal tribunals, stating that those involved judicial findings made in an indictment or appellate review, where the standard of proof was lower.³² He stressed the uniqueness of this situation – both trials involved the same Co-Accused, and the Judges had made overlapping findings to the highest standard of proof.³³

Judge Downing noted that the majority opinion was driven by the presumption that professional judges were impartial, as well as by practical necessity, given the limited pool of international judges available to decide inevitably overlapping cases. However, he concluded firmly that necessity should not impinge on “the absolute right” to an impartial fact finder in a criminal trial.³⁴ Judge Downing then set out, in some detail, the findings from Case 002/01, which he argued evinced attribution of criminal responsibility for the charges in Case 002/02. For example, in Case 002/01, the Trial Chamber found that internal purges occurred, and Nuon Chea was involved in them. These were grounds to apprehend bias on the part of the Trial Chamber judges in respect of Nuon Chea’s responsibility for internal purges, an alleged crime in Case 002/02.³⁵ Judge Downing argued that a reasonable observer would thus apprehend bias in Case 002/02, and therefore all current active Trial Chamber judges should be disqualified, with the exception of Judge Fenz, who was only a reserve judge in Case 002/01.

Notably, the dissenting Judge considered that procedural ambiguities in the severance orders may have exacerbated any “overlap.” The Trial Chamber initially had discussed the severance as merely “two phases” of the same trial,³⁶ however eight days before the Trial Chamber’s decision in Case 002/01, the Supreme Court Chamber suddenly declared that they were in fact two separate and distinct trials.³⁷ Judge Downing argued that the Trial Chamber judges may have been proceeding on the assumption that this Judgment could establish the foundation for the second “phase” of proceedings.³⁸ Although the motions to disqualify failed, it will be instructive to see whether international criminal tribunals are more cautious about severing future cases in the same manner.

IV. TRIAL MANAGEMENT

The Trial Chamber utilized its first week with four days of hearings in Case 002/02 to complete the testimonies of two witnesses, and the majority of testimony from a Civil Party. However, the Thursday, 5 February discussion of a possible closed hearing for the Civil Party (see III.B), as well as common translation or technical issues, delayed the fast-paced schedule somewhat.

A. Attendance

Due to backache, Nuon Chea waived his right to be present in the main courtroom, and he observed proceedings from the holding cell while Khieu Samphan was present in the courtroom during all sessions throughout the week.

Civil Parties Attendance: There were approximately ten Civil Parties observing the proceedings each day this week in the courtroom.

Parties: All the Parties were represented in the courtroom in this week. However, international counsel for Khieu Samphan, Mr. Arthur Vercken, was absent all week, due to his health. Neither of the national counsel for Nuon Chea, Mr. Son Arun or Mr. Suon Visal, was present in the courtroom on the 6 February hearing. On 5 February, Singaporean lawyer Mahesh Rai was recognized as a Civil Party Lawyer, and National Civil Party Lead Co-Lawyer Pich Ang announced that he would be absent from proceedings until after Khmer New Year in April; until that time, he has designated Mr. Ven Pov as his temporary replacement as national lead co-lawyer. Additionally, international assistant prosecutor Travis Farr made his first appearance in the courtroom, leading the OCP’s questioning of Witness Keo Chandara.

Attendance by the public:

DATE	MORNING	AFTERNOON
Monday 02/02/2015	<ul style="list-style-type: none"> ▪ Approximately 100 villagers from Kandieng District and Krakor District, Pursat Province ▪ 70 villagers from Kampong Tralach District, Kampong Chhnang Province ▪ Approximately 60 Cham villagers from Kandieng District and Krakor District, Pursat Province ▪ 9 foreign observers 	<ul style="list-style-type: none"> ▪ Approximately 130 villagers from Kandieng District, Pursat Province ▪ 80 villagers from Kampong Tralach District, Kampong Chhnang Province ▪ 20 Buddhist monks from Kampong Tralach District, Kampong Chhnang Province ▪ 2 foreign observers

Wednesday 04/02/2015	<ul style="list-style-type: none"> ▪ Approximately 250 students, 10 Cham students, and 6 teachers from Western University, Phnom Penh ▪ 3 foreign observers 	<ul style="list-style-type: none"> ▪ Approximately 200 students, from Hun Sen Serei Pheap High School, Takhmao City, Kandal Province ▪ 6 foreign observers
Thursday 05/02/2015	<ul style="list-style-type: none"> ▪ Approximately 200 students from Hun Sen Serei Pheap High School, Takhmao City, Kandal Province ▪ 10 foreigner observers 	<ul style="list-style-type: none"> ▪ Approximately 300 students from Hun Sen Serei Pheap High School, Takhmao City, Kandal Province ▪ 2 foreign observers
Friday 06/02/2015	<ul style="list-style-type: none"> ▪ 315 students from Sok An Prey Melong High School, Takeo Province ▪ 6 foreigner observers 	<ul style="list-style-type: none"> ▪ Approximately 200 students from Hun Sen Serei Pheap High School, Takhmao City, Kandal Province ▪ 8 foreigner observers

B. Time Management

This week marked the first with four days of hearings in Case 002/02, and the Trial Chamber strictly enforced time allocation in order to complete the testimonies of Cheang Srei Mom, Keo Chandara, and Soy Sen within that newly expanded schedule. On Monday, February 2nd, the Court explicitly asked that the defense teams complete their examination of Witness Cheang Srei Mom by the morning break, in order to begin the testimony of the new witness. However, proceedings were delayed slightly during Soy Sen’s testimony as a result of the request for a closed session to discuss matters requiring privacy during his testimony. On February 5th, the Trial Chamber closed the third session to the public in order to hear this request from the Civil Parties, but it decided to postpone any decision on the request in order to complete as much of the Civil Party’s testimony as possible within the week. However, Mr. Soy Sen’s testimony was left uncompleted; the Chamber may recall him for either public or private examination on identification of guards by the Defense teams, and he is within his right as a Civil Party to make a statement of impact before the Tribunal.

C. Courtroom Etiquette

During international assistant prosecutor Travis Farr’s first appearance before the ECCC Trial Chamber this week, he faced some instances of tension with both the international counsel for Nuon Chea and the President. During Mr. Victor Koppe’s attempt to question Witness Keo Chandara about his knowledge of a book called “War and Genocide: A Never-Ending Cycle of Human Brutality,” Mr. Farr objected that the document had not been presented to the Witness yet. Mr. Koppe responded curtly, “Homework, counsel,” and again, “Hence my answer, ‘Do your homework’.” When the President intervened, he adopted a sharp tone as he warned the prosecutor to indicate the full grounds of his objection on the first occasion. The President allowed Mr. Koppe to continue with his questioning. There were a number of objections to Mr. Koppe’s examination of Soy Sen on grounds that he was asking questions based on unreferenced documents, seeking speculation from the witness, or that Counsel was providing opinions of his own through his examination. Objections obstructed his questioning to such a degree that at one point the Mr. Koppe asserted he was being “sabotaged” (see III.A). Trial monitors in the public gallery also noted multiple parties looking at personal mobile phones during proceedings throughout this week. Perhaps most noticeably, Judge You Ottara took his phone out and typed messages at some point during each hearing this week.

D. Translation and Technical Issues

This week's proceedings saw several issues of translation, prompting complaints from all the parties, including the Chamber, on the accuracy of communication. For example, President Nil Nonn corrected an error in the translation to Khmer concerning the number of skulls found at Kraing Ta Chan after 1979: the prosecutor noted documentation detailing over 12,000 skulls, but the number in Khmer was translated as 10,000. On several other occasions, interpreters from the translation booth had to inform the parties to slow down their statements, especially during Civil Party Lawyer Moch Sovannary's questioning of Soy Sen on 4 and 6 February.

E. Time Table

DATE	START	MORNING BREAK	LUNCH	AFTERNOON BREAK	RECESS	TOTAL HOURS
Monday 02/02/2015	9:05	10:12 – 10:33	11:35 – 13:33	14:42 – 15:02	16:08	4 hours and 24 minutes
Wednesday 04/02/2015	9:02	10:16 – 10:33	11:34 – 13:30	14:43 – 15:02	16:03	4 hours and 29 minutes
Thursday 05/02/2015	9:02	10:12 – 10:33	11:45 – 13:34	14:27 – 15:04* <i>(*Majority in Closed Session*)</i>	16:03	4 hours and 14 minutes
Friday 06/02/2015	9:03	10:40 – 11:04	11:33 – 13:51	14:42 – 15:03	15:28	3 hours and 22 minutes
Average number of hours in session				4 hours and 7 minutes		
Total number of hours this week				16 hours and 29 minutes		
Total number of hours, day, weeks at trial				48 hours and 42 minutes		
15 TRIAL DAYS OVER SEVEN WEEKS						

*This report was authored by Mayuri Anupindi, Sambor Huy, Nget Lonh, Daniel Mattes, Claire McMullen, Lina Tay, Lucy Sullivan, Penelope Van Tuyl, and Oudom Vong as part of AIJI's KRT Trial Monitoring and Community Outreach Program. AIJI is a collaborative project between the East-West Center, in Honolulu, and the WSD Handa Center for Human Rights and International Justice at Stanford University (previously known as the UC Berkeley War Crimes Studies Center). 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 Southeast Asia.



Unless specified otherwise,

- § the documents cited in this report pertain to *The Case of Nuon Chea 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 made by AIJI staff; 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
VSS	Victims Support Section
WESU	Witness and Expert Support Unit

¹ Ms. CHEANG Srei Mom (2-TCW-834) was questioned in the following order: international Co-Lawyer for Nuon Chea, Victor KOPPE; national Co-Lawyer for Khieu Samphan, KONG Sam Onn.

² See CASE 002/02 KRT TRIAL MONITOR, Issue 6, Hearings on Evidence Week 3 (26-29 January 2015), pp. 2-4.

³ Mr. KEO Chandara (2-TCW-964) was questioned in the following order: President NIL Nonn; international assistant prosecutor Travis FARR; international Civil Party Lead Co-Lawyer Marie GUIRAUD; national legal consultant to Nuon Chea, SUON Visal; international Co-Lawyer for Nuon Chea, Victor KOPPE; national Co-Lawyer for Khieu Samphan, KONG Sam Onn. Judge Jean-Claude LAVERGNE; Judge Claudia FENZ; international Co-Lawyer for Nuon Chea, Victor KOPPE (for a second time); national Co-Lawyer for Khieu Samphan, KONG Sam Onn (for a second time).

⁴ Any crimes that Mr. Keo Chandara witnessed during his time at KTC in March and April 1975 may be used to establish proof of the environment at the Security Center, but the ECCC only has the jurisdiction to examine crimes allegedly committed after 17 April 1975. The Chamber must therefore determine when key elements of his experiences, such as the graphic acts of torture he witnessed or the alleged visit of 'Ta Chea', occurred. The Witness testified that 'Ta Chea' visited before the Liberation.

⁵ Trial Chamber, Transcript of Trial Proceedings (4 February 2015), E1/256.1 [hereinafter **4 FEBRUARY TRANSCRIPT**], lines 11-12. p. 32.

⁶ 4 FEBRUARY TRANSCRIPT, lines 18-21. p. 31.

⁷ 4 FEBRUARY TRANSCRIPT, lines 6-8. p. 32.

⁸ 4 FEBRUARY TRANSCRIPT, lines 3-4. p. 14.

⁹ Mr. SOY Sen (2-TCCP-271) was questioned in the following order: President NIL Nonn; national Civil Party lawyer MOCH Sovannary; international Civil Party lawyer Martine JACQUIN; international senior assistant prosecutor Vincent DE WILDE D'ESTMAEL; Judge Jean-Marc LAVERGNE; international Co-Lawyer for Nuon Chea, Victor KOPPE; national Co-Lawyer for Khieu Samphan, KONG Sam Onn.

¹⁰ 4 FEBRUARY TRANSCRIPT, lines 5-6. p. 46.

¹¹ 4 FEBRUARY TRANSCRIPT, line 21. p. 85.

¹² 4 FEBRUARY TRANSCRIPT, lines 4-5. p. 54.

¹³ 4 FEBRUARY TRANSCRIPT, lines 7-8. p. 92.

¹⁴ For example, Meas Sokha previously testified that over 100 prisoners were executed at KTC in a single day, and the Civil Party confirmed this occurred in 1977. See CASE 002/02 KRT TRIAL MONITOR, Issue 4, Hearings on

Evidence Week 1 (8-9 January 2015), pp. 1-3; CASE 002/02 KRT TRIAL MONITOR, Issue 5, Hearings on Evidence Week 2 (21-23 January 2015), pp. 2-4.

¹⁵ Although CPLCL Pich Ang did not specifically cite the procedures he referenced, the ECCC Law (Amended, 2004) and the Internal Rules (9th Revision, as revised on 16 January 2015) govern the use of such protective measures. IR 21 ensures the Chamber preserve transparency in its management of proceedings, but Article 34 new of the ECCC Law qualifies this openness with an exception, stating that the ECCC can “decide to close the proceedings for good cause in accordance with existing procedures in force where publicity would prejudice the interests of justice.” Article 33 new of the ECCC Law specifies, “The Court shall provide for the protection of victims and witnesses. Such protection measures shall include, but not be limited to, the conduct of *in camera* proceedings and the protection of the victim’s identity.”

¹⁶ IR 29, entitled “Protective Measures,” puts the legal exception permitted for in the ECCC Law, into place. IR 29(1) states, “The ECCC shall ensure the protection of Victims who participate in the proceedings, whether as complainants, or Civil Parties, and witnesses, as provided in the supplementary agreement on security and safety and the relevant Practice Directions.” IR 29(3) allows for the Trial Chamber to “order appropriate measures to protect victims and witnesses whose appearance before them is liable to place their life or health or that of their family members or close relatives in serious danger.” They are supposed to order any necessary protective measures far in advance of the testimony, but they are allowed to consider later applications on an exceptional basis. To determine this level of liability, the TC should consult with Victims Support Section (VSS) and Witnesses/Experts Support Unit (WESU). Then the TC must make a reasoned decision on the matter. If the reasoned decision of the Chamber regarding a life-threatening situation results in the decision to issue protective measures for the witness or Civil Party’s testimony, Rule 29(4)(e) specifically notes the use of *in camera* hearing sessions. IR 29(4)(e): “as an exception to the principle of public hearings, that the Chambers may conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means. IR 29 also states that any appeals to Decisions issued by the Trial Chamber on this matter shall be subject to appeal to the Supreme Court Chamber.

¹⁷ Beyond the matter of a specific victim’s protection during testimony, Article 33 new of the ECCC Law speaks generally to the Court’s “protection of victims.” This generally includes all victims, not only admitted Civil Parties. Protection of an alleged rape victim by concealing his or her name during proceedings is therefore a prerogative of the Trial Chamber. IR 21 further deals with the general rights of victims.

¹⁸ Special Panel (Judges THOU Mony, President, Judge Rowan DOWNING, Judge Chang-ho CHUNG, Judge HUOT Vuthy, and Judge PRAK Kimsan), Reasons for Decision on Application for Disqualification (30 January 2015), E314/12/1 [hereinafter, **REASONS FOR DECISION**].

¹⁹ ECCC Internal Rules, 9th Revision, as revised on 16 January 2015.

²⁰ REASONS FOR DECISION, ‘Majority Opinion’, para. 33, citing Supreme Court Chamber, Decision on IENG Thirith’s Application to Disqualify Judge SOM Sereyvuth for Lack of Independence (3 June 2011), I/4, para. 10, and adopting Trial Chamber, Decision on IENG Thirith, NUON Chea and IENG Sary’s Applications for Disqualifications of Judges NIL Nonn, Silvia CARTWRIGHT, YA Sokhan, Jean Marc LAVERGNE and THOU Mony (23 March 2011), E55/4, paras. 11-12.

²¹ *Poppe v The Netherlands*, ECtHR, Application No. 32271/04, ‘Judgment’ (24 March 2009).

²² REASONS FOR DECISION, ‘Majority Opinion’, paras. 37-41.

²³ REASONS FOR DECISION, ‘Majority Opinion’, paras. 37- 70.

²⁴ REASONS FOR DECISION, ‘Majority Opinion’, para. 70.

²⁵ REASONS FOR DECISION, ‘Majority Opinion’, para. 35.

²⁶ REASONS FOR DECISION, ‘Majority Opinion’, paras. 93-95.

²⁷ REASONS FOR DECISION, ‘Majority Opinion’, paras. 75-76, 97. Note the Special Panel also stated that the erroneous examination of CPK policies “...are matters for appeal rather than a disqualification application. Even if the Trial Chamber erred when it examined the three policies in question, this would not in itself give rise to any appearance of bias.”

²⁸ REASONS FOR DECISION, ‘Majority Opinion’, para. 106.

²⁹ REASONS FOR DECISION, ‘Majority Opinion’, para. 106.

³⁰ REASONS FOR DECISION, ‘Partly Dissenting Opinion of Judge Rowan Downing’ [hereinafter **JUDGE DOWNING’S DISSENT**], para. 1.

³¹ JUDGE DOWNING’S DISSENT, para. 16.

³² JUDGE DOWNING’S DISSENT, para. 17.

³³ JUDGE DOWNING’S DISSENT, para. 3.

³⁴ JUDGE DOWNING’S DISSENT, paras. 20-21.

³⁵ JUDGE DOWNING’S DISSENT, para. 29.

³⁶ JUDGE DOWNING’S DISSENT, para. 9, citing Trial Chamber, Memorandum entitled “Clarification regarding the use of evidence and the procedure for recall of witnesses, civil parties and experts from Case 002/01 in Case 002/02” (7 February 2014), E302/5, para. 5.

³⁷ JUDGE DOWNING’S DISSENT, para. 9, citing Supreme Court Chamber, Decision on KHIEU Samphan’s Immediate Appeal Against the Trial Chamber’s Decision on Additional Severance of Case 002 and Scope of Case 002/02 (29 July 2014), E301/9/1/1/3, paras. 42-43 and 74. The Supreme Court Chamber also stated that it could only assume that the “Trial Chamber will not make findings in Case 002/01 which would evince attributing criminal responsibility to the co-accused in relation to charges to be adjudicated in subsequent cases” (para. 85).

³⁸ JUDGE DOWNING’S DISSENT, paras. 8-10.