

BEFORE THE TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

**FILING DETAILS**

**Case No:** 002/19-09-2007-ECCC/TC **Party Filing:** Co-Prosecutors  
**Filed to:** Trial Chamber **Original Language:** English  
**Date of document:** 6 February 2014

**CLASSIFICATION**

**Classification of the document  
suggested by the filing party:** PUBLIC

**Classification by Trial Chamber:** សាធារណៈ/Public

**Classification Status:**

**Review of Interim Classification:**

**Records Officer Name:**

**Signature:**



**CO-PROSECUTORS' JOINT REPLY TO RESPONSES TO THE  
CO-PROSECUTORS' SUBMISSION REGARDING THE USE OF EVIDENCE AND  
PROCEDURE FOR RECALL OF WITNESSES FROM CASE 002/01 IN CASE 002/02**

**Filed by:**

**Co-Prosecutors**  
CHEA Leang  
Nicholas KOUMJIAN

**Distributed to:**

**Trial Chamber**  
Judge NIL Nonn, President  
Judge Silvia CARTWRIGHT  
Judge YA Sokhan  
Judge Jean-Marc LAVERGNE  
Judge YOU Ottara  
  
**Civil Party Lead Co-Lawyers**  
PICH Ang  
Elisabeth SIMONNEAU FORT

**Copied to:**

**Accused**  
NUON Chea  
KHIEU Samphan  
  
**Lawyers for the Defence**  
SON Arun  
Victor KOPPE  
KONG Sam Onn  
Arthur VERCKEN  
Anta GUISSÉ

## I. INTRODUCTION

1. On 15 January 2014, the Co-Prosecutors requested the Trial Chamber (“Chamber”) to rule that: “a) all evidence accepted in Case 002/01 and assigned an E3 number will be considered as duly placed before the Trial Chamber for the purpose of all future trial proceedings concerning the remaining charges; and b) witnesses, civil parties and experts heard in Case 002/01 may be recalled in the trial Case 002/02 only if the requesting parties satisfy the court that further questioning is in the interests of justice.”<sup>1</sup>
2. On 27 January 2014, Khieu Samphan’s Defence responded to the Co-Prosecutors’ submission and requested that the Chamber reject the request in its entirety.<sup>2</sup>
3. On 3 February 2014, Nuon Chea’s Defence responded to the Co-Prosecutors’ submission stating that “[t]he Defence concurs with the Co-Prosecutors that documents admitted in Case 002/01 should be admissible in Case 002/02.”<sup>3</sup> Nuon Chea’s Defence also partly concurred with the requested ruling pertaining to the rehearing of witnesses. They submitted “that any party is entitled to request the appearance in Case 002/02 of any person who testified before the Chamber in Case 002/01,”<sup>4</sup> and that, when considering whether a particular witness should be recalled, the Chamber should consider if the proposed evidence aids in the assessment of Nuon Chea’s criminal liability for crimes at issue in Case 002/02.
4. On 3 February 2014, the Lead Co-Lawyers for Civil Parties submitted a response to the Co-Prosecutors’ submission concurring with the requested ruling.<sup>5</sup>

---

<sup>1</sup> **E302** Co-Prosecutors’ Submission Regarding the Use of Evidence and Procedure for Recall of Witnesses from Case 002/01 in Case 002/02, 15 January 2014 (“OCP Submission”), para. 1.

<sup>2</sup> **E302/1** Réponse de la Défense de M. KHIEU Samphân à la “Demande des Co-Procureurs relative à la continuité entre le premier et le deuxième procès dans le dossier 002, s’agissant de l’utilisation des éléments de preuve et de la procédure pour faire citer à comparaître les personnes ayant déjà déposé”, 27 January 2014 (“Khieu Samphan Response”).

<sup>3</sup> **E302/2** Nuon Chea’s Response to Co-Prosecutors’ Submission Regarding Use of Evidence from Case 002/01 in Case 002/02, 3 February 2014 (“Nuon Chea Response”), para. 3.

<sup>4</sup> **E124/7** Decision on Co-Prosecutors’ Request for Reconsideration of the Terms of the Trial Chamber’s Severance Order (E124/2) and Related Motions and Annexes, 18 October 2011 (“Reconsideration of Terms of Severance Decision”), para. 4.

<sup>5</sup> **E302/3** Civil Parties’ Response to the Co-Prosecutors’ Submission Regarding the Use of Evidence and Procedure for the Recall of Witnesses from Case 002/01 in Case 002/02, 3 February 2014 (“Civil Parties’ Response”).

## II. ARGUMENT

### *A. Case 002/01 and Case 002/02 are two trials within the same case*

5. The Khieu Samphan Defence response ignores the relation between Cases 002/01 and 002/02 and the procedures that were envisaged by the Trial Chamber in severing these highly-related cases.<sup>6</sup> Both cases were borne out of a single investigation that resulted in a single charging document, the Case 002 Closing Order. Irrespective of severance, the charges detailed in the Closing Order constitute parts of the same case.<sup>7</sup> The Khieu Samphan Defence asserts that all the procedures followed in Case 002/01 must be repeated anew in their entirety in Case 002/02.<sup>8</sup> They submit that this necessitates the reproduction by the parties of (new and inclusive) witness and evidence lists, submissions regarding the admissibility of the evidence (including the evidence already admitted in Case 002/01), and the re-examination of witnesses who may have already testified to the same matters in Case 002/01.<sup>9</sup> The Khieu Samphan Defence's interpretation of the Severance Decision is incorrect and would result in unnecessary duplication of evidence already heard and tested by all of the parties to the case before the same Chamber.
6. Since Case 002/01 and Case 002/02 are discrete parts of the same case,<sup>10</sup> the re-application of all procedures and repetition of evidence from Case 002/01 is neither mandated nor appropriate. This position is supported by the Nuon Chea Defence<sup>11</sup> and the Lead Co-Lawyers for Civil Parties.<sup>12</sup> Khieu Samphan Defence's attempt to compare the requested ruling in the present case to the transfer of transcripts from Case

<sup>6</sup> **E302/1** Réponse de la Défense de M. KHIEU Samphân à la “Demande des co-Procureurs relative à la continuité entre le premier et le deuxième procès dans le dossier 002, s’agissant de l’utilisation des éléments de preuve et de la procédure pour faire citer à comparaître les personnes ayant déjà déposé”, 27 January 2014, para. 34.

<sup>7</sup> Jean Pradel, “Manuel de Procédure Pénale” (2006) 13<sup>th</sup> Edition, p.476: “La procédure d’instruction est écrite [...] Tous les actes de l’instruction, qu’il s’agisse des actes d’investigation ou des actes de juridiction, donnent lieu à un écrit, signé du juge (ou du président de la chambre de l’instruction) et du greffier, voire du déposant lorsque l’acte est un interrogatoire ou une audition. Tous les actes sont réunis dans *un dossier* dont disposera le président de la juridiction de jugement” [emphasis added].

<sup>8</sup> **E302/1** Khieu Samphan Response, para. 15.

<sup>9</sup> *Ibid.* at para. 10.

<sup>10</sup> **E163/5/1/9** Response to Co-Prosecutors’ Immediate Appeal of Decision on Scope of Trial in Case 002/01, 30 November 2012, para.31, citing **E124/7** Reconsideration of Terms of Severance Decision, para. 10; **E284** Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013 (“Second Severance Decision”), para. 15.

<sup>11</sup> **E302/2** Nuon Chea Response, para. 3: “[Support for the Co-Prosecutor’s request] aligns with Nuon Chea’s Submission on Scope, which argued that the Chamber should consider evidence pertaining to any fact within the Closing Order as a whole to be relevant to the allegations in Case 002/02”.

<sup>12</sup> **E302/3** Civil Parties’ Response.

001 to Case 002/01 is wholly invalid, as the Accused here were not parties in Case 001 and thus had not yet had the opportunity to cross-examine the witnesses who testified in that trial.<sup>13</sup>

***B. The Requested Ruling has been endorsed by the Chamber in previous decisions***

7. The Khieu Samphan Defence asserts that the Co-Prosecutors have relied on an erroneous interpretation of the intentions of the Chamber in severing Case 002.<sup>14</sup> However, contrary to the Defence's submissions, this Chamber has clearly indicated that evidence adduced in Case 002/01 would be available in Case 002/02. Case 002/01 was intended by the Chamber to "provide a foundation for a more detailed examination of the remaining charges and factual allegations against the Accused in later trials."<sup>15</sup> This statement has previously been explicitly supported by the Khieu Samphan Defence.<sup>16</sup> The most logical and efficient means to use Case 002/01 as the "foundation" for future trials is to admit the evidence from that trial in Case 002/02.
8. The Khieu Samphan Defence incorrectly asserts that the right to question expert witnesses on the entire scope of Case 002 was a theoretical right only.<sup>17</sup> The Chamber held that expert witnesses were permitted to be "questioned on all matters within their knowledge or expertise relevant to the entirety of the Closing Order in Case 002."<sup>18</sup> This is clearly based on the principle that evidence from Case 002/01 would be used in Case 002/02. In practice, contrary to Khieu Samphan's assertion,<sup>19</sup> expert witnesses were permitted to be questioned with respect to matters related to charges that would only be addressed at subsequent trials.<sup>20</sup> As previously submitted, the Chamber also

<sup>13</sup> **E302/1** Khieu Samphan Response, para. 17.

<sup>14</sup> **E302/1** Khieu Samphan Response, para. 19, 20: "Cette analyse est particulièrement erronée. Tout d'abord, si la Chambre a indiqué qu'il était prévu que le premier procès serve à poser le « fondement » pour l'examen des suivants, ce n'était certainement pas de la façon dont l'entendent les co-Procureurs."  
<sup>15</sup> *Ibid.* at para. 10.

<sup>16</sup> **E163/5/1/9** Response to Co-Prosecutor's Immediate Appeal of Decision on Scope of Trial in Case 002/01, 30 November 2012, para. 31.

<sup>17</sup> **E302/1** Khieu Samphan Response, para. 24.

<sup>18</sup> **E215** Decision on Assignment of Experts, 5 July 2012 at para. 4. See also, **E284** Second Severance Decision *supra* note 9 at para. 45(i); **E264/1** Memorandum: Scheduling of Experts Phillip Short and Elizabeth Becker and Postponement of Fact Witnesses until Decision on Severance, 26 February 2013 ("Scheduling of Experts") at para. 2.

<sup>19</sup> **E302/1** Khieu Samphan Response, para. 24.

<sup>20</sup> **E215** Decision on Assignment of Experts, para. 4; **E284** Second Severance Decision, para. 45(i); **E264/1** Scheduling of Experts, para. 2; **E194** Memorandum: Order of Witnesses until Decision on Severance, 26 February 2013 at para. 2; **E1/18.1** Transcript of Trial Proceedings, 7 December 2011, pp. 28:17–29:9, 50:5–9. See also **E145** Notice of Trial Chamber's disposition of remaining pre-trial motions and further guidance to the Civil Party Lead Co-Lawyers, 29 November 2011, p. 3.

permitted all parties to question elderly witnesses on issues within the entire scope of Case 002.<sup>21</sup>

***C. The request would have no impact on the standard of proof required in Case 002/02***

9. The Khieu Samphan Defence contends that the requested ruling would reduce the standard of proof required in Case 002/02, and submits that the carryover of evidence would circumvent procedural rules that require the relevance of documents and testimonies to be examined in light of the facts alleged in Case 002/02.<sup>22</sup> This assertion is incorrect. Nothing in the Co-Prosecutors' submissions invites the Chamber to assess the evidence that is before it with any less scrutiny than is otherwise the case. The Co-Prosecutors' proposal simply reflects the reality that the evidence that the Chamber has admitted is relevant to the case as a whole, and that the charges against the Accused are highly inter-related. The Defence will of course have ample opportunity to make submissions before the Chamber as to the weight that should be given to this evidence in the context of the charges to be addressed in Case 002/02.
10. The Co-Accused were provided with ample opportunity to assess the authenticity and reliability of all the documentary evidence admitted in Case 002/01 through document hearings on admissibility and extensive adversarial debate. Further, the Co-Accused have their right to examine each of the relevant experts, civil parties and witnesses. The Defence's submissions with respect to the right to confront and cross-examine<sup>23</sup> overlook the fact that these rights have been realised and would not be compromised by the requested ruling.
11. Moreover, there is no restriction on any party adducing additional evidence in Case 002/02 that repudiates the probative value of a piece of documentary evidence that was admitted in Case 002/01. Professional judges can be presumed not to consider evidence for any irrelevant purpose. Reassessing the relevance of each individual document or portion of testimony would make no sense, as rather than streamlining the case, the process of such re-evaluation would unduly consume a great deal of time. Moreover, because the Closing Order alleges that all of the crimes charged were within a single joint criminal enterprise, none of the evidence admitted in Case 002/01 is irrelevant to the remaining charges from the Closing Order.

<sup>21</sup> E194 Memorandum: Order of Witnesses for Current segment of Case 002/01, 11 May 2012.

<sup>22</sup> E302/1 Khieu Samphan Response, para. 28: "...sous couvert de prétendus gains de temps, ne cesse de suggérer de faux raccourcis et des interprétations portant atteinte à la qualité du débat judiciaire."

<sup>23</sup> E302/2 Nuon Chea Response, paras. 5-6; E302/1 Khieu Samphan Response, para. 36.

*D. Witnesses, experts and civil parties should only be recalled if necessary*

12. The Khieu Samphan Defence submit that the process followed in Case 002/01 for the admission of testimonial evidence should be entirely repeated in order to avoid having to justify the recall of such witnesses.<sup>24</sup> The Co-Prosecutors assert that allowing the recall of experts, witnesses or civil parties, where this is in the interests of justice, would prevent unnecessary repetition and facilitate the expeditious conduct of the proceedings. Starting the admission of evidence afresh would unduly extend the length of the trial, as evidence supports the foundational elements that are common to all of Case 002 (such as the historical background of Democratic Kampuchea, the role of the Accused, the CPK's administrative, communications and military structures, and the existence of a joint criminal enterprise).<sup>25</sup> It is not unduly taxing to expect a party to provide a reason why certain experts, witnesses or civil parties, who have already testified before each Accused and been examined by defence counsel, should be recalled. The Khieu Samphan Defence asserts that repeated and time consuming appearances of the same witnesses are inevitable drawbacks of severance,<sup>26</sup> but fail to justify why such repetition is necessary.
13. The Co-Prosecutors do not disagree with the Nuon Chea Defence submission that witnesses should be recalled in circumstances where this “serves the Chamber’s objective of assessing Nuon Chea’s criminal liability for crimes at issue in Case 002/02.”<sup>27</sup> This is not inconsistent with the Co-Prosecutors’ assertion that witnesses should be recalled if it serves the interests of justice.<sup>28</sup> Provided a party can demonstrate that it was not permitted to question an expert, witness or civil party on issues relevant to Case 002/02, and that the individual is capable of providing such additionally relevant information, the Chamber may order their recall.<sup>29</sup> The Co-

---

<sup>24</sup> **E302/1** Khieu Samphan Response, para. 35.

<sup>25</sup> **E124/7.3** Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/01, amended further to the Trial Chamber’s Decision on Ieng Thirith’s Fitness to Stand Trial (E138) and the Trial Chamber’s Decision on the Co-Prosecutor’s Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163).

<sup>26</sup> **E302/1** Khieu Samphan Response, para. 34, citing **E284/4/8** Decision on Immediate Appeals Against Trial Chamber’s Second Decision on Severance of Case 002, 25 November 2013 (“Supreme Court Severance Appeal”), para. 38-39.

<sup>27</sup> **E302/2** Nuon Chea Response, *supra* note 2 at para. 4

<sup>28</sup> **E302** OCP Submission *supra* note 1 at para. 8; citing **E267/3** Decision on Request to Recall Civil Party TCCP-187 for Review of Procedure Concerning Civil Parties’ Statements on Suffering and Related Motions and Responses (E240, E240/1, E250, E250/1, E267, E267/1 and E267/2), 2 May 2013, para. 20.

<sup>29</sup> **E302** OCP Submission, para. 8-9.

Prosecutors are not seeking to impose “special criteria” for these witnesses, but simply to apply existing rules requiring that evidence be relevant and not repetitive.

***E. The requested recall procedure would promote an efficient and expeditious trial***

14. The Khieu Samphan Defence seeks to dismiss as unsubstantiated the Co-Prosecutors’ assertion that the time required for the Case 002/02 trial would be doubled if the evidence from Case 002/01 must be repeated. The Co-Prosecutors note that this was a conservative estimate, and that there can be no reasonable dispute that the amount of trial time would be dramatically increased if the evidence from the first trial is not admitted. Even the Khieu Samphan Defence admits that their proposal to restart proceedings would inevitably reduce the expeditiousness of the trial.<sup>30</sup> The most time-consuming part of Case 002/01 was the hearing of witnesses and experts who testified to common foundational issues such as the role of the Accused, CPK policies and the structure of the CPK and DK regime. (The testimony of such former cadres and experts required a total of 110.75 trial days, in comparison to 20 trial days for the hearing of the witnesses and civil parties relating to the two forced movements and Tuol Po Chrey.) To rehear all such witnesses and experts would unnecessarily add many months to the time to complete the second trial, and result in repetitive proceedings that would defeat the Trial Chamber’s directive that Case 002/01 serve as the “foundation” for future trials.
15. Moreover, the Khieu Samphan Defence has previously urged that “[t]he Trial Chamber must discharge its duty by ensuring that the right of the Accused to be tried within a reasonable time is respected.”<sup>31</sup> The unnecessary repetition of evidence already heard in Case 002/01 in Case 002/02 risks impacting the right of both Accused to an expeditious trial.

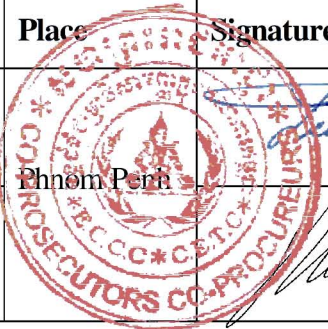

---

<sup>30</sup> **E302/1** Khieu Samphan Response, *Ibid.* at para. 34.

<sup>31</sup> **E163/5/1/9** Response to Co-Prosecutor’s Immediate Appeal of Decision on Scope of Trial in Case 002/01, 30 November 2012

16. For these reasons, the Co-Prosecutors request that the Chamber grant their requests relating to the use of evidence and recall of witnesses from Case 002/01.

Respectfully submitted,

Date	Name	Place	Signature
6 February 2014	CHEA Leang Co-Prosecutor	 Phnom Penh	
	Nicholas KOUMJIAN Co-Prosecutor		