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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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RESPONSE TO CO-PROSECUTORS' IMMEDIATE APPEAL OF DECISION CONCERNING THE SCOPE OF TRIAL IN CASE 002/01

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I. INTRODUCTION

1. Counsel for the Accused Nuon Chea (the 'Defence') hereby submits this Response to the **Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01** (the 'Appeal').[1] For the reasons stated below, the Defence submits that: (i) the Appeal against Trial Chamber Memorandum dated 8 October 2012 (the 'Decision')[2] is inadmissible, or (ii) should be dismissed. For reasons of expedition, the Defence will not respond to all positions and arguments submitted by the Co-Prosecutors (the 'OCP'), but this cannot be construed as support for these positions and arguments.

II. PROCEDURAL HISTORY

2. The Defence refers to paragraphs 4-9 of the Appeal for an overview of the Procedural History.

III. THE APPEAL IS INADMISSIBLE

3. The Appeal is inadmissible, as the relevant condition of Rule 104.4(a) has not been satisfied: the Trial Chamber decision does not have 'the effect of terminating the proceedings.' The OCP attempts to convince the Supreme Court Chamber ('SCC') that future proceedings regarding S-21 and alleged killings at Kampong Tralach Leu District (District 12) are very unlikely. The OCP claims that: 'the prospect of a subsequent trial […] is exceedingly remote'[3], it discusses the 'substantial risk that the Accused will not be subject to further trials'[4] and it states that the exclusion […] will lead to a situation in which the Accused […] - may never stand trial for some of the most important core crimes with which they have been charged.'[5]

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[1] Document No. **E-163/5/1/1**, 'Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of the Trial in Case 002/01 with Annex I and Confidential Annex II', 7 November 2012, ERN 00859078-00859107 ('Co-Prosecutors' Immediate Appeal').
[2] Document No. **E-163/5**, 'Notification of Decision on Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of the Trial in Case 002/01 (E163) and Deadline for Submission on Applicable Law Portion of Closing Briefs', 8 October 2012, ERN 00850036-00850037 ('Notification of Decision on the Co-Prosecutors' Request').
[3] Co-Prosecutors' Immediate Appeal, para. 2.
[4] Co-Prosecutors' Immediate Appeal, para. 36.
[5] Co-Prosecutors' Immediate Appeal, para. 37.

4. While the Defence is willing to accept the fact that the OCP indeed *fears* that the proposed additions to Case 002/001 will never be heard, this fear in and of itself does not turn the Trial Chamber's Decision into a decision that has the effect of terminating the proceedings. Not only does the Trial Chamber retain full discretion as to the decision whether or not to continue with the prosecution of additional facts, it has in fact already announced (and one might say: thereby committed itself) that it *intends* for such future prosecutions to take place: in the very same Memorandum in which the Trial Chamber announced it might consider a modest extension of the scope of Case 002/001, it also stated that it is 'the intention of the Chamber [...] to commence Case 002/02 soon after the conclusion of the evidence in Case 002/01.'[6] There is no reason why the fear of the OCP that further prosecutions will not be conducted should 'trump' the stated position of the Trial Chamber that it fully intends to hold such prosecutions; in other words, there is no reason to conclude that the Decision terminates the proceedings or has the effect of terminating the proceedings: further proceedings in Case 002 are entirely possible and even plausible.

5. At most, the Decision has the effect of *postponing* the decision whether or not to prosecute the facts surrounding S-21 and District 12 to a later date; that future decision will be based on a number of factors, for which the proper assessment can be done only at that unspecified time in the future. Both the fact that such a *final* determination as to continuation or discontinuation still has to be made at some future time *and* the fact that the Trial Chamber will retain unfettered discretion to do so at that later stage militates against the admissibility of this appeal.

IV. THE TRIAL CHAMBER DID NOT ERR IN LAW, NOR IN THE EXERCISE OF ITS DISCRETION

A. Scope of Appellate Review

6. The OCP's position is that the Trial Chamber erred in law, or discernibly erred in the exercise of its discretion, by, *inter alia,* failing to apply the correct legal standard for

[6] Document No. **E-218**, 'Scheduling of Trial Management Meeting to Enable Planning of the Remaining Trial Phases in Case 002/01 and Implementation of Further Measures Designed to Promote Trial Efficiency', 3 August 2012, ERN 00831321-00831326, para. 1.

severance of charges in rejecting the District 12 and Security Centre S-21 crime sites.[7] As to the scope of appellate review, it remarks that the deference due to the Trial Chamber's discretionary decisions is not total, and [i]t does not foreclose appellate review of whether a given action was within the bounds of a trial chamber's discretion, or was premised on incorrect law or facts.'[8] The Defence agrees with this submission on the scope of appellate review.

B. The OCP's Assertion that Primary Consideration must be given to the Requirement of Reasonable Representativeness is Incorrect.

7. However, the OCP's submission that the Trial Chamber has exceeded its discretion or was premised on incorrect law or facts in this particular instance is incorrect. The primary basis for the Appeal is the OCP's assertion that '[i]n severing charges, primary consideration must be given to the requirement of reasonable representativeness.[9]

8. The OCP bases this assertion entirely on its own interpretation of Rule 89*ter*. This Rule reads, in full: 'When the interest of justice so requires, the Trial Chamber may at any stage order the separation of proceedings in relation to one or several accused and concerning part or the entirety of the charges contained in an Indictment. The cases as separated shall be tried and adjudicated in such order as the Trial Chamber deems appropriate.'

9. The OCP makes much of its reading of 'the interest of justice' in Rule 89*ter*, and the alleged complications surrounding the meaning of this concept. According to the OCP, as '[t]here is no guidance provided in the Rules, in the ECCC Law or in Cambodian criminal procedure as to the elements to be taken into account in considering the "interests of justice" in the context of a severance' it 'is therefore appropriate to look to international practice, in accordance with Article 33 new of the ECCC Law.'[10]

10. This position is unconvincing. First of all, before looking for any possible guidance for the interpretation of the term 'interest of justice,' the purpose and background of Rule 89*ter* as a whole should be considered. Rule 89*ter* is clearly supposed to be a tool for

[7] Co-Prosecutors' Immediate Appeal, para. 21.
[8] Co-Prosecutors' Immediate Appeal, para. 25.
[9] Co-Prosecutors' Immediate Appeal, paras. 31-35.
[10] Co-Prosecutors' Immediate Appeal, para. 31.

effective trial management, and it is equally clear that the Rule intends to provide the Trial Chamber with a broad discretion.[11] Importantly, it is only reasonable that this discretion is designed so broadly: after all, the Rule encompasses no more than a trial management mechanism. The Rule does *not* envision drastic measures such as discontinuation of the charges: all cases will be tried, as far as this Rule is concerned, it is just the *order* of the cases that is determined by the Trial Chamber. In that light, considering this purposefully broad discretion, it is clear that 'interest of justice' essentially can mean what the Trial Chamber (within reason) understands it to mean. It is clear that the Trial Chamber *may* take a broad range of circumstances into account when deciding to sever charges, such as a need for expeditiousness of the proceedings, the health of the accused, and the interests of the victims, as well as simple trial management considerations such as a desire to discuss certain closely linked facts during a specific and more condensed time frame. To be sure, nothing prevents the Trial Chamber from *also* considering a concern such as the 'representativeness' of the charges when reaching a decision to sever part of the case; however, this particular concern is not the one all-important concern that overrides all other reasonable concerns (the 'primary consideration'), as the OCP would have it.

11. The intentional broadness of the discretion that has been conferred on the Trial Chamber therefore means that *no* guidance from international practice is needed to help interpret the term 'interest of justice.' While it is true that 'interest of justice' is a broad term, that broadness as such is not problematic in the context of Rule 89*ter*, as the term here must be considered to encompass a wide range of interests. In other words, there is no need to turn to international practice; the broad discretion of the Trial Chamber pursuant to this rule is clear.[12]

[11] This is also illustrated by the fact that, as the Trial Chamber itself has noted, the Rules do not envision the possibility of appeal against such decisions.

[12] Another reasoning that leads to the same result is to simply have a detailed look at the *actual language* of Rule 89ter. The OCP treats the 'interest of justice' component of Rule 89ter as an 'umbrella' instruction that enfolds the Rule as a whole, and suggests that the entire Trial Chamber's severance decision should therefore be guided by an abstract 'interest of justice' principle. However, it is important to look at the *precise* language of Rule 89ter: this Rule does not speak of 'interest of justice' in any generalized sense, but rather, it speaks of a specific 'interest of justice' that apparently *mandates* ('requires') the separation of proceedings. ('*When* the interest of justice so requires', *then* 'the Trial Chamber may […] order a separation of proceedings.') In other words, in order for the Trial Chamber's Decision to be validly based on rule 89ter, one must be able to identify a certain 'interest of justice' which requires a separation of the proceedings. Such interests that require separation of proceedings could clearly be: expeditiousness of the trial, and the desire to come to a verdict against elderly accused; 'representativeness of the charges,' on the other hand, is clearly (and by definition) not an interest of justice that 'requires' the separation of the proceedings. In other words, there is no need to look for guidance from international practice on the issue of representativeness of the charges.

73bis(D) ICTY cannot provide guidance

12. Importantly, even if one were to accept the OCP position that guidance needs to be sought in international practice for the interpretation of the term 'interest of justice,' it is clear that such guidance *cannot* be found (and indeed should not be sought) in Rule 73*bis*(D) of the ICTY Rules of Procedure and Evidence, for a number of reasons.

13. This is true first of all because Rule 73*bis*(D) and Rule 89*ter* have a fundamentally different purpose and application. Application of Rule 73*bis* (D) results in an actual *termination* of the proceedings for those charges that the ICTY Trial Chamber decides to not entertain; this is a crucial difference with ECCC Rule 89*ter*, which does not in any way contemplate a dismissal or termination of the remaining charges.[13] In other words: ICTY Rule 73*bis* (D) is a tool to limit and effectively dismiss charges, while Rule 89*ter* is a mere trial scheduling tool that explicitly does not envision or encompass the dismissal of charges.

14. The reason that this difference between the two provisions is so fundamental in the context of this Appeal is the fact that it is only *sensible* within the legal structure of the ICTY and its Rule 73*bis*(D) that the remaining charges *must* be reasonably representative of the crimes charged, as no further charges will be entertained by the ICTY Trial Chamber; in other words, the indictment is modified to reflect a smaller scale version of the case as a whole. 'Representativeness' is therefore, logically, the predominant (and perhaps only) consideration within that system. But this is entirely unlike the situation at the ECCC with its Rule 89*ter*, where further cases are *assumed* to follow; at the ECCC, we are merely dealing with a large trial that is divided in stages through application of this Rule.[14] 'Representativeness' of the charges therefore simply has no role to play in interpreting Rule 89*ter*. Rule 73*bis*(D) cannot be used to interpret Rule 89*ter*, or provide guidance to the Trial Chamber when applying it; and it certainly cannot now be relied on at the appeal stage to support the far-reaching claim that the

[13] The Rule even effectively *instructs* the Chamber to entertain these charges at a later stage: 'The cases as separated *shall* be tried and adjudicated in such order as the Trial Chamber deems appropriate.' Rule 89ter (emphasis added)

[14] The fact that the OCP alleges that further charges are highly unlikely in the current case is irrelevant when deriving the actual intent behind the Rule from its *wording* , as the OCP is attempting to do in this appeal; clearly, the rule, including its 'interest of justice' component, has been written on the basis of the assumption that further charges *will* be brought before the Trial Chamber. Accordingly, the article must be interpreted with that assumption in mind, and therefore Rule 73*bis*(D) ICTY has no role to play in its interpretation, even if one were to accept the OCP's position that further charges are unlikely in this particular instance.

Trial Chamber somehow erred in law or fact, or abused its discretion by disregarding the system in place at the ICTY.

15. Yet another reason why Rule 73*bis*(D) cannot be used to provide guidance when interpreting Rule 89*ter* can be found in the background and legislative history of the latter Rule. After all, when discussing the issue, the Plenary Session actively considered implementing a rule along the lines of Rule 73bis (D), but explicitly *rejected* it: '[T]he ECCC Plenary Session in February 2011 chose not to merely replicate ICTY Rule *73bis* but instead enacted the present Rule *89ter.*'[15] According to the Trial Chamber, the underlying reason for that decision was that 'ICTY Rule *73bis* is instead a specific measure adopted within an institutional setting that differs significantly from that of the [ECCC].'[16] In other words, not only did the Plenary Session actively reject implementing a rule similar to ICTY Rule 73*bis*, it in addition considered that the ECCC and ICTY structures were relevantly divergent on this particular topic.[17] Considering this reasoned rejection of the ICTY rule 73*bis* by the drafters of the Internal Rules, it is clear that this rule cannot provide guidance when interpreting Rule 89*ter*.

C. The Trial Chamber Properly Considered 'The Number of Witnesses Sought' in Reaching its Decision

16. The Appeal states that the 'Trial Chamber has committed a discernible error in the exercise of its discretion by basing its finding on an irrelevant consideration (the number of witnesses *sought)* and failing to properly consider and decide on the number of witnesses that would actually be required to be heard.'[18]

17. A reasonable reading of the Decision makes clear that the Trial Chamber has made a preliminary assessment of all the witnesses as proposed by the parties, and made a *prima facie* finding that the number of witnesses that would need to be heard

[15] Document No. **E-124/7**, '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, ERN 00747737-00747742, para. 5 ['Decision on Co-Prosecutors' Request for Reconsideration'].
[16] Decision on Co-Prosecutors' Request for Reconsideration, para. 3. *See* for further explanation paragraph 4.
[17] In addition, considering that the requirement of 'representativeness' is the dominant operative clause of ICTY Rule 73*bis*(D), the explicit decision to *not* include similar language in Rule 93*ter* must be understood as an outright *rejection* of representativeness as the central (or even important) consideration for ECCC severance decisions.
[18] Co-Prosecutors' Immediate Appeal, para. 59.

(considering the requirements of a fair trial) in case the charges were to be extended would risk a substantial prolongation of the trial. The Trial Chamber was well within its right to conduct such an assessment.

18. Nothing in the Rules dictates that the Trial Chamber must make a detailed and pre-emptive determination of which witnesses would be summonsed and on what aspects they would testify before the Trial Chamber may reach a decision to (not) extend the charges. In fact, such a time- and labor-intensive requirement would run counter to the aim of Rule 89*ter*, which is to streamline and expedite proceedings. The OCP's assertion on this point must therefore fail.

19. The Nuon Chea Defence does need to set the record straight on a related assertion by the OCP, where they state that '[t]he Nuon Chea Defence has failed to offer tangible justifications in support of the witnesses it has proposed.'[19] The OCP suggests that the only reasoning the Defence has provided with regard to these witnesses can be found in the Appeal Annex II.[20] This is untrue.

20. First of all, at the Trial Management Meeting in August 2012 the Defence set out in detail its reasons for its request to hear a substantial number of witnesses, including S-21 staff members, former detainees and experts, in case the charges would be expanded.[21] These reasons hold true also today.[22]

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[19] Co-Prosecutors' Immediate Appeal, para. 62.
[20] *See* Co-Prosecutors' Immediate Appeal, para. 62, fn. 111.
[21] Document No. **E-1/114.1**, 'Transcript of Proceedings – Trial Management Meeting', 17 August 2012, ERN 00840164-00840303, pp. 113:22-115:18 (*emphasis added*): I understand it's to [the OCP] an important topic, and it is our position that if you concur with that assessment, then we need to deal with this issue **at length**. We cannot have -- and I apologize for using the word, but I use it with a purpose -- **we cannot have a "mini-trial" as to S-21**; it is an important topic -- **it is to the Prosecution. And if we are going to deal with S-21, we need to do it well; and that means no shortcuts.** We need to discuss the facts. [T]o the Defence it is very obvious, what **the core issue in S-21** is; it is **the credibility of Duch**. And we have questioned Duch as part of the first trial here, but we did not get to test his credibility in full, simply because it was **outside the scope of what we were allowed to question Duch on.** We will need to hear more witnesses that can testify on S-21 and that can tell us more about Duch's credibility. That will mean that we will be asking for **staff members of S-21** to appear here in this courtroom to testify, because these staff members, in the first trial, have given statements that **contradict** some of the things that Duch has said. Same for survivors; **certain survivors have testified and have contradicted some of the issues that Duch has testified to**. And we will also suggest to hear **expert witnesses**, just like in Case 001, who can testify on S-21 and on Duch, because again we need to be able to challenge Duch's **credibility**. And I've mentioned Case 001, and I think it's important to note that we cannot rely on the factual assessments in Case 001. And I'm not here to argue or re-argue Case 001, but a few relevant observations are that, as you know, the Defence in 001 was, in fact, on many points concurring with the Prosecution. So there was not a very strong factual discussion on certain issues. Another issue was that the

21. Furthermore, after being invited to do so, the Defence further outlined its position as to why several witnesses would need to be heard if S-21 were to be included in the charges. It did so in a follow-up e-mail communication to the Trial Chamber's Senior Legal Officer, of which all parties received a copy (Annex I).[23] The message it contained was clear and, the Defence submits, convincing: '[S-21] is an important and complicated enough topic to deserve serious and extended attention by the Trial Chamber' and '[p]rosecuting Nuon Chea for S-21-related offenses [...] while not allowing the Defence the opportunity to present witness testimony that directly challenges Duch's credibility, would violate our client's fair trial rights.'[24]

22. It is wholly reasonable to conclude that the Trial Chamber concurred with at least some of these submissions by the Defence, and decided that a proper assessment of S-21 and its related offences would 'risk a substantial prolongation' of the trial. Similarly, it is possible that the Trial Chamber was convinced by the *OCP* submission that a proper assessment of the facts at District 12 would require at least the 12 witnesses that the OCP proposed; not an insignificant number, and it was therefore not unreasonable to conclude that calling these witnesses might unduly delay the proceedings. In order to reach these conclusions, the Trial Chamber did not need to assess the value of each and every individual witness as proposed by the parties in detail, and decide on whether or not to call each individual one of them.[25]

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suspect in Case 001, Duch, was cooperating and he was testifying. However, it is our position that he had reasons to minimize his own position and, therefore, not declare truthfully during his own trial. It is important to note also that the Prosecution has acknowledged this in their final submissions in Case 001. They have stated on paper that Duch's testimony is, at times, not truthful. Long story short, **we cannot rely on Case 001**. In Case 001, there were 72 days of hearing evidence. There were 17 fact witnesses, seven character witnesses, 22 civil parties, and nine expert witnesses. I do not suggest that we would need a similar amount of days to speak about S-21 if we do it as part of this case, but **we will need a very substantial number of witnesses simply so that we can test the credibility of Duch**.

[22] The Trial Chamber must have been convinced by at least some of these arguments, leading it to conclude that numerous witnesses regarding S-21 would need to be heard as part of a fair trial, which in turn would cause undue delays to Case 002/001.

[23] Of course, these communications per e-mail hamper the transparency of the proceedings; it is (also) for that reason that the Nuon Chea defence has repeatedly asked the Trial Chamber to consider issues related to witness selection in public, during oral hearings: the public has a right to know which witnesses the parties request and why. *See* Document No. **E-212**, 'Request for a Public Oral Hearing Regarding the Calling of Defence Witnesses', 22 June 2012, ERN 00818577-00818588 (on which the Trial Chamber has still not ruled.)

[24] *See* Annex I to this Response.

[25] To be sure, the Trial Chamber indeed did not seek overly detailed information regarding the witnesses that would be sought. This also makes sense, as precise witness selection would only be relevant if (and only if) the extension was granted; only at that time would final and detailed submissions be required; until then, summary reasons sufficed. This is also illustrated by the heading of point 7 of the initial Trial Chamber communication,

In other words, it was entirely reasonable for the Trial Chamber to obtain a *prima facie* understanding of how many witnesses would be sought by the parties and how inherently strong their arguments for calling these witnesses were, and to base its decision whether or not to extend the charges on that assessment.[26] This falls well within the broad jurisdiction that Rule 89ter provides to the Trial Chamber.

Further Anticipated Practical Concerns have Been Reasonably Assessed

23. In general, it must be noted that the OCP takes issue with the Trial Chamber's invocation of anticipated difficulties in limiting the scope of these proposed extensions[27], the reliance on anticipated Defence objections[28] and the failure to properly assess the number of additional witnesses required to be heard.[29] In essence, the OCP claims that the Trial Chamber has the relevant tools and powers to counter all those anticipated difficulties, by simply applying the trial management techniques it has used so far.[30] However, it can be deduced from the Decision that the Trial Chamber envisions that *even when using the techniques and powers that it has used for its trial management so far*, the risks for delays are substantial.[31] This is a reasonable assumption about the Chamber's highly discretionary trial

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reflected in the e-mail in Annex I: *'Additional individuals the other parties would seek to call if these proposed extensions were granted.*' Moreover, the Trial Chamber is closely familiar with the subject matter and the proposed witnesses relating to S-21, as a result of having conducted the first Duch-trial, so there must exist a presumption that it is capable of properly assessing the time commitment for a proper discussion of the underlying facts of S-21.

[26] Indeed, the fact that the Trial Chamber *sua sponte* decided to limit the discussion of facts relating to Toul Po Chrey to 'incidents that occurred immediately after the evacuation of Phnom Penh' demonstrates that the Trial Chamber indeed diligently considered the Request by the OCP, while conscious of the requirements of an expeditious trial, and did not just flat-out reject the Request in its entirety.

[27] Co-Prosecutors' Immediate Appeal, paras. 54-57.

[28] Co-Prosecutors' Immediate Appeal, paras. 51-53.

[29] Co-Prosecutors' Immediate Appeal, paras. 58-68.

[30] *See* Co-Prosecutors' Immediate Appeal, paras. 52-55, 57 and 66-67.

[31] This fear on the part of the Trial Chamber is clearly justified. The Defence has already indicated that it would need four months to effectively prepare for the addition of S-21 alone; (*see* Document No. **E-1/114.1**, 'Transcript of Proceedings – Trial Management Meeting', 17 August 2012, ERN 00840164-00840303, pp. 115:19-24). Clearly, a large number of witnesses would need to be called to assess the facts, which would be time consuming. (For the reasons as set out during the TMM and in the e-mail to the Senior Legal Officer (Annex I) the Trial Chamber cannot rely on the findings in Case 001. To be sure, considering that the credibility of Duch is a core issue to the Defence, the psychologists that prepared a rather scathing report on his personality would be key witnesses. Documents related to S-21 would need to be discussed at length, more so than other documents on the case file, simply because the affairs at S-21 seem to have been well-documented and at times contradict Duch's statement and memory. Also, the issue of documents that have been culled by the Vietnamese remains to be addressed by the Trial Chamber. It should also be remembered that the scope of the questioning of Duch was designed to be exceedingly limited, to stay within the confines of Case 002/001; certainly, Duch would need to be questioned again, and, as argued, Defence witnesses should be allowed to testify to challenge his credibility. More generally speaking, with an extension of the facts to S-21, other witnesses that are already called to testify on other facts could now be questioned on a much broader range of issues, including the killing of Lon Nol soldiers, execution sites and security centers more generally.

management authority (which the Chamber has not been reluctant to use in the past, for instance by rescheduling witnesses on short notice and cancelling the testimony of others altogether), based on the facts before the Trial Chamber, and due substantial deference.

24. This observation is further reinforced by the fact that the Trial Chamber has *demonstrably* given extensive and diligent consideration to the OCP application, as evinced by the modality of the addition of the alleged executions at Tuol To Chrey: these may be discussed only insofar as they are incidents which occurred immediately after the evacuation of Phnom Penh, but not those that occurred between 1976 and 1977.[32] In other words, they have considered the OCP application in fine detail, and given a measured and finely tailored ruling, keeping in mind the need to retain a connection with the existing factual allegations.

D. The Trial Chamber has Properly Assessed the Nexus Between the Current Scope of Trial and the Proposed Extensions

25. In its Decision, the Trial Chamber noted that it 'remains unconvinced that these additional crime sites are closely connected to the existing factual allegations in Case 002/01.'[33] This is a factual assessment that falls well within the discretion of the Trial Chamber.

26. However, the Appeal claims that the Trial Chamber has failed to 'properly assess the nexus and logical sequencing between the current scope of trial and S-21 and District 12 executions.' The OCP claims that there is an 'inherent link' between the forced evacuation of Phnom Penh and the executions at District 12 and Tuol Po Chrey on the one hand, and S-21 on the other.[34] There is no such inherent link, and indeed, the OCP has not come close to establishing it.[35]

[32] Notification of Decision on the Co-Prosecutors' Request, para. 3.
[33] Notification of Decision on the Co-Prosecutors' Request, para. 2.
[34] Co-Prosecutors' Immediate Appeal, para 74.
[35] The OCP tries to link the additions of the new sites to the existing facts also through looking at the putative CPK policy to destroy its enemies (Co-Prosecutors' Immediate Appeal, para. 71). This issue will be discussed below in paragraphs 31-32.

27. Of course, the *factual* allegations in Case 002/001 relate to population movements phases 1 and 2 exclusively.[36] As the OCP does not attempt to link S-21 to population movement phase 2, the discussion can be limited to population movement phase 1, which is the evacuation of Phnom Penh. There simply is no logical or convincing factual link between the evacuation of Phnom Penh on the one hand, and S-21 on the other. According to the Closing Order, the evacuees from Phnom Penh were sent to the countryside, *not* S-21. This only makes sense if one considers that the evacuation of Phnom Penh was finalized within a few weeks from 17 April 1975,[37] while S-21 only became fully operational in October 1975.[38]

28. Moreover, there is no indication that people were sent to S-21 *because* they were Phnom Penh evacuees.[39] According to the Closing Order, the 'focus' of S-21 was wholly different. '[T]he primary function of S-21 was to extract confessions from detainees that would help uncover other networks of potential traitors.'[40] According to the OCIJ, 'the most prominent group [of S-21 prisoners] was former RAK members (5,609 entries in the revised prisoners list)', while '[t]he second largest group of detainees was composed of CPK cadres (4,371 entries in the revised prisoners list).'[41] In other words, according to this description, S-21 was mostly intentioned to uncover, control and quell *internal* dissent from *within* the army (RAK) and party (CPK) ranks; this sets S-21 apart from the alleged facts surrounding the evacuation of Phnom Penh; this evacuation (almost by definition) did not target 'internal' dissenters, but rather affected 'outsiders' to the party, the inhabitants of Phnom Penh.

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[36] Document No. **E-124/7.3**, '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 Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163), 8 October 2012, ERN 00852356-00852358 ['Annex – List of Paragraphs and Portions of the Closing Order Relevant to Case 002/01']. With regard to the recent addition of the Tuol Po Chrey execution site and therefore the alleged execution of Lon Nol soldiers to the factual considerations of this case, *see* paras. 33-34 below.
[37] Document No. **D-427**, 'Closing Order', 15 September 2010, ERN 00604508-00605246, para 224 ('Closing Order).
[38] Closing Order, para. 416.
[39] While it is not unlikely that some people that were evacuated from Phnom Penh were eventually detained in S-21, that number must have been limited, and, more importantly, the fact that they had been evacuated from Phnom Penh was not the identifying criterion used for their detention.
[40] Closing Order, para. 455.
[41] Closing Order, paras. 424-425.

29. One only needs to consider the time period during which S-21 was in existence (until January 1979) to realize that the facts relating to S-21 are not closely related to the evacuation of Phnom Penh in a temporal sense, and should therefore not be discussed as part of Case 002/001. A discussion of the relevant facts regarding S-21 would greatly increase the temporal scope of Case 002/001, and could therefore delay the proceedings extensively.[42] Indeed, the Nuon Chea defence team would logically and reasonably request an extensive factual assessment of the operations of S-21 for the time period that Nuon Chea is alleged to have been directly responsible for the operations of Phnom Penh, that is, as of August 1977[43] until early 1979; a time period far removed from the one that is under discussion in case 002/001.

30. The only attempt the OCP makes to link S-21 and the evacuation of Phnom Penh is by repeating a claim that was unconvincing the first time that it was made: 'In requesting the Chamber to include S-21 in Case 002/01, the Co-Prosecutors submitted: "the decision to evacuate Phnom Penh was predicated on the basis that, in flushing out the cities, the Party would be able to identify 'enemies' and eliminate them at security centres and killing sites.'[44] Leaving aside the shaky support for that proposition as such,[45] there is simply no denying that there is no logical connection between the 'enemies' that were allegedly targeted during the evacuation of Phnom Penh, and the 'enemies' that were allegedly targeted in S-21.

OCP reliance on 'policy' is misguided

31. The OCP states that '[t]he first two criminal episodes [the evacuation of Phnom Penh and the executions at Tuol Po Chrey] are directly and inextricably related to

[42] *E.g.*, it is entirely predictable that the discussion of putative S-21 confessions by certain senior CPK officials such as Hu Nim, Vorn Vet, Men Sat, Ruos Nheum, Kung Sophal, or Klang Chap (*see* Closing Order, para. 425) will necessitate debate in the courtroom on the specific political and factual circumstances underlying that specific confession and on the time period in which the confession was allegedly obtained, thus bringing a nearly unlimited range of facts from the 1975-1979 period within the realm of Case 002/001 .
[43] Closing Order, para. 421.
[44] Co-Prosecutors' Immediate Appeal, para. 74.
[45] As can be seen in Document No. **E-163**, 'Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01', 27 January 2012, ERN 00759910-00759921, para. 10: the sole support for this assertion is a single and short quotation by Duch. The OCP in the Appeal also claims (para.72) that its assertion 'that the CPK policy of identifying, rooting out and destroying its enemies was a key factor underpinning the decision to forcibly evacuate the urban centres in April 1975' is supported by the findings in the Closing Order, para. 248; a cursory review of that paragraph reveals that this is a wild overstatement of the findings of the OCIJ. Moreover, in the Closing Order, a whole range of justifications has been discussed (paras 242-249); regardless of what the Trial Chamber may eventually rule on this issue, the bare assertion by the OCP that the policy of identifying, rooting out and destroying its enemies was a 'key factor' underpinning the decision to forcibly evacuate Phnom Penh is no more than that: a bare assertion.

the CPK criminal policy to destroy its perceived enemies - the policy implemented at S-21 and through the District 12 executions.'[46] This language makes clear that the OCP fails to appreciate the distinguishing criterion that the Trial Chamber used in reaching its Decision: the Trial Chamber reasonably assessed whether 'these additional crime sites are closely connected to the existing *factual* allegations in Case 002/01.'[47] These *factual* allegations are, of course, *only* the actual evacuation of Phnom Penh and the actual movement of the population in phase 2,[48] and there is no 'direct and inextricable link' between those facts and the new charges that the OCP has proposed.

32. The OCP, conversely, tries to convince the SCC that these events formed part of a certain *policy* (unhelpfully broadly defined as a policy 'to destroy its enemies'), which policy allegedly also was implemented at S-21 and through the executions at District 12. However, if one were to follow that reasoning one would move away from the *factual* basis of Case 002/001 (the evacuation of Phnom Penh and phase 2) entirely; any meaningful criterion for limiting the number of facts to be discussed in Case 002/001 would be lost, as arguably all the facts in the entire Closing Order could be linked to this broad putative policy of destroying enemies. In other words, whether or not certain facts formed part of an alleged meta-policy of destroying the enemies of the CPK is not a workable criterion when assessing which facts should form part of Case 002/001;[49] the Trial Chamber's criterion (which aims to establish whether the proposed additional crime sites are closely connected to the existing *factual* allegations in Case 002/01) on the other hand is very workable; moreover, the Trial Chamber stayed well within its discretion when applying it.[50]

[46] Co-Prosecutors' Immediate Appeal, para. 71.
[47] Notification of Decision on the Co-Prosecutors' Request, para. 2 (emphasis added).
[48] With regard to the addition of the Tuol Po Chrey execution site, *see* paras 33-34 below.
[49] The circumstance that certain acts can be subsumed under one overarching policy does not mean that these facts themselves are factually closely linked; this is especially true when a policy is formulated as broadly as the one that the OCP is relying on.
[50] And of course, all these considerations do not change the fact, discussed above, that the killing of Lon Nol soldiers on the one hand was not one of the main purposes of S-21, and, on the other hand, according to the Closing Order, numerous other security centers during the DK regime are alleged to have killed Lon Nol soldiers; S-21 can therefore not be distinguished from these other centers on that ground.

Lon Nol Soldiers do not provide the relevant link

33. The OCP places special emphasis on the fact that '[c]rucially, as the Trial Chamber held in Case 001, S-21's victims included "former Lon Nol cadres and soldiers", the group which was especially targeted during the forced evacuation of Phnom Penh and in the executions at Tuol Po Chrey.'[51] The use of the word 'crucially' suggests that the OCP is of the opinion that this connection between the evacuation of Phnom Penh and the executions at Tuol Po Chrey on the one hand, and S-21 on the other hand is particularly relevant.

34. It is, however, important to set out the procedural order of things in a clear manner: the factual **implementation** of the policy of targeting the former officials of the Khmer Republic (which implementation sees to the executions at Tuol Po Chrey only, and not the evacuation of Phnom Penh[52]) only became relevant *as a result of* and *flowing from* the Decision by the Trial Chamber to extend the charges with the execution of Lon Nol soldiers at Tuol Po Chrey.[53] The Annex with the list of paragraphs relevant in Case 002/001 has been *amended* to reflect that *as per 18 October 2012*, and only now contains a reference to officials of the Khmer Republic.[54] In other words, up to and *until* the Decision by the Trial Chamber to extend the charges, the 'facts' to which the new charges were required to be linked were *solely* the evacuation of Phnom Penh and population movement Phase 2; it is *that* procedural starting point which should be form basis for this appellate review (and not the 'new' situation in which also the factual implementation of certain policies against Lon Soldiers are included in the 'revised' charges.) And considering that starting point, it was eminently reasonable for the Trial Chamber to conclude that killings at District 12 and killings at S-21, also those concerning former Lon Nol soldiers, were not closely connected to the existing *factual* charges as they existed in Case 002/001.

[51] Co-Prosecutors' Immediate Appeal, para. 74.
[52] Annex – List of Paragraphs and Portions of the Closing Order Relevant to Case 002/01, para. 1 (vii).
[53] Any other reasoning would mean that the Trial Chamber, by *applying* its broad discretion to add the Tuol Po Chrey killing site to the topics to be discussed during Case 002/001, automatically *limited* its discretionary powers to the extent that it lost the right *not* to include S-21 in the extended charges. This surely cannot be the case.
[54] Document No. **E-124/7.3/corr. 2**, '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 Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163) – Corrected Version, 18 October 2012, ERN 00854112-00854115, p. 1.

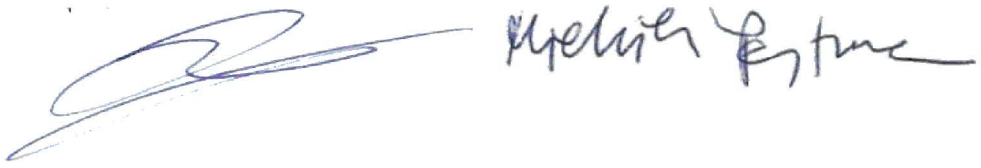
E. The Evidence Relevant to S-21 and District 12 Executions Will be Put to Use

35. The OCP asserts, finally, that the Trial Chamber has committed an additional error of fact or a discernible error in the exercise of its discretion by failing to take into account the extensive evidence which has been put before it in Case 002/01, and which is relevant to S-21 and the District 12 executions. According to the OCP, 'to fail to use' this evidence is 'contrary to the interests of justice and good trial management.' This argument is unconvincing. Indeed, if evidence exists that has been put before the Chamber which is relevant to S-21 and District 12 executions, there is no reason to assume that this evidence will not be used, even if proceedings were not to continue after Case 002/001: after all, such evidence could be used by the Trial Chamber in reaching a verdict, exactly for the purpose of the assessment of 'several overarching themes in Case 002, including the history, authority structure and communications of the CPK and the Democratic Kampuchea regime, roles and positions of the Accused, as well as the development of the five criminal policies alleged in the Closing Order.'[55] This evidence will thus not be lost in any way.

V. CONCLUSION

36. Accordingly, for the reasons stated herein, this Chamber should: (i) declare the Appeal inadmissible, or (ii) dismiss the Appeal, and (iii) confirm the Decision by the Trial Chamber.

CO-LAWYERS FOR NUON CHEA



Jasper Pauw Michiel Pestman

[55] Co-Prosecutors' Immediate Appeal, para 70.