

**BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**CO-PROSECUTORS' REPLY TO NUON CHEA RESPONSE TO APPEAL OF DECISION
CONCERNING THE SCOPE OF TRIAL IN CASE 002/01**

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I. INTRODUCTION

1. The Co-Prosecutors submit the following reply to Nuon Chea's Response to Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 (the "Response").¹ While the Co-Prosecutors have requested an oral hearing or, alternatively, leave to file a joint reply to the responses of the three Accused,² the Supreme Court Chamber has yet to rule on that request. The Co-Prosecutors thus submit this filing in order to ensure that they do not waive their right to reply to the Response filed by the Nuon Chea Defence.³

II. THE APPEAL IS ADMISSIBLE

2. As the Response does not make any different arguments regarding the appeal's admissibility than those already asserted by the Ieng Sary Defence, the Co-Prosecutors will not repeat the arguments made in their recent reply to the Ieng Sary response.⁴
3. The Co-Prosecutors do note, however, that in stark contrast to the assertion in their Response that "further proceedings in Case 002 are entirely possible and even plausible,"⁵ the Nuon Chea Defence's previous statements on this issue were unequivocal in their agreement with the Co-Prosecutors' position. In addition to their previously cited 22 October 2012 statement that "everyone agrees" there will "never" be another trial in Case 002,⁶ the Nuon Chea Defence has confirmed on several other occasions their agreement with the Co-Prosecutors that the prospects of a second trial are remote at best.⁷ The Defence cannot credibly reverse their position on this issue now, simply to suit the current argument they wish to advance against the appeal.
4. Moreover, the Defence's statement that the Impugned 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"⁸ amounts to an admission that the Trial Chamber's decision was equivalent to an indefinite stay of proceedings relating to the S-21 and District 12 crime sites.

¹ E163/5/1/4 Response to Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, 19 November 2012 ("Response").

² E163/5/1/6 Co-Prosecutors' Request for a Public Oral Hearing of the Immediate Appeal of the Decision Concerning the Scope of Trial in Case 002/01 or in the Alternative Request to File a Joint Reply to the Three Defence Responses, 21 November 2012.

³ The Nuon Chea Response was notified in English on 20 November 2012 and in Khmer on 26 November 2012, thus the reply to that Response is due on 3 December 2012. The response of the Khieu Samphan Defence was not due until 30 November 2012, and was only notified in Khmer and French on 3 December 2012.

⁴ See E163/5/1/8 Co-Prosecutors' Reply to Ieng Sary Response to Appeal of Decision Concerning the Scope of Trial in Case 002/01, 26 November 2012.

⁵ E163/5/1/4 Response, para. 4.

⁶ E1/136.1 Transcript of Trial Proceedings, 22 October 2012, p. 9 (lines 3-11).

⁷ E1/114.2 Transcript of Proceedings: Trial Management Meeting, 27 August 2012, pp. 24-25; E1/135.1 Transcript of Trial Proceedings, 19 October 2012, p. 42 ("we register our full agreement with what Mr. Cayley said on that issue the last time he was in Court, that that will never, ever happen").

⁸ E163/5/1/4 Response, para. 5.

III. THE IMPUGNED DECISION WAS BASED ON FACTUAL AND LEGAL ERRORS, AND CONSTITUTED AN ABUSE OF DISCRETION

A. The Trial Chamber Applied Incorrect Legal Standards and Failed to Properly Consider the Consequences of Severance

5. The Defence begins its substantive arguments by mischaracterizing the Co-Prosecutors' arguments regarding "reasonable representativeness" as the "primary basis for the Appeal."⁹ In fact, this argument was just one of several grounds of appeal. The Co-Prosecutors contend that by failing to give any reasonable consideration to the consequences of its severance of certain crimes, the Trial Chamber erred legally and failed to exercise its discretion in accordance with the "interests of justice," as required by Internal Rule 89*ter*. Specifically, in a case such as this where there is no tangible prospect of future trials, the Trial Chamber was obligated to consider whether the retained crimes were reasonably representative of the crimes charged in the Case 002 Closing Order. In these circumstances, the Trial Chamber erred by leaving the Co-Prosecutors and victims with a drastically reduced crime base that did not adequately reflect the seriousness and scope of crimes with which the Accused were originally charged.
6. The Response asserts that there is "no need to turn to international practice" because the Trial Chamber is given discretion to act in the "interests of justice" by Rule 89*ter*.¹⁰ To the contrary, it was essential for the Trial Chamber to look to international practice for guidance on how its discretion should be exercised and what factors should be considered. The relevant international law relating to severance was set forth in paragraph 34 of the Co-Prosecutors' appeal brief. ICTY Rule 73*bis* (D) is relevant where, as here, the severance of crimes constituted an effective termination.¹¹

B. The Trial Chamber Erred by Concluding that the Number of Witnesses Sought by the Parties Could Result in a Substantial Prolongation of the Trial

7. The Trial Chamber further erred to the extent it based its decision upon the number of witnesses "sought" by the Defence or other parties.¹² Rather than the number of witnesses requested by the parties, the Trial Chamber should have considered the total number of witnesses that were necessary relating to the additional crime sites, and the amount of time that such witnesses would add to the overall length of trial. Contrary to the Response, the Co-Prosecutors do not

⁹ E163/5/1/4 Response, para. 7.

¹⁰ E163/5/1/4 Response, para. 11.

¹¹ There is no record that the ECCC Plenary "actively considered" and "explicitly rejected" Rule 73*bis* (D), as asserted by the Defence. The Trial Chamber statement cited by the Defence only asserts, without reference to any record of the Plenary's deliberations, that it "chose not to *merely* replicate ICTY Rule 73*bis*." 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, para. 5 (emphasis added).

¹² E163/5 Notification of Decision on Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163) and deadline for submission of applicable law portion of Closing Briefs, 8 October 2012, para. 2.

contend that it was necessary for the Trial Chamber to make definitive decisions on individual witnesses that it would need to hear.¹³ Rather, it was sufficient to make a general assessment of the number of additional witnesses that would be necessary.

8. The Defence assertion that the Trial Chamber was “convinced” that a substantial number of witnesses would need to be heard relating to the District 12 and S-21 crime sites¹⁴ is not supported by the record. In relation to the District 12 executions, the Trial Chamber determined that the twelve witnesses proposed by the Co-Prosecutors in their original January 2011 witness list were “excessive” and “likely to be unnecessarily duplicative,” and that it was only necessary to call “a maximum of 5-6 additional witnesses.”¹⁵ The Co-Prosecutors agreed with this limitation and, in their August 2012 Trial Management filing, proposed six witnesses to be heard relating to the District 12 site.¹⁶ The Trial Chamber confirmed this proposal at the 17 August 2012 Trial Management Meeting,¹⁷ and no additional witnesses were proposed by either the Defence or Civil Parties relating to this site.¹⁸ Accordingly, the Defence suggestion that the Trial Chamber determined that “a proper assessment of the facts at District 12 would require at least the 12 witnesses that the OCP proposed” is a complete misstatement of the record.¹⁹
9. In relation to S-21 witnesses, the position of the Trial Chamber as of 3 August 2012 was as follows: “The Trial Chamber is mindful to grant this proposed extension but in view of KAING Guek Eav’s testimony to date (in addition to the totality of crime base evidence already before the Chamber in relation to these topics and admissible in consequence of Decision E96/7), the Chamber is unconvinced of the need to hear further witnesses or Civil Parties to address crimes committed at S-21 and Choeng Ek. All additional witnesses proposed by the Co-Prosecutors in this regard were functionaries at S-21 subordinate to KAING Guek Eav and therefore unlikely to be able to address the responsibility of the Accused in Case 002/01.”²⁰
10. The Co-Prosecutors proposed that the Trial Chamber hear further testimony from Duch and four other witnesses, including “one surviving detainee, one interrogator, the cadre responsible for taking prisoners for execution at Choeng Ek and the head of the documentation unit responsible

¹³ E163/5/1/4 Response, para. 18.

¹⁴ E163/5/1/4 Response, para. 17, 22.

¹⁵ E218.1 Annex to Trial Chamber Memorandum titled “Co-Prosecutors’ proposed extension of scope of trial in Case 002/1 (E163),” 3 August 2012, para. 9.

¹⁶ E218/2 Notice of Co-Prosecutors’ Position on Key Issues to be Discussed at 17 August 2012 Trial Management Meeting (with Confidential Annex A), 15 August 2012, para. 16.

¹⁷ E1/114.1 Transcript of Proceedings: Trial Management Meeting, 17 August 2012, pp. 120-121.

¹⁸ E236 Individuals sought by the parties to be heard at trial (as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer), 2 October 2012, para. 6-7.

¹⁹ E163/5/1/4 Response, para. 22.

²⁰ E218.1 Annex to Trial Chamber Memorandum titled “Co-Prosecutors’ proposed extension of scope of trial in Case 002/1 (E163),” 3 August 2012, para. 11.

for keeping records of the prisoners at S-21.”²¹ The Nuon Chea Defence proposed 31 witnesses for this crime site.²² For the reasons set forth in paragraphs 61 to 65 of the Co-Prosecutors’ appeal brief, the number of witnesses proposed by the Nuon Chea Defence was grossly excessive. In its Response, the Defence makes no effort to provide legitimate justifications for its large number of proposed witnesses, and continues to simply assert that those witnesses are needed to “test the credibility of Duch.”²³

11. The Trial Chamber gave no indication that it accepted the excessive number of S-21 witnesses proposed by the Defence (or if so, why), or that it had reconsidered its earlier stated position that further crime sites could be tried without the need to hear large numbers of additional witnesses. Indeed, it was patently unreasonable for the Trial Chamber to have first concluded that it only needed to hear testimony from S-21’s chairman, and then to deny the extension of that site because of the risk of “substantial prolongation of the trial,” without a sufficient explanation of the basis for such conclusion.
12. The Co-Prosecutors thus submit that the Trial Chamber’s conclusion that the addition of District 12 and S-21 would risk a “substantial prolongation of the trial” was either unreasoned or based on patently incorrect conclusions of fact. The basis for this error could be the Trial Chamber’s grossly inaccurate estimates of the amount of time that would be required to hear additional witnesses relating to the District 12 and S-21 sites. In its 3 August 2012 memorandum, the Trial Chamber first estimated that the 23 witnesses originally proposed by the Co-Prosecutors for the Tuol Po Chrey, District 12 and S-21 sites would “equate to a prolongation of proceedings by at least four to six months.”²⁴ The Trial Chamber later stated that if the number of additional witnesses was reduced to eight, as it proposed, the trial would still be prolonged “by at least three months.”²⁵
13. The Trial Chamber thus appears to have been guided by the erroneous conclusion that, for each additional crime base witness it needed to hear, the trial would be prolonged by at least one week. In reality, as borne out by the actual hearing of forced movement witnesses, the Trial Chamber is able to complete the testimony of such witnesses in a day or less. As of this date, the Trial Chamber has heard the testimony of 11 witnesses and civil parties regarding the first

²¹ **E218/2** Notice of Co-Prosecutors’ Position on Key Issues to be Discussed at 17 August 2012 Trial Management Meeting (with Confidential Annex A), 15 August 2012, para. 18.

²² **E236** Individuals sought by the parties to be heard at trial (as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer), 2 October 2012, para. 7.

²³ **E163/5/1/4** Response, para. 20-21, fn. 21; *see also* **E163/5/1/4.1.1** Annex I to Response.

²⁴ **E218.1** Annex to Trial Chamber Memorandum titled “Co-Prosecutors’ proposed extension of scope of trial in Case 002/1 (E163),” 3 August 2012, para. 8.

²⁵ **E218.1** *Ibid.* at para. 17.

and second forced movements in only 9 days of court time. The time estimates for the forced movement witnesses that were provided by the Co-Prosecutors in August 2012 have proven to be realistic and accurate.²⁶ Pursuant to those same estimates, the six proposed District 12 witnesses would require only five days of court time, while the five S-21 witnesses proposed by the Co-Prosecutors (whose testimony is expected to be more complex and thus require 2 days per witness) would require only eleven days of court time.²⁷ Even if the Nuon Chea Defence were allowed to call an additional five S-21 witnesses, the testimony of such witnesses could be completed in no more than ten court days.

14. It is thus difficult to envision any scenario under which the hearing of witnesses relating to these crime sites would require more than eight weeks of court time, and it is possible such testimony could be completed in as little as four weeks. In a trial that is expected to last one year and a half, an extension of four to eight weeks is not a “substantial prolongation” that justifies the exclusion of the S-21 and District 12 crime sites.²⁸
15. The Trial Chamber was required to evaluate the reasonableness of that extension in view of the overall length of the Case 002/01 trial and in comparison to the delay of waiting to adjudicate those crimes in a later trial. The delay that would be associated with waiting until the issuance of judgment in the forced movement trial (or possibly until the completion of all appeals), and then starting a second trial to adjudicate the District 12 and S-21 crimes, would be far greater than an eight-week prolongation of the current trial, and more likely to face complications relating to the health of the Accused. There can be no question that the facts relating to these sites will be adjudicated sooner if tried now, rather than delayed to a hypothetical (and unlikely) future trial.

C. The Trial Chamber’s Belief that District 12 Executions Were Not “Closely Connected” to Case 002/01 Was a Patently Incorrect Conclusion of Fact

16. The Response makes the conclusory assertion that there is no connection or link between the evacuation of Phnom Penh and the District 12 executions, but makes no attempt to explain or

²⁶ OCP’s time estimates for the forced movement witnesses or civil parties who have since testified were as follows: Lay Bony (1 day); Sum Chea (.75); Chum Sokha (.75); Mom Sam Oeurn (.75); Kung Kim (1); Pechuy Chipse (.75); Sokh Chhin (.75); Yim Sovann (.75). **E218/2.1** OCP Proposed Trial Schedule, 15 August 2012. The total time estimated by OCP for the testimony of those 8 individuals was 6.5 days. The Trial Chamber was able to complete their testimony in a total of 7 days time.

²⁷ **E218/2.1** OCP Proposed Trial Schedule, 15 August 2012.

²⁸ The Defence also asserts, in a footnote in the Response, that “it would need four months to effectively prepare for the addition of S-21 alone.” **E163/5/1/4** Response, fn. 31. The Co-Prosecutors note that the parties had already prepared for trial on the entire scope of Case 002 between the time of the Closing Order (15 September 2010) and the time the Severance Order was issued (22 September 2011), less than two months before the start of trial. As discussed in detail in section III.D below, issues relating to S-21 have been a regular part of the Case 002/01 trial to date, including the 12 days of testimony by Duch, and there is no legitimate reason Defence Counsel would require any extra time to prepare for additional S-21 witnesses.

substantiate that position.²⁹ It is telling that the Defence arguments on the nexus issue are limited to S-21, and that no effort is made to defend the Trial Chamber's conclusion regarding the District 12 crime site.

17. The allegations of the Closing Order relating to District 12 that were proposed for inclusion by the Co-Prosecutors were paragraphs 691 and 693 to 697.³⁰ The latter paragraphs are titled "Evacuees in District 12 After 17 April," and allege that in the period immediately following 17 April 1975, evacuees from Phnom Penh and other cities were subject to mass executions at various sites throughout the district.³¹ Paragraph 691 was also proposed for inclusion because it contains the allegation that in Kraing Lvea subdistrict, "upon the arrival of the people who had been evacuated from Phnom Penh, many meetings were held" and "deportees who were identified as former Khmer Republic soldiers [were] sent for execution."
18. There can be no question that these executions were "closely connected" to the evacuation of Phnom Penh, and reflect the criminal purpose of that first forced movement.

**D. The Trial Chamber Erred by Failing to Properly Consider the Nexus
Between S-21 and the Existing Factual Allegations in Case 002/01**

19. The Defence also argues that there was an insufficient nexus between S-21 and "the existing factual allegations in Case 002/01," but misstates the scope of the original allegations of Case 002/01.³² In fact, as demonstrated below, the allegations of the Closing Order that were originally included in Case 002/01 encompassed the CPK policy towards enemies, the targeting of former Lon Nol officials and soldiers, and numerous other issues directly connected to S-21. As a result, S-21 is a subject on which numerous witnesses have testified in the Case 002/01 trial, and numerous documents relating to S-21 have already been admitted.
20. Contrary to the Response, the original Case 002/01 allegations³³ included numerous matters directly connected to S-21. The Historical Background section of the Closing Order incorporates the development of the CPK policy authorizing the use of "revolutionary violence" to eliminate

²⁹ E163/5/1/4 Response, para. 25-26.

³⁰ E163 Co-Prosecutors' Request to Include Additional Crime Sites Within the Scope of Trial in Case 002/1, 27 January 2012, para. 4(a).

³¹ D427 Closing Order, 15 September 2010, paras. 693-697. See, e.g., para. 695 (describing how "just after 17 April 1975" village chiefs were ordered to record the biographies of "all the new people evacuated from Phnom Penh," and those identified as "soldiers, civil servants of Lon Nol and capitalists" were executed at Prey Toteong), para. 696 ("In late April 1975 or early May 1975 families evacuated from Phnom Penh that arrived in Thmei Khmer Village in Tbeng Khpous Subdistrict were taken to Prey Sre Val forest and killed"), para. 697 (referencing "similar mass killings in late April or early May 1975 in District 12" of "new people who were considered to be Khmer Republic officials and soldiers").

³² E163/5/1/4 Response, para. 31.

³³ See E124/7.1/corr-1 List of Paragraphs and Portions of the Closing Order Relevant to Trial One in Case 002, 27 October 2011 (the original list of relevant paragraphs following severance).

enemies of the Party.³⁴ During this phase of the trial proceedings, Nuon Chea testified that Democratic Kampuchea was “very cautious” about “traitors who infiltrated into the Angkar” and that it took a “long period of time to investigate the people,” after which they were “rounded up and sent to S-21 where their confessions or testimonies would be taken further.”³⁵

21. The Administrative and Communication Structures sections of the Closing Order include allegations regarding the arrest and execution of Central Committee members,³⁶ the authority of the Standing Committee to order arrests,³⁷ the role of S-71 in monitoring suspected Party members and conducting arrests and transfers to S-21,³⁸ reporting to the Standing Committee on enemies, traitors and internal security matters,³⁹ the arrests of cadres called to Phnom Penh for “study meetings”⁴⁰ and the broadcast of Vietnamese POW confessions from S-21.⁴¹
22. The Military Structure section of the Closing Order includes allegations regarding the responsibility of the RAK for the “defence of the CPK rule against perceived enemies and spies within the armed forces, the Party and the country as a whole,”⁴² the responsibility of the Party’s Military Committee (including Nuon Chea) for the “operation of S-21,”⁴³ reporting to the Centre on “discoveries of internal enemies,”⁴⁴ purges of internal enemies that were conducted “under the orders of the CPK centre”⁴⁵ and the use of S-21 for the “interrogation and arrest of alleged traitors.”⁴⁶
23. As a result of the numerous issues that were included in the scope of Case 002/01 relating to S-21 and the CPK policy to eliminate enemies, there have been 1,453 references to “S-21” in the trial proceedings to date.⁴⁷ The chairman of S-21, Kaing Guek Eav alias Duch, testified for over 12 days. Contrary to the Response, there was no significant limitation on the scope of his examination, and the Defence used most of their 2 ½ day examination of Duch⁴⁸ on the subject of Nuon Chea’s responsibility for S-21. In addition to Duch, the Trial Chamber has heard

³⁴ D427 Closing Order, 15 September 2010, paras. 21, 23.

³⁵ E1/26.1 Transcript of Trial Proceedings, 12 January 2012, pp. 8-9.

³⁶ D427 Closing Order, 15 September 2010, paras. 38, 43, 50.

³⁷ D427 *Ibid.* at para. 41.

³⁸ D427 *Ibid.* at para. 53.

³⁹ D427 *Ibid.* at para. 76-77.

⁴⁰ D427 *Ibid.* at para. 87-88.

⁴¹ D427 *Ibid.* at para. 112.

⁴² D427 *Ibid.* at para. 117.

⁴³ D427 *Ibid.* at para. 122-123.

⁴⁴ D427 *Ibid.* at para. 137.

⁴⁵ D427 *Ibid.* at para. 146-149.

⁴⁶ D427 *Ibid.* at para. 145.

⁴⁷ This number was derived from a search for the term “S-21” in the pdf files of the Case 002/01 trial transcripts through 14 November 2012 (Day 131). Accordingly, S-21 has been mentioned on average 11 times each day during the Case 002/01 trial.

⁴⁸ Nuon Chea Defence Counsel examined Duch for one hour on 3 April 2012 (E1/58.1), the entire days of 4 and 5 April 2012 (E1/59.1 & E1/60.1) and an additional hour on 10 April 2012 (E1/62.1).

testimony from Nuon Chea's messenger and bodyguard, who testified that he delivered S-21 confessions from Duch to Nuon Chea.⁴⁹ Witnesses from the Ministry of Foreign Affairs have testified to Ieng Sary's receipt and use of S-21 confessions, and his responsibility for arrests of cadres from the Ministry.⁵⁰ CPK sector, district and commune leaders have testified on the reporting on enemy situations in their regions and local cadres who were called to Phnom Penh and disappeared, including numerous persons identified on S-21 lists.⁵¹ Professor David Chandler testified regarding the mission of S-21 and its relationship with the CPK Party Centre.⁵² Having heard the key policy and linkage evidence relating to S-21 as part of this trial, the Trial Chamber could not reasonably reject the inclusion of that crime site on grounds of an insufficient connection to the "existing factual allegations in Case 002/01."

24. Moreover, contrary to the Response,⁵³ allegations regarding the targeting of former officials and soldiers of the Khmer Republic were included in the original scope of Case 002/01, and did not only become relevant as a result of the Trial Chamber's recent decision to add the Tuol Po Chrey site. For example, paragraph 148 of the Closing Order alleged that, in the period immediately after 17 April 1975, "orders to execute ex-Khmer Republic officers and others who were considered enemies – were carried out by military personnel answering to zone secretaries, who received their orders from the Standing Committee."⁵⁴ The section of the Closing Order relating to the first forced movement references evidence that the purpose of the evacuation of Phnom Penh was to identify and eliminate Lon Nol soldiers, and alleges that during the evacuation "Lon Nol soldiers were identified by questioning and taken away separately from the people leaving the city."⁵⁵ Accordingly, the Trial Chamber should have also considered the connection between S-21 and the CPK's targeting of Lon Nol officials and soldiers.
25. In that regard, Duch has testified in this trial that the first group of "key enemies" targeted by the CPK after 1975 was "former soldiers and officers of the Lon Nol regime," that he saw lists of such prisoners at S-21, and that those former Lon Nol soldiers and officials were executed in the

⁴⁹ E1/63.1 Transcript of Trial Proceedings, 18 April 2012, p. 44; E1/64.1 Transcript of Trial Proceedings, 19 April 2012, pp. 14-19.

⁵⁰ E1/67.1 Transcript of Trial Proceedings, 24 April 2012, pp. 50-52 [14:20:52 to 14:27:22] (So Hong); E1/102.1 Transcript of Trial Proceedings, 6 August 2012, pp. 93-95 [15:29:34 to 15:35:06], pp. 103-104 [15:54:35 to 15:59:28] (Suong Sikoeun); E1/98.1 Transcript of Trial Proceedings, 30 July 2012, pp. 45-50 [11:36:45 to 11:53:44] (Phy Phuon).

⁵¹ E1/83.1 Transcript of Trial Proceedings, 7 June 2012, pp. 6-14, 28-32; E1/84.1 Transcript of Trial Proceedings, 11 June 2012, pp. 37-48; E1/88.1 Transcript of Trial Proceedings, 19 June 2012, pp. 80-92, 102-104.

⁵² E1/91.1, Transcript of Trial Proceedings, 18 July 2012, pp. 111-113, 117-118; E1/92.1, Transcript of Trial Proceedings, 19 July 2012, pp. 133-137; E1/93.1, Transcript of Trial Proceedings, 20 July 2012, p. 47.

⁵³ E163/5/1/4 Response, para. 34.

⁵⁴ D427 Closing Order, 15 September 2010, para. 148.

⁵⁵ D427 *Ibid.* at para. 234, 243, 254.



period prior to his promotion as S-21 chief.⁵⁶ Duch's testimony is confirmed by a March 1976 S-21 execution list, which identifies 162 Lon Nol soldiers, officials and relatives killed at S-21.⁵⁷

26. Finally, the Defence disputes that the CPK policy to eliminate enemies (including persons associated with the Lon Nol regime) was central to the decision to evacuate Phnom Penh, claiming that "the sole support for this assertion is a single and short quotation by Duch."⁵⁸ In fact, this "assertion" has been proven by clear and convincing evidence in the Case 002/01 trial, including statements of the Accused and other Party leaders,⁵⁹ CPK documents describing the purpose of the evacuation⁶⁰ and testimony of CPK soldiers who participated in the evacuation.⁶¹ The evacuation of Phnom Penh was just the first step in the CPK's effort to control the population and eliminate all perceived enemies, and its connection to S-21 and the CPK policy on enemies cannot be denied.

IV. CONCLUSION

27. The Co-Prosecutors thus respectfully request that the Chamber reject the arguments made by the Nuon Chea Defence in its Response, determine that the instant Appeal is admissible and grant the requested relief.

Respectfully submitted,

Date	Name	Place	Signature
3 December 2012	YET Chakriya Deputy Co-Prosecutor	Phnom Penh	
	William SMITH Deputy Co-Prosecutor		

⁵⁶ E1/52.1 Transcript of Trial Proceedings, 21 March 2012, pp. 25-26.

⁵⁷ E3/1539 S-21 Prisoner List titled "Names of Prisoners Who Died at Office S-21 Kor," March 1976.

⁵⁸ E163/5/1/4 Response, para. 30, fn. 45.

⁵⁹ E1/14.1 Transcript of Trial Proceedings, 22 November 2011, pp. 103-104, 107-109 (Nuon Chea statement that reasons for decision to evacuate Phnom Penh included concern that some Lon Nol soldiers "would remain hiding in Phnom Penh" and "destructive actions by the traitors who infiltrated in the party"); D199/26.2.35 Pol Pot Press Conference in Peking, 3 October 1977, at ENG 00390927 (statement that city residents were evacuated in order to smash "all sorts of enemy spy organizations"); E3/550 Interview of Ieng Sary by Newsweek, 8 September 1975, at ENG 00087603 (stating that reason for evacuation was discovery of plan of Lon Nol agents and soldiers to cause problems in Phnom Penh); E3/196 Nuon Chea Speech to Communist Workers' Party of Denmark, July 1978, at ENG 00762402.

⁶⁰ See, e.g., E3/5 Revolutionary Flag, August 1975, at ENG 00401486.

⁶¹ E1/140.1 Transcript of Trial Proceedings, 5 November 2012, pp. 16-18, 26, 29-33; E3/419 Written Record of Interview of IENG Phan, 23 November 2009, at ENG 00411004.