

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

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**CO-PROSECUTORS' IMMEDIATE APPEAL OF
SECOND DECISION ON SEVERANCE OF CASE 002**

Filed by:

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Distribute to:

Supreme Court Chamber
Judge KONG Srim, President
Judge A. KLONOWIECKA-MILART
Judge SOM Sereyvuth
Judge C. N. JAYASINGHE
Judge MONG Monichariya
Judge YA Narin
Judge Florence Ndepele MUMBA

Accused
NUON Chea
KHIEU Samphan

Lawyers for the Defence
SON Arun
Victor KOPPE
KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN
Jacques VERGÈS

Copied to:

Civil Party Lead Co-Lawyers
PICH Ang
Elisabeth SIMONNEAU FORT

I. INTRODUCTION

1. Pursuant to Internal Rules 104, 105, 106(2) and 107,¹ the Co-Prosecutors submit this immediate appeal (“Appeal”) to the Supreme Court Chamber against the Trial Chamber’s Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013 (“Impugned Decision”).² The Co-Prosecutors file this appeal because:
 - (a) the Impugned Decision effectively terminates the prosecution of the Accused for the most serious charges of the Indictment, including the arrest, detention, torture and execution of hundreds of thousands of Cambodians at the network of security centres across Democratic Kampuchea;
 - (b) the Trial Chamber has failed to follow the directives of this Chamber, dismissing as “meaningless” the requirement that the Trial Chamber consider whether the scope of trial in Case 002/01 is reasonably representative of the Case 002 Indictment as a whole;
 - (c) the S-21 security centre is the single most representative crime site of the Case 002 Indictment, and the one and only security centre that reported directly to the senior leaders of the CPK; and
 - (d) there is no rational basis to conclude that the short period of additional trial time necessary to include S-21 in Case 002/01 would materially increase the risk that a judgment could not be rendered before the death or incapacity of the Accused.
2. While this Appeal is firmly based in the law and facts of this case, it is motivated by something much more fundamental. The fair and proper resolution of this Appeal is the last opportunity for the ECCC to seek the accountability of these Accused for some of the most serious crimes under international humanitarian law. That was promised to the Cambodian people a generation after deliberate and catastrophic events took place which this court was established to address. The Co-Prosecutors cannot seek accounting for all crimes committed during the period of Democratic Kampuchea. However, they do firmly believe that it is their duty to ensure in Case 002 that there is a reasonable and realistic attempt to more accurately represent the total criminality that was the policies of the Khmer Rouge. The window to obtain this more representative justice is fast closing. For these reasons, the Co-Prosecutors request that this Chamber act decisively and determine that a greater measure of real justice must be done at trial.
3. The Co-Prosecutors accordingly submit that: (1) the Appeal is admissible; (2) the Impugned Decision contains errors of law, errors of fact and errors in the exercise of the Trial Chamber’s

¹ Extraordinary Chambers of the Courts of Cambodia, Internal Rules (Rev. 8), as revised on 3 August 2011 (“Rules”).

² **E284** Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013 (“Impugned Decision”).

discretion; and (3) the Impugned Decision should be amended to include the **S-21 Security Centre**³ within the scope of trial in Case 002/01.

II. PROCEDURAL HISTORY

4. The Co-Prosecutors previously set forth the procedural history related to the first severance of Case 002 in paragraphs four through nine of their first severance appeal,⁴ and incorporate those paragraphs by reference. In the first appeal, the Co-Prosecutors alleged that the Trial Chamber had erred *inter alia* by failing to apply the correct standard of severance.⁵ The Accused each responded in opposition to the appeal,⁶ and the Civil Party Lead Co-Lawyers filed a brief in support of the appeal.⁷ The Co-Prosecutors replied to each defence response individually.⁸
5. On 8 February 2013, the Supreme Court Chamber rendered the Severance Appeal Decision.⁹ The Chamber found the appeal admissible on grounds that the Trial Chamber's Severance Order was in effect a termination of proceedings under Internal Rules 104(4)(a). The Chamber required the Trial Chamber, should it consider re-severing Case 002 for reasons of judicial manageability, to provide "for a tangible plan for the adjudication of the entirety of the charges in the Indictment."¹⁰ On the other hand, if "faced with the deteriorating health of the Co-Accused [...] justice is better served by concluding [Case 002] with a judgment [...] of at least one smaller trial on some portion of the Indictment," the Trial Chamber was directed to "state this clearly and give due consideration to reasonable representativeness of the Indictment within the smaller trial(s)."¹¹
6. On 12 February 2013, the Trial Chamber issued a memorandum setting out its views on the effect of the Severance Appeal Decision: "The immediate consequence of the SCC Decision is that Case 002 is no longer confined in scope and the Trial Chamber cannot proceed to a verdict

³ **D427** Closing Order, para. 415-475.

⁴ **E163/5/1/1** Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, 7 November 2012, paras. 4-9.

⁵ **E163/5/1/1** Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, 7 November 2012.

⁶ **E163/5/1/3** Ieng Sary's Response to the Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, 19 November 2012; **E163/5/1/4** [Nuon Chea's] Response to Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, 19 November 2012; **E163/5/1/9** [Khieu Samphan] Response to Co-Prosecutors' Immediate Appeal of Decision on Scope of Trial in Case 002/01, 30 November 2012.

⁷ **E163/5/1/5** Civil Party Lead Co-Lawyers Support to the Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, 21 November 2012.

⁸ **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; **E163/5/1/10** Co-Prosecutors' Reply to Nuon Chea's Response to Appeal of Decision Concerning the Scope of Trial in Case 002/01, 3 December 2012; **E163/5/1/11** Co-Prosecutors' Reply to Khieu Samphan Response to Appeal of Decision Concerning the Scope of Trial in Case 002/01, 7 December 2012.

⁹ **E163/5/1/13** Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 8 February 2013 ("Severance Appeal Decision").

¹⁰ **E163/5/1/13** *Ibid.* at para. 50.

¹¹ **E163/5/1/13** *Ibid.*

in Case 002 until all factual allegations and charges contained in the Case 002 Closing Order are adjudicated.”¹² The Trial Chamber further stated that it “will render a fully-reasoned decision regarding the scope of Case 002/01 as soon as possible after [scheduled oral hearings], taking into account both the submissions of the parties and the principles enshrined in the SCC Decision.”¹³

7. On 18, 20 and 21 February 2013, the Trial Chamber convened oral hearings on the issue of severance, directing the parties to respond to a set of questions contained in its 12 February 2013 memorandum¹⁴ and a subsequent memorandum of 19 February 2013.¹⁵
8. On 14 March 2013, the Accused Ieng Sary died, and the Trial Chamber terminated proceedings against him.¹⁶ On 25 March 2013, the court-appointed medical experts testified that that Nuon Chea was fit to stand trial.¹⁷ On 29 March 2013, the Trial Chamber found Nuon Chea fit to stand trial.¹⁸
9. On 29 March 2013, the President of the Trial Chamber also announced in court that: “For the reasons that will be outlined in its written decision, the Trial Chamber decides to sever Case 002, pursuant to Internal Rule 89*ter*, by confining the scope of Case 002/01 to the charges related to forced movement of population phases 1 and 2 and executions at Tuol Po Chrey.”¹⁹ The Trial Chamber also indicated that the reasons for that decision would follow in writing “as soon as possible.”²⁰ On the same day, the Co-Prosecutors communicated to the Senior Legal Officer requesting an indication as to when the Trial Chamber would issue written reasons on the severance of Case 002.²¹ On behalf of the Trial Chamber, the Senior Legal Officer replied that reasons would be provided “as soon as possible,” observing that editorial and translation processes and the potential unavailability of national staff made it difficult to estimate when the reasoned decision would become available.²²

¹² **E163/5/1/13/1** Trial Chamber Memorandum: Directions to the parties in consequence of the Supreme Court Chamber’s Decision on Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision concerning the Scope of Case 002/01 (E163/5/1/13), 12 February 2013, para. 2.

¹³ **E163/5/1/13/1** *Ibid.* at para. 5.

¹⁴ **E163/5/1/13/1** *Ibid.*

¹⁵ **E264** Trial Chamber Memorandum: Supplementary questions to the parties following hearing of 18 February 2013 in consequence of the Supreme Court Chamber’s Decision on Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision concerning the Scope of Case 002/01 (E163/5/1/13), 19 February 2013.

¹⁶ **E270/1** Termination of the Proceedings Against the Accused Ieng Sary, 14 March 2013.

¹⁷ **E1/175.1** Trial Transcript, 25 March 2013.

¹⁸ **E1/176.1** Trial Transcript, 29 March 2013, p.2; **E256/5** Second Decision on Accused Nuon Chea’s Fitness to Stand Trial, 2 April 2013.

¹⁹ **E1/176.1** Trial Transcript, 29 March 2013, p. 4, lines 13-17.

²⁰ **E1/176.1** *Ibid.* at p. 2, lines 23-24.

²¹ **E163/5/1/13/2.2.1** Email from the Deputy Co-Prosecutor, 29 March 2013.

²² **E163/5/1/13/2.2.1** Emails from the Senior Legal Officer to the Parties, 29 March 2013.

10. On 5 April 2013, the Co-Prosecutors filed a request seeking confirmation from the Trial Chamber on the availability of the written reasons for the revised severance order by 12 April 2013, or – in anticipation of the unavailability of translation resources over the Khmer New Year period – that the parties be provided with written reasons in one working language by that date.²³ The Trial Chamber did not respond to this request.
11. On 7 April 2013, in advance of the resumption of witness testimony, the Co-Prosecutors requested the Trial Chamber to confirm that the Closing Order paragraphs relevant to Case 002/01 as a result of the renewed severance were the same as the initial severance order.²⁴ The Senior Legal Officer replied on 8 April 2013, confirming that the scope of severance was the same as previously identified.²⁵
12. On 18 April 2013, the Deputy Co-Prosecutor once again requested an update as to when a reasoned decision would be placed on the Case File.²⁶ The Senior Legal Officer replied on that same date, indicating that an update “cannot” be provided “other than to say that it won’t be too much longer.”²⁷
13. On 23 April 2013, the Co-Prosecutors seised this Chamber with an urgent request to order the Trial Chamber to produce written reasons for its oral decision on severance of Case 002/01, if necessary in one working language of the ECCC, in order to prevent further denial of the rights of all Parties.²⁸ The request was later dismissed as moot.²⁹
14. On 26 April 2013, the Trial Chamber released the Impugned Decision.³⁰ On the same day, it also released a press release concerning the Impugned Decision.³¹

III. ADMISSIBILITY

15. The Co-Prosecutors submit that this appeal is timely pursuant to Rule 107(1), which directs that immediate appeals pursuant to Rule 104(4)(a) must be filed within 30 days of the notification of the decision. The Impugned Decision was notified to the parties on 26 April 2013, and therefore this appeal is filed well within the 30-day deadline.

²³ **E264/4** Co-Prosecutor’s Request to Confirm Availability of Written Reasons for Revised Severance Order, 5 April 2013.

²⁴ **Annex 1**, Email from the Deputy Co-Prosecutor, 7 April 2013.

²⁵ **Annex 1**, Email from the Senior Legal Officer to the Parties, 8 April 2013.

²⁶ **E163/5/1/13/2.2.1** Email from the Deputy Co-Prosecutor, 18 April 2013.

²⁷ **E163/5/1/13/2.2.1** Email from the Senior Legal Officer to the Parties, 18 April 2013.

²⁸ **E163/5/1/13/2** Co-Prosecutors’ Request for an Urgent Order to the Trial Chamber to Issue a Reasoned Decision on the Severance of Case 002, 23 April 2013.

²⁹ **E163/5/1/13/3** Decision on Co-Prosecutors’ Request for Urgent Order to Trial Chamber to Issue Reasoned Decision on Severance of Case 002, 8 May 2013, para. 5.

³⁰ **E284** Impugned Decision.

³¹ **Annex 2**, Trial Chamber Press Release: “Trial Chamber Issues Reasoned Decision on Case 002 Severance,” 26 April 2013.

16. The Impugned Decision is subject to immediate appeal pursuant to Rule 104(4)(a) and 104(1). This Chamber has ruled that “the right of appeal provided for in Rule 104(4)(a) of the Internal Rules ensures that an avenue of appeal exists where the proceedings are terminated without arriving at a judgment and therefore without an opportunity to appeal against it,” that this includes decisions to stay proceedings that do not have a tangible promise of resumption, and that “[i]n the context of the ECCC, which has only one Trial Chamber with only one trial on its docket, the severance of Case 002 into discrete trials creates the inevitable situation that proceedings in relation to charges falling outside the scope of Case 002/01 are, in effect, stayed.”³² Where there is a “*de facto* stay of proceedings in relation to all charges placed outside the scope of Case 002/01, and [...] such a stay does not carry a sufficiently tangible promise of resumption as to permit arriving at a judgement on the merits,” an appeal in that regard is admissible under Rule 104(4)(a).³³
17. As a result of the Impugned Decision, S-21 falls outside of the scope of Case 002/01. Charges related to S-21 are therefore stayed under this Chamber’s jurisprudence. In relation to whether the stay has a tangible promise of resumption, this Chamber has held that merely including S-21 in a plan for future trials does not resolve “whether arrival at a judgment on the merits in respect of the alleged crimes at S-21 [...] is effectively barred by virtue of their deferral to a future trial.”³⁴
18. This Chamber has further held that there is a sufficient probability that charges deferred to future trials will *not* reach judgment, and therefore are appealable under Rule 104(4)(a), where a combination of factors indicates that future trials are unlikely to occur or reach completion.³⁵ The same factors that this Chamber relied upon in determining that the initial severance was appealable as an effective termination remain applicable now, including: the advanced age and declining health of the Co-Accused, as referenced by the Trial Chamber in the Impugned Decision;³⁶ the Trial Chamber’s failure to provide a tangible plan by which future trials could begin prior to an appeal judgment in Case 002/01, and the related fact that judgments on the merits are not final until having passed through the appellate stage;³⁷ and the views expressed by the parties and Trial Chamber itself that Case 002/01 will likely be the only one to ever reach judgment.³⁸ The “uncertainty regarding the duration and continuity of financial support to the

³² E163/5/1/13 Severance Appeal Decision, para. 22.

³³ E163/5/1/13 Severance Appeal Decision, para. 25.

³⁴ E163/5/1/13 Severance Appeal Decision, para. 23.

³⁵ E163/5/1/13 Severance Appeal Decision, para. 24.

³⁶ E284 Impugned Decision, para. 121 (“[g]iven the age and physical frailty of all Accused”), para. 126-134.

³⁷ E163/5/1/13 Severance Appeal Decision, para. 24.

³⁸ E163/5/1/13 Severance Appeal Decision, para. 24; E284 Impugned Decision, paras. 87, 93, 121.

ECCC” referenced in the Impugned Decision³⁹ further supports the conclusion that there is no realistic prospect of further trials in Case 002, and that the Trial Chamber is effectively terminating all charges not included within the scope of Case 002/01.

19. For all of these reasons, the Co-Prosecutors submit that the exclusion of S-21 from Case 002/01 under the terms of the Impugned Decision is an effective stay of proceedings in relation to the charges associated with the S-21 crime site, the resolution of which in a judgment on the merits is intangibly remote. The Impugned Decision is therefore immediately appealable pursuant to Rule 104(4)(a).

IV. SUBMISSIONS IN SUPPORT OF THE APPEAL

A. The Trial Chamber erred in law by failing to apply the legal standards for severance mandated by this Chamber

20. In paragraph 50 of this Chamber’s decision, the Trial Chamber was directed as follows: “It is necessary that the Trial Chamber determine, based on its organic familiarity with Case 002, whether the gist of such severance is in judicial manageability, in which case there is necessity for a tangible plan for the adjudication of the entirety of the charges in the Indictment, and not merely a portion thereof. If, however, faced with the deteriorating health of the Co-Accused, the principal motivation is that justice is better served by concluding with a judgment, whether in a conviction or acquittal, of at least one smaller trial on some portion of the Indictment, then the Trial Chamber should state this clearly and give due consideration to reasonable representativeness of the Indictment within the smaller trial.”⁴⁰
21. In section 4.1.1 of the Impugned Decision, the Trial Chamber concluded that renewed severance was necessary based on “the advanced age and increasing physical frailty of the Case 002 Co-Accused, and the unlikelihood that all allegations in the Case 002 Closing Order could be heard during the lifespan of the Accused or while they remained fit to be tried.”⁴¹ However, notwithstanding this conclusion that the need for severance arose from the deteriorating health of Accused, the Trial Chamber failed to give due consideration to reasonable representativeness of the Indictment within the smaller trial, characterizing the Supreme Court Chamber’s holding as “meaningless.”⁴² In the press release accompanying its decision, the Trial Chamber described

³⁹ E284 Impugned Decision, para. 145-146.

⁴⁰ E163/5/1/13 Severance Appeal Decision, para. 50.

⁴¹ E284 Impugned Decision, para. 87, 90. Section 4.1.1 is titled “Should the Trial Chamber undertake renewed severance of Case 002?”

⁴² E284 Impugned Decision, para. 99 (“Unless therefore the Trial Chamber disregards the current legal framework, the notion of ‘representativeness of an Indictment’ is meaningless”).

the principle of “reasonable representativeness” as “a notion imported by the Co-Prosecutors,”⁴³ rather than as a legal holding by a superior court which they were bound to follow.

22. Instead of evaluating whether the smaller trial to be conducted in Case 002/01 was reasonably representative of the Case 002 indictment as a whole, the Trial Chamber rejected this Chamber’s mandate and created its own test: whether the S-21 crime site proposed for inclusion by the Co-Prosecutors was representative of the Case 002/01 forced movement trial devised by the Trial Chamber in its original severance decision. In paragraph 99 of the Impugned Decision, the Trial Chamber erroneously concluded that it was not appropriate “to determine if the first portion of the Indictment to be adjudicated is reasonably representative of the entirety of the charges contained in the Closing Order,” because formal termination of proceedings is not possible under the ECCC framework, and thus determined that it was “preferable to refer to the representativeness of the scope of Case 002/01 than to the representativeness of the Indictment.”⁴⁴ Applying this erroneous legal standard, the Trial Chamber concluded that the addition of S-21 was not “essential to any criterion of reasonable representativeness” due to “the absence of any obvious connection (geographically or temporally) to the major theme of Case 002/01 (*i.e.* forced evacuations).”⁴⁵ The Trial Chamber thus determined the representativeness of S-21 in the context of the annulled Case 002/01 forced movement trial rather than the Case 002 Indictment as a whole.
23. The Supreme Court Chamber voided the first Severance Decision entirely, and required the Trial Chamber to reconsider severance *ab initio* in order to assess “how to render the scope of Case 002/01 reasonably representative of the Indictment” and to “maximize representation of the totality of the charges against the Co-Accused.”⁴⁶ The Trial Chamber should have considered anew whether the two forced movements and Tuol Po Chrey were reasonably representative of the whole Indictment and *which additional charges and crime sites* should be added to render the scope of Case 002/01 reasonably representative. Instead, the Trial Chamber declined to evaluate additional crime sites that would make Case 002/01 more representative, stating that it would “confront insuperable challenges in undertaking a fair and equitable selection between numerous and equally-deserving candidates for inclusion” and did not want to disturb a “delicate, albeit painful, balance of considerations” that could affect admitted Civil Parties.⁴⁷ In

⁴³ **Annex 2**, Trial Chamber Press Release, 26 April 2013.

⁴⁴ **E284** Impugned Decision, para. 99.

⁴⁵ **E284** Impugned Decision, para. 116.

⁴⁶ **E163/5/1/13** Severance Appeal Decision, para. 43-44.

⁴⁷ **E284** Impugned Decision, para. 115, 119.

other words, the Trial Chamber abdicated its judicial responsibility to decide and include representative crime sites because the process would be too difficult and painful.

24. The Trial Chamber further erred by maintaining the fiction that the Accused will be subject to a series of trials,⁴⁸ when their own evaluation of the health of the Accused⁴⁹ and the financial condition of the ECCC⁵⁰ compelled a determination that the prospect of future trials is intangibly remote. In this context, the Trial Chamber was obliged to consider the actual consequences of severance – *i.e.*, that proceedings against the Accused with respect to all severed charges would be effectively terminated. The Impugned Decision concludes that formal withdrawal or termination of charges from the Indictment is not permissible in the ECCC system,⁵¹ but fails to recognize that effective termination nonetheless occurs when charges are indefinitely stayed in circumstances, such as here, where they are unlikely to ever be resumed. The legal analysis contained in the Impugned Decision was rejected by the Supreme Court Chamber in its February 2013 decision,⁵² and it was an error for the Trial Chamber to disregard the legal conclusions of this Chamber.
25. Contrary to the Trial Chamber’s claim that the “current legal framework” of the ECCC renders the notion of representativeness “meaningless,”⁵³ the jurisprudence of this Chamber is part and parcel of the ECCC’s “legal framework” that the Trial Chamber is obligated to apply. The Severance Appeal Decision amply guides the Trial Chamber in terms of the direct applicability of the concept of reasonable representativeness in a “*sui generis* mixed jurisdiction”⁵⁴ such as the ECCC, on the basis of “comparable international legal standards,”⁵⁵ and dismisses as “unreasonable” the Trial Chamber’s position that the requirement of reasonable representativeness does not apply where “no charges are discontinued in consequence of the Severance Order.”⁵⁶ This Chamber has also provided detailed guidance on the concepts of both temporary and indefinite stays of proceedings in connection with its recent Decision on the release of Accused Ieng Thirith.⁵⁷

⁴⁸ E284 Impugned Decision, para. 155.

⁴⁹ E284 Impugned Decision, para. 126-134.

⁵⁰ E284 Impugned Decision, para. 145-146.

⁵¹ E284 Impugned Decision, para. 98-99.

⁵² E163/5/1/13 Severance Appeal Decision, para. 43 (dismissing as “unreasonable” the Trial Chamber’s justification that “no allegations or charges in the Indictment are discontinued,” in view of the finding that the Accused’s health would not allow them to participate in a lengthy series of trials).

⁵³ E284 Impugned Decision, para. 99.

⁵⁴ E163/5/1/13 Severance Appeal Decision, para. 42.

⁵⁵ E163/5/1/13 Severance Appeal Decision at note 95 and para. 42, construing ICTY Rule 73bis(D) as a “comparable international legal standard”.

⁵⁶ E163/5/1/13 Severance Appeal Decision, para. 43.

⁵⁷ E138/1/10/1/5/7 Decision on Immediate Appeal against the Trial Chamber’s Order to unconditionally release the Accused Ieng Thirith, 14 December 2012, paras. 35-40.

26. The Trial Chamber's error of law resulted in it failing to give proper consideration to the relevant factors that should have guided its severance decision. For example, the Impugned Decision states that a small trial limited to the 1st and 2nd forced movements allows the Trial Chamber "to proceed in a manner consistent with the chronological and logical structure of the Closing Order."⁵⁸ However, in the present circumstance where there is no tangible prospect of further trials, the Trial Chamber erred by giving any consideration to the chronological order of the Case 002 indictment. By refusing to apply this Chamber's directive to choose either a series of trials or a single more representative trial, the Trial Chamber thus repeated the same error of law that invalidated its initial severance decision.
27. Notwithstanding the clear directives of the Severance Appeal Decision, the Trial Chamber refused to accept and recognise that its decision effectively dismissed the bulk of the Case 002 charges against the Accused, including all charges relating to the network of security centres in Democratic Kampuchea at which hundreds of thousands of victims were unlawfully arrested, detained, tortured and executed. As a result of this error, the scope of Case 002/01 does not include any security centres and is not reasonably representative of the Indictment as a whole, as addressed in detail below.

B. The Trial Chamber erred in fact and law by concluding that the existing scope of Case 002/01 was sufficiently representative of the Indictment without the addition of the S-21 security office

28. This Chamber has directed the Trial Chamber to consider ICTY Rule 73bis(D) as reflective of "comparable international legal standards" on severance.⁵⁹ The Impugned Decision disregards this clear direction, distinguishing and dismissing the relevance of ICTY jurisprudence in this regard.⁶⁰ In the Co-Prosecutors' submission, the Trial Chamber erred both in fact and in law in failing to properly consider the non-exhaustive list of "relevant circumstances" in Rule 73bis(D) that should be weighed in assessing severance of charges, namely: (a) the crimes charged in the indictment; (b) their classification and nature; (c) the places where they are alleged to have been committed; (d) their scale; and (e) the victims of the crimes charged. In addition, the Trial Chamber failed to properly assess two factors not expressly enumerated in Rule 73bis(D) but reflected in ICTY jurisprudence, namely: (i) the time period of the crimes charged; and (ii) the fundamental nature or theme of the case. These factors, and their application to Case 002, were

⁵⁸ E284 Impugned Decision, para. 111.

⁵⁹ E163/5/1/13 Severance Appeal Decision, para. 42.

⁶⁰ E284 Impugned Decision, para. 101-107.

addressed in the International Co-Prosecutor's oral submissions to the Trial Chamber in February 2013.⁶¹

29. The observation of the Trial Chamber that “the application of ICTY Rule 73bis(D) is highly fact-dependent and approaches have varied greatly”⁶² cannot itself render the applicable legal test for determining representativeness of an Indictment “meaningless,”⁶³ and accords entirely with the reality that severance necessarily involves a detailed, case-by-case assessment – neither mechanical nor sweeping, but nuanced, dispassionate and thoughtful. Any other approach risks remaining “guided...by undisclosed criteria other than logical relations among the particular charges.”⁶⁴
30. Whilst the first two factors identified in Rule 73bis(D) – the “crimes charged” and their “classification and nature” – are reasonably clear, the Co-Prosecutors submit that the first requires the crimes retained in a severed Indictment to be of similar severity and variety as those in the Closing Order as a whole. The second factor requires the severed Indictment to include, where possible, crimes representative of the recognised categories of core international crimes and applicable national crimes.
31. ICTY case law provides a useful distillation of principles that clarify the remaining three factors. The “places where [crimes] were alleged to have been committed” requires a severed Indictment to be geographically reflective of the crimes in the Closing Order as a whole.⁶⁵ If a region can be identified as the locus of the case, the fact that crimes are committed outside that region may be a reason for their exclusion.⁶⁶ An equal and proportionate geographic distribution of retained crime sites tends to retain the representative nature of the Indictment.⁶⁷ However, the elimination of an entire crime site from a region not otherwise represented in an Indictment has been found to not fulfill the requirement of Rule 73 bis (D), as such a removal would lead to victims of crimes committed in certain areas not being represented in the case anymore.⁶⁸
32. In order to distinguish the fourth factor – “scale” of the crimes charged – from the other factors, the Co-Prosecutors submit that scale refers to factors such as the magnitude, regularity and

⁶¹ E1/171.1 Trial Transcript, 18 February 2013, pp. 43-57.

⁶² E284 Impugned Decision, para. 101.

⁶³ E284 Impugned Decision, para. 99.

⁶⁴ E163/5/1/13 Severance Appeal Decision, para. 45.

⁶⁵ *Prosecutor v. Vojislav Seselj*, Case No. IT-03-67, Decision on the Application of Rule 73bis (ICTY Trial Chamber), 8 November 2006, para 30.

⁶⁶ *Prosecutor v. Milutinovic*, Case No. IT-05-87, Decision on the Application of Rule 73bis (ICTY Trial Chamber), 11 July 2006, para 11.

⁶⁷ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Decision Pursuant to Rule 73bis(D) (ICTY Trial Chamber), 4 February 2008, para. 23.

⁶⁸ *Prosecutor v. Perisic*, Case No. IT-04-81-PT, Decision on Application of Rule 73bis and Amendment of Indictment (ICTY Trial Chamber), 15 May 2007, para 12.

severity of the crimes. A review of ICTY jurisprudence provides a number of practical examples of reductions in scope that were found to adequately reflect the “scale” of the crime for the purposes of Rule 73bis(D): (i) from 140 crimes in 23 municipalities to 66 crimes in 15 municipalities;⁶⁹ (ii) from 22 to 20 killing sites charged in one count;⁷⁰ (iii) from 16 to 10 sniping incidents and 18 to 10 shelling incidents;⁷¹ and reducing the temporal scope of the Indictment by two months to eliminate “approximately one third” of the allegations.⁷²

33. In terms of representation of “victims of the crimes charged”, the numbers of victims, grouping of victims and in particular ethnic groups have been viewed as relevant considerations at the ICTY. A severed Indictment should seek to retain all ethnic and religious groups, and any other particular groups who were targeted in the alleged crimes, and should not jeopardize the ability of the prosecution to prove the victimization of all ethnic groups in the Indictment.⁷³
34. In terms of factors not expressly enumerated in Rule 73bis(D), ICTY jurisprudence establishes that severance should also ensure that the time period of the retained crimes is reasonably representative of the original Indictment in two respects: first, a severed Indictment should be reasonably representative of the months or years over which the crimes took place; and second, a severed Indictment should reflect any key phases in the commission of those crimes.⁷⁴ Finally, in *Stanišić and Simatović*, following *Milutinović*, the ICTY Trial Chambers ruled that a severance order should reasonably represent the “fundamental nature or theme of the case.”⁷⁵

Crimes Charged in Indictment

35. The crimes included within the scope of Case 002/01 in the Impugned Decision are not sufficiently representative of the Indictment. The existing scope includes only one of the three classes of crimes charged by the Indictment – crimes against humanity. Expanding the trial to

⁶⁹ *Prosecutor v. Mladić*, Case No. IT-09-92-PT, Decision Pursuant to Rule 73bis(D), (ICTY Trial Chamber), 2 December 2011, para. 5, 11.

⁷⁰ *Prosecutor v. Mladić*, Case No. IT-09-92-PT, Decision Pursuant to Rule 73bis(D), (ICTY Trial Chamber), 2 December 2011, para. 6, 11.

⁷¹ *Prosecutor v. Mladić*, Case No. IT-09-92-PT, Decision Pursuant to Rule 73bis(D), (ICTY Trial Chamber), 2 December 2011, para. 6, 11.

⁷² *Prosecutor v. Gotovina, Cermak and Markac*, Case No. IT-06-90-PT, Order Pursuant to Rule 73bis(D) to reduce the Indictment (ICTY Trial Chamber), 21 February 2007, pp. 2-4.

⁷³ *Prosecutor v. Vojislav Seselj*, Case No. IT-03-67, Decision on the Application of Rule 73bis (ICTY Trial Chamber), 8 November 2006, para. 25-26; *Prosecutor v. Ramush Haradinaj et. Al.*, Case No. IT-04-84-A, Decision Pursuant to Rule 73bis(D) (ICTY Trial Chamber), 22 February 2007, para 11; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Decision Pursuant to Rule 73bis(D) (ICTY Trial Chamber), 4 February 2008, para. 26.

⁷⁴ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Decision Pursuant to Rule 73bis(D) (ICTY Trial Chamber), 4 February 2008, para. 28; *Prosecutor v. Gotovina, Cermak and Markac*, Case No. IT-06-90-PT, Order Pursuant to Rule 73bis(D) to reduce the Indictment (ICTY Trial Chamber), 21 February 2007, pp. 2-4.

⁷⁵ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Decision Pursuant to Rule 73bis(D) (ICTY Trial Chamber), 4 February 2008, paras. 8-9.

include S-21 would add the crime of Grave Breaches of the Geneva Conventions,⁷⁶ thus increasing the representativeness of the trial to two of the three classes of crimes.

36. The existing scope of Case 002/01 is also limited to only six of the specific Crimes Against Humanity offences included in the overall Indictment: forced transfer, attacks against human dignity, political persecution, enforced disappearance, murder and extermination.⁷⁷ Expanding the trial to include S-21 would add five more Crimes Against Humanity offences: imprisonment;⁷⁸ torture;⁷⁹ enslavement;⁸⁰ racial persecution;⁸¹ and rape.⁸² The Trial Chamber thus erred by failing to ensure that the scope of Case 002/01 was sufficiently representative of the crimes charged in the Indictment, and by concluding that the additional charges related to S-21 would “add depth but not breadth to the catalogue of offences already at issue in Case 002/01.”⁸³ Torture, imprisonment, rape, racial persecution and Grave Breaches are entirely different types of crimes than those to which Case 002/01 is presently limited.

Geographic Scope, Scale of Crimes & Victims

37. The Trial Chamber further erred in concluding that crimes sites or charges other than forced movement “occurred either within an individual locality or against a particular religious group or ethnicity.”⁸⁴
38. S-21 was the antithesis of a local prison. S-21 prisoners came from every part of the country - every Zone,⁸⁵ every military division⁸⁶ and every ministry or organisation.⁸⁷ They consisted of men and women, and persons of all age including children.⁸⁸ The prisoners at S-21 represented all racial and ethnic groups, including Vietnamese, Cham,⁸⁹ Chinese⁹⁰ and other ethnic

⁷⁶ D427 Closing Order, 15 September 2010, para. 1479.

⁷⁷ E124/7.3 List of Paragraphs and Portions of the Closing Order Relevant to Case 002/01, section 4.

⁷⁸ D427 Closing Order, para. 1402.

⁷⁹ D427 Closing Order, para. 1408.

⁸⁰ D427 Closing Order, para. 1391.

⁸¹ D427 Closing Order, para. 1422.

⁸² D427 Closing Order, para. 1426.

⁸³ E284 Impugned Decision, para. 147.

⁸⁴ E284 Impugned Decision, para. 112.

⁸⁵ D427 Closing Order, para. 431 [“The CPK cadres and the members of the RAK who were arrested came from all zones and autonomous sectors of Cambodia”].

⁸⁶ D427 Closing Order, para. 424; D288/6.68.9 Annex 9 – S-21 Prisoners from the RAK.

⁸⁷ D427 Closing Order, para. 426-430; D288/6.68.10 Annex 10 – S-21 Prisoners from DK Government Offices.

⁸⁸ D427 Closing Order, para. 423; D288/6.68.6 Annex 6 – S-21 Prisoners Identified as Women [listing 1,698 female prisoners at S-21]; D288/6.68.7 Annex 7 – S-21 Prisoners Identified as Children [listing 89 child prisoners at S-21]; D288/6.68.5 Annex 5 – S-21 Prisoners Identified as Men [listing 5,994 male prisoners].

⁸⁹ See, e.g., D366/7.1.82 S-21 Confession of Yi Sales Yasya.

⁹⁰ E3/1654 S-21 Interrogation List, 8 April 1978, at ERN 00234246-47 [list of 8 “Chinese Minorities”]; E3/1954 S-21 Prisoner List, 23 May 1978, at ERN 00183835-36 [list identifying 9 “Chinese Ethnic Minority” held at S-21].

minorities.⁹¹ They included ordinary people (such as peasants and workers), persons connected to the Khmer Republic regime,⁹² teachers, students, doctors and lawyers,⁹³ and foreign nationals such as Thai, Laotians, Indians and Westerners.⁹⁴ The Vietnamese prisoners at S-21 included both soldiers and alleged spies captured and held as prisoners-of-war,⁹⁵ and civilians of Vietnamese nationality and ethnicity.⁹⁶ No individual crime site provides a more representative sample of the victims of the CPK than S-21. In its Case 001 Judgment, the Trial Chamber recognized the broad representativeness of the S-21 security office, stating that S-21 victims came “from all parts of the country and from all sectors of Cambodian society,” such that “the scope of its activities reached across the entire country.”⁹⁷

39. The Impugned Decision also errs in concluding that the “entire Cambodian population” was harmed by the forced movements, and that forced movement “impacted virtually all victims of the DK era.”⁹⁸ It is certainly true that the number of victims of the forced movements was extremely large. The persons who were subject to the forced movements, however, were primarily those from the urban population of Cambodia as of 17 April 1975.⁹⁹
40. An example of the failure of Case 002/01 to adequately represent all groups of victims from the Indictment is its ethnic representativeness. While the existing scope of Case 002/01 includes crimes committed against the Khmer population and the forced movement of the Cham,¹⁰⁰ it does not include any crimes that specifically targeted the Vietnamese ethnic group, such as the deportation of Vietnamese from Cambodia.¹⁰¹ The addition of S-21 would remedy this error, by including charges specifically related to the Vietnamese prisoners that were detained, interrogated, tortured and killed at the S-21 security office.

⁹¹ **D175/3.19** S-21 Execution Log, 21 April 1978 [list includes 4 “Phnong ethnic minority” from Mondulkiri]; **E3/2285** S-21 Execution Log, 21 October 1977, at ERN 00873667-68 [Nos. 45, 46 & 48 identified as ethnic Jarai]; **E3/342** OCP Revised S-21 Prisoner List [Nos. 945, 946, 11812 & 11821 identified as FULRO].

⁹² **D427** Closing Order, para. 432; **D288/6.68.24** Annex 24 – S-21 Prisoners Described as Former Khmer Republic Soldiers.

⁹³ **D427** Closing Order, para. 432; **D288/6.68.26** Annex 26 – S-21 Prisoners Described as Teachers, Professors, Students, Doctors, Lawyers or Engineers [identifying 279 such persons].

⁹⁴ **D427** Closing Order, para. 433.

⁹⁵ **D427** Closing Order, para. 432; **D288/6.68.28** Annex 28 – S-21 Prisoners Described as Vietnamese Soldiers [identifying 122 such persons]; **D288/6.68.29** Annex 29 – S-21 Prisoners Described as Vietnamese Spies [identifying 144 such persons].

⁹⁶ **D288/6.68.30** Annex 30 – S-21 Prisoners Identified as Vietnamese [identifying 79 such persons].

⁹⁷ **E188** Case 001 Judgement, 26 July 2010, para. 23, 323.

⁹⁸ **E284** Impugned Decision, para. 112, 114.

⁹⁹ **D427** Closing Order, para. 162, 250 [CPK “policy of removing people from the towns and cities”].

¹⁰⁰ **D427** Closing Order, para. 266, 268, 281.

¹⁰¹ **D427** Closing Order, para. 794-796.

41. The Trial Chamber further erred by comparing the number of victims from S-21 (“at least 12,273 persons”)¹⁰² to the total number of deaths in the DK period (1.7 to 2.2 million).¹⁰³ The Indictment does not charge the Accused with all deaths during the DK period, or even all violent deaths (estimated by demographic expert to be 800,000),¹⁰⁴ and it was error to compare the number of victims at S-21 to the total death toll for the DK period.
42. In defending the representativeness of a forced movement trial, the Trial Chamber notes that “countless deaths” allegedly occurred due to starvation, deprivation of medical care and other necessities of life during and in the aftermath of the forced evacuations.¹⁰⁵ However, the Closing Order allegations quoted in the Impugned Decision are part of the charge of Other Inhumane Acts Through Attacks Against Human Dignity.¹⁰⁶ The only murder charge that is included relating to the forced movements is the following allegation from paragraph 1377 of the Closing Order: “Whilst the main purpose of the population movement and worksites was not to kill the persons concerned, the evidence on the Case File shows that **some people** were executed by CPK armed forces shortly before, during or upon arrival from phases 1 and 3 of the population movements.”¹⁰⁷
43. The existing scope of Case 002/01 contains only limited charges of the crime of murder, and does not adequately represent the number and type of victims who were arrested, detained and executed at DK security offices, nor the magnitude, regularity and severity of such crimes. S-21 is the only crime site for which documentary evidence exists establishing both the identity and number of victims,¹⁰⁸ and in terms of confirmed executions is by far the most significant killing site in the Indictment.

Temporal Scope

44. The temporal scope of Case 002/01 is also not representative of the entire Indictment, being limited chronologically to the initial part of the DK period. The crimes included in the present scope of Case 002/01 are limited to a forced movement of the population of Phnom Penh on 17 April 1975 and the ensuing weeks, executions at Tuol Po Chrey in late April 1975 and a second forced movement that was initiated by the CPK Standing Committee in September 1975 and

¹⁰² **D427** Closing Order, para. 423, 460. It should be noted that in its Case 001 Judgment, the Trial Chamber concluded that this was the “minimum number of S-21 victims” and that “their numbers are likely to be considerably greater than indicated.” **E188** Case 001 Judgement, 26 July 2010, para. 141, 143.

¹⁰³ **E284** Impugned Decision, para. 110.

¹⁰⁴ **D427** Closing Order, para. 1360.

¹⁰⁵ **E284** Impugned Decision, para. 110.

¹⁰⁶ **E284** Impugned Decision, footnote 209; **D427** Closing Order, para. 1436.

¹⁰⁷ **D427** Closing Order, para. 1377 (emphasis added).

¹⁰⁸ **E109/4.9** Annex 9 – S-21 Prisoner Records, Co-Prosecutors’ Rule 80(3)(d) Document List [identifying 337 S-21 prisoner lists, interrogation logs and execution logs].

may have continued into subsequent years.¹⁰⁹ By comparison, the S-21 security office operated from October 1975 to 7 January 1979.¹¹⁰ The addition of S-21 would thus make the Case 002/01 trial representative of the entire time period of the Indictment. It would ensure that Case 002/01 reflects the key phases of crimes in the DK period, including the initial targeting of persons associated with the Khmer Republic regime,¹¹¹ the purge of the RAK that began in mid-1976,¹¹² and the massive purges of the North Zone in 1977¹¹³ and the East Zone and Vietnamese in 1978.¹¹⁴ It would also ensure that the extensive evidence that has been introduced relating to the role of the Accused, administrative structures, communications and policies in the 1976 to 1978 time period has a more substantive purpose relating to an actual crime site.¹¹⁵

Fundamental Nature or Theme of Case

45. The Impugned Decision errs by failing to consider that the “fundamental nature or theme” of the Case 002 Indictment is the charge that hundreds of thousands of Cambodians were unlawfully detained, tortured and executed at a network of security centres, pursuant to policies and decisions of the senior leaders of the CPK. The Accused were charged with crimes at 11 different security offices, by far the most prevalent type of crime site in the Indictment.¹¹⁶
46. A single smaller trial cannot be considered representative of the Indictment as a whole if it does not include one of those security centres, and there can be no doubt that the most representative of those crime sites is S-21. Philip Short, whom the Trial Chamber recognizes as an expert and has called to testify in the Case 002/01 trial, describes S-21 as “the pinnacle, the distillation, the reflection in concentrated form of the slave state” created by Pol Pot and the CPK.¹¹⁷ The Trial Chamber itself has previously recognized the significance of the S-21 security office, stating in its Case 001 Judgment that “S-21 was a very important security centre of DK, considered as an

¹⁰⁹ **D427** Closing Order, para. 224, 262, 705; **E3/216** Record of Standing Committee visit to Northwest Zone, 20-24 August 1975. It should be noted that the Closing Order allegations relating to executions in Tuol Po Chrey from 1976 to 1977 (para. 712-713) were excluded by the Trial Chamber from the scope of Case 002/01. **E124/7.3** List of Paragraphs and Portions of the Closing Order Relevant to Case 002/01, section 2.

¹¹⁰ **D427** Closing Order, para. 416.

¹¹¹ **E3/1539** S-21 Prisoner List, March 1976 [identifying 162 Lon Nol soldiers, officials and relatives killed at S-21].

¹¹² **D288/6.68.9** Annex 9 – S-21 Prisoners from the RAK.

¹¹³ **D427** Closing Order, para. 431 (“the number of prisoners coming from the former Central (old North) Zone rose to 360 prisoners for the whole period, with more than 80 arrests in February 1977”); **D288/6.68.48** Arrests from Old North Zone/Central Zone by Month.

¹¹⁴ **D427** Closing Order, para. 431 (“for the East Zone, the number rose to 1,165 arrests with close to 500 arrests in the month of June 1978”); **D288/6.68.46** Arrests from East Zone by Month; **D427** Closing Order, para. 433 (numbers of Vietnamese prisoners “grew as the conflict with Vietnam escalated”); **D288/6.68.27** Annex 27 – Vietnamese Prisoners Entering S-21.

¹¹⁵ **E284** Impugned Decision, para. 117 (noting that the Co-Prosecutors can still make use of the “significant quantity of evidence already before the Chamber in relation to S-21, to the extent this is relevant to leadership or communications structures, or other overarching themes in Case 002/01”).

¹¹⁶ **D427** Closing Order, para. 415-685.

¹¹⁷ **E3/9** Philip Short, *Pol Pot: The History of a Nightmare*, at ENG 00396573 (p. 365).

organ of the [CPK], reporting to the very highest levels of the CPK leadership, carrying out nation-wide operations and receiving high-level cadres and prominent detainees.”¹¹⁸

47. S-21 is also the crime site most closely connected to the Accused on trial in Case 002. Evidence proving the direct linkage between the Accused and S-21 has already been heard by the Trial Chamber as part of the segments of Case 002/01 relating to the role of the Accused, JCE policies, administrative and military structures, and communications.¹¹⁹ Such evidence includes the testimony of S-21 chairman Duch, expert David Chandler, and CPK leaders from the Zones and RAK establishing the responsibility of the Party Centre for decisions and policies relating to S-21 and the arrests of enemies,¹²⁰ as well as documents from S-21 containing annotations proving the knowledge and participation of Nuon Chea and the other DK leaders.¹²¹ Most significantly, the S-21 office was supervised by Nuon Chea for part of the DK period, and throughout the regime was the only security office in the country that reported directly to the “highest echelons of the Party.”¹²² Nuon Chea is alleged by the Indictment to have directly ordered the executions of prisoners at S-21.¹²³
48. The Trial Chamber erred in failing to give any consideration to the close relationship between the Accused and this crime site – a critical factor that makes it essential S-21 not be severed from the charges for which Nuon Chea and Khieu Samphan will be prosecuted. It would be a gross miscarriage of justice if the one trial against these senior leaders does not include the one security centre that reported directly to them, and it certainly cannot be said under Internal Rule 89ter that the “interests of justice” require the severance of this critically important crime site.

Prior S-21 Trial

49. The Trial Chamber further erred to the extent it placed any reliance on the fact it had already conducted a trial of S-21 prison chief Duch, in determining the charges for which Nuon Chea and Khieu Samphan should be tried in Case 002/01.¹²⁴ The focus of the Case 001 trial was the

¹¹⁸ **E188** Case 001 Judgement, 26 July 2010, para. 23.

¹¹⁹ **E284** Impugned Decision, para. 117.

¹²⁰ **E163/5/1/1.2** Annex I: Representative Sample of Testimonial and Documentary Evidence Adduced in Case 002/01; **E163/5/1/1** Co-Prosecutors’ Immediate Appeal of Decision Concerning the Scope of Trial In Case 002/01, 7 November 2012, para. 77-80; **E163/5/1/10** Co-Prosecutors’ Reply to Nuon Chea Response to Appeal of Decision Concerning the Scope of Trial in Case 002/01, 3 December 2012, para. 23.

¹²¹ See, e.g., **E3/1565** S-21 Confession of Kung Kien, 16 May 1977, at KHM 00017305, ENG 00822048 [annotation “Sent directly to Brother Nuon” identified by Duch as Son Sen’s writing, and further note “excerpts sent to Comrade Mok” identified by Duch as Nuon Chea’s handwriting]; **E3/1705** S-21 Confession of Ke Kim Huot, 29 April 1978, at KHM 00014150, ENG 00242282 [containing annotation “Khieu Samphan alias Hem”].

¹²² **D427** Closing Order, para. 422, 952, 959-961, 972-973, 1062, 1183, 1185; **E188** Case 001 Judgement, 26 July 2010, para. 23.

¹²³ **D427** Closing Order, para. 970, 972-973.

¹²⁴ **E284** Impugned Decision, para. 112 (“the Trial Chamber also doubts the desirability of including within the scope of Case 002/01 the only crime site to have been conclusively adjudicated by the ECCC to date”); see also

responsibility of a prison chief for the crimes committed at a site he operated. The Case 002 charges against Nuon Chea and Khieu Samphan involve a different and far more significant issue – who was responsible for the decisions and policies that resulted in the arrest, torture and execution of over 12,000 people at S-21. As set forth above, S-21 best represents the core crimes for which the Accused were charged in the Case 002 Indictment and is the crime site most closely connected to those senior leaders. The Trial Chamber should have limited its analysis to whether S-21 is representative of the Indictment and whether it would be in the “interests of justice” to sever (and effectively terminate) the charges against these Accused relating to the one security centre that reported directly to them. It was error for the Trial Chamber to give any consideration to other cases against different defendants in making this assessment.

50. The errors of law and fact set forth in sections IV.A and IV.B invalidate the Trial Chamber’s decision that the existing scope of Case 002/01 is reasonably representative of the Indictment as a whole, and compel the inclusion of S-21 in order to avoid a miscarriage of justice. The Impugned Decision expressly recognizes that the Supreme Court Chamber has “corrective jurisdiction” pursuant to which it can order the Trial Chamber “to add S-21.”¹²⁵

C. The Trial Chamber erred in concluding that the addition of S-21 would unreasonably delay the trial

51. The Impugned Decision concludes that the addition of S-21 would unreasonably delay the Case 002/01 trial and “jeopardize the Chamber’s ability to reach any timely verdict in Case 002/01” before the death or incapacity of the remaining Accused.¹²⁶ However, as demonstrated below, there was no rational basis upon which to conclude that the short period of additional trial time necessary to include S-21 in Case 002/01 would materially increase the risk that a judgment could not be rendered before the death or incapacity of the Accused. These errors of fact and errors in the exercise of the Trial Chamber’s discretion have substantially prejudiced the Co-Prosecutors, by effectively precluding them from prosecuting the Accused for the most serious and important charges of the Case 002 Indictment.

i. Conclusion that addition of S-21 would have “uncertain impact on the length of proceedings”

52. The Trial Chamber erred in finding that the impact on the length of proceedings should S-21 be added to Case 002/01 was “uncertain” and “may risk a substantial or indeterminate prolongation

E163/5/1/13/1 Directions to the Parties in Consequence of the Supreme Court Chamber’s Decision, 12 February 2013, para. 3(iv).

¹²⁵ E284 Impugned Decision, para. 94.

¹²⁶ E284 Impugned Decision, para. 137.

of trial proceedings.”¹²⁷

53. On 27 March 2013, the Co-Prosecutors filed a Proposed Trial Schedule that contained a specific plan for the expeditious completion of trial proceedings, pursuant to which the additional trial time arising from the inclusion of S-21 would be limited to one month.¹²⁸ The Co-Prosecutors proposed a maximum of 15 days of witness testimony, including 11 days for the five S-21 witnesses previously requested by both the Co-Prosecutors and the Nuon Chea Defence and a “discretionary period of four days for any further witnesses proposed by the Defence or Civil Parties and deemed necessary by the Trial Chamber.”¹²⁹
54. The determination of the number of S-21 witnesses who would testify, and the length of their testimony, are matters within the control of the Trial Chamber. As such, it was error for the Trial Chamber to abdicate its responsibility and authority to establish an expeditious schedule for the hearing of S-21 witnesses, and to conclude that the impact on the length of proceedings was “uncertain” or doubtful.¹³⁰ The Trial Chamber limited the Tuol Po Chrey crime site to two witnesses whose testimony would be heard in a total of 2.5 days,¹³¹ and there is no reason it could not establish a definitive and expeditious schedule for the hearing of S-21 witnesses.
55. The Trial Chamber could not reasonably conclude that substantial numbers of witnesses would be necessary due to the addition of S-21 as a crime site. The Impugned Decision recognizes that there is a “significant quantity of evidence already before the Chamber in relation to S-21.”¹³² Moreover, the Trial Chamber previously concluded that few (if any) additional witnesses would be required were S-21 included in Case 002/01: “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 Choeung 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

¹²⁷ E284 Impugned Decision, section 4.3.3 & para. 138.

¹²⁸ E273 Co-Prosecutors’ Proposed Trial Schedule, 27 March 2013, para. 9-10; E273.1 Annex A: OCP Proposed Trial Schedule for Final Phase of Case File 002.

¹²⁹ E273 Co-Prosecutors’ Proposed Trial Schedule, 27 March 2013, para. 9.

¹³⁰ E284 Impugned Decision, para. 139.

¹³¹ 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. 10; E163/5 Notification of Decision on Co-Prosecutors’ Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01, 8 October 2012, para. 3; E1/186.1 Trial Transcript, 30 April 2013; E1/187.1 Trial Transcript, 2 May 2013; E1/188.1 Trial Transcript, 3 May 2013.

¹³² E284 Impugned Decision, para. 117.

of the Accused in Case 002/01.”¹³³

56. The Trial Chamber’s conclusion that Duch was the only essential witness were S-21 to be added was based in part on its decision allowing the use of witness statements, without the appearance of the witness at trial, if such statements do not relate to the acts or conduct of the Accused.¹³⁴ The consequence of that ruling is that fewer live witnesses would be required in an S-21 trial against the current Accused than were needed in the Case 001 trial against Duch, where many former prison cadres and detainees had testimony directly relating to the acts and conduct of Duch. Because almost all the witnesses with knowledge of acts and conduct of the Accused relating to S-21 have already testified in the Case 002/01 trial, the hearing of evidence relating to that crime site can be completed with minimal additional witnesses. The Impugned Decision fails whatsoever to address or provide any explanation of the prior conclusion of the Trial Chamber that S-21 could be added to the scope of Case 002/01 without the need for substantial numbers of additional witnesses, and is patently unreasonable on that basis alone.
57. It should also be noted that during the August 2012 Trial Management Meetings, all parties were required to advise the Trial Chamber whether they requested any additional witnesses were S-21 to be added to Case 002/01. In response, the Khieu Samphan Defence, Ieng Sary Defence and Civil Parties made no witness requests relating to S-21.¹³⁵ Only the Nuon Chea Defence proposed S-21 witnesses beyond the five requested by the Co-Prosecutors. As set forth in the prior appeal of the Co-Prosecutors, the necessity of these witnesses was never justified by the Nuon Chea Defence, and the witnesses proposed were either highly repetitive or irrelevant to the central issues in the S-21 charges against these Accused.¹³⁶ The Trial Chamber was able to review the over 500 trial witnesses requested by the Nuon Chea Defence,¹³⁷ and select from them 20 witnesses whose testimony was necessary on Phase 1 (structural) or forced movement issues.¹³⁸ Pursuant to Internal Rule 87(3), it would be obligated to do the same with respect to the 27 additional S-21 witnesses proposed by the Nuon Chea Defence.

¹³³ **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.

¹³⁴ **E96/7** Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, 20 June 2012, para. 21-22.

¹³⁵ **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), para. 7.

¹³⁶ **E163/5/1/1** Co-Prosecutors’ Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, 7 November 2012, para. 61-65.

¹³⁷ **E9/4/4.4** Annex A: Proposed Witness List – NUON Chea Defence Team, 22 February 2011 [proposing 527 witnesses to be called by Trial Chamber]; **E9/4/4.2** Annex B: Proposed List of Experts – NUON Chea Defence Team, 22 February 2011 [proposing 13 expert witnesses to be called by Trial Chamber].

¹³⁸ **E131/1.1** Confidential Annex A: Partial List of Witnesses, Experts and Civil Parties for First Trial in Case 002 [65 witnesses, civil parties and experts selected by Trial Chamber, of whom 17 were proposed by Nuon Chea Defence]; **E236/1** Preliminary Indication of Individuals to be Heard During Population Movement Trial Segments in Case

58. The Trial Chamber further erred to the extent it relied on the need to address the admission of an additional 200 to 250 S-21 documents as a basis for refusing to add that crime site.¹³⁹ The Trial Chamber has already admitted approximately 600 S-21 prisoner lists and confessions, after the Defence was given the opportunity to make objections to such documents and hearings were held at which the parties argued the admissibility and relevance of such documents.¹⁴⁰ The additional remaining S-21 documents are the exact same types of documents that have already been considered and admitted by the Trial Chamber.¹⁴¹
59. The Impugned Decision also errs in stating that the Co-Prosecutors proposed four days of document hearings for S-21, in addition to the 15 days of witness testimony.¹⁴² The four day period in the OCP Proposed Trial Schedule was for all remaining document issues in Case 002/01, the most substantial of which are unrelated to S-21 and concern the admission of witness statements and Defence objections to documents not translated in all three languages of the ECCC.¹⁴³ The failure of the Trial Chamber to understand the schedule proposed by the Co-Prosecutors may be due to the fact that, after admonishing the Co-Prosecutors for filing the plan, it refused to hear from the parties on the scheduling issues raised by that proposal.¹⁴⁴

ii. Reliance on Speculative Medical Evidence

60. The Trial Chamber also erred to the extent it relied upon the statement of Professor John Campbell that “it would be unsurprising if the Accused [Nuon Chea] were no longer alive in six months”¹⁴⁵ as support for the conclusion that the addition of S-21 would jeopardize its ability to reach a verdict before the death or incapacity of the Accused.
61. Decisions of this importance must be based on reason and facts, rather than speculation or fear that an Accused may die within the next six months. When cross-examined by the Co-Prosecutors about his six-month statement, Professor Campbell warned not to take the six months “too literally,” clarified that he was “not giving him a six-month prognosis,” could not

002/01, 2 October 2012, para. 1 [priority witnesses selected by Trial Chamber to testify on forced movements, 3 of whom were proposed by Nuon Chea Defence].

¹³⁹ **E284** Impugned Decision, para. 138, 144.

¹⁴⁰ **E185/1** Decision on Objections to Documents Proposed to Be Put Before the Chamber in Co-Prosecutors’ Annexes A6-A11 and A14-A20 and by the Other Parties, 3 December 2012; **E185/1.3** Annex C – Documents Proposed by the Co-Prosecutors.

¹⁴¹ The Co-Prosecutors’ Rule 80(3)(d) Trial Document Lists included a total of 337 S-21 prisoner lists and 464 S-21 confessions, approximately 600 of which the Trial Chamber has already admitted. **E109/4.9** Annex 9 – S-21 Prisoner Records; **E109/4.10** Annex 10 – S-21 Confessions.

¹⁴² **E284** Impugned Decision, para. 139.

¹⁴³ **E273** Co-Prosecutors’ Proposed Trial Schedule, 27 March 2013, para. 11.

¹⁴⁴ **Annex 3**, E-mail from Senior Legal Officer to Parties, 28 March 2013 (stating that Co-Prosecutors’ filing was “premature and unsolicited” and directing other parties not to respond); **E1/176.1** Trial Transcript, 29 March 2013, p. 7.

¹⁴⁵ **E284** Impugned Decision, para. 128.

say “how long he will continue to survive” and would also not be surprised if Nuon Chea was alive in six months.¹⁴⁶ Professor Campbell’s admissions made clear that the six-month period referenced in his initial statement was meaningless, speculative and arbitrary, and that there was no objective basis to conclude that Nuon Chea’s life expectancy was only six months. In these circumstances, it was error for the Trial Chamber to rely upon a statement that the expert was unwilling to defend or support, and hastily withdrew upon cross-examination.

62. The objective facts, as found in the medical reports of various experts who have examined Nuon Chea (including Professor Campbell), is that his cardiovascular disease has been stable since he first entered custody of the ECCC in 2007,¹⁴⁷ and that he has no immediate life-threatening disease or medical condition upon which a short-term prognosis of six months could be based.¹⁴⁸ The written report prepared by Professor Campbell days before his testimony¹⁴⁹ contained no prognosis at all, let alone one that Nuon Chea may have only six months to live.
63. Written prognoses were provided by Dr. Antoine Lafont, the Director of Interventional Cardiology at the Georges Pompidou hospital in Paris, who examined Nuon Chea every six months between 2007 and 2010. Dr. Lafont’s October 2007 prognosis states: “It is difficult to foretell the future, but in light of this thorough check-up, this patient enjoys at present a real stability of pathologies from which he suffers. The hypertension is treated, the coronary illness is remarkably stable since 12 years ... and the after-effects of the cerebral vascular accident are ancient.”¹⁵⁰ His prognosis in June 2009 reads: “As already well explained, it is difficult to predict the future, but in light of the various medical examinations carried out in the past 18 months, the patient’s disorders are not only stable, but the last medical examination revealed an improvement in his general health condition.”¹⁵¹ Dr. Lafont made similar conclusions about the stability of Nuon Chea’s conditions in his December 2009 and July 2010 reports.¹⁵²
64. The Trial Chamber further erred on this issue by refusing to hear the objective, scientific data on

¹⁴⁶ **E1/175.1** Trial Transcript, 25 March 2013, pp. 75-76, 79-80.

¹⁴⁷ **E62/3/4** Geriatric Expert Report – Mr. Nuon Chea, 13 June 2011, para. 12 (“well controlled hypertension, stable ischaemic heart disease and currently free from symptoms”); **E62/3/13** Follow Up Geriatric Report Concerning Mr. Nuon Chea, 20 August 2011, para. 7-9; **E256/4** Expert Medical Report – Mr. Nuon Chea, 20 March 2013, para. 9 (“his cardiovascular disease is stable. ... There were no apparent changes in Nuon Chea’s cardiovascular state from when Prof. Campbell last examined him in 2011”); **E284** Impugned Decision, para. 127; **E1/175.1** 25 Mar 2013 Trial Transcript, p. 65 (“very satisfactory blood pressure for a person of his age”) & pp. 70-73.

¹⁴⁸ **E1/175.1** Trial Transcript, 25 March 2013, p. 66 (“no significant sign of progression in his underlying heart, lung or cerebrovascular problems” and kidney function that has “remained reasonably stable”); **E256/4** Expert Medical Report – Mr. Nuon Chea, 20 March 2013, para. 8-15.

¹⁴⁹ **E256/4** Expert Medical Report – Mr. Nuon Chea, 20 March 2013.

¹⁵⁰ **D24/VII** Medical Expertise Report for Mr. Nuon Chea, 20 October 2007, section 3.

¹⁵¹ **B27/I** Medical Report by Dr. Antoine Lafont, 11 June 2009, pp. 2-3.

¹⁵² **B41/I** Report of Medical Examination of Mr. Nuon Chea, 18 December 2009; **B48/I** Medical Report of Mr. Nuon Chea, 18 July 2010.

life expectancy that was offered by the Co-Prosecutors during the testimony of Professor Campbell.¹⁵³ (Copies of the two documents that were offered by the Co-Prosecutors are submitted herewith as **Annexes 4** and **5**.) In contrast to the speculative statement of Professor Campbell that was cited and relied on by the Trial Chamber, the actual percentage of 86-year old men who die within one year is relatively low (only 12 to 16%) and the average life expectancy of males of this age ranges from 3 to 5 years.¹⁵⁴

65. Data on life expectancy, of course, is not a guarantee as to how long a particular individual will survive. But in terms of assessing the level of risk created by an extension to the trial of one to two months, the objective evidence clearly demonstrates that a relatively short extension would not materially increase the risk of an Accused dying before judgment. By contrast, while the chances of surviving one year are relatively high, the probability that an 86-year old would survive through a second lengthy trial that could not begin until 2015¹⁵⁵ is relatively low.
66. The Co-Prosecutors also submit that a number of comparisons suggested in the Impugned Decision are erroneous. For example, the Trial Chamber's suggestion that the present situation is comparable to the *Milošević* case is grossly inaccurate,¹⁵⁶ as the Co-Prosecutors here only seek to extend the trial by one month (not 2 years), and this case involves only a single indictment (in contrast to the three separate indictments against *Milošević* that the prosecutors requested be tried together). The reference in the Impugned Decision to the death of Ieng Sary is also inappropriate.¹⁵⁷ Ieng Sary died from "irreversible cardiogenic shock due to long-standing ischaemic cardiopathy,"¹⁵⁸ a heart condition that had progressively worsened over the course of his detention at the ECCC.¹⁵⁹ By contrast, as set forth in detail above, Nuon Chea's heart condition has been stable since 2007, and he shows no signs of heart failure.¹⁶⁰

¹⁵³ **E1/175.1** Trial Transcript, 25 March 2013, pp. 77-79.

¹⁵⁴ **Annex 4**, New Zealand Life Tables: 2005-07, p. 71 [life expectancy of 86-year old Maori male is 4.26 years, and probability of death within one year is 16.3%]; **Annex 5**, National Vital Statistics Reports: United States Life Tables 2008, p. 25 [life expectancy of 86-year old African-American male is 5.5 years, and probability of death within one year is 12.3%], p. 13 [life expectancy of 86-year old US male is 5.3 years, and probability of death within one year is 11.5%]. The preceding figures are from population bases whose life expectancy at birth ranges from 70 to 75 years. Using data from the early 1950's in New Zealand, when the life expectancy at birth of a Maori male was only 54 years, the average life expectancy of a 85-year old Maori was still 3.4 years. **Annex 4**, New Zealand Life Tables: 2005-07, p. 14.

¹⁵⁵ **E284** Impugned Decision, p. 71 (fn. 270).

¹⁵⁶ **E284** Impugned Decision, para. 136.

¹⁵⁷ **E284** Impugned Decision, para. 129.

¹⁵⁸ **E284** Impugned Decision, para. 129, fn. 225.

¹⁵⁹ Medical records show that Ieng Sary's dyspnea worsened over time under the New York Heart Association (NYHA) standards from Stage II (mild) heart failure in 2007, to Stage III (moderate) heart failure in 2011 or 2012, to Stage IV (severe) in 2013: **A100/I** Calmette Medical Report, 20 December 2007, p. 1 (Dyspnea NYHA II); **A134/I** Calmette Medical Report, 28 January 2008 (Dyspnea NYHA II); **E11/68.1** Medical Report from Khmer-Soviet Hospital, 17 April 2012 (noting that Ieng Sary's dyspnea had worsened from NYHA II in 2009 to NYHA

iii. Failure of the Trial Chamber to Expedite Proceedings

67. It was also an error and abuse of discretion to base the exclusion of S-21 on the purported time or delay associated with the trial of that crime site, when the Trial Chamber is failing to make use of all available trial days, as was directed by this Chamber.¹⁶¹ The Trial Chamber has only rarely sat on Fridays, even where such sittings would have made up for lost days due to holidays, recesses or delays. It cancelled the hearing of a number of witnesses following the Severance Appeal Decision,¹⁶² and did not resume trial proceedings until 10 days after the oral announcement of its renewed severance, even though the interpreter strike had been resolved and the Accused were fit and available to participate.¹⁶³ The eleven court days requested by the Co-Prosecutors to hear the five core S-21 witnesses could have been scheduled within the existing time period planned for the Case 002/01 trial, were the Trial Chamber to have made a reasonable effort to increase the number of days for hearing witnesses.¹⁶⁴
68. The conclusion of the Trial Chamber that the scheduling of 15 days of witness testimony would require on average 2.5 months (*i.e.*, 75 calendar days)¹⁶⁵ or “between two and four months”¹⁶⁶ is entirely erroneous. In reality, there is no reason to believe that 15 days of testimony would require more than one month to complete, were the Trial Chamber to proceed expeditiously. If the relief requested by this Appeal is granted, the hearing of witnesses associated with S-21 could take place in August or September 2013. August 2013 has 22 available court days. September 2013 has 20 available court days. The Trial Chamber would thus only need to make use of 75% of the available court days in order to complete that 15 days of testimony in either of those months.
69. The health of Nuon Chea and Khieu Samphan is unlikely to delay the hearing of such testimony. Most of the trial delays that have occurred to date due to the health of the Accused were attributable to Ieng Sary.¹⁶⁷ Between November 2011 and May 2013, Nuon Chea and Khieu

Stage III); **E11/117/I** Medical Report from Khmer-Soviet Hospital, 11 March 2013 (noting that Ieng Sary’s dyspnea had progressed from NYHA III in 2011 to NYHA IV).

¹⁶⁰ See, e.g., **E256/4** Expert Medical Report – Mr. Nuon Chea, 20 March 2013, para. 9; **B48/I** Medical Report of Mr. Nuon Chea from Dr. Lafont, 18 July 2010, p. 1 (“no dyspnea”).

¹⁶¹ **E163/5/1/13** Severance Appeal Decision, para. 51 (“it is imperative that the ECCC utilize every available day to ensure a final determination of the remaining charges as expeditiously as possible”).

¹⁶² **E264/1** Scheduling of Experts Philip Short and Elizabeth Becker and Postponement of Fact Witnesses until Decision on Severance, 26 February 2013, para. 3, 5.

¹⁶³ **E1/176.1** Trial Transcript, 29 March 2013, pp. 6-8.

¹⁶⁴ A number of adjustments to the trial schedule designed to save or increase available court days were proposed by the Co-Prosecutors, but have not been taken up by the Trial Chamber. **E273** Co-Prosecutors’ Proposed Trial Schedule, 27 March 2013, para. 2 (fn. 3), para. 3, 11.

¹⁶⁵ **E284** Impugned Decision, para. 140 (fn. 239).

¹⁶⁶ **E284** Impugned Decision, para. 141.

¹⁶⁷ The health of Ieng Sary was the reason for the disruptions in the trial schedule during the week of 21 May 2012 (**E1/74.1** Trial Transcript, 21 May 2012) and the period from 12 to 27 September 2012 (see **E1/125.1** Trial

Samphan have each had only one noteworthy occasion on which the trial was delayed on account of their health.¹⁶⁸ Since the Case 002/01 trial resumed on 8 April 2013 (after a lengthy delay attributable to a variety of factors, including the illness and eventual death of Ieng Sary, a strike by ECCC interpreters and cancellation of proceedings by the Trial Chamber following the Severance Appeal Decision), there have been no lost days attributable to the health of either Accused and the court has conducted 16 days of witness testimony. There is thus no reason to expect or assume that the Trial Chamber could not proceed expeditiously with the hearing of S-21 witnesses and complete such testimony in four weeks time.

70. In practice, the most significant impediment to the completion of 15 days of hearings each month has been the four-day trial schedule (reduced to three days per week for a period of time) and the frequent judicial recesses scheduled by the Trial Chamber. For example, the Impugned Decision states that “the scheduling of 15 days of witness testimony would have required virtually the entirety of December 2011 through February 2012 (approximately 3 months),”¹⁶⁹ but fails to mention that the Trial Chamber (a) took two lengthy judicial recesses during that period - one from 19 December 2011 to 9 January 2012, and another from 17 February to 11 March 2012,¹⁷⁰ and (b) chose during that period to use at least 9 of the 28 available court days for various document hearings.¹⁷¹ In order to give this Chamber a complete picture of the course of trial proceedings to date, the Co-Prosecutors submit with this filing **Annex 6**, a chart that shows the number of days of court hearings held each month (witness testimony, admission of documents or other substantive trial proceedings) and the reason if less than 15 days was completed (e.g., scheduling of judicial recesses, illness of the Accused).
71. Even based on the misleading “average of 7.3 courtroom days per month” cited in the Impugned Decision,¹⁷² which would amount to less than two days of testimony each week, the hearing of the S-21 witnesses would be completed in only two months. As demonstrated in **Annex 6**, the principal reason for that low average is not the health of the Accused or factors beyond the control of the Trial Chamber, but rather matters within its control, such as the scheduling of judicial recesses and the number of days it sits each week.

Transcript, 21 September 2012), and one of the causes for the cancellation of hearings the first two weeks of March 2013 (**E1/174.1** Trial Transcript, 4 March 2013).

¹⁶⁸ **E284** Impugned Decision, para. 131 [noting that Nuon Chea was hospitalized with bronchitis for most of the period from 13 January to 19 February 2013, and that Khieu Samphan was also hospitalized during this same period from 16 to 25 January 2013].

¹⁶⁹ **E284** Impugned Decision, para. 140.

¹⁷⁰ **E1/23.1** Trial Transcript, 15 December 2011, p. 102; **E165** Judicial Recesses During 2012, 6 February 2012.

¹⁷¹ See, e.g., **E1/27.1** Trial Transcript, 16 January 2012, pp. 1-2; **E1/42.1** Trial Transcript, 13 February 2012, p. 1.

¹⁷² **E284** Impugned Decision, para. 140.

72. The additional month of trial time required for S-21 cannot be considered a material delay in a trial that has already lasted a year and a half, where it is projected that the Trial Chamber may take as much as 8 months time to issue a judgment.¹⁷³ The Trial Chamber was required to evaluate the length of the extension associated with S-21 in view of the overall length of the Case 002/01 trial, and it erred in concluding that the addition of S-21 would “jeopardize the Chamber’s ability to reach any timely verdict in Case 002/01.”

iv. Trial Management Considerations

73. The Trial Chamber also erred by relying on “considerations of efficiency and effective trial management” to exclude S-21. The assertion in the Impugned Decision that the trial should conclude “on the basis of the parameters that have been known and understood by all parties from the outset”¹⁷⁴ overlooks that the parties proceeded for most of the first year of the trial without a definitive ruling on its scope and with the understanding that the Trial Chamber “may at any time decide to include in the first trial additional portions of the Closing Order in Case 002.”¹⁷⁵ The Trial Chamber’s initial instructions to the parties at the time of opening statements were that, notwithstanding the September 2011 Severance Order, “the Accused must confront all allegations contained in the Indictment in Case 002.”¹⁷⁶ The parties prepared for trial on the entire scope of Case 002 for over one year from September 2010 (the time of issuance of the Closing Order) to September 2011 (the time of the original severance order). Accordingly, the parties have already proposed trial witnesses on all Case 002 subject matters¹⁷⁷ and identified their trial exhibits for the entire scope of Case 002.¹⁷⁸
74. The Trial Chamber refers to the “reluctance” of ICTY Trial Chambers to “expand the scope of trial where an Accused’s defence has proceeded on the basis that evidence would not be presented in relation to certain incidents.”¹⁷⁹ However, as noted above, the Accused here have been on notice both that additional crimes could be added to Case 002/01 and that the evidence at this trial may be used as the foundation for future trials. Substantial evidence regarding S-21 has thus been presented throughout the Case 002/01 trial (including 12 days of testimony by S-21 chairman Duch), as acknowledged by the Trial Chamber in the Impugned Decision.¹⁸⁰ This

¹⁷³ E284 Impugned Decision, p. 71 (fn. 270).

¹⁷⁴ E284 Impugned Decision, para. 144.

¹⁷⁵ E124 Severance Order Pursuant to Internal Rule 89ter, 22 September 2011, para. 6.

¹⁷⁶ E131 Scheduling Order for Opening Statements and Hearing on the Substance in Case 002, 18 October 2011.

¹⁷⁷ E9/4 Co-Prosecutors’ Rule 80 Expert, Witness and Civil Party Lists, Including Confidential Annexes 1, 2, 3, 3A, 4 and 5, 28 January 2011; E9/4.1 Annex 1: Proposed Order of Witness Appearance at Trial; E9/4/6 Proposed List of Witnesses and Experts, 21 February 2011; E9/4/6.2 Annex 1: Proposed Witnesses List – Khieu Samphan.

¹⁷⁸ E9/31 Co-Prosecutors’ Rule 80(3) Trial Document List, 19 April 2011; E9/29 List of Documents, 19 April 2011; E9/29.2 Annex: Document and Exhibit Lists – Khieu Samphan.

¹⁷⁹ E284 Impugned Decision, para. 143.

¹⁸⁰ E284 Impugned Decision, para. 117.

case is thus readily distinguishable from the ICTY precedent cited by the Trial Chamber,¹⁸¹ and there can be no concern here that the Accused did not have sufficient notice regarding the S-21 crime site.

75. While the Trial Chamber states that it is near “final determinations” on the logistics of how the Case 002/01 trial will be concluded,¹⁸² it is now three months after this Chamber’s severance decision and the parties still have not received any schedule or plan informing them of when the Trial Chamber plans to complete witness testimony, the identity of the remaining witnesses who will testify, and when closing arguments will be scheduled and final written submissions due. In circumstances where the Trial Chamber is managing and planning the trial on a week-to-week basis, it cannot assert that logistical problems associated with the late addition of S-21 justify its exclusion from the trial. Moreover, contrary to the Impugned Decision,¹⁸³ none of the Defence or other parties have argued that it is not appropriate to make changes to the scope of trial “at this late stage.” In fact, it was the position of the Defence teams at the February 2013 severance hearings that the scope of trial should be expanded to include all Case 002 crimes, and not a single party favored returning to the original scope of Case 002/01.¹⁸⁴

D. The Trial Chamber erred in proposing a series of future trials, given the age and health of the Accused

76. The Impugned Decision includes an annex at its conclusion that purports to present a “Tentative plan for future trial of the remaining portions of Case 002.”¹⁸⁵ For reasons stated above, the Trial Chamber erred in issuing such a plan, as its conclusions regarding the age and health of the Accused required it to opt for a single trial that was reasonably representative of the Indictment.
77. In describing the option of a tangible plan for the adjudication of the entirety of the charges in its Severance Appeal Decision, this Chamber stated:

“The ECCC is under an affirmative obligation to ensure that proceedings are conducted within a reasonable time. However, the Trial Chamber’s continued failure to create a tangible plan for the future of remaining trials in Case 002 has resulted in confusion for the parties and has effectively ‘buried’ the remaining charges in the Indictment. While the Trial Chamber has announced its intent to commence subsequent cases shortly after the conclusion of evidence in Case 002/01 in 2013, and that subsequent proceedings could commence prior to the conclusion of any appeals in Case 002/01, several practical

¹⁸¹ The Trial Chamber cites only one case in support of its proposition, that of *Dragomir Milošević*. In that case, the prosecution failed to include the additional criminal incidents in an Amended Indictment, and had merely referenced those incidents in a pre-trial brief. *Prosecutor v Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Prosecution’s Motion pursuant to Rule 73bis(F) (ICTY Trial Chamber), 3 April 2007, paragraph 13.

¹⁸² E284 Impugned Decision, para. 144.

¹⁸³ E284 Impugned Decision, para. 148.

¹⁸⁴ E284 Impugned Decision, para. 51-54; E1/172.1 Trial Transcript, 20 February 2013, pp. 90-91 [submission of Co-Prosecutors noting that all parties had agreed the Trial Chamber should not return to the original severance, that it should proceed on the basis there would be only one trial, and that the one trial should be more representative].

¹⁸⁵ E284 Impugned Decision, para. 150-155, section 6.1 (pp. 71-74).

concerns raised by the Co-Prosecutors and the Civil Party Lead Co-Lawyers that may prevent the adjudication of future cases within a reasonable time period remain unaddressed. The Supreme Court Chamber therefore considers that prejudice also arises from the Trial Chamber's failure to articulate any plan for the adjudication of future trials in Case 002."¹⁸⁶

78. This Chamber made clear that what was required was not only information as to what charges would be included in future trials, but also an explanation of how "subsequent proceedings could commence prior to the conclusion of any appeals in Case 002/01" and thus occur within a "reasonable time." The Impugned Decision errs by failing to address this issue in any concrete way. A footnote to the plan for future trials states that "Case 002/02 shall commence, circumstances permitting and unless directed to the contrary, after the conclusion of Case 002/01," and then projects that "a first-instance verdict in this case may follow approximately 8 months after the conclusion of the hearing of evidence in Case 002/01 (namely, during the first quarter of 2014), and a verdict on any eventual appeal 18 months thereafter (namely, late 2015)."¹⁸⁷ However, the Trial Chamber does not indicate whether its statement that Case 002/02 would commence "after the conclusion of Case 002/01" is a reference to the conclusion of evidence, the issuance of a first-instance verdict or the conclusion of appeals. Nor did it address the significant legal issues concerning the ability to start a second trial prior to the conclusion of any appeals in Case 002/01.
79. The Co-Prosecutors submit that the failure of the Trial Chamber to explain how hypothetical future trials could occur within a "reasonable time" is yet further confirmation that the prospect of any such trials is intangibly remote, and that the only viable option available to the Trial Chamber was a single trial reasonably representative of the Case 002 Indictment.

V. REQUEST TO EXPEDITE HEARING OF APPEAL

80. This Chamber has urged the ECCC as a whole to "utilize every available day to ensure a final determination of the remaining charges as expeditiously as possible."¹⁸⁸ Whilst Internal Rule 108(4bis)(b) prescribes a period of up to three months for the issuance of a summary of reasons, extended by one month in exceptional circumstances, nothing prevents this Chamber from issuing a summary decision within a shorter timeframe.
81. It has been over three months since this Chamber handed down its Severance Appeal Decision on 8 February 2013, and two weeks since the Trial Chamber's issuance of the Impugned Decision. The Case 002/01 trial has resumed, but only in respect of the factual allegations set

¹⁸⁶ E163/5/1/13 Severance Appeal Decision, para. 47 (internal citations omitted).

¹⁸⁷ E284 Impugned Decision, p. 71 (fn. 270).

¹⁸⁸ E163/5/1/13 Severance Appeal Decision, para. 51.

out in the Impugned Decision. Given that the scope of severance at present is identical to that from September 2011, the Trial Chamber's past statements indicate that the trial in Case 002/01 may be coming to a close in the near future. In a memorandum dated 14 February 2013, the Trial Chamber states,

*“At the time of the [Severance Appeal Decision], the Trial Chamber was nearing the conclusion of Case 002/01. It estimates that relatively few additional courtroom days in the presence of all three Accused were required (emphasis added) in order to conclude the hearing of evidence in that first trial.”*¹⁸⁹

82. In the Co-Prosecutors' submission, the present circumstances warrant an expedited summary decision on an urgent basis. The severance of Case 002 has already been subject to extensive briefing and appellate review before this Chamber. The instant Appeal has been prepared and put before this Chamber by the Co-Prosecutors in 14 days, just half the time afforded by Internal Rule 107(1). By this Chamber's Order of 12 March 2013, it should now have “unrestricted and immediate access to the entirety of the case file in Case 002.”¹⁹⁰ Pursuant to Internal Rule 108(4bis)(b), the three-month time limit for issuance of a summary decision would lapse on 12 August 2013, subject to extension until 12 September 2013. Although no trial schedule has been provided to the parties to date, the Co-Prosecutors' expectation is that closing trial submissions from the parties may be due in August 2013.
83. The Co-Prosecutors recognise that the errors of the Trial Chamber “remain susceptible to appellate scrutiny and intervention” even after the conclusion of evidence in Case 002/01.¹⁹¹ Nevertheless, under the present circumstances, it would be of great benefit to all parties and the Trial Chamber were it possible to have a ruling on the Appeal as soon as possible, so that if the Appeal was to be successful, any resulting adjustments to the Case 002/01 trial schedule could be made prior to the filing of closing trial submissions. For these reasons, the Co-Prosecutors respectfully request the Chamber to decide the instant Appeal on an expedited and urgent basis, and if necessary to issue a decision with summary reasons and full reasons to follow later.

VI. RELIEF SOUGHT

84. For the reasons set forth above, the Co-Prosecutors request that the Supreme Court Chamber:
- 1) **admit** and **consider** the instant Appeal on an expedited and urgent basis;

¹⁸⁹ E163/5/1/13/1 Directions to the Parties in Consequence of the Supreme Court Chamber's Decision, 12 February 2013, para. 3(iii).

¹⁹⁰ E238/9/1/4 Order for immediate compliance with Rule 108 of the Internal Rules, 12 March 2013.

¹⁹¹ E163/5/1/13/3 Decision on Co-Prosecutors' Request for Urgent Order to Trial Chamber to Issue Reasoned Decision on Severance of Case 002, 8 May 2013, para. 5.

- 2) **amend** the Impugned Decision so as to include the **S-21 Security Centre** within the scope of the trial in Case 002/01, and direct the Trial Chamber to hear such evidence without further delay.

Respectfully submitted,

Date	Name	Place	Signature
10 May 2013	CHEA Leang Co-Prosecutor		
	Andrew CAYLEY Co-Prosecutor		