

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

FILING DETAIL

Case no: 002/19-09-2007-ECCC-TC
Filing party: Nuon Chea Defence Team
Filed to: Supreme Court Chamber
Original language: English
Date of document: 27 May 2013

ឯកសារដើម	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de réception):	
..... 27 / 05 / 2013	
ម៉ោង (Time/Heure):	
..... 16 : 50	
មន្ត្រីទទួលបន្ទុកករណីរឿង/Case File Officer/L'agent chargé du dossier:	
..... SANNARAD	

CLASSIFICATION

Classification suggested by the filing party:
Classification of the Trial Chamber:
Classification status:
Review of interim classification:
Records officer name:
Signature:

PUBLIC
សាធារណៈ / Public

IMMEDIATE APPEAL AGAINST TRIAL CHAMBER'S SECOND DECISION ON
SEVERANCE AND RESPONSE TO CO-PROSECUTORS' SECOND SEVERANCE
APPEAL

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Pursuant to Rules 104(1), 104(4) and 105(2) of the ECCC Internal Rules (the 'Rules'), the Co-Lawyers for Nuon Chea (the 'Defence') hereby submit the instant Immediate Appeal against the Trial Chamber's Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013 ('Impugned Decision')¹ and Response to the Co-Prosecutors' immediate appeal ('Second Severance Appeal')² against the same:

I. PROCEDURAL HISTORY

1. On 22 September 2011, the Trial Chamber ordered the severance of the Case 002 Closing Order into an unspecified number of smaller trials and indicated that the first trial, which it designated Case 002/01, would encompass population movement phases I and II ('First Severance Order').³ The Co-Prosecutors sought reconsideration of that decision, proposing that the scope of Case 002/01 be widened to include a broader cross-section of the charges in Case 002.⁴ The Chamber denied that request.⁵
2. On 27 January 2012, the Co-Prosecutors again requested a modification to the scope of Case 002/01 to include allegations concerning S-21 and executions at Tuol Po Chrey and in District 12.⁶ The Trial Chamber granted that request in part, adding Tuol Po Chrey to the scope of Case 002/01, but denying the request with regard to S-21 and District 12.⁷ The Co-Prosecutors appealed that decision ('First Severance Appeal').⁸ This Chamber held on appeal that the Trial Chamber erred in numerous respects and annulled the First Severance Order and the Trial Chamber's two subsequent decisions ('SCC Severance Decision').⁹

¹ Document No. **E-284**, 'Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013', 26 April 2013 ('Impugned Decision').

² Document No. **E-284/2/1**, 'Co-Prosecutors' Immediate Appeal of Second Decision on Severance of Case 002', 10 May 2013 ('Second Severance Appeal').

³ Document No. **E-124**, 'Severance Order Pursuant to Internal Rule 89ter', 22 September 2011 ('First Severance Order').

⁴ Document No. **E-124/2**, 'Co-Prosecutors' Request for Reconsideration of "Severance Order Pursuant to Internal Rule 89ter"', 3 October 2011.

⁵ Document No. **E-124/7**, 'Decision on Co-Prosecutors' Request for Reconsideration of the Terms of the Trial Chamber's Severance Order (E124/2) and Related Motions and Annexes', 18 October 2011 ('Decision on Request for Reconsideration').

⁶ Document No. **E-163**, 'Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01, 27 January 2012.

⁷ Document No. **E-163/5**, Memorandum from the President of the Trial Chamber, 8 October 2012.

⁸ Document No. **E-163/5/1/1**, 'Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 with Annex I and Confidential Annex II', 7 November 2012 ('First Severance Appeal').

⁹ Document No. **E-163/5/1/13**, 'Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01', 8 February 2013 ('SCC Severance Decision').

3. The Trial Chamber held hearings over the week of 18 February 2013 for the purpose of soliciting submissions from the parties with regard to the severance of Case 002 ('Severance Hearing'). On 29 March 2013 the Chamber announced its decision to again sever Case 002 and to proceed with a trial in Case 002/01 identical in scope to the one ordered in October 2012.¹⁰ On 26 April 2013 the Trial Chamber filed its reasons in connection with that decision ('Impugned Decision'). On 10 May 2013, the Co-Prosecutors filed the Second Severance Appeal.

II. THE IMPUGNED DECISION

4. In reversing the First Severance Order, this Chamber affirmed the Trial Chamber's discretionary authority in relation to severance and the relevance of the key considerations upon which the Trial Chamber had based its decisions.¹¹ This Chamber nevertheless found that the Trial Chamber abused its discretion in failing to consult the parties,¹² failing to substantiate its conclusions with adequate reasoning,¹³ failing to give any consideration to the representativeness of Case 002/01 relative to Case 002 as a whole,¹⁴ and failing to articulate a plan for future trials.¹⁵
5. The Trial Chamber's second decision on severance (the Impugned Decision) addressed these concerns in part. The Trial Chamber solicited submissions from the parties and gave detailed reasoning for its decision. The Trial Chamber also gave consideration to the representativeness of the charges included in Case 002/01 and the place of S-21 in relation thereto. In that regard, the Trial Chamber held that it might not be possible to complete a truly representative trial within the natural lifespan of the Accused¹⁶ and that under those circumstances it was appropriate to focus on factual sequences which concern the broadest segments of the Cambodian population.¹⁷ In the Trial Chamber's estimation, forced movement best satisfied that criterion.¹⁸ Other allegations in the Closing Order, including S-21 and the genocide charges, concerned individual crime sites and/or encompassed a narrow scope of the overall composition of alleged

¹⁰ Document No. E-1/176.1, 'Transcript of Trial Proceedings', 29 March 2013, p. 4:13-17.

¹¹ SCC Severance Decision, paras 36, 49.

¹² SCC Severance Decision, para. 40.

¹³ SCC Severance Decision, para. 41.

¹⁴ SCC Severance Decision, para. 42.

¹⁵ SCC Severance Decision, paras 24, 46-47.

¹⁶ Impugned Decision, para. 109.

¹⁷ Impugned Decision, para. 110.

¹⁸ Impugned Decision, paras 110, 112, 115.

victims.¹⁹ Lacking a principled basis on which to distinguish between other possible candidates for inclusion in Case 002/01, the Chamber instead opted to include further allegations only where they were logically related to forced movement.²⁰

6. The Trial Chamber also set out a “plan” for future trials. That plan identified which allegations in the Closing Order would be heard in two subsequent trials. Citing unknown contingencies, the Trial Chamber declined to supply a timeline in relation to those trials, although it did indicate that Case 002/02 could begin shortly after ‘the conclusion’ of Case 002/01. The Chamber also declined to address any of the legal or practical impediments to sequential trials at the ECCC raised by the parties and by this Chamber.²¹

III. ARGUMENT

A. This Appeal and Response is Admissible

7. The thirty day deadline for appeals against the Impugned Decision, which was issued on 26 April 2013, expires on 27 May 2013.²² The ten day deadline for responses to the Co-Prosecutors’ Second Severance Appeal, notified on 14 May 2013, expires on the same day.²³ The Appeal and the Response are therefore both timely.
8. The Defence concurs with the Co-Prosecutors, although for slightly different reasons, that appeals against the Impugned Decision are admissible pursuant to Rules 104(4)(a) and 104(1).²⁴ Although the Defence has no independent basis on which to conclude that a trial in Case 002/02 is ‘intangibly remote’,²⁵ the Supreme Court Chamber has already determined that whatever doubt does surround the prospect of further proceedings following Case 002/01 is sufficient to trigger the application of Rule 104(4)(a).²⁶ The Defence further notes that the Impugned Decision decides to exclude not only S-21 from the ongoing proceedings, but also the balance of the Closing Order.

B. The Trial Chamber Erred in Law in Deciding to Sever the Closing Order

¹⁹ Impugned Decision, paras 112-113.

²⁰ Impugned Decision, para. 116.

²¹ See paras 12-21, *infra*; Impugned Decision, paras 150-155.

²² Rule 107(1).

²³ Practice Direction on Filing, *Practice Direction ECCC/01/2007/Rev. 7*, Art. 8.3. May 24, 2013 was an ECCC public holiday.

²⁴ Second Severance Appeal, paras 15-19.

²⁵ Second Severance Appeal, para. 19. See paras 34-37, *infra*.

²⁶ SCC Severance Decision, para. 25.

9. This Chamber held that the Trial Chamber was entitled to reassess the severance of Case 002 in the wake of the annulment of the First Severance Order only if it complied with certain preconditions.²⁷ Although the Impugned Decision addressed those concerns in part, it failed to comply with this Chamber's instructions in two respects: it gave no consideration to the Defence's submissions concerning the decision to sever the Closing Order; and it did not articulate a plan sufficient to resolve the legal and practical impediments to holding sequential trials at the ECCC. These errors require annulment of the Impugned Decision.
10. Although this Chamber's decision focused primarily on the form of Case 002/01, it also indicated that the predicate decision to sever the trial raised a 'preliminary concern':

Considerations of efficiency and fairness lend support to the general principle, expressed in the laws applicable to the ECCC as well as in international criminal jurisdictions, that charges concerning similar events against several accused should preferably be tried in joint proceedings. Severance of a confirmed indictment is not foreseen under Cambodian law, and the *ad hoc* tribunals have been reluctant to grant severance requests. Where severance has been deemed necessary, it has characteristically involved separating an accused person from joint proceedings. As such, decisions on severance constitute exceptions to the general preference for joint trials.²⁸ (emphasis added)

11. International practice recognizes that facts which arise from a common sequence of events should normally be heard in a single trial.²⁹ Before ordering severance of joined charges, a court is therefore required to consider:

1) the potential prejudice to the accused's rights [...] 2) other factors relevant to the interests of justice, particularly the relative manageability for the Chamber and the parties of a single trial versus separate trials; and; 3) the potential burden on witnesses.³⁰

All of these factors are applicable in this case and should have led the Trial Chamber to decide to hold a single trial on the totality of the Case 002 Closing Order.

i – Severance is Inconsistent with Nuon Chea's Right to a Fair Trial

²⁷ SCC Severance Decision, para. 50.

²⁸ SCC Severance Decision, para. 33.

²⁹ *Prosecutor v. Milosevic*, 'Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder', 18 April 2002, paras 19-21.

³⁰ *Prosecutor v. Mladic*, IT-09-92-PT, 'Decision on Consolidated Prosecution Motion to Sever the Indictment, to Conduct Separate Trials, and to Amend the Indictment', 13 October 2011 ('Mladic Decision'), para. 28.

12. The experience of the Case 002/01 trial has demonstrated that the allegations in the Closing Order are too closely related to permit meaningful separation into distinct trials. The effort to do so in Case 002/01 has caused prejudice to Nuon Chea's right to a fair trial, and also rendered Case 002/01 unmanageable. Sequential trials before the same panel of judges would furthermore violate the presumption of innocence and the right to an independent and impartial tribunal. The Defence raised all of these objections to renewed severance during hearings before the Trial Chamber.³¹
13. The limited scope of Case 002/01 has prejudiced Nuon Chea most seriously by hindering his ability to mount a full and effective defence. The policies which Nuon Chea is charged with implementing in Case 002/01 were 'one part of a larger effort to restore order to a country and economy devastated by war, and independence to a people placed for so many years under the rule of foreign occupying and colonial powers.'³² In order to assess Nuon Chea's intent with regard to the crimes charged – and hence his criminal responsibility – the Trial Chamber will be required to determine what Nuon Chea expected would come from those policies. With regard to the crimes charged in Case 002/01, the plan 'did not end at the evacuees' destinations.'³³ It must therefore be considered in its entirety.
14. This holistic perspective is not available to Nuon Chea within the narrow frame of Case 002/01. Although both the Trial Chamber and the Co-Prosecutors argue that all five alleged policies of Democratic Kampuchea are subject to examination by the parties, the record shows clearly that with the exception of specific, pre-selected witnesses, live examination has always been limited to subjects within the scope of Case 002/01.³⁴

³¹ Document No. **E-1/172.1**, 'Transcript of Trial Proceedings', 20 February 2013 ('TC Severance Hearing (Day 2)'), pp. 4:3-8:18.

³² TC Severance Hearing (Day 2), p. 4:9-12.

³³ TC Severance Hearing (Day 2), p. 4:19-20.

³⁴ See Document No. **E-145**, Memorandum from Trial Chamber, 29 November 2011, ERN 00756549-00756551, pp. 2-3; Document No. **E-172/10**, Memorandum from Trial Chamber, 28 March 2012, ERN 00793936 (defining scope of testimony as to particular witnesses); Document No. **E-172/27**, Memorandum, from Trial Chamber, 15 June 2012, ERN 00816394-0081635 (similar); Document No. **E-1/173.1**, 'Transcript of Trial Proceedings', 21 February 2013, ERN 00890050-00890119, p. 22:7-11 (Co-Prosecutor noting that examination outside the scope of Case 002/01 is limited to certain witnesses); Document No. **E-1/177.1**, 'Transcript of Trial Proceedings', 8 April 2013, ERN 00899302-00899397, pp. 19:13-21:13 (objection to questions beyond the scope overruled because relevant to structure); Document No. **E-1/159.1**, 'Transcript of Trial Proceedings', 13 January 2013, ERN 00879818-00879927, pp. 91:22-93:9 (similar); Document No. **E-1/150.1**, 'Transcript of Trial Proceedings', 7 December 2012, ERN 00870086-00870205, pp. 1:23-2:5 (President reminding parties to examine only as to evacuations policy and administrative structures); Document No. **E-1/35.1**, 'Transcript of Trial Proceedings', 30 January 2012, ERN 00775428-

Because facts beyond that scope are relevant to Nuon Chea's defence, severance of the trial is inappropriate.³⁵

15. One concrete example of this effect concerns the relationship between the evacuation of Phnom Penh and the crimes alleged to have been committed at cooperatives and worksites. The Defence has argued in preliminary legal submissions that 'forced transfer' was not unlawful as such in 1975, and that its possible criminality depends (at a minimum) on an assessment of the 'objectives, manner of implementation and effects' of the transfer.³⁶ Evacuees from Phnom Penh and other urban centers are alleged to have lived primarily in cooperatives following their exodus from the cities.³⁷ In April 1975, Nuon Chea had good reason to believe that cooperatives were effective methods of food production and distribution, and they proved as such in many parts of Cambodia.³⁸ Nuon Chea cannot articulate a coherent defence to forced transfer without a detailed assessment of that which was supposed to, and did, follow the evacuation.
16. Another example concerns the legitimacy of the threat posed by the Vietnamese prior to and during the regime. Witnesses have testified before the Trial Chamber that Nuon Chea implemented policies at 'breakneck speed' (and thereby caused harm to Cambodian civilians) because he believed that rapid economic development was essential to deflect Vietnamese ambitions as to Cambodian territory.³⁹ The legitimacy of that threat bears on both the necessity of the policies that Nuon Chea allegedly implemented and his state of mind in relation thereto.
17. The Co-Prosecutors agree that evidence of conduct and policies outside the scope of Case 002/01 is essential to a holistic understanding of Democratic Kampuchea.⁴⁰ But

00775523, pp. 59:13-19 (civil party attorney noting that questions are posed only for the purpose of establishing structure).

³⁵ Mladic Decision, para. 34.

³⁶ Document No. **E-163/5/11**, 'Preliminary Submissions Concerning the Applicable Law', 18 January 2013, paras 26-27.

³⁷ Document No. **D-427**, 'Closing Order', 15 September 2010 ('Closing Order'), para. 161 ('One of the objectives of the population movements was to fulfill the labour requirements of the cooperatives and worksites.').

³⁸ See e.g., Document No. **E-3/20**, 'When the War Was Over', pp. 150, 158; Document No. **E-3/9**, 'Pol Pot: The History of a Nightmare', p. 290; Document No. **E-3/2412**, 'Kampuchea: A Revolutionary Economy', p. 6; Document No. **D-153.13**, 'Cambodia Termination Report', pp. 16-17 (describing anticipated rice yields as of April 1975); Document No. **E-131/1/15.1**, 'Cambodia: Starvation and Revolution', p. 85.

³⁹ See e.g., Draft Transcript, 7 May 2013, pp. 97:21-101:23 (Witness Philip Short describing Democratic Kampuchea's 'paranoia' about Vietnam).

⁴⁰ Document No. **E-96/8**, 'Co-Prosecutors' Further Request to Put Before the Chamber Written Statements and Transcripts with Confidential Annexes 1 to 16', 27 July 2012, paras 30-34.

rather than seek a full airing of those issues in a public forum at trial, the Co-Prosecutors have asked the Trial Chamber to admit without cross-examination hundreds of witness statements on matters outside the scope.⁴¹ The Defence strongly objects to the implication that it is required to choose between acquiescing to the admission of testimony without cross-examination and obtaining a full hearing of the relevant facts, and has accordingly objected to the admission of those statements *in toto*.⁴²

18. This same difficulty in defining hermetically discrete sections of the Closing Order has also caused a continuing violation of Nuon Chea's ability to confront the witnesses against him. A substantial part of the Case 002/01 trial has concerned questions of general applicability to Case 002 as a whole, such as historical background and administrative, communication and military structures. The Trial Chamber has granted the prosecution substantial leeway to explore questions outside the scope of Case 002/01, including security centers, cooperatives and worksites, under the guise of eliciting testimony relevant to 'structure'.⁴³
19. Detailed cross-examination of that evidence would have been beyond the scope of Case 002/01 as well as a poor strategic use of the defence's allocated time – which is already very limited. That evidence is nevertheless on the case file and before the Chamber. If that evidence would then be admissible in Case 002/02, a violation of Nuon Chea's right to confront the witnesses against him would ensue. Those witnesses would otherwise need to be recalled, which would defeat the purpose of severance and itself constitute a reason to try the full Closing Order.⁴⁴
20. For similar reasons, both the manageability of the trial and the narrative it has produced have suffered. It has proven difficult and time-consuming to isolate the relevant portions of each witness's testimony from those beyond the scope, leading to frequent

⁴¹ Document No. **E-278**, 'Co-Prosecutors' Submission of Revised Annexes 12 and 13 of their Rule 80(3) Trial Document List (Witness Statements and Complaints)', 9 April 2013; Document No. **E-278.2**, 'Overview of Revised Annexes 12 and 13', 10 April 2013.

⁴² Document No. **E-223/2/8**, 'Objections to Request to Put Before the Chamber Written Statements and Transcripts', 26 April 2013, paras 20-33.

⁴³ There are innumerable examples of this practice before the Trial Chamber, where a standing rule permits examination on questions outside the scope of the trial where supposedly relevant to structure. For selected examples, see fn 34, *supra*.

⁴⁴ See para. 11, *supra*.

objections from the parties and deliberations by the Chamber.⁴⁵ The effect on the Chamber's effort to ascertain the truth has also been damaging:

What we hear in court is neither a precisely circumscribed account of a population movement, nor a comprehensible story about the DK as a whole. What we hear is a series of fragments supposedly relevant to Case 002/01 in some way but incomplete as a description of what really happened.⁴⁶

21. Finally, renewed severance is inappropriate because the Trial Chamber would be unable to act impartially in Case 002/02 after issuing a judgment in Case 002/01.⁴⁷ This Chamber expressed that exact concern and suggested that a separate panel of the Trial Chamber might be necessary to adjudicate Case 002/02.⁴⁸ There is no indication that a second panel is forthcoming, and all of the parties agreed during the Severance Hearing that the constitution of such a panel was unlikely.⁴⁹ The ICTY Appeals Chamber has similarly held that courts should refrain from separating charges against a single accused into sequential trials in order to avoid giving rise to an appearance of bias.⁵⁰

ii – The Trial Chamber Failed to Consider the Defence's Objections

22. Despite this Chamber's clear instruction to hear the parties and reason its decision, the Trial Chamber manifestly failed to address any of these objections. The Chamber decided to renew severance in three paragraphs of its 70-page decision, the first two of which restated its original reasons for severing the trial.⁵¹ The Chamber then held:

In relation to the recent Defence objection to the concept of severance, the Chamber considers that the concerns they expressed concerning legal certainty in the wake of the annulment of the Severance Order given the late stage of the proceedings in Case 002/01 to be legitimate. It considers, however, that these concerns are best alleviated not by the hearing of the entire Case 002 Closing Order but by returning to the previous form of Case 002/01 and the continuation of proceedings in accordance with the parameters of trial understood by all parties from the outset of the trial.⁵²

⁴⁵ See e.g. fn 34, *supra*.

⁴⁶ TC Severance Hearing (Day 2), p. 7:5-9.

⁴⁷ TC Severance Hearing (Day 2), pp. 7:21-8:18.

⁴⁸ SCC Severance Decision, para. 51.

⁴⁹ Document No. **E-1/171.1**, 'Transcript of Trial Proceedings', 18 February 2013 ('TC Severance Hearing (Day 1)'), pp. 95:11-17, 101:22-102:7.

⁵⁰ Mladic Decision, para. 35.

⁵¹ Impugned Decision, paras 86-87.

⁵² Impugned Decision, para. 88.

23. It is not clear which of the Defence objections, if any, comprise ‘concerns [...] concerning legal certainty’, but it is apparent that the Chamber’s conclusion that they are ‘best alleviated [...] by returning to the previous form of Case 002/01’ fails to articulate a single reason in support of that conclusion. The Trial Chamber did not explain how Nuon Chea’s interest in presenting a defence or confronting the evidence against him is protected in the context of a severed trial, nor why the managerial benefits of severance outweigh the costs. Nor did it consider whether a second panel of the Trial Chamber was required, whether it was possible, or how the Chamber would ‘safeguard’ against its own bias if such a panel were not constituted.⁵³
24. The Defence similarly concurs with the Co-Prosecutors that the Trial Chamber did not adhere to this Chamber’s instruction to ‘create a tangible plan for the future of remaining trials.’⁵⁴ As the Co-Prosecutors observe, this Chamber ordered the Trial Chamber to provide more than a mere list of allegations to be heard in subsequent trials. This Chamber specifically instructed the Trial Chamber to address the practical concerns raised by the civil parties and the Co-Prosecutors.⁵⁵ That instruction logically applies also to the concerns subsequently raised by the Defence at the Severance Hearing. The Trial Chamber declined to do so.⁵⁶

iii – The Only Remedy is Annulment of the Impugned Decision

25. The effect of these failures is to annul the decision to sever the trial. During more than 18 months of proceedings, the Trial Chamber has been unable to craft a trial in Case 002/01 consistent with Nuon Chea’s right to a fair trial. That is not likely to change. In the event that Case 002/02 goes forward, the Trial Chamber will encounter all of these problems for a second time. The Supreme Court Chamber should decide to put an end to the debate and uncertainty now, and follow the simplest and only uncontroversial path: hear the full Case 002 Closing Order as the Co-Investigating Judges formulated it following a three year investigation. This Chamber should therefore annul the Trial Chamber’s decision to sever the trial with prejudice to renewed severance.

⁵³ Mladic Decision, para. 35.

⁵⁴ Second Severance Appeal, para. 77.

⁵⁵ SCC Severance Decision, para. 47.

⁵⁶ Impugned Decision, para. 155 (proposing a trial management meeting to address certain concerns raised by the Co-Prosecutors).

26. This Chamber should also order the Trial Chamber to hold a single trial of the full Closing Order for the additional and sole reason that it would be unable to preside over a second trial in Case 002/02 after rendering judgment in Case 002/01. As the Trial Chamber correctly observed, there is ‘no legal basis’ on which to justify dismissing a portion of the charges in favour of a single revised indictment.⁵⁷ The Supreme Court Chamber recognized that reality by issuing its instruction to the Trial Chamber to formulate a plan for adjudicating the balance of the Closing Order. Since sequential trials are inconsistent with Nuon Chea’s right to an impartial tribunal, it follows that the Chamber is required to hear the entirety of the Case 002 Closing Order.
27. Finally, this Chamber’s instruction to solicit submissions, reason its decision and propose a plan for the adjudication of the balance of the Closing Order, applied not only to the scope of Case 002/01 but also the decision as to whether severance was appropriate from the outset.⁵⁸ The Trial Chamber’s failure to take any of these steps in relation to the decision to sever the trial constitutes an error of law invalidating the Impugned Decision.

C. The Trial Chamber Erred in Fact or Abused its Discretion in Failing to Include Charges Relating to Genocide and Cooperatives and Worksites in Case 002/01

28. The Trial Chamber held that it was ‘apparent [...] from the outset that a case containing even a single example of each category of crime or serious violation of humanitarian law would be one of such breadth and scope as to be unable to conclude within the Accused’s natural life-span or whilst they remained fit to be tried.’⁵⁹ On that basis, the Chamber concluded that ‘a timely verdict in Case 002 could only be achieved in significant measure at the expense of the representativeness of the totality of the charges and factual allegations in the Closing Order.’⁶⁰ The Chamber then reinstated Case 002/01 as it existed prior to this Chamber’s decision despite conceding that it was not representative of the full Closing Order.⁶¹

⁵⁷ Impugned Decision, para. 152.

⁵⁸ SCC Severance Decision, para. 50 (SCC decision is without prejudice to Trial Chamber’s ‘reassessment of severing Case 002’ subject to the conditions set out therein).

⁵⁹ Impugned Decision, para. 109.

⁶⁰ Impugned Decision, para. 121; *see also, id.*, para. 112 (‘most [victims] must inevitably be excluded’).

⁶¹ Impugned Decision, paras 111-113, 118-119 (noting that Case 002/01 does not include the full temporal or geographic scope of the Closing Order or all of the class of crimes charged, that the Chamber elected not to

29. The Trial Chamber manifestly failed to undertake any legitimate effort to formulate a reasonably representative trial in Case 002/01. The Chamber's certainty that such a trial 'would be' unable to conclude within the Accused's natural lifespan is implausible, since Nuon Chea's lifespan is inherently unpredictable. Nor is there any evidence before the Trial Chamber that Nuon Chea's life or his fitness to stand trial is in imminent danger.⁶² The Trial Chamber was required to weigh the condition of his health against the expected length of adjudicating the trials proposed by the parties. It failed to do either and therefore abused its discretion.
30. By indicating that its conclusion had been 'apparent [...] from the outset', the Trial Chamber also conceded that it failed to revisit its' analysis in light of the requirements of this Chamber's decision. The Trial Chamber previously indicated that representativeness was not relevant at all to its formulation of the scope of Case 002/01.⁶³ This Chamber's instruction that it was relevant ought to have prompted a reconsideration of its original assessment of the scope of Case 002/01 in light of the age and health of the Accused. The Trial Chamber should also have considered whether Ieng Sary's death had since altered the timeframe within which the first trial ought to be completed. Instead, the Chamber deferred to its original decision.
31. For these reasons, the Trial Chamber abused its discretion by failing to give any consideration to the possibility of holding a reasonably representative trial of the Closing Order in Case 002/01. Such a trial is both possible and necessary. It should include, at a minimum, the genocide charges against Nuon Chea and a cross-section of the allegations concerning cooperatives and worksites.

i – Case 002/01 Must be Reasonably Representative of the Full Closing Order

32. For the same reasons that this Chamber should reverse the Trial Chamber's renewed severance of Case 002, it must ensure that if the Closing Order is severed, the trial in Case 002/01 is reasonably representative of the entirety of Case 002. In the context of a severed trial, Nuon Chea's right to present a full and effective defence and his right to

choose between 'numerous and equally-deserving candidates for inclusion', and that most victims would be 'must inevitably be' excluded).

⁶² See Second Severance Appeal, paras 61-63.

⁶³ Decision on Request for Reconsideration, para. 9.

confront the evidence against him can be protected only by a trial which captures all of the major themes and alleged policies of Democratic Kampuchea.

33. Nuon Chea is also entitled to an opportunity to contest all of the allegations against him. As the Defence argued before the Trial Chamber, the Closing Order is a judicially issued indictment which considers that Nuon Chea is 'probably' guilty of a plethora of serious international crimes.⁶⁴ Any part of the Closing Order which is not heard at trial 'will survive as the final adjudication of Nuon Chea's criminal responsibility for the events during Democratic Kampuchea.'⁶⁵ Nuon Chea was granted almost no right of participation in the judicial investigation.⁶⁶ The ongoing trial is therefore his 'only opportunity to present his defence to the allegations in the Closing Order' and for the Cambodian public to hear a far closer approximation of the historical truth.⁶⁷
34. The Co-Prosecutors argue that the prospect of a trial in Case 002/02 is 'intangibly remote' and that charges not included within the scope of Case 002/01 will be 'effectively terminated.'⁶⁸ Yet they do not explain in any detail why the scope of Case 002/01 should be narrowly limited to forced movement phases I and II, Tuol Po Chrey and S-21 alone. As this Chamber recognized, the possibility that no future trials will take place militates in favor of 'maximiz[ing] representation' of the charges in Case 002/01.⁶⁹
35. A broader version of Case 002/01 is far more likely to come to fruition than a second trial in Case 002/02. Donors are much more likely to refuse to fund a second trial than they are to allow Case 002/01 to lapse without any verdict after nearly six years of proceedings. Case 002/02 could furthermore begin only after a judgment in Case 002/01 is issued, likely after a delay of many months.⁷⁰ Allegations added to Case 002/01 could be heard almost immediately.

⁶⁴ Closing Order, para. 1323 (standard for charging the Accused is a probability, rather than a mere possibility, of guilt).

⁶⁵ TC Severance Hearing (Day 2), p. 3:22-23.

⁶⁶ *See e.g.*, Document No. **A-110**, Memorandum from Co-Investigating Judges to Counsel for Nuon Chea, 10 January 2008.

⁶⁷ TC Severance Hearing (Day 2), pp. 3:24-4:2.

⁶⁸ Second Severance Appeal, para. 24.

⁶⁹ SCC Severance Decision, para. 43.

⁷⁰ TC Severance Hearing (Day 2), pp. 23:17-24:23.

36. Nor is there any imminent risk to Case 002/01. As the Co-Prosecutors recognize, Nuon Chea's health continues to be stable.⁷¹ Funding for the international side of the Court has never been interrupted, and indeed, the international Co-Investigating Judge is currently expanding his staff for the purpose of the investigation in Cases 003 and 004. In 2012, the Court administration increased the budget of the each of the defence teams by 30%.
37. If a trial in Case 002/02 really is 'intangibly remote', the imperative to ensure that a truly representative version of the Closing Order is tried in Case 002/01 is acute. Nuon Chea, like all of the parties, has a substantial interest in as full a trial of the Closing Order as possible. This Chamber should do its utmost to ensure that it takes place.

ii – Case 002/01 Must Include the Genocide Charges

38. The Closing Order charges Nuon Chea with criminal liability for having 'deliberately and systematically identified, targeted, gathered and killed' tens of thousands of people because of their membership in a national or religious group.⁷² It concludes that he specifically intended to destroy those groups and sought to destroy them in their entirety.⁷³ No allegation could more wrongfully mischaracterize the Khmer Rouge or Nuon Chea's role as one of its leaders.
39. The sheer gravity of the genocide charge requires that this Chamber be especially vigilant in ensuring that Nuon Chea's right to contest the allegations against him is respected. The judicially confirmed Closing Order concludes that Nuon Chea 'probably' committed the worst crime known to man. This court cannot just decide that count is not important enough to try. It cannot deliberately leave the *decision* hanging against Nuon Chea that he *probably* intended to destroy entire groups of people.
40. Equally important is the special and privileged role occupied by the phrase 'genocide' as an encapsulation of the Khmer Rouge period in the public mind. The entity which founded DC-Cam and in effect collected most of the evidence at this trial, Yale University's 'Cambodian Genocide Program', places Democratic Kampuchea on par with all of the iconic genocides of the 20th Century:

⁷¹ Second Severance Appeal, paras 61-63.

⁷² Closing Order, paras 1337, 1344.

⁷³ Closing Order, paras 1338, 1345.

The Cambodian genocide of 1975-1979, in which approximately 1.7 million people lost their lives (21% of the country's population), was one of the worst human tragedies of the last century. As in the Ottoman Empire during the Armenian genocide, in Nazi Germany, and more recently in East Timor, Guatemala, Yugoslavia, and Rwanda, the Khmer Rouge regime headed by Pol Pot combined extremist ideology with ethnic animosity and a diabolical disregard for human life to produce repression, misery, and murder on a massive scale.⁷⁴

41. In spite of this public perception, genocide is one of the few crimes whose very occurrence is contested even by experts sought by the Prosecution.⁷⁵ More than any other single allegation in the Closing Order, public opinion about the role of genocide in the Khmer Rouge misstates the historical record. This tribunal, and its public proclamation of genocide charges against the Accused, is not blameless in creating that perception. Nuon Chea is entitled to an opportunity to disprove these allegations, correct the public record and establish that he did not deliberately murder his fellow citizens.
42. The genocide charge also goes to the heart of the most important and elusive question to be confronted at this Tribunal: what was the essence of the Khmer Rouge revolution? Genocide is the only charge in the Closing Order pursuant to which Nuon Chea is charged with having specifically intended to murder his fellow citizens. It therefore most pointedly poses the question: Was the Khmer Rouge in essence a well-intentioned movement seeking to improve the living standards of the Cambodian people? Or was it in essence a murderous and hateful regime that set out to eliminate any group outside of its preferred rural peasant class? Those questions are fundamental, legally and morally, to our understanding of Democratic Kampuchea. A trial that ignores them cannot be either representative or in the interests of justice.
43. The Trial Chamber recognized 'the perception of genocide as the gravest offence punishable before the ECCC' but refused to include those charges within the scope of Case 002/01 because they extend only to 'killings of the Vietnamese and Cham.'⁷⁶ That conclusion misconstrued the role of the genocide charges in the context of the Closing Order and accordingly constituted an error of fact.

⁷⁴ 'Cambodian Genocide Program: The CGP, 1994-2003', available at: <http://www.yale.edu/cgp/>

⁷⁵ Draft Transcript, 9 May 2013, pp. 17:24-19:11.

⁷⁶ Impugned Decision, para. 113.

44. The Closing Order alleges that one of the five key policies of Democratic Kampuchea was the targeting of groups in order ‘to establish an atheistic and homogenous society without class divisions, abolishing all ethnic, national, religious, racial, class and cultural differences.’⁷⁷ Among the groups allegedly targeted pursuant to that policy were ‘opponents of the revolution’ such as feudalists, capitalists and bourgeois and ‘all national minorities.’⁷⁸ With these groups ‘abolished [...] the only class types that existed were workers and peasants.’⁷⁹
45. In exactly the same way, the Co-Prosecutors have sought to establish that CPK policy viewed city-dwellers as enemies of the Party and the revolution as such.⁸⁰ Khmer Rouge soldiers are alleged to have shown a total disregard for the lives of civilians in Phnom Penh and other urban centers.⁸¹ ‘New people’, intellectuals, students, diplomatic staff and former officials of the Khmer Republic are alleged to have been systematically mistreated, arrested *en masse* and killed.⁸²
46. Allegations concerning the treatment accorded to the Cham and the Vietnamese are a microcosm of this supposed Khmer Rouge policy toward all those they are alleged to have deemed impure. Steve Heder wrongfully argues that ‘both Marxism and Communism were at the root of racism and genocide in Democratic Kampuchea.’⁸³ According to Heder, groups such as the Cham and the Vietnamese were targeted because the Khmer Rouge effort ‘to establish socialist relations of production [...] destroyed populations whose class identities were defined in terms of ‘national’ or ‘racial’ essences.’⁸⁴ The phenomenon charged as ‘genocide’ in the Closing Order is therefore not alleged to have been a discriminatory sideshow to a socialist revolution unfolding in parallel. It is alleged to be emblematic of the socialist revolution’s supposed effort to eliminate groups deemed to fall outside of its preferred class

⁷⁷ Closing Order, para. 207.

⁷⁸ Closing Order, para. 207.

⁷⁹ Closing Order para. 207.

⁸⁰ Document No. **E-1/181.1**, ‘Transcript of Trial Proceedings’, 22 April 2013, p. 51:7-11; Document No. **E-1/182.1**, ‘Transcript of Trial Proceedings’, 23 April 2013, pp. 5:16-6:9.

⁸¹ Draft Transcript, 7 May 2013, p. 68:10-23.

⁸² Closing Order, paras 1417-1418.

⁸³ Document No. **E-131/1/13.3**, ‘Racism, Marxism, Labelling and Genocide in Ben Kiernan’s *The Pol Pot Regime*’, p. 3.

⁸⁴ Document No. **E-131/1/13.3**, ‘Racism, Marxism, Labelling and Genocide in Ben Kiernan’s *The Pol Pot Regime*’, p. 5-6.

category. Only the legal qualification is different, since genocide applies to national and ethnic but not political or economic groups.

47. The Defence agrees with the Co-Prosecutors that severance does not apply to the legal qualification of facts.⁸⁵ It follows that by adjudicating the genocide charges the Chamber would also place at issue the knowledge and intent of the Accused with regard to all of the crimes alleged to have been perpetrated against targeted groups. These include, at a minimum, murder, extermination, torture and persecution.⁸⁶ A trial on these charges as they apply to the Cham and the Vietnamese would reasonably approximate the Khmer Rouge policy toward outsiders, a central feature of the alleged Khmer Rouge ideology and its policies as they are described in the Closing Order.
48. For all of these reasons, the genocide charges capture the fundamental nature or theme of the Case 002 Closing Order. Other factors cited by the Co-Prosecutors in their assessment of representativeness similarly support the inclusion of genocide within the scope of Case 002/01:
- a. *Nature of Crimes and their Classification*: The inclusion of genocide charges would render Case 002/01 considerably more representative of Case 002 as a whole by incorporating a second of the three categories of the crimes charged in the Closing Order. Although there is some dispute whether crimes against humanity are more serious than war crimes,⁸⁷ genocide holds a privileged position in international criminal law as the ‘crime of all crimes.’⁸⁸ A trial on forced movement and genocide would therefore better represent the crimes charged than a trial on forced movement alone or forced movement and S-21.
 - b. *Victims*: Relying on Ewa Tabeau’s demographic report, the Closing Order concludes that 90,000 Cham and 20,000 Vietnamese were killed during Democratic Kampuchea and cites both figures as evidence of genocidal intent.⁸⁹ No crime site in the Closing Order is alleged to have caused as many deaths,

⁸⁵ TC Severance Hearing (Day 2), p. 113:7-14.

⁸⁶ Closing Order, paras 1373, 1381, 1402, 1408.

⁸⁷ *Prosecutor v. Kambanda*, ICTR-97-23-S, ‘Judgment and Sentence’, 4 September 1998, paras 14-15; cf. *Prosecutor v. Furundzija*, IT-95-17/1-A, ‘Judgment’, 21 July 2000, paras 242-243 (discussing conflicting case law).

⁸⁸ *Prosecutor v. Kambanda*, ICTR-97-23-S, ‘Judgment and Sentence’, 4 September 1998, para. 16.

⁸⁹ Closing Order, paras 747, 792, 1342, 1349; Document No. **D-140/1/1**, ‘Khmer Rouge Victims in Cambodia, April 1975-January 1979: A Critical Assessment of Major Estimates’ (‘Tabeau Report’), pp. 49-50.

including either S-21⁹⁰ or forced movement.⁹¹ Aside from forced movement, possibly no single set of facts is alleged to have affected as many victims. The Trial Chamber placed singular weight on the number of victims allegedly affected by forced movement⁹² and was therefore bound to consider the same factor in relation to genocide. Its failure to do so constituted an abuse of discretion.

The alleged victims of genocide were representative of the victims as a whole. By its nature, genocide targets the members of a group indiscriminately and therefore cuts across all segments of the population. The Closing Order alleges that every Vietnamese person living in Cambodia on 17 April 1975 and 36% of the Cham were killed.⁹³ According to Ysa Osman, ‘Cham were killed in all localities across the country’,⁹⁴ including Phnom Penh,⁹⁵ Pursat,⁹⁶ Kampong Cham,⁹⁷ Kampot,⁹⁸ Kampong Thom,⁹⁹ Prey Veng¹⁰⁰ and Kandal,¹⁰¹ among others. They were Lon Nol government officials, students, fishermen, interpreters, religious figures and professors.¹⁰² The Trial Chamber abused its discretion in holding that allegations concerning genocide were limited to ‘killings of Vietnamese and Cham’ without also considering the broad spectrum of alleged victims affected.¹⁰³

- c. *Geographic Scope*: The Closing Order alleges that the killing of Vietnamese civilians was ‘organised as a national policy.’¹⁰⁴ Cham and Vietnamese persons are alleged to have been killed in every zone and autonomous sector of Democratic Kampuchea, covering locations in Battambang, Pursat, Monduliri, Kampot, Takeo, Kratie, Koh Kong, Prey Veng, Svay Rieng, Ratanakiri, Kampong Cham,

⁹⁰ Closing Order, para. 423.

⁹¹ Closing Order para. 240; Document No. **E-1/189.1**, ‘Transcript of Trial Proceedings’, 6 May 2013, pp. 39:17-40:4.

⁹² Impugned Decision, paras 112, 116.

⁹³ Closing Order, paras 747, 792.

⁹⁴ Document No. **E-3/1822**, ‘Oukoubah: Justice for the Cham Muslims under the Democratic Kampuchea Regime’, 2002 (‘Osman’), p. 6.

⁹⁵ Osman, pp. 11, 12, 21, 31, 45, 50, 53, 68.

⁹⁶ Osman, p. 19.

⁹⁷ Osman, pp. 46, 120-121

⁹⁸ Osman, pp. 72,75.

⁹⁹ Osman, pp. 120-121.

¹⁰⁰ Osman, pp. 122-124.

¹⁰¹ Osman, pp. 120-124.

¹⁰² Osman, pp. 8, 12, 66, 69, 74, 119, 122-123.

¹⁰³ Impugned Decision, para. 113.

¹⁰⁴ Closing Order, para. 802.

Kampong Thom and Siem Reap.¹⁰⁵ The Trial Chamber relied on the geographic representativeness of the forced movement charges yet failed to consider it in relation to genocide, and consequently abused its discretion.

- d. *Temporal Scope*: Khmer Rouge policies concerning the Cham and the Vietnamese are alleged to have covered the full temporal scope of Democratic Kampuchea, beginning prior to 1975 and continuing until 6 January 1979.¹⁰⁶ It is therefore more temporally representative than either forced movement phases I and II, which concluded in 1977,¹⁰⁷ or S-21, which ‘became fully functional in October 1975.’¹⁰⁸

49. For these reasons, the Supreme Court Chamber should conclude that the genocide charges are essential to any trial of the Case 002 Closing Order and, if it decides not to annul the second severance order, instruct the Trial Chamber to include them within the scope of Case 002/01.

iii – Case 002/01 Must Include Cooperatives and Worksites

50. For the reasons already stated,¹⁰⁹ a reasonably representative trial of the Case 002 Closing Order must include a full assessment of the intentions and objectives of the Khmer Rouge revolution. In terms of the facts as they are presented in the Closing Order, that assessment would require inclusion of the crimes allegedly committed at cooperatives and worksites. The test relied upon by the Co-Prosecutors supports that conclusion.
51. *Fundamental Nature or Theme of the Case*: The Closing Order alleges that the combined effect of the five alleged policies of Democratic Kampuchea was the ‘forced collectivization of all aspects of society.’¹¹⁰ That collectivization is alleged to have involved the suppression of economic freedom and ‘generally forcing everyone to live in communal units.’¹¹¹ Life in those communal units – cooperatives and worksites – is accordingly alleged to have been the daily experience of the overwhelming majority of ordinary Cambodians.

¹⁰⁵ Closing Order, paras 797-803.

¹⁰⁶ Closing Order, paras 753-770, 792-804.

¹⁰⁷ Closing Order, para. 262.

¹⁰⁸ Closing Order, para. 416.

¹⁰⁹ See paras 13-17, *supra*.

¹¹⁰ Closing Order, para. 158.

¹¹¹ Closing Order, para. 158.

52. The Closing Order alleges that, through these cooperatives and worksites, Nuon Chea knowingly subjected millions of Cambodians to ‘inhumane’ conditions causing serious harm and often death.¹¹² If genocide is the most serious crime with which Nuon Chea is charged, those allegedly committed at cooperatives are the most widespread, and the ones alleged to have most fully permeated the lives of ordinary Cambodians. It is exactly for the sake of those ordinary Cambodians that Nuon Chea joined the Communist Party of Kampuchea and undertook to create a socialist revolution. He is entitled to refute the allegation that he intentionally caused them such grievous harm.
53. *Nature and Classification of Crimes Charged:* Nearly every crime against humanity of which Nuon Chea stands accused, including murder, extermination, enslavement, persecution and other inhumane acts, is charged in connection with every cooperative and worksite in the Closing Order.¹¹³ The remaining crimes against humanity, torture and imprisonment, are both alleged to be linked to the Tram Kok cooperatives.¹¹⁴
54. *Geographic and temporal scope:* Cooperatives and worksites are alleged to have been ‘set up throughout Cambodia before 1975, from the early stages of the CPK control over certain parts of the territory [...] until at least 6 January 1979’, and therefore cover the full geographic and temporal scope of the Closing Order.¹¹⁵ At least one cooperative and one worksite is alleged to have spanned the full length of Democratic Kampuchea.¹¹⁶
55. *Victims:* The Closing Order does not specify the number of people alleged to have been affected by cooperatives and worksites but in light of their geographic and temporal scope it is apparent that the number is considered to be very large. Cooperatives are alleged to have affected the broadest possible cross-section of Cambodian society, including ‘base people’, ‘new people’, and people transferred there from geographic locations across the country.¹¹⁷

D. The Trial Chamber Did Not Err in Failing to Include S-21 Within the Scope of Case 002/01

¹¹² Closing Order, paras 1434, 1437.

¹¹³ Closing Order, paras 1373, 1381, 1391, 1416, 1434.

¹¹⁴ Closing Order, paras 1402, 1408.

¹¹⁵ Closing Order, para. 168.

¹¹⁶ Closing Order, paras 303, 370.

¹¹⁷ Closing Order, para. 161 (‘One of the objectives of the population movements was to fulfil the labour requirements of the cooperatives and worksites’).

56. Unlike the Nuon Chea defence, the Co-Prosecutors accept that the Trial Chamber was correct to limit the scope of Case 002/01 to just a handful of factual allegations. In a case as large and complex as Case 002, so small a sample of the charges could never be ‘reasonably’ representative of the full Closing Order. Absent clear guidelines for determining the exact point at which Case 002/01 becomes representative enough, the Trial Chamber’s decision in that regard necessarily entailed the exercise of substantial discretion.¹¹⁸ It is therefore owed deference by this Chamber.

i – S-21 is Not Uniquely Representative of the Case 002 Closing Order

57. Not a single aspect of the Co-Prosecutors’ test¹¹⁹ supports their apparent view that S-21 is uniquely representative of the charges against the Accused. S-21 is less representative than forced movement with respect to both the scope of the alleged victims and the geographic regions covered. S-21 is no more representative than any one of a dozen other possible crime sites with respect to temporal scope and the crimes charged. In terms of the fundamental theme or nature of the case, S-21 would affirmatively distort the character of Case 002/01 relative to Case 002 as a whole.

58. *Scope of Alleged Victims:* S-21 counts roughly 12,000 alleged victims and 128 admitted civil parties¹²⁰ and in both respects is comparable to other crimes and crime sites alleged in the Closing Order.¹²¹ Of the alleged victims at S-21, the Closing Order claims that 81% were members of the CPK or RAK.¹²² Another 12% were detained for unknown reasons or because of their family connections to another detainee.¹²³ The mere fact that people from other ethnic groups were also occasionally detained does not alter the basic character of the institution. It certainly does not make S-21 more representative of the victims than crimes alleged to have affected nearly half of the Cambodian population.

¹¹⁸ SCC Severance Decision, para. 35 (affirming the Trial Chamber’s discretion in applying Rule 89ter).

¹¹⁹ Second Severance Appeal, paras 30-34 (describing the relevant factors).

¹²⁰ Closing Order, paras 423, 475.

¹²¹ See e.g., Closing Order, paras 350 (99 civil parties in connection with Trapeang Thma Dam Worksite); 744 (87 civil parties in connection with treatment of Buddhists), 861 (664 civil parties in connection with the regulation of marriage), 301 (219 civil parties in connection with forced movement Phase III). See also Document No. E-3/2763, ‘Burial’, 18 February 2008, Nos 17 (compare to Closing Order, paras 551-2), 353 (compare to Closing Order, para. 644), 61 (compare to Closing Order, para. 776).

¹²² Closing Order, paras 424-425.

¹²³ Closing Order, para. 432.

59. *Geographic Scope*: It is uncontested that the *situs* of the crimes allegedly committed at S-21 was limited to Phnom Penh. Although the Co-Prosecutors claim that S-21 was geographically diverse because detainees are alleged to have originated in different parts of the country,¹²⁴ their own test focuses not on the place of origin of the victims but on ‘the places where [crimes] were alleged to have been committed’.¹²⁵ In this case the fact that crimes at S-21 took place in only one geographic location is of special significance, since it correlates to and reflects other ways in which S-21 is not representative of the Closing Order as whole.¹²⁶
60. *Temporal Scope and Crimes Charged*: The Trial Chamber noted that the criminal charges it included in Case 002/01 did not cover the full three years and eight months of the Democratic Kampuchea regime or all of the crimes charged in the Closing Order.¹²⁷ The Chamber weighed those factors against the scope of the alleged victims and locations of the crimes charged and gave greater weight to the latter two factors.¹²⁸ It did not ignore any relevant considerations and was entitled to that exercise of its discretion.
61. The Trial Chamber was also correct when it observed that there was no principled way to differentiate in these respects between S-21 and other crimes alleged in the Closing Order.¹²⁹ Numerous crimes and crime sites are alleged to have traversed all or most of the Democratic Kampuchea regime.¹³⁰ Every crime against humanity charged in the indictment is alleged to have occurred at numerous security centers, execution sites, cooperatives and worksites.¹³¹ Although there are relatively few crime sites in connection with which Grave Breaches are charged, the Trial Chamber considered that fact, noted that grave breaches were narrowly focused, factually and legally, in the Closing Order, and concluded that it would not substantially enhance the

¹²⁴ Second Severance Appeal, para. 38.

¹²⁵ Second Severance Appeal, para. 31.

¹²⁶ See paras 62-71, *infra*.

¹²⁷ Impugned Decision, paras 111, 113, 115.

¹²⁸ Impugned Decision, paras 118.

¹²⁹ Impugned Decision, para. 122 (the addition of S-21 would render Case 002/01 more representative ‘in the sense that the addition of *any* crime site would further this objective’).

¹³⁰ These include among others the Tram Kok Cooperatives, Srae Ambel Worksite, Kampong Chhnang Airport Construction Site, Kraing Ta Chan Security Center, Koh Kyang Security Center and Phnom Kraol Security Center and all the charges concerning the treatment of targeted groups. Nearly every security center in the Closing Order was operational through the last two years of Democratic Kampuchea and would therefore cover the full temporal scope of the regime in conjunction with phases I and II of the population movement.

¹³¹ Closing Order, paras 1373-1478.

representativeness of the Case 002/01 trial to include them.¹³² Those conclusions too were within its discretion.

62. *Fundamental Theme or Nature of the Case:* As the Defence argued before the Trial Chamber, the Co-Prosecutors' view that S-21 is the most representative crime site in the Closing Order is a serious misstatement of reality.¹³³ S-21 has nothing at all to do with the primary theme of the case, the Khmer Rouge effort to implement socialist revolution through a great leap forward. It is a very particular and distinctive manifestation of the secondary theme of the case, the effort to defend that revolution against internal and external enemies. A trial on forced movement and S-21 alone would badly misrepresent the crimes charged in the indictment, the criminal responsibility of the Accused persons and the events during Democratic Kampuchea.

63. The Closing Order alleges that the common purpose underlying the JCE was to

implement rapid socialist revolution in Cambodia through a 'great leap forward' and to defend the Party against internal and external enemies, by whatever means necessary.¹³⁴

The Co-Prosecutors adopted this statement as the theme of Democratic Kampuchea during the severance hearing before the Trial Chamber.¹³⁵ They have now reformulated the fundamental theme in a transparent effort to tailor it as closely as possible to S-21: 'the charge that hundreds of thousands of Cambodians were unlawfully detained, tortured and executed at a network of security centers, pursuant to policies and decisions of the senior leaders of the CPK.'¹³⁶

64. Excised from this formulation is even a single mention of socialism, revolution, Communism or the great leap forward. It follows that according to the Co-Prosecutors, the Closing Order would not have been different in character had the Khmer Rouge operated a network of security centers for no alleged ideological purpose. Yet the Co-Prosecutors have tendered extensive evidence concerning the alleged ideological

¹³² Impugned Decision, para. 113.

¹³³ TC Severance Hearing (Day 2), pp. 12:22-14:25.

¹³⁴ Closing Order, para. 1524.

¹³⁵ TC Severance Hearing (Day 2), p. 56:2-7.

¹³⁶ Second Severance Appeal, para. 45.

foundations of the Khmer Rouge revolution¹³⁷ and argued that evidence of all five alleged policies of Democratic Kampuchea is necessary to understand the crimes charged in Case 002/01.¹³⁸

65. Had the Co-Prosecutors acknowledged the same ‘fundamental theme’ they formulated in argument before the Trial Chamber, it is apparent that the numerous criminal charges which are alleged to have followed from the objectives of the socialist revolution – including those which concern cooperatives, worksites and the regulation of marriage – would have appeared at least as essential as S-21.
66. Even within the narrow frame of ‘security centers’, S-21 is not a representative crime site. Whereas security centers located throughout Cambodia are alleged to have punished a broad swath of the population for an assortment of quotidian offences, S-21 is alleged to have been fundamentally a tool of internal political purges. According to the Closing Order security centers were located in a variety of geographic areas and held a mix of base people, new people, CPK cadres and ethnic minorities. People were allegedly detained for any number of reasons, including minor offences such as stealing food, so-called moral offences, and serious offences such as political disloyalty. Torture was allegedly widespread in some and almost non-existent in others; executions were allegedly total in some, occasional in others.¹³⁹
67. S-21, by contrast, is alleged to have been a ‘political and military establishment’.¹⁴⁰ As already noted, an overwhelming majority of detainees were members of the CPK or RAK.¹⁴¹ The alleged ‘primary function of S-21 was to extract confessions from detainees that would help uncover other networks of potential traitors.’¹⁴² Nearly every

¹³⁷ See e.g., Document No. **E-9/31.2**, ‘Annex 2—CPK Publications & Directives’, 19 April 2011 (seeking admission of dozens of CPK documents for the purpose of establishing CPK political lines and strategies); Document No. **E-1/29.1**, ‘Transcript of Trial Proceedings’, 18 January 2012 (OCP presenting documents concerning historical background of CPK and ideological foundations of the revolution); Document No. **E-1/42.1**, ‘Transcript of Trial Proceedings’, 13 February 2012 (similar).

¹³⁸ Document No. **E-96/8**, ‘Co-Prosecutors’ Further Request to Put Before the Chamber Written Statements and Transcripts with Confidential Annexes 1 to 16’, 27 July 2012, paras 30-34 (seeking admission of evidence of all the policies of Democratic Kampuchea as circumstantial evidence in connection with Case 002/01).

¹³⁹ See e.g., Closing Order, paras 500-503 (re Kraing Ta Chan), 523-530 (re Koh Kyang), 541-545 (re Prey Damrei Srot), 559-560 & 563-570 (re Wat Kirirum), 576 & 581-584 (re North Zone security center), 599 & 610-623 (re Au Kanseng), 634-641 (re Phnom Kraol), 653 & 658 & 664 (re Wat Tlork), 673-684 (re Kok Kduoch).

¹⁴⁰ Closing Order, para. 421.

¹⁴¹ See para. 58, *supra*.

¹⁴² Closing Order, para. 455.

detainee at S-21 is alleged to have been tortured. Except for a tiny handful, every detainee at S21 is alleged to have been killed.¹⁴³ In none of these respects is S-21 an accurate reflection of the ‘network of security centers’ which the Co-Prosecutors (now) allege lie at the center of Case 002.

68. A finding by the Supreme Court Chamber at this stage of the Case 002/01 trial that S-21 is representative of the full Closing Order would also constitute a serious violation of the presumption of innocence. This Chamber has previously (and wrongfully) described the crimes for which Duch was convicted at S-21 as ‘among the gravest’ at any international tribunal and ‘undoubtedly among the worst in recorded human history.’¹⁴⁴ Philip Short’s conclusion in his testimony before the Trial Chamber that S-21 constituted the ‘pinnacle in concentrated form’ of Democratic Kampuchea was an extension of his conclusion that Democratic Kampuchea as a whole was the first and only ‘slave state’ in modern history.¹⁴⁵ A finding by this Chamber that S-21 encapsulates the Closing Order in its essence would suggest that these epithets are equally applicable to both Democratic Kampuchea and all of the crimes charged in Case 002. At a minimum, a reasonable apprehension of bias would follow.
69. S-21 is also the only security center alleged to have reported directly to the party center. Almost every security center and cooperative in Cambodia is alleged to have been operated and/or established by local officials.¹⁴⁶ The Case 001 Closing Order describes S-21 as ‘unique’ in its focus on CPK cadres and its linkages to the center.¹⁴⁷ It is therefore also in this sense not representative of the Closing Order.
70. Neither would it be in the ‘interests of justice’ to include S-21 merely because it is alleged to be ‘the crime site most closely connected to the Accused.’¹⁴⁸ The interests of justice are not co-extensive with the interest of the prosecution in securing convictions. Including S-21 within the scope of Case 002/01 because it is alleged to be uncommonly connected to Nuon Chea would constitute a deliberate choice to distort the record in Case 002 so as to over-emphasize the role of party leaders and obscure the role of tens

¹⁴³ Closing Order, paras 448, 451, 460-461.

¹⁴⁴ Duch Appeal Judgment, paras 376, 380.

¹⁴⁵ Document No. **E-1/191.1**, ‘Transcript of Trial Proceedings’, 8 May 2013, pp. 9:9-20, 68:15-19.

¹⁴⁶ Closing Order, paras 477, 490, 519, 537, 557, 594, 630-631, 649, 670-671.

¹⁴⁷ Case 001/18-07-2007-ECCC-OCIJ, Document No. **D-99**, ‘Closing Order’, 8 August 2008, para. 20.

¹⁴⁸ Second Severance Appeal, para. 47.

of thousands of ordinary Cambodians and party cadres. That would be a failure of this Court's effort to 'ascertain the truth' and a distortion of the historical narrative.

71. If the Co-Prosecutors had wanted to try Nuon Chea for the small number of crimes to which they believed he was truly proximate, they could have significantly narrowed the scope of their Introductory Submission. That decision would have had its own significance as an acknowledgment of the diffuse responsibility existing across Democratic Kampuchea and the limited role of the party center. They chose instead to accuse Nuon Chea of wide-ranging criminal conduct at all levels of the regime and in every province in Cambodia. They initiated a three-year, highly publicized investigation which resulted in a judicially issued indictment affirming those allegations. They cannot now – without ever adjudicating those charges – revert to the one allegation they believe is most connected to Nuon Chea and characterize it as 'representative' of his responsibility for the full scope of the Closing Order.

ii – Prior S-21 Trial

72. The Trial Chamber properly gave weight to its prior adjudication of charges concerning S-21 in Case 001 as one relevant factor among the many it considered.¹⁴⁹ A trial of the allegations concerning S-21 in Case 002 would overlap substantially with the trial in Case 001 in terms of factual findings as to crime base evidence and the role and restitution of victims. Of the 128 civil parties admitted with respect to S-21 in Case 002, 46 were already recognized as civil parties in Case 001. It was in the interests of justice for the Trial Chamber to privilege the adjudication of restitutionary claims and factual allegations which have not yet been resolved over those which have. The fact that the Accused in Case 002 are charged with formulating the policies of Democratic Kampuchea is not unique to S-21 and does not justify revisiting it.¹⁵⁰
73. The Duch trial was furthermore not an 'other case[] against different defendants'¹⁵¹; it was the same case, severed during the investigation to permit the CIJs to focus on a single crime site. It would be contrary to the interests of justice to hold two successive trials on the same crime site without ever adjudicating the overwhelming majority of the allegations originally formulated against the (then) Suspects.

¹⁴⁹ Impugned Decision, para. 112.

¹⁵⁰ Second Severance Appeal, para. 49.

¹⁵¹ Second Severance Appeal, para. 49.

iii – Adjudicating S-21 Would be Onerous

74. The allegations surrounding S-21 are complex and disputed by the Defence. The Defence accordingly disagrees with the Co-Prosecutors that those allegations could be adjudicated in 15 days, representing five specific witnesses over eleven days and a four-day allowance for other witnesses sought by the defence or civil parties.¹⁵²
75. Live testimony concerning S-21 is required for at least four reasons: to challenge the credibility of Duch's testimony, to establish Son Sen's continued role at S-21 after 15 August 1977, to establish that Vietnamese prisoners held at S-21 were not the target of discriminatory treatment, and to establish that S-21 detainees were legitimate military targets. As the Defence indicated at the Trial Chamber's hearings on severance, it will make its final evidentiary submissions with regard to S-21 before the Trial Chamber if and when S-21 is added to the scope of the trial.¹⁵³

Duch's Credibility

76. Duch's testimony is by far the most inculpatory evidence before the Trial Chamber as to Nuon Chea's role at S-21. Duch claims that Nuon Chea took direct control over S-21 from Son Sen beginning on 15 August 1977 and held that position until 6 January 1979.¹⁵⁴ However, the documentary evidence establishes Son Sen's continued role at S-21 well after that date,¹⁵⁵ as does the testimony of former S-21 staff members.¹⁵⁶ Duch's own prior statements also contradict his in-court testimony.¹⁵⁷ The question of Nuon Chea's role at S-21 is therefore disputed, and rests substantially on Duch's credibility.
77. The Defence can only effectively challenge Duch's credibility by hearing live testimony from former S-21 staff members. Whereas Duch has testified that he had

¹⁵² Second Severance Appeal, para. 53.

¹⁵³ The witness statements discussed herein are *in addition to* the witnesses proposed by the Co-Prosecutors, whom the Defence agrees are also essential to a trial of the allegations concerning S-21.

¹⁵⁴ Document No. **E-1/58.1**, 'Transcript of Trial Proceedings', 3 April 2012, pp. 72:4-8.

¹⁵⁵ Document No. **E3/83**, Written Record of Interview of Kaing Guek Eav, 20 October 2009, p. 4 (discussing one such document); Document No. **E-3/394**, Written Record of Interview of Kaing Guek Eav, 22 October 2009, p. 4 (similar).

¹⁵⁶ See para. 79, *infra*.

¹⁵⁷ Document No. **E-3/449**, Written Record of Interview of Kaing Guek Eav, 21 January 2008, p. 7 (Son Sen's continued involvement at the end of 1977).

virtually no role in interrogations at S-21 and no role at all in torture,¹⁵⁸ a variety of former S-21 guards and interrogators suggest that the opposite may be true.¹⁵⁹ Defence counsel tried to confront Duch with those statements at trial, but was prevented from doing so by a supposed and incomprehensible rule against confronting a witness with the statements of another witness during cross examination.¹⁶⁰ The live testimony of those former S-21 staff members is therefore the only way to challenge Duch's live testimony with regard to his own role at S-21.

78. There is a direct link between the credibility of Duch's testimony concerning his own role in torture and his testimony concerning Nuon Chea's role as his superior: both bear on Duch's willingness to deflect his responsibility for crimes committed at S-21 to others. This Chamber has expressed exactly that concern:

KAING Guek Eav failed to offer a complete picture of his factual knowledge of this case in order to *minimise his role in the crimes*. He carefully avoided responding in full when confronted with allegations related to this personal involvement, *seeking to attribute the responsibility for the crimes to others*, and uttered statements which are inconsistent with available evidence.¹⁶¹ (emphasis added)

The Defence is entitled to explore these questions at trial in order to persuade the Trial Chamber that it ought to be equally skeptical of Duch's testimony.

Role of Son Sen

79. As already noted, Duch has testified that Nuon Chea replaced Son Sen as his superior in respect of S-21 after Son Sen was dispatched to the East Zone on 15 August 1977. Former S-21 staff members have testified that Son Sen continued to come to S-21 as often as once per week all the way until 6 January 1979.¹⁶² In court testimony to that

¹⁵⁸ Document No. **E-1/58.1**, 'Transcript of Trial Proceedings', 3 April 2012, pp. 78:20-79:5, 85:20-86:6, 87:18-88:3; Document No. **E-1/59.1**, 'Transcript of Trial Proceedings', 4 April 2012, pp. 38:18-39:1.

¹⁵⁹ Document No. **D-108/6/3**, Written Record of Interview of Saom Met, 28 November 2007, p. 5; Document No. **E-3/68**, Written Record of Interview of Nhem En, 1 November 2007; Document No. **D-108/3/13**, Written Record of Interview of Lach Mean, 24 October 2007, p. 10 (Duch entered interrogation rooms 'frequently'); Document No. **D-108/3/14**, Written Record of Interview of Mam Nai, 26 October 2007, p. 12.

¹⁶⁰ Document No. **E-1/59.1**, 'Transcript of Trial Proceedings', 4 April 2012, pp. 37:1-44:13.

¹⁶¹ Case 001/18-07-2007-ECCC/SC, Document No. **F-28**, 'Appeal Judgement', 3 February 2012 ('Duch Appeal Judgment'), para. 368.

¹⁶² Document No. **E-3/68**, Written Record of Interview of Nhem En, 1 November 2007, pp. 13-14 (Son Sen came regularly until the Vietnamese arrived); Document No. **D-108/3/13**, Written Record of Interview of Lach Mean, 24 October 2007, p. 11 (although he believes he arrived at Tuol Sleng in 1977, saw Son Sen at Tuol Sleng 'often, every month or two').

effect would directly contradict Duch and would be exculpatory with respect to the role of Nuon Chea.

Targeting Vietnamese

80. Live testimony of S-21 guards and interrogators is required in order to disprove the allegation that ‘Vietnamese people were persecuted on the basis that the CPK considered the Vietnamese to be racially distinct from Cambodian people, based on biological and particularly matrilineal descent.’¹⁶³ The Co-Prosecutors cite this specific allegation as one of the distinctive contributions of S-21 to the representativeness of the Case 002/01 trial they have proposed to this Chamber.¹⁶⁴
81. The Defence denies that Vietnamese persons were targeted as such. Vietnam was a legitimate military enemy which sought to control Cambodian territory, attempted repeatedly to do so between 1975 and 1979, and finally succeeded in doing so on 6 January 1979. The Vietnamese army then occupied Cambodian territory for the ensuing ten years. Statements from S-21 staff indicate that Vietnamese detainees were questioned primarily about the military situation on the border rather than traitor networks.¹⁶⁵ Testimony to that effect would establish that Vietnamese persons were not persecuted at S-21 on racial or ethnic grounds but rather detained for legitimate military purposes.

Enemy Threats Inside Cambodia

82. International humanitarian law contemplates the use of extrajudicial violence, and even killing, against individuals actively involved in planning a serious security threat to the state. The United States government currently employs extrajudicial killing causing large-scale civilian casualties on an ongoing and regular basis and has purported to justify that practice under customary international law.¹⁶⁶ In light of the existential

¹⁶³ Closing Order, para. 1422.

¹⁶⁴ Second Severance Appeal, para. 40.

¹⁶⁵ Document No. **E-3/351**, Written Record of Interview of Mam Nai, 7 November 2007, pp. 5, 13-16; Document No. **D-108/22/2**, Written Record of Interview of Mam Nai, 14 February 2008, p. 3 (Vietnamese prisoners were always military); Document No. **D-108/3/11**, Written Record of Interview of Nim Kiseang, 22 October 2007, pp. 6-7 (similar); Document No. **IS19.167**, DC-Cam Interview of Saom Met, 25 January 2003, p. 27; Document **E-3/352**, Written Record of Interview of Pes Mat, 18 March 2008, p. 4 (saw Vietnamese soldiers in military uniforms, Cambodians and Vietnamese were treated the same).

¹⁶⁶ ‘Lawfulness of Lethal Operations Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or an Associated Force’ (United States Department of Justice White Paper, 2012).


threats facing Democratic Kampuchea, which ultimately did materialize, the likelihood that subversive elements existed inside the country prior to 1979 is substantial. The evidence indicates that CIA spies were operating in Cambodia prior to 1975 and that the United States government was a committed opponent of the Pol Pot regime.¹⁶⁷

83. Because Duch chose not to contest the allegation that criminal acts were committed at S-21 there has never been any serious consideration of whether military necessity justified those alleged acts. The testimony of former S-21 guards and interrogators is necessary to establish their knowledge of such imperatives.

IV. CONCLUSION AND RELIEF SOUGHT

84. The Defence respectfully requests that the Supreme Court Chamber:
- a. ADMIT the present Appeal and Response;
 - b. ANNUL the Impugned Decision with prejudice to future severance orders; or, in the alternative
 - c. ANNUL the Impugned Decision and ORDER the Trial Chamber to formulate a reasonably representative of the full Case 002 Closing Order which includes the genocide charges and those concerning crimes allegedly committed at cooperatives and worksites; and
 - d. DISMISS the Second Severance Appeal in full.

CO-LAWYERS FOR NUON CHEA



SON Arun



Victor KOPPE

¹⁶⁷ Document No. E-3/9, 'Pol Pot: A History of a Nightmare', p. 287 (CIA operative Frank Snepp indicated that the evacuation of the towns destroyed CIA networks in Cambodia).