

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

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**CO-PROSECUTORS' COMBINED RESPONSE TO  
NUON CHEA'S APPEAL OF THE SECOND DECISION ON SEVERANCE  
AND REPLY TO HIS RESPONSE TO THE CO-PROSECUTORS' APPEAL**

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## I. INTRODUCTION

1. Pursuant to Rules 104, 105, 106(2) and 107 of the Internal Rules (“Rules”),<sup>1</sup> the Co-Prosecutors submit this combined response and reply (“Response”) to: (i) Accused Nuon Chea’s immediate appeal (“Appeal”)<sup>2</sup> and subsequent addendum (“Addendum”)<sup>3</sup> to the Supreme Court Chamber (“Chamber”) against the Trial Chamber’s Decision on the Severance of Case 002/01 following the Decision of the Supreme Court Chamber of 8 February 2013 (“Impugned Decision”);<sup>4</sup> and (ii) to Accused Nuon Chea’s Response to the Co-Prosecutors’ immediate appeal before this Chamber (“Co-Prosecutors’ Appeal”).<sup>5</sup>
2. For the reasons stated below, the Co-Prosecutors do not contest the admissibility of the Appeal but submit that the Appeal should be dismissed in full.

## II. PROCEDURAL HISTORY

3. On 26 April 2013, the Trial Chamber released the Impugned Decision. On 10 May 2013, the Co-Prosecutors’ Appeal was submitted to this Chamber. On 23 May 2013, the Defence for Accused Nuon Chea (“Defence”) requested and received leave to file the instant Appeal in English only by no later than 27 May 2013. The Appeal was filed on time, but notified to the Parties on 30 May 2013, and a Khmer version was subsequently notified to the Parties on 5 June 2013. The Addendum was filed in English and Khmer on 31 May 2013.
4. On 5 June 2013, the Co-Prosecutors requested and received leave to file this combined Response. In accordance with Article 8.3 of the applicable Practice Direction,<sup>6</sup> the present Response has been filed, in English and Khmer, within 10 calendar days of the date of notification of the Khmer version of the Appeal.

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<sup>1</sup> Extraordinary Chambers of the Courts of Cambodia, Internal Rules (Rev. 8), as revised on 3 August 2011 (“Rules”).  
<sup>2</sup> **E284/4/1** Immediate Appeal against Trial Chamber’s Second Decision on Severance and Response to Co-Prosecutors’ Second Severance Appeal, 27 May 2013 (“Nuon Chea Immediate Appeal”).

<sup>3</sup> **E284/4/2** Addendum to Immediate Appeal against Trial Chamber’s Second Decision on Severance, 30 May 2013.

<sup>4</sup> **E163/5** Notification of Decision on Co-Prosecutors’ Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163) and deadline for submission of applicable law portion of Closing Briefs, 8 October 2012 (“Impugned Decision”).

<sup>5</sup> **E284/2/1** Co-Prosecutors’ Immediate Appeal of Second Decision on Severance of Case 002, 10 May 2013 (“Co-Prosecutors’ Second Decision Appeal”).

<sup>6</sup> Practice Direction on Filing Documents before the ECCC (Rev. 8), as revised on 10 May 2012.

### III. ADMISSIBILITY

5. The Co-Prosecutors do not contest the admissibility of the Appeal. This Chamber has previously ruled that severance of charges in circumstances where the prospect of trying the remaining charges in the Indictment is intangibly remote amounts to effective termination of the proceedings in relation to such charges, and therefore is subject to immediate appeal on the basis of Rule 104(4)(a).<sup>7</sup>

### IV. MERITS

#### *(a) The Defence is barred from arguing the impropriety of the principle of severance*

6. It is a general principle of law that a party cannot succeed in advancing arguments inconsistent with that party's prior submissions (*allegans contraria non audiendus est*).<sup>8</sup> This principle finds direct expression across civil law and common law systems,<sup>9</sup> as well as before international criminal tribunals<sup>10</sup> and the International Court of Justice, in a judgment specifically binding upon the Kingdom of Cambodia.<sup>11</sup> The Co-Prosecutors do not suggest that the common law species of *judicial estoppel*<sup>12</sup> is directly applicable before the ECCC,<sup>13</sup> but rather submit that the underlying principle *allegans contraria* is properly part of the applicable law and fully compatible with the Cambodian legal system. The principle operates here to bar the Defence

<sup>7</sup> **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 at paras. 22, 25 ("Co-Prosecutors' Scope Appeal Decision"). See also **E138/1/7** Decision on Immediate Appeal Against the Trial Chamber's Order to Release the Accused Ieng Thirith, 13 December 2011 at para. 15; **E51/15/1/2.1** Dissenting Opinion of Judges Klonowiecka-Milart and Jayasinge to "Decision on Ieng Sary's Appeal Against Trial Chamber's Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne Bis In Idem* and Amnesty and Pardon)", 20 March 2012 at para. 1 (rejecting "the implicit proposition that this Chamber's jurisdiction over immediate appeals is strictly limited to the narrow circumstances listed in Rule 104(4)").

<sup>8</sup> See e.g. *Cairncross v Lorimer* (1860) 3 Macq 827, recognising the cognate doctrine of "personal bar" in Scots law as part of "the laws of all civilized nations".

<sup>9</sup> See e.g. *Boizard (Liselotte) v Commission of the European Communities* [1982] 1 CMLR 157, per Advocate General Warner at 171: "It seems to me that, if one considers, for instance, the Danish law as to 'stiltiende afkald', the English law as to estoppel, the German law as to 'Rechtsverwirkung', the Italian law as to 'legittimo affidamento' and the Scots law as to personal bar, as well as the French law as to 'renonciation implicite', there emerges a general principle...".

<sup>10</sup> See e.g. *Prosecutor v Bizimungu*, Case No. ICTR-99-50-T, Decision on Defence Motion to Reconsider Order of 2 June 2008 Denying Admission of Church and School Records (ICTR Trial Chamber II), 23 July 2008 at paras. 9ff (applying the common law doctrine of issue estoppel); *Prosecutor v Édouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Strike Allegation of Conspiracy with Juvenal Kajelijeli on the Basis of Collateral Estoppel, 16 July 2008 (considering the common law doctrine of collateral estoppel but finding it inapplicable on the facts).

<sup>11</sup> *Temple of Preah Vihear (Cambodia v Thailand) (Merits)* [1962] ICJ Rep 6, 39 (Separate Opinion of Judge Alfaro); see also *North Sea Continental Shelf (Denmark v Federal Republic of Germany; Netherlands v Federal Republic of Germany)* [1969] ICJ Rep 4, 120 (Separate Opinion of Judge Ammoun).

<sup>12</sup> See e.g. *New Hampshire v. Maine*, 532 U.S. 742 (2001); *In re Kane*, 628 F.3d 631, 638-40 (3d Cir. 2010).

<sup>13</sup> See e.g. E96/6 at para. 27, where the Co-Prosecutors submitted that "concept of estoppel is unknown in Cambodian law, or the civil law tradition more broadly".

from advancing arguments that the Trial Chamber erred in adopting *any* form of severance,<sup>14</sup> or that recourse to severance stands in opposition to fundamental fair trial rights,<sup>15</sup> having previously advanced an irreconcilably inconsistent position in judicial proceedings in Case 002.

7. Since severance was first ordered in September 2011, the Defence has advanced a position exactly opposite to the submissions in the instant Appeal – that severance was not only consistent with the Accused’s rights but *proper* under the circumstances. When the Co-Prosecutors sought inclusion of a reasonably representative set of charges in Case 002/01 following severance,<sup>16</sup> the Defence “urge[d] the Trial Chamber to stand by the current terms of its severance order – without a doubt the most sensible decision to emerge from the ECCC and one that should have been taken by the OCIJ in 2007.”<sup>17</sup> The Defence having advanced one position to oppose the Co-Prosecutors – successfully in that particular instance<sup>18</sup> – the Chamber should not hear – *non audiendus* – arguments that now advance an irreconcilably inconsistent position. The Defence wholeheartedly supported the severance and opposed the Co-Prosecutors’ attempts to remedy errors resulting from it, including an attempt to shield the severance of Case 002 from review by this Chamber.<sup>19</sup> The Defence cannot now legitimately seek appellate relief by adopting an opposite position at this late stage in the trial proceedings.

***(b) The severance of Case 002 is fully compatible  
with the fair trial rights of the Accused***

8. The Defence fails to meaningfully support the argument that severance would violate the fair trial rights of the Accused. The premise of the Defence argument is that the Accused’s fair trial rights are dependent on him facing all of the charges against him and therefore that Case 002 must “be considered in its entirety”<sup>20</sup> because “[t]he 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.’”<sup>21</sup> The Defence offers scant factual or legal

<sup>14</sup> E284/4/1 Nuon Chea Immediate Appeal, *supra* note 2 at para. 9.

<sup>15</sup> E284/4/1 *Ibid.* at paras. 12-21.

<sup>16</sup> E124/2 Co-Prosecutors’ Request for Reconsideration of “Severance Order Pursuant to Internal Rule 89Ter”, 3 October 2011 (“Request for Reconsideration”).

<sup>17</sup> E124/5 Response to Co-Prosecutors’ Request for Reconsideration of the Severance Order, 11 October 2011 at para. 3 (“Response to Co-Prosecutors’ Reconsideration Request”).

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

<sup>19</sup> See E163/5/1/4 Response to Co-Prosecutors’ Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, 19 November 2012 (“Response to Co-Prosecutors’ Scope Appeal”).

<sup>20</sup> E284/4/1 Nuon Chea Immediate Appeal, *supra* note 2 at para. 13.

<sup>21</sup> E284/4/1 *Ibid.*

substantiation for their allegations of violation of the rights of the Accused, and principally rely upon quotes from their own submissions to the Trial Chamber during the severance hearings.<sup>22</sup>

9. The Defence's claim that severance has somehow impaired the Accused's right to confront witnesses against him is groundless. The Defence has been allowed to question every witness and Civil Party brought before the court on all issues included in Case 002/01. It has been clear from the outset that in addition to the particular criminal events charged in Case 002/01, the scope of Case 002/01 included historical background and administrative, communicative, and military structures,<sup>23</sup> and that all parties could submit evidence and question witnesses on these areas. Part of the reason for the inclusion of these issues in the first trial is that Case 002/01 was intended to provide a foundation for the adjudication of all charges against the Accused, both in the present and any future trials. Thus, before the commencement of the evidentiary proceedings in Case 002/01, the Trial Chamber instructed the parties that, notwithstanding the September 2011 Severance Order, "the Accused must confront all allegations contained in the Indictment in Case 002."<sup>24</sup> If the Defence claims not to have advanced evidence on some of these areas because they deemed it "a poor strategic use of the defence's allocated time,"<sup>25</sup> that is a choice for counsel in advising their client, but it is not a violation of the rights of the Accused Nuon Chea.
10. The Defence have been well aware that these topics formed part of the evidentiary record, even advocating at one point that evidence collected to date in Case 002/01 concerning S-21 and District 12 executions, should it not be used in direct charges against the Accused in this trial, "could be used by the Trial Chamber in reaching a verdict, exactly for the purpose of the assessment of several overarching themes in Case 002, including the history, authority structure and communications of the CPK and the Democratic Kampuchea regime, roles and positions of the Accused, as well as the development of the five criminal policies alleged in the Closing Order. This evidence will thus not be lost in any way."<sup>26</sup>
11. The Defence argument that Case 002/01 is the Accused's "only opportunity to present his defence to the allegations in the Closing Order and for the Cambodian public to hear a far closer

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<sup>22</sup> E284/4/1 *Ibid.*

<sup>23</sup> E124/7.3 List of Paragraphs and Portions of the Closing Order Relevant to Case 002/01, amended further to the Trial Chamber's Decision on IENG Thirith's Fitness to Stand Trial (E138) and the Trial Chamber's Decision on Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163), 18 October 2011 at section 1.

<sup>24</sup> E131 Scheduling Order for Opening Statements and Hearing on the Substance in Case 002, 18 October 2011.

<sup>25</sup> E284/4/1 Nuon Chea Immediate Appeal, *supra* note 2 at para. 19.

<sup>26</sup> E163/5/1/4 Response to Co-Prosecutors' Scope Appeal, *supra* note 19 at para. 35 (internal quotations and citations omitted).

approximation of the historical truth”<sup>27</sup> is an emotional, not legal, argument, and has no bearing on the Accused’s fair trial rights. Ironically, in relation to the Defence’s current claim to an amorphous right to “correct the public record”<sup>28</sup> in regards to the Accused, the Defence have previously opined in defending severance that “all parties would do well to recall that the ECCC should be engaged in the business of trying cases rather than attempting to write history.”<sup>29</sup>

12. Furthermore, in relation to the claim that the Accused’s rights would be violated if charges in the Closing Order are never brought to trial against him, it is clear that the presumption of innocence applies to any charges until there is an actual conviction on those charges individually,<sup>30</sup> a principle that the Trial Chamber itself has stated with lucidity: “It is a fundamental principle of criminal proceedings that accused persons are presumed innocent until proven guilty.”<sup>31</sup> The judicial investigation does not establish criminal responsibility and therefore cannot be the basis for a claimed violation of the Accused’s rights.
13. It is also important to note that when Nuon Chea testified at the start of trial proceedings, he provided a wide-ranging statement that was not limited to forced movement issues, but instead put forth a comprehensive explanation and defence of the CPK movement and DK regime.<sup>32</sup> Nuon Chea has addressed issues ranging from the CPK position on Buddhism,<sup>33</sup> economic and social policies,<sup>34</sup> foreign policy (including the relationship with, and perceived threat from, Vietnam)<sup>35</sup> and security practices in relation to enemies.<sup>36</sup> Neither the Trial Chamber nor the parties have sought to limit the subjects addressed by Nuon Chea in his various statements over the course of the trial. In reality, the only such limits have been self-imposed. For example, Nuon Chea recently advised the Trial Chamber that he will testify and respond to questions in the final phase of the Case 002/01 trial, but only on subject matters “up until and including population movement phase I and the alleged events at Tuol Po Chrey”.<sup>37</sup> Accordingly, the Defence has no basis whatsoever to claim that “the limited scope of Case 002/01 has prejudiced Nuon Chea most seriously by hindering his ability to mount a full and effective defence.”<sup>38</sup>

<sup>27</sup> E284/4/1 Nuon Chea Immediate Appeal, *supra* note 2 at para. 33.

<sup>28</sup> E284/4/1 *Ibid.* at para. 41.

<sup>29</sup> E124/5 Response to Co-Prosecutors’ Reconsideration Request, *supra* note 17 at para. 3.

<sup>30</sup> Rule 21(d): “Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established.”

<sup>31</sup> E176/2 Decision on Rule 35 Applications of Summary Action, 11 May 2012 at para. 16.

<sup>32</sup> See E1/14.1 Transcript, 22 November 2011 at pp. 76-112.

<sup>33</sup> E1/21.1 Transcript, 13 December 2011 at pp. 39-44; E1/23.1 Transcript, 15 December 2011 at pp. 80-82, 88-89.

<sup>34</sup> E1/14.1 Transcript, 22 November 2011 at pp. 108-111; E1/21.1 Transcript, 13 December 2011 at pp. 29-34.

<sup>35</sup> E1/14.1 Transcript, 22 November 2011 at pp. 78-81, 97-107; E1/16.1 Transcript, 5 December 2011 at pp. 51-53.

<sup>36</sup> E1/21.1 Transcript, 13 December 2011 at pp. 6-9; E1/26.1 Transcript, 12 January 2012 at pp. 8-9.

<sup>37</sup> E287 Notice of Intent Pursuant to Internal Rule 90, 27 May 2013 at para. 2.

<sup>38</sup> E284/4/1 Nuon Chea Immediate Appeal, *supra* note 2 at para. 13.

14. The Defence further claims that the Impugned Decision “gave no consideration to the Defence’s submissions.”<sup>39</sup> The Defence submits that the Trial Chamber failed to address three arguments: (1) 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; (2) whether a second panel of the Trial Chamber was required and possible, or how the Trial Chamber would safeguard against bias in the absence of a second panel; and (3) by failing to create a tangible plan for future remaining trials.<sup>40</sup> Only the first of these grounds has any plausible connection to the rights of the Accused in Case 002/01. In regards to the second ground, issues regarding alleged bias of the panel in any Case 002/02 are not relevant to this Appeal, whose jurisdiction arises from the conclusion that there is no tangible prospect that further such trials will ever occur. In regards to the third ground, as the Defence notes, the Co-Prosecutors also observed the failure of the Trial Chamber to create a tangible plan for future trials.<sup>41</sup> However this was a failure to comply with this Chamber’s directions, not a failure to consider the arguments of the Defence, which merely parroted, belatedly, arguments that the Co-Prosecutors and Civil Parties had previously raised.<sup>42</sup>
15. In relation to the Trial Chamber’s consideration of the Defence’s arguments on severance, the Co-Prosecutors recall that this Chamber has previously held that “[t]he Trial Chamber is not required to articulate every step of its reasoning for each finding it makes.”<sup>43</sup> Furthermore, the Trial Chamber clearly noted the Defence’s arguments that “the only possible response to the annulment of the Severance Order, and which remedies the uncertainty this creates, is to proceed with the hearing of the entirety of the Case 002 Closing Order.”<sup>44</sup> The Trial Chamber considered that because of the “constraints that made severance necessary in September 2011 (namely, 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 remain fit to be tried),”<sup>45</sup> “severance of the Case 002 Closing Order is still required in the interests of justice.”<sup>46</sup> The Trial Chamber explicitly referenced in this regard

<sup>39</sup> E284/4/1 *Ibid.* at para. 9.

<sup>40</sup> E284/4/1 *Ibid.* at paras. 23-24.

<sup>41</sup> E284/2/1 Co-Prosecutors’ Second Decision Appeal, *supra* note 5 at para. 78.

<sup>42</sup> See E163/5/1/13 Co-Prosecutors’ Scope Appeal Decision, *supra* note 7 at para. 47 (noting that these arguments were raised by the Co-Prosecutors and Civil Parties).

<sup>43</sup> E163/5/1/13 *Ibid.* at para. 36.

<sup>44</sup> E284 Decision on Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013 at para. 52; see also *ibid.* at paras. 59-60, 67, 78, 82.

<sup>45</sup> E284 *Ibid.* at para. 87.

<sup>46</sup> E284 *Ibid.* at para. 90.

“the recent Defence objection to the concept of severance.”<sup>47</sup> It therefore clearly took the Defence’s arguments in this regard into consideration.

16. Further allegations in the Appeal are similarly unconvincing. The argument that “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 objections from the parties and deliberations from the Chamber”<sup>48</sup> hardly demonstrates a violation of the Accused’s rights. First, this claim is demonstrably incorrect, as the trial has progressed successfully through the examination of over 80 Civil Parties and witnesses to date. Additionally, the fact that parties, including the Defence, have objected during questioning and the Chamber has considered those objections through deliberations are not only the way a trial works in practice, but also provide strong evidence that the Accused’s procedural rights are being respected, rather than violated. Furthermore, such a claim is particularly unpersuasive now that the vast majority of the witnesses that will be called in Case 002/01 have been successfully examined.<sup>49</sup>

***(c) The addition of charges arising from the S-21 crime site satisfies the requirement of reasonable representativeness of the charges in the Closing Order and would be in the interests of justice***

17. As this Chamber’s jurisprudence establishes, international procedural rules provide that for severance to be in the interests of justice, the scope of the severed trial should be *reasonably representative* of the totality of the charges.<sup>50</sup> The Co-Prosecutors agree with the Defence that the Trial Chamber “manifestly failed to undertake any legitimate effort to formulate a reasonably representative trial in Case 002/01,” and that a “broader version” of Case 002/01 is “both possible and necessary.”<sup>51</sup> The Co-Prosecutors disagree with the Defence, however, that the Trial Chamber is obligated to hear the entirety of the Case 002 Indictment. This Chamber has recognized that the Trial Chamber can opt for a “smaller trial on some portion of the Indictment” in view of the age and health of the Accused, provided it gives “due consideration to reasonable representativeness of the Indictment within the smaller trial.”<sup>52</sup>
18. In determining which charges should be prosecuted in a smaller, single trial, the Co-Prosecutors submit that some deference should be given to their discretion and judgment as to the most appropriate charges for which the Accused should be tried. This Chamber has already

<sup>47</sup> E284 *Ibid.* at para. 88.

<sup>48</sup> E284/4/1 Nuon Chea Immediate Appeal, *supra* note 2 at para. 20.

<sup>49</sup> See E288 Trial Chamber Memorandum on Announcement of remaining hearings prior to the close of evidentiary proceedings in Case 002/01 and scheduling of final Trial Management Meeting for 13 June 2013, 31 May 2013.

<sup>50</sup> E163/5/1/13 Co-Prosecutors’ Scope Appeal Decision, *supra* note 7 at para. 42.

<sup>51</sup> E284/4/1 Nuon Chea Immediate Appeal, *supra* note 2 at paras. 29, 31, 35.

<sup>52</sup> E163/5/1/13 Co-Prosecutors’ Scope Appeal Decision, *supra* note 7 at para. 50.



recognised the “Co-Prosecutors’ crucial role and responsibility in creating ECCC indictments and proving the charges therein.”<sup>53</sup> The Co-Prosecutors’ prior submissions have also addressed the distinctive role of the prosecution in shaping severed indictments at the *ad hoc* Tribunals.<sup>54</sup>

19. It is the view of the Co-Prosecutors that the most serious charges contained in the Case 002 Indictment arise from the allegation that the Accused oversaw a network of security centres throughout Democratic Kampuchea at which hundreds of thousands of Cambodians were unlawfully detained, tortured and executed. The Indictment charges the Accused with crimes associated with eleven such security centres and related execution sites, none of which are included in the current scope of Case 002/01.
20. The Defence alleges, in sum, that S-21 is not “uniquely representative” of the Closing Order on grounds of alleged victims, geographic and temporal scope, crimes charged, and fundamental theme of the case and was properly excluded by the Trial Chamber.<sup>55</sup> The Co-Prosecutors oppose this position given the place of S-21 as the most representative security centre within the totality of the factual allegations in the Case File, particularly those directly inculpatory of the Co-Accused.
21. S-21 was the one and only security office, and the sole crime site in the Closing Order, with Accused Nuon Chea as its “direct supervisor.”<sup>56</sup> The Co-Investigating Judges found that Accused Nuon Chea “assumed significant responsibility for the implementation of policy” by “supervising S-21 and internal security throughout Cambodia.”<sup>57</sup> The Co-Investigating Judges found “at least 27” S-21 confessions with annotations indicating that a copy was sent to Nuon Chea and another six S-21 confessions bearing Nuon Chea’s handwriting.<sup>58</sup> Nuon Chea is alleged to have been directly responsible for decisions to arrest persons sent to S-21, and to have directly ordered executions of S-21 prisoners.<sup>59</sup> It is thus not surprising that the Defence would prefer that S-21 not be included within the scope of Case 002/01, and that in this unique instance believe that the Impugned Decision should be afforded deference.<sup>60</sup> The Defence does not dispute the close and direct relationship between the Accused and S-21, and fails to provide any

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<sup>53</sup> E163/5/1/13 *Ibid.* at para. 42.

<sup>54</sup> E124/2 Request for Reconsideration, *supra* note 16 at para. 20.

<sup>55</sup> E284/4/1 Nuon Chea Immediate Appeal, *supra* note 2 at paras. 57-71.

<sup>56</sup> D427 Closing Order, 15 September 2010 at paras. 421, 952, 959.

<sup>57</sup> D427 *Ibid.* at para. 1552.

<sup>58</sup> D427 *Ibid.* at paras. 964 (fn. 4029 & 4031), 966.

<sup>59</sup> D427 *Ibid.* at paras. 467, 958-962, 970, 972-973.

<sup>60</sup> E284/4/1 Nuon Chea Immediate Appeal, *supra* note 2 at para. 56.

convincing reason why that should not be a significant factor in deciding the scope of Case 002/01.<sup>61</sup>

22. The specific arguments made by the Defence regarding the representativeness of S-21 do not withstand scrutiny. The Defence first errs by limiting their analysis to whether S-21 would be representative as a stand-alone crime site, as opposed to the relevant consideration of whether the inclusion of S-21 is necessary in order to make Case 002/01 representative of the overall Indictment. The Defence cannot credibly assert that one of the eleven security centres forming the factual basis for charges against Nuon Chea would not be an essential ingredient of any reasonably representative severance of the Indictment. The Defence offers no legitimate reason why that one security centre should not be S-21, which was the highest-level security office in the country, the only one that included prisoners from all parts of the country, and the only one that reported directly to the Accused.
23. The Defence argument that the Trial Chamber properly excluded S-21 in order to privilege “the adjudication of restitutionary claims and factual allegations which have not yet been resolved”<sup>62</sup> ignores fundamental differences between Case 001 and 002. While arising from the same crimebase, the charges involving S-21 in Case 001 concerned the internal functioning of a detention, torture and execution site and the responsibility of its chairman. The charges involving S-21 that the Co-Prosecutors seek to include in Case 002 are concerned with its role as an instrument established and supervised by the senior leaders of Democratic Kampuchea to implement their policy that all political opponents and perceived enemies of the regime would be eliminated. To equate the two, as the Defence attempts to do, is to commit a category error in terms of relative hierarchical position and degree of responsibility.
24. The Defence argument that proper adjudication of S-21 requires oral testimony “to establish that S-21 detainees were legitimate military targets”<sup>63</sup> is morally repugnant and legally unsound. First, the events in S-21 took place almost twenty years after Cambodia became a party to the 1949 Geneva Conventions,<sup>64</sup> and at a time when the legal principles enshrined in those Conventions were part of binding customary international law. Therefore, even if the majority of S-21’s victims were targeted by the Co-Accused Nuon Chea and Khieu Samphan for “military” purposes, their imprisonment, torture and execution constituted Grave Breaches of the Geneva Conventions and breaches of the Common Article 3 of those Conventions. Second, the vast

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<sup>61</sup> E284/4/1 *Ibid.* at paras. 69-71.

<sup>62</sup> E284/4/1 *Ibid.* at para. 72.

<sup>63</sup> E284/4/1 *Ibid.* at para. 75, to be read with paras. 82-83.

<sup>64</sup> See ICRC, *State Parties to the Following International Humanitarian Law and Other Related Treaties as of 30-May-2013* at p. 2: Cambodia became a party to the Four Conventions on 8 December 1958.

majority of S-21 victims were not “military” prisoners belonging to an adversarial armed force, but ordinary civilians, cadres, government employees and members of CPK’s own armed forces. The most appropriate legal characterisation for the atrocities committed against them is therefore as crimes against humanity, also part of customary international law in 1975, and like the Geneva Conventions, admitting no defence of “legitimate military target” for the criminal activity carried out at S-21.

25. The Defence’s discussion of the factors to be considered in assessing representativeness likewise does not support its position that S-21 should be excluded:
- a. *Alleged Victims*:<sup>65</sup> The Defence cannot and does not dispute that the prisoners at S-21 included Cambodians across the spectrum of age, sex, race and ethnicity.<sup>66</sup> S-21 was also the principal security office to which foreign nationals arrested by CPK forces were taken.<sup>67</sup> The fact that the majority of prisoners were CPK cadres, workers or soldiers does not alter the fundamental diversity of the prisoner base.
  - b. *Geographic Scope*:<sup>68</sup> S-21 was the only security office whose prisoners came from all regions of the country.<sup>69</sup> The Defence assertion that the crimes were only committed at the actual prison in Phnom Penh is incorrect, as the crimes often began with the unlawful arrests of such individuals at their place of origin.<sup>70</sup> It was Accused Nuon Chea and other Party leaders who are alleged to have ordered the arrests of such prisoners at locations throughout the country and who ordered those persons to be sent to Phnom Penh.<sup>71</sup> The Defence cannot dispute that S-21 was the one and only CPK security office with nationwide scope.
  - c. *Temporal Scope*:<sup>72</sup> The Defence cannot and does not dispute that the addition of S-21 would remedy the current limited temporal scope of Case 002/01, and expand that scope to include the entire period of the DK regime.<sup>73</sup>
  - d. *Crimes Charged*:<sup>74</sup> The Defence does not dispute that the inclusion of S-21 would add to Case 002/01 charges of Grave Breaches of the Geneva Conventions, as well as the

<sup>65</sup> E284/4/1 *Ibid.* at para. 58.

<sup>66</sup> E284/2/1 Co-Prosecutors’ Second Decision Appeal, *supra* note 5 at para. 38.

<sup>67</sup> D427 Closing Order, *supra* note 74 at para. 433.

<sup>68</sup> E284/4/1 Nuon Chea Immediate Appeal, *supra* note 2 at para. 59.

<sup>69</sup> D427 Closing Order, *supra* note 74 at para. 431.

<sup>70</sup> D427 *Ibid.* at paras. 434, 437-438.

<sup>71</sup> D427 *Ibid.* at paras. 434, 960-961.

<sup>72</sup> E284/4/1 Nuon Chea Immediate Appeal, *supra* note 2 at para. 60.

<sup>73</sup> E284/2/1 Co-Prosecutors’ Second Decision Appeal, *supra* note 5 at para. 44

<sup>74</sup> E284/4/1 Nuon Chea Immediate Appeal, *supra* note 2 at para. 61.

enumerated crimes against humanity of imprisonment, torture, enslavement, persecution on grounds of race and religion, and rape.<sup>75</sup>

- e. *Fundamental Theme or Nature of Case:* The Defence asserts that “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,” and criticises the Co-Prosecutors for not mentioning “socialism, revolution [or] communism” in their description of the core crimes of the Indictment.<sup>76</sup> The Co-Prosecutors submit that this is not a political trial in which the Accused are being prosecuted because they were communists, socialists or revolutionaries. The relevant issue is not whether Case 002/01 is representative of the overall political goals or policies of the CPK. Rather, it is whether the scope of trial is representative of the crimes charged in the Case 002 Indictment. The Defence cannot credibly dispute that the core crime charged in the Indictment is the unlawful detention, torture and execution of Cambodians at the 11 security centres included in the Indictment. Moreover, in erroneously asserting that the Co-Prosecutors have changed their description of the fundamental nature of Case 002, the Defence omits the following statement by the International Co-Prosecutor made during the severance hearings of February 2013: “In conclusion on this issue of representativeness, this case, the heart of this case, although there were multiple types of crimes that were committed during this period of time – but the heart of this case is about arrests, torture and murder at security centres.”<sup>77</sup> As acknowledged in the Appeal itself, Expert Witness Philip Short has testified that, S-21 was a reflection in concentrated form of the slave state which the CPK created. It was “the apex of [the] pyramid” of this slave state and “the place where freedoms were most completely suppressed, including eventually the freedom to live.”<sup>78</sup>
26. For these reasons, the Co-Prosecutors reaffirm their position that S-21 is the most representative crime site reflecting the broader policy of the CPK to systematically target and eliminate its enemies, and it is for that reason that the inclusion of S-21 is essential in order for Case 002/01 to be adequately representative of the Indictment. The inclusion of S-21 will give the Defence the opportunity they seek to establish that Nuon Chea “did not deliberately murder his fellow citizens.”<sup>79</sup> The victims of S-21 include people who sat across the table from Nuon Chea at meetings of the Standing and Central Committees. If Accused Nuon Chea truly wishes to

<sup>75</sup> E284/2/1 Co-Prosecutors’ Second Decision Appeal, *supra* note 5 at paras. 35-36.

<sup>76</sup> E284/4/1 Nuon Chea Immediate Appeal, *supra* note 2 at paras. 62-64.

<sup>77</sup> E1/171.1 Transcript, 18 February 2013 at p. 56, lines 20-24.

<sup>78</sup> E1/191.1 Transcript, 8 May 2013 at p.9, lines 2-21; see E284/4/1 Nuon Chea Immediate Appeal, *supra* note 1 at 68.

<sup>79</sup> E284/4/1 *Ibid.* at para. 41.

contest the charge that he is criminally responsible for murder, it is S-21 that best serves that purpose.

*(d) The addition of charges arising from the S-21 crime site is not onerous, but efficient*

27. The Defence asserts, but fails to demonstrate, that trial of the S-21 charges would be “onerous.”<sup>80</sup> The Co-Prosecutors make three submissions in response. First, this assertion is completely at odds with the Defence assertion that a broader trial in Case 002/01 is “both possible and necessary,” and the Defence’s request that the scope of trial be expanded even further than that proposed by the Co-Prosecutors.<sup>81</sup>
28. Second, it should be noted that the Defence has already spent 2.5 trial days examining Duch on the factual issues they identify as central to S-21, including Nuon Chea’s alleged responsibility for S-21 and whether Son Sen continued to have a role at S-21 subsequent to his departure from Phnom Penh in August 1977.<sup>82</sup>
29. Third, the Co-Prosecutors concur with the Defence that a select number of S-21 guards and interrogators should be called to testify, and the Defence will certainly be entitled to question those witnesses on issues such as Son Sen’s role, Duch’s credibility and the treatment of Vietnamese prisoners. Three such S-21 cadres are included in the five witnesses proposed by the Co-Prosecutors and agreed to by the Defence. The Appeal only identifies six additional possible S-21 guards or interrogators whose testimony the Defence asserts may also be necessary: TCW-470, TCW-367, TCW-598, TCW-410, TCW-474 and TCW-512.<sup>83</sup> The Co-Prosecutors do not concede the relevance, probative value or necessity of the testimony of these witnesses, but observe that their testimony, if ordered by the Trial Chamber, could be heard within a matter of days.
30. In these circumstances, it cannot be said that it would be “onerous” for the Trial Chamber to adjudicate the charges relating to S-21. In comparison to the genocide charges that the Defence seeks to add (for which the Co-Prosecutors alone have requested the Trial Chamber to call 42 witnesses),<sup>84</sup> the trial of S-21 would require a relatively small number of additional witnesses. A

<sup>80</sup> E284/4/1 *Ibid.* at paras. 74-83.

<sup>81</sup> E284/4/1 *Ibid.* at paras. 31, 34-37.

<sup>82</sup> See E1/58.1 Transcript, 3 April 2012; E1/59.1 Transcript, 4 April 2012; E1/60.1 Transcript, 5 April 2012; E1/62.1 Transcript, 10 April 2012.

<sup>83</sup> E284/4/1 Nuon Chea Immediate Appeal, *supra* note 2 at para. 77, fn. 159; para. 79, fn. 162; and para. 81, fn. 165.

<sup>84</sup> E9/4.1 Annex 1: Proposed Order of Witness Appearance at Trial (to “Direction Requesting Written Submissions on Preliminary Objection” (E9/4)), 20 April 2009. This Internal Rule 80 witness list includes a total of 42 witnesses relating to the treatment of the Cham and Vietnamese.

significant amount of witness testimony<sup>85</sup> and documentary evidence<sup>86</sup> relating to S-21 has already been presented in the Case 002/01 trial, as acknowledged in the Impugned Decision.<sup>87</sup>

***(e) The addition of genocide charges is not required in order for Case 002/01 to be reasonably representative of the Indictment***

31. The Co-Prosecutors fully concede the seriousness of the genocide charges concerning the Cham and Vietnamese groups, but submit that those charges are necessarily a smaller part of a broader policy by which the CPK systematically targeted all persons considered as enemies of the regime. S-21 is the prime and single most representative example of that broader policy.
32. The Co-Prosecutors were guided by the imperative of timely justice in not seeking to include genocide within the scope of trial in Case 002/01. The criterion of reasonableness necessarily implies a balancing of legal interests: the scope of a severed trial must be weighed against the likelihood of achieving timely justice. Absent from the Appeal is any consideration or assessment of the countervailing factors that militate against the inclusion of all or most of the charges from the Case 002 Indictment.
33. The Co-Prosecutors have undertaken exactly such an assessment in order to demonstrate the reasonableness of the inclusion of S-21, setting out the estimated numbers of witnesses and trial days that would be required.<sup>88</sup> The crimes committed at S-21 are thoroughly documented, and most of these documents have already been admitted into evidence by the Trial Chamber. An expansion of the scope of trial to include S-21 thus would only require a minimal number of additional witnesses. By contrast, evidence of the CPK policy against the Cham, in particular, is dependent upon extensive witness accounts that establish a pattern of conduct directed against the Cham people in different Zones consistent with a common policy emanating from the Party Centre. As noted above, trial proceedings encompassing genocide charges would require the hearing of numerous additional witnesses (including the 42 witnesses proposed by the Co-Prosecutors) and would extend the trial by many months.

<sup>85</sup> See **E284/2/1** Co-Prosecutors' Second Decision Appeal, *supra* note 5 at para. 78; **E163/5/1/1.2** Annex I: Representative Sample of Testimonial and Documentary Evidence Adduced in Case 002/01 (to "Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial In Case 002/01" (E163/5/1/1)), 7 November 2012; **E163/5/1/1** Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial In Case 002/01, 7 November 2012, paras. 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.

<sup>86</sup> **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** 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: Annex C – Documents Proposed by the Co-Prosecutors, 3 December 2012.

<sup>87</sup> **E284** Impugned Decision at para. 117.

<sup>88</sup> **E284/2/1** Co-Prosecutors' Second Decision Appeal, *supra* note 5 at paras. 51-59.

34. The Co-Prosecutors further note that the current scope of Case 002/01 already includes the dispersal of the Cham population as part of the Second Phase of the forced movement,<sup>89</sup> and that the inclusion of S-21 would incorporate crimes committed at that site against both ethnic Vietnamese living in Cambodia and Vietnamese soldiers captured and taken to S-21 as prisoners-of-war.<sup>90</sup> The inclusion of genocide charges would thus not be necessary in order for the treatment of both the Cham and Vietnamese groups to be represented within the scope of Case 002/01.
35. On the Defence's own reasoning,<sup>91</sup> the inclusion of S-21 would be sufficient to "place at issue the knowledge and intent of the Accused" with regard to (non-genocidal) crimes against the Cham and Vietnamese groups. Specifically, the inclusion of S-21 would put before the Trial Chamber the criminal responsibility of Co-Accused Nuon Chea and Khieu Samphan for the crime against humanity of persecution of these same groups. Thus, while the Defence seeks judicial determination of the "knowledge and intent" of the Accused concerning the treatment of targeted groups, the inclusion of genocide is not necessary for this purpose. The adjudication of the persecutory mental element will also establish, quite clearly, whether Co-Accused Nuon Chea and Khieu Samphan "*specifically intended* [understood as *dolus specialis*] to murder [their] fellow citizens,"<sup>92</sup> part of what the Defence calls "the heart of the most important and elusive question to be confronted at this Tribunal."<sup>93</sup>
36. Moreover, the number of deaths of Cham and Vietnamese cited by the Defence<sup>94</sup> are the total deaths for the entire country, and not the number of deaths associated with the specific crime sites in the Central and Eastern Zones that are included in the Case 002 Indictment genocide charges.<sup>95</sup> The Defence also ignores the fact that the organised extermination of Cham and Vietnamese people is alleged to have started in 1977,<sup>96</sup> and thus does not cover the entire temporal scope of the DK period, contrary to the assertion in paragraph 48(d) of the Appeal.
37. Finally, in the Addendum, the Defence argues that the recent news events leading to the "law criminalizing genocide denial" support their position that the Case 002/01 trial must include the charges of genocide. The Co-Prosecutors understand that the *Law on Denial of Crimes Committed During the Period of Democratic Kampuchea*, as passed by the National Assembly,

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<sup>89</sup> D427 Closing Order, *supra* note 74 at paras. 266, 268, 281.

<sup>90</sup> E284/2/1 Co-Prosecutors' Second Decision Appeal, *supra* note 5 at para. 38.

<sup>91</sup> E284/4/1 Nuon Chea Immediate Appeal, *supra* note 2 at para. 47.

<sup>92</sup> E284/4/1 *Ibid.* at para. 42; presumably, the Defence is referring here to the Cham citizens of Democratic Kampuchea, and those of Vietnamese origin.

<sup>93</sup> E284/4/1 *Ibid.*

<sup>94</sup> E284/4/1 *Ibid.* at para. 48(b).

<sup>95</sup> D427 Closing Order, *supra* note 74 at paras. 763, 771-789, 797-801.

<sup>96</sup> D427 *Ibid.* at paras. 763, 797.

makes no reference to genocide. Moreover, this law did not result from a denial of genocide of the Cham or Vietnamese, but rather from reported statements questioning the authenticity of the S-21 security centre. In any event, the matter before this Chamber concerns the scope of trial before the Trial Chamber, and not the court of public opinion. The considerations raised in the Defence's Addendum are wholly extraneous and irrelevant to the determination of the merits of the Appeal.

***(f) The addition of charges involving  
worksites and cooperatives is not required***

38. The Defence asserts that it is necessary to include crimes committed at a cooperative or worksite, so that Nuon Chea has an opportunity to address the issue of “forced collectivization.”<sup>97</sup> However, this issue is already part of Case 002/01. As the Defence recognises,<sup>98</sup> one of the purposes of the forced movements, in particular the Second Phase, was to move the population into cooperatives.<sup>99</sup> The Co-Prosecutors thus submit that inclusion of a specific cooperative or worksite is not required to satisfy the requirement of reasonable representativeness as concerns this type of crime site.
39. By contrast, while the Case 002 Indictment includes 11 security centres, not one is currently represented within the scope of Case 002/01. Security centres represent by far the most prevalent type of crime site in the Indictment. The 11 security offices included in the Indictment were part of a nationwide network, with S-21 at the pinnacle of that security structure. In comparison, the worksites and cooperatives included in the Indictment were less uniform or common in their purpose. One was a tempering worksite that was part of S-21.<sup>100</sup> Another was a tempering site used by the military for soldiers who were considered “bad elements,” many of whom were subsequently sent on to S-21.<sup>101</sup> The Case 002 Indictment also included the Srae Ambel salt fields<sup>102</sup> and two worksites at which dams were constructed.<sup>103</sup> The Indictment only includes one crime site that can be classified as a “cooperative.”<sup>104</sup> The Defence thus cannot credibly assert that crimes at cooperatives represent the “fundamental nature or theme of the case.”<sup>105</sup> Were this Chamber to find it necessary to include a worksite in order for the Case 002/01 trial to be

<sup>97</sup> E284/4/1 Nuon Chea Immediate Appeal, *supra* note 2 at paras. 50-52.

<sup>98</sup> E284/4/1 *Ibid.* at para. 15.

<sup>99</sup> D427 Closing Order, *supra* note 74 at paras. 161, 276-277.

<sup>100</sup> D427 *Ibid.* at para. 400.

<sup>101</sup> D427 *Ibid.* at paras. 387, 389, 396.

<sup>102</sup> D427 *Ibid.* at paras. 369-381.

<sup>103</sup> D427 *Ibid.* at paras. 323-349, 351-367.

<sup>104</sup> D427 *Ibid.* at paras. 302-321.

<sup>105</sup> E284/4/1 Nuon Chea Immediate Appeal, *supra* note 2 at para. 51.



reasonably representative, this could be achieved simply by including the worksite that was part of S-21.<sup>106</sup>

40. Finally, while the Defence argues that cooperatives and worksites in general affected many victims and existed throughout the country and the DK time period,<sup>107</sup> the relevant consideration is the geographic scope, temporal scope and victims associated with the specific crime sites that would be included in the Case 002/01 trial. The actual geographic and temporal scope associated with these individual crime sites is far more limited than what is suggested by the Defence.

***(g) The appropriate remedy is amendment, not annulment of the Impugned Decision***

41. The Defence seeks “the simplest and only uncontroversial path,” namely annulment of the Impugned Decision “with prejudice to renewed severance.”<sup>108</sup> At the same time, they request that the Trial Chamber be ordered to include charges relating to genocide and worksites or cooperatives in “a broader version of Case 002/01 [which] is far more likely to come to fruition than a second trial in Case 002/02.”<sup>109</sup> The Defence advances no meaningful factual basis on which the Supreme Court Chamber might evaluate the prospects of completion of a trial on the entirety of the Closing Order, or indeed the circumscribed trial they seek including genocide and worksite/cooperative charges, apart from asserting that such a trial is both “possible and necessary”<sup>110</sup> and that Nuon Chea’s lifespan is “inherently unpredictable.”<sup>111</sup>
42. The lifespan of any individual is, indeed, inherently unpredictable. But the average lifespan of aggregated populations has been, and remains, the domain of actuarial science from which courts may draw conclusions and make decisions.<sup>112</sup> The Defence has also previously stated in unequivocal terms its agreement that there is no realistic prospect of further trials against these Accused: “I think we should absolutely dispense once and for all with the notion that there’s going to be another trial in Case 2. Clearly, we’re stuck with Case 002/001 [sic], that is the trial we’re hearing now, and there will never be another one. I think everyone agrees with that.”<sup>113</sup>
43. The Co-Prosecutors seek amendment rather than annulment of the Impugned Decision and have advanced concrete projections to assist the Chamber in assessing the reasonableness of the

<sup>106</sup> D427 Closing Order, *supra* note 74 at paras. 400-413.

<sup>107</sup> E284/4/1 Nuon Chea Immediate Appeal, *supra* note 2 at paras. 54-55.

<sup>108</sup> E284/4/1 *Ibid.* at para. 25.

<sup>109</sup> E284/4/1 *Ibid.* at para. 35.

<sup>110</sup> E284/4/1 *Ibid.* at para. 31.

<sup>111</sup> E284/4/1 *Ibid.* at para. 29.

<sup>112</sup> E284/2/1 Co-Prosecutors’ Second Decision Appeal, *supra* note 5 at paras. 64-65.

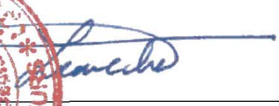

<sup>113</sup> E1/136.1 Transcript, 22 October 2012 at p. 9, lines 3-11; *see also* E1/114.2 Transcript, 27 August 2012 at pp. 24-25; E1/135.1 Transcript, 19 October 2012 at p. 42.

proposed inclusion of S-21.<sup>114</sup> Remanding this matter to the Trial Chamber to decide *ab initio* for a third time is unwarranted, given its refusal to follow the directions of this Chamber regarding severance, and would risk an unnecessary prolongation of the proceedings. This Chamber is well-versed in the relevant severance considerations. The Trial Chamber itself has acknowledged the “corrective jurisdiction” of this Chamber to order the Trial Chamber to “add S-21.”<sup>115</sup> Such corrective jurisdiction should be exercised in the most direct, least intrusive and surgical manner at this late stage, by specifically directing the inclusion of S-21 and its associated execution site within the scope of trial in Case 002/01.

## V. RELIEF SOUGHT

44. For these reasons, the Co-Prosecutors request that the Supreme Court Chamber:
- a. **dismiss** the Appeal on the merits;
  - b. **uphold** the Co-Prosecutors’ Appeal and **amend** the Impugned Decision so as to include **Security Centre S-21** (together with the related execution site at Choeung Ek) within the scope of the trial in Case 002/01.

Respectfully submitted,

Date	Name	Place	Signature
17 June 2013	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		

<sup>114</sup> E284/2/1 Co-Prosecutors’ Second Decision Appeal, *supra* note 5 at paras. 51-75.

<sup>115</sup> E284 Impugned Decision at para. 94.