

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

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**REPLY TO CO-PROSECUTORS' RESPONSE TO NUON CHEA'S IMMEDIATE
APPEAL AGAINST THE SEVERANCE OF CASE 002**

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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 reply ('Reply') to the Co-Prosecutors' Response to Nuon Chea's Appeal of the Second Decision on Severance ('Response')¹:

1. On 26 April 2013, the Trial Chamber renewed the severance of the Case 002 Closing Order ('Impugned Decision').² On 27 May 2013, the Defence filed an immediate appeal against that decision ('Appeal')³ and on 30 May 2013 a supplementary Addendum to that Appeal.⁴ On 17 June 2013 the Co-Prosecutors filed the Response. Although the Defence contests numerous allegations in the Response, it submits the instant Reply for the purpose of correcting a limited number of significant errors.
2. First, the Defence notes, principally for the record, that Nuon Chea has never, in the Appeal or elsewhere, failed to 'dispute' his alleged role at S-21.⁵ The question of severance concerns the allegations as they exist in the Closing Order, which clearly accuses Nuon Chea of having had a distinctively important role at S-21.⁶ The position of the Defence is that this accusation establishes that S-21 is not representative of the Closing Order as a whole.⁷ Nuon Chea's *actual* role at S-21 is completely irrelevant, and was therefore not the subject of analysis in the Appeal. The Defence notes that the Appeal does discuss Nuon Chea's actual role incidentally, insofar as it concerns the witnesses the Trial Chamber would be required to summons in order to adjudicate S-21. The Appeal emphasizes the need to challenge the credibility of Duch's claim that he reported to Nuon Chea and his related claim that Son Sen was no longer involved at S-21 after 15 August 1977.⁸ Both reflect the Defence's consistent position that Nuon Chea had no responsibility for S-21.

¹ Document No. **E-284/4/3**, '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', 17 June 2013 ('Response').

² Document No. **E-284**, 'Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013', 26 April 2013 ('Impugned Decision').

³ Document No. **E-284/4/1**, 'Immediate Appeal Against Trial Chamber's Second Decision On Severance and Response to Co-Prosecutors' Second Severance Appeal', 27 May 2013 ('Appeal').

⁴ Document No. **E-284/4/2**, 'Addendum to Immediate Appeal Against Trial Chamber's Second Decision on Severance', 30 May 2013 ('Addendum').

⁵ Response, para. 21.

⁶ See e.g., Document No. **D-427**, 'Closing Order', 15 September 2010 ('Closing Order'), paras 949-974.

⁷ Appeal, para. 69.

⁸ Appeal, paras 76-79.

3. Second, the views previously expressed by the Defence with regard to the severance of the Closing Order have no bearing on the determination of the Appeal.⁹ The Defence notes with amusement the Co-Prosecutors' reliance on a principle they have previously rejected for the purpose of establishing that the Defence is barred from advancing an argument (they believe is) inconsistent with an earlier position.¹⁰ In fact, no rule exists 'barring' parties from modifying a position over time, a routine feature of criminal proceedings. The only two criminal law authorities cited by the Co-Prosecutors concern collateral estoppel, which prohibits the re-litigation of issues finally decided by the Court.¹¹
4. In any event, nothing in the Appeal is inconsistent with any prior Defence position. As the Appeal makes clear, it is the experience of the trial thus far which has caused the Defence to conclude that it no longer supports severance of the Closing Order.¹² The Defence supported severance in October 2011, weeks before the hearing of the evidence began.¹³ In November 2012, the Defence merely opposed the Co-Prosecutors' request to add S-21 to the scope of Case 002/01,¹⁴ a position it continues to advance.¹⁵ The propriety of severance itself was not placed at issue until this Chamber's decision in February 2012, which, as the Co-Prosecutors rightly argue,¹⁶ required a reassessment

⁹ Response, paras 6-7.

¹⁰ See Response, fn. 13 and prior submissions cited therein.

¹¹ Response, para. 6 & fn 10. Other forms of estoppel cited by the Co-Prosecutors would be inapplicable on the facts even if they applied to criminal proceedings. *New Hampshire v. Maine*, 532 U.S. 742 (2001) applies where a party succeeds in advancing one position and then advances a contrary position. The ICJ jurisprudence cited similarly applies where the party against whom estoppel is asserted benefitted from its prior position. See Response, fn. 11. But the Co-Prosecutors never opposed severance, only its terms, and hence the Defence never 'succeeded' in or benefitted from supporting it. See Document No. **E-124/1**, 'Co-Prosecutors' Notice of Request for Reconsideration of the Terms of "Severance Order Pursuant to Internal Rule 89ter"', 23 September 2011, para. 4. *In re Kane*, 628 F. 3d 631 (3d Cir. 2010) requires irreconcilable inconsistency, which is not established in this case (see para. 4, *infra*) and bad faith, which the Co-Prosecutors do not allege. *Boizard v. E.C. Commission*, [1982] 1 C.M.L.R. 157 similarly applies where one party 'misleads' another party as to a material fact, on which the opposing party relies. See *id.*, p. 171.

¹² Appeal, paras 12-21.

¹³ Document No. **E-124/5**, 'Response to Co-Prosecutors' Request for Reconsideration of the Severance Order', 11 October 2011.

¹⁴ Document No. **E-163/5/1/4**, 'Response to Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of the Trial in Case 002/01', 19 November 2012.

¹⁵ Appeal, paras 56-71.

¹⁶ Document No. **E-284/2/1**, 'Co-Prosecutors' Immediate Appeal of Second Decision on Severance of Case 002', 10 May 2013 ('OCP Appeal'), para. 23.

of the question of severance *de novo*. The Defence conducted that assessment, and arrived at a different conclusion. Nothing about that decision is improper.¹⁷

5. Third, the Defence amply supported its argument that the severance of the Closing Order is inconsistent with Nuon Chea's right to a fair trial.¹⁸ The Defence gave specific examples of the manner in which the specific restrictions imposed by the Trial Chamber with regard to the examination of witnesses¹⁹ affected their ability to explore questions of fact of direct relevance to the charges at issue in Case 002/01.²⁰ Instead of addressing these arguments, the Co-Prosecutors recycle general platitudes about the role of questions of 'structure' in the ongoing trial²¹ then baldly assert that the Defence offers 'scant factual or legal substantiation' of its Appeal.²² The Defence 'rel[ie]d] upon quotes from their own submissions to the Trial Chamber' because – as the Co-Prosecutors implicitly recognize²³ – the Impugned Decision failed to even acknowledge that those objections had been made.²⁴ All that was left for the Defence to do was to reiterate its objections for the benefit of this Chamber.

6. Fourth, the Co-Prosecutors object as 'morally repugnant' to the proposition that crimes allegedly committed at S-21 were justified by military necessity. Yet the United States government – the world's sole superpower, a permanent member of the Security Council and a supporter of this Tribunal – claims the lawful authority to execute thousands of admittedly innocent civilians by executive fiat on the territory of a state with which it is not at war for the purpose of eliminating an imagined security threat.²⁵ That threat includes US citizens not belonging to any organized 'adversarial armed force.'²⁶ The US government claims that authority to be rooted in decades of state practice,²⁷ which is relevant to the status and formation of customary international

¹⁷ In a possibly apocryphal story, legendary British economist John Maynard Keynes was once confronted by a critic for having contradicted himself. Keynes' response was terse: 'When I discover new evidence, I change my mind; what do you do, sir?'

¹⁸ See Response, paras 8-10.

¹⁹ Appeal, para. 14.

²⁰ Appeal, paras 15-16.

²¹ Response, para. 9.

²² Response, para. 8.

²³ Response, para. 15.

²⁴ Appeal, paras 22-24.

²⁵ Appeal, paras 82-83 & fn 166.

²⁶ Response, para. 24.

²⁷ '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).

law.²⁸ The Co-Prosecutors argue that the ‘most appropriate legal characterization’ of the allegations concerning S-21 is ‘as crimes against humanity’, yet seek the inclusion of S-21 precisely because it would entail the adjudication of the grave breaches charged in the Closing Order.²⁹ Although the double standards applicable to the mass terror campaigns of Nobel Peace Prize-winning American politicians should no longer surprise anyone, the Nuon Chea defence might still have expected a more robust legal argument before this Tribunal.

7. Fifth, the ongoing effort of the Cambodian government to outlaw the denial of crimes allegedly committed by the Khmer Rouge is unquestionably relevant. The Co-Prosecutors’ view that a legal prohibition enacted by the Cambodian legislature is ‘extraneous’ because the ECCC is not a ‘court of public opinion’ is curious, to say the least.³⁰ The Defence submits that it is in the interests of justice to adjudicate as many allegations in the Closing Order as possible before the present government begins to impose criminal sanctions against Nuon Chea and his supporters for asserting his innocence. The Co-Prosecutors have not endeavored to show otherwise.
8. The Defence notes that a week after it filed the Addendum – eleven days after Hun Sen first suggested a draft law during a public ceremony – the *Law on the Denial of Crimes Committed During the Period of Democratic Kampuchea* was adopted without debate by the National Assembly.³¹ Shortly thereafter, it was approved by the Senate.³² The abstract concern expressed by the Defence in the Addendum has quickly become a concrete hindrance to Nuon Chea’s ability to proclaim his innocence. In that very real sense, the much-vaunted presumption of innocence³³ no longer applies to Nuon Chea under Cambodian law, of which the ECCC is a part. The progress of this recent prohibition from Prime-Minister’s-whim to law-of-the-land inside of two weeks also demonstrates – yet again³⁴ – the possibilities for the abuse of political power in

²⁸ Document No. **E-163/5/11**, ‘Preliminary Submissions Concerning the Applicable Law’, 18 January 2013, paras 5, 18-21 & fn 39.

²⁹ OCP Appeal, para. 35.

³⁰ Response, para. 37.

³¹ Meas Sokchea, ‘Without debate, Assembly passes heavily criticised denial law’, Phnom Penh Post, 7 June 2013.

³² Cheang Sokha, ‘Victims file suit against “denier”’, Phnom Penh Post, 17 June 2013.

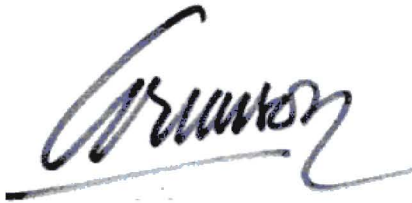
³³ Response, para. 12.

³⁴ As the Chamber is aware, the Defence has previously described these issues in great detail. For one example, see Document No. **E-189**, ‘Application for Immediate Action Pursuant to Rule 35’, 25 April 2012, paras 2-15 & independent sources cited therein.

Cambodia, especially where opponents of the government are concerned. The potential for the use of this new law in arbitrary ways which have the effect of causing prejudice to Nuon Chea's right to be presumed innocent should not be underestimated.³⁵

9. For these reasons, the Defence respectfully requests that the Supreme Court Chamber:
- a. ADMIT the present Reply; and
 - b. DISMISS the arguments in the Response; and
 - c. GRANT the relief sought in the Appeal.

CO-LAWYERS FOR NUON CHEA



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³⁵ See e.g., Paolo Lobba, 'Criminalizing Negationism Beyond the Holocaust: Some Comments on the EU Framework Decision 2008/913/JHA on Racism and Xenophobia', part 5 (describing the use of genocide denial laws for political purposes in Rwanda).