

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

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**ADDENDUM TO REPLY TO OCP RESPONSE TO NUON CHEA'S IMMEDIATE  
APPEAL AGAINST TRIAL CHAMBER'S SECOND DECISION ON SEVERANCE**

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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 Addendum to its Reply to the Co-Prosecutors Response to Nuon Chea's Immediate Appeal against Trial Chamber's Decision on Severance ('Reply')<sup>1</sup>:

1. The Defence files this Addendum to its Reply for the purpose of placing before the Supreme Court Chamber new evidence of the Trial Chamber's likely intention to make findings of fact in Case 002/01 based on evidence to which the Defence has not been given an opportunity to respond. These new indications provide heretofore unavailable support for the Defence's contention that the severance of the Case 002 Closing Order in the form it has taken of the course of the ongoing trial is inconsistent with Nuon Chea's right to challenge the evidence against him and to an independent and impartial tribunal.

### I. PROCEDURAL HISTORY

2. On 26 April 2013, the Trial Chamber renewed the severance of the Case 002 Closing Order ('Impugned Decision').<sup>2</sup> On 27 May 2013, the Defence filed an immediate appeal against that decision ('Appeal')<sup>3</sup> and on 30 May 2013 a supplementary addendum to that Appeal.<sup>4</sup> On 17 June 2013 the Co-Prosecutors filed a Response and on 24 June 2013 the Defence filed the Reply.<sup>5</sup>
3. With regard to the effect of severance on Nuon Chea's right to a fair trial, in the Appeal the Defence argued (in part) as follows:

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.

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<sup>1</sup> Document No. **E-284/4/4**, 'Reply to Co-Prosecutors' Response to Nuon Chea's Immediate Appeal Against the Severance of Case 002', 24 June 2013 ('Reply').

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

<sup>3</sup> 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').

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

<sup>5</sup> Document No. **E-284/4/3**, 'Co-Prosecutors' Combined Response to Nuon Chea's Appeal of the Second Severance Decision and Reply to his Response to the Co-Prosecutors' Appeal', 17 June 2013 ('Response').

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.’ 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.’ It must therefore be considered in its entirety.

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

[...]

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’.

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.<sup>6</sup>

4. In its Response, filed on 17 June 2013, the Co-Prosecutors argued that this allegation was ‘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

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<sup>6</sup> Appeal, paras 12-14, 18-19.

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, communication and military structures, and that all parties could submit evidence and question witnesses on these areas.<sup>7</sup>

## II. PAST EVIDENTIARY RULINGS IN CASE 002/01

5. The Trial Chamber's initial framework for severance established a distinction between the existence of the five alleged policies of the joint criminal enterprise and their implementation. The Chamber held that although the existence of all five policies was at issue in Case 002/01, 'detailed factual consideration in the first trial' would be reserved for topics within the scope of Case 002/01.<sup>8</sup> The Chamber then appended an 'Annex' for the purpose of separating those paragraphs of the Closing Order at issue in Case 002/01 from those not at issue.<sup>9</sup> According to that Annex, the only allegations at issue concerning JCE policies outside the scope of Case 002/01 were found in paragraphs 156 through 159 of the Closing Order.<sup>10</sup> Those paragraphs state the overarching common purpose, identify the five policies by name and include exactly one footnote. Excluded from Case 002/01 were all other allegations concerning those alleged policies, including: (i) any details *at all* about those policies, including (among other things) their dates, objectives, content and the manner in which they were formulated<sup>11</sup>; (ii) *any* crime base allegations<sup>12</sup>; and (iii) *any* allegations of the participation of the accused.<sup>13</sup>
6. In order to give effect to this distinction between the existence of the JCE policies and their implementation, the Chamber instructed the parties that in general, they were entitled to examine fact witnesses only on questions relevant to the crimes charged in Case 002/01. Only expert witnesses (of which two have appeared before the Chamber) would be subject to examination on the entirety of the Closing Order.<sup>14</sup> Parties were furthermore entitled to question any witness on facts outside the scope of Case 002/01

<sup>7</sup> Response, para. 9.

<sup>8</sup> 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, para. 11,

<sup>9</sup> Document No. **E-124/7.3**, 'Annex: 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 the Trial in Case 002/01 (E163)', 8 October 2012 ('Severance Annex'), points I(vi), (vii).

<sup>10</sup> Severance Annex, point I(vi).

<sup>11</sup> Severance Annex, point I(vii); Document No. **D-427**, 'Closing Order', 15 September 2010 ('Closing Order'), paras 168-177 (concerning, by way of example, co-operatives and worksites).

<sup>12</sup> Severance Annex, point I(vii).

<sup>13</sup> Severance Annex, point I(vii); Closing Order, paras 903-915 (concerning co-operatives and worksites).

<sup>14</sup> Appeal, para. 14 & fn 34.

where strictly necessary to establish questions of administrative, communication or military structure.<sup>15</sup> Questioning outside the scope of Case 002/01 was otherwise prohibited.<sup>16</sup>

7. In light of these rules, the defence teams objected to the admission of documentary evidence beyond the scope of Case 002/01.<sup>17</sup> The Chamber dismissed those objections on the basis that they were not articulated with sufficient specificity and with a conclusory statement that all the documents ‘fall within the scope of Case 002/01’.<sup>18</sup> Accordingly, the Chamber admitted those documents, but never explained their role and relevance to the questions at issue in Case 002/01. The Chamber also indicated for the first time on 13 June 2013 that it intends to admit 1,500 statements of witnesses who have not appeared before the Chamber.<sup>19</sup> Hundreds of those statements concern questions of fact beyond the scope of Case 002/01.<sup>20</sup> Weeks before the end of trial, the Chamber has not yet issued a reasoned decision explaining the relevance of that evidence to the allegations at issue in Case 002/01.

### III. THE DOCUMENT HEARING

8. During the week of 24 June 2013, the Trial Chamber began its final document presentation hearing in Case 002/01, which concerned the five policies of the joint criminal enterprise alleged in the Closing Order and the role of Nuon Chea. During the Co-Prosecutors’ presentation of a speech allegedly given by Pol Pot concerning the alleged policy of cooperatives and worksites, and reprinted in a Revolutionary Flag,

<sup>15</sup> Appeal, para. 14 & fn 34.

<sup>16</sup> Appeal, para. 14 & fn 34.

<sup>17</sup> See e.g., Document No. **E-131/1/9**, ‘Objections, Observations, and Notifications Regarding Various Documents to be Put Before the Chamber’, 14 November 2011, paras 10, 20; Document No. **E-131/1/12**, ‘Document Objections & Further Submissions’, 5 January 2012, para. 1 & fn 1; Document No. **E-131/1/10**, ‘Ieng Sary Objections to the Admission of Certain OCP Documents for the First Four Trial Segments’, 5 January 2012 (see objections in attached annexes, e.g. Annex 8 – Tram Kok Records); Document No. **E-131/1/7**, ‘Ieng Thirith Defence’s Objections to Co-Prosecutors’ and Civil Parties’ Lists of Documents to be Used at First Phase of Trial’, 14 November 2011, para. 12; Document No. **E-223/2/8**, ‘Objections to Requests to Put Before the Chamber Written Statements and Transcripts’, 26 April 2013, paras 17-33.

<sup>18</sup> Document No. **E-185**, ‘Decisions on Objections to Documents Proposed to be Put Before the Chamber on the Co-Prosecutors’ Annexes at A1-A5 and to Documents cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01’, 9 April 2012, paras 15(x), 23; Document No. **E-185/1**, ‘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, paras 5(i), 12.

<sup>19</sup> Document No. **E-1/207.1**, ‘Transcript of Trial Proceedings’, 13 June 2013, p. 26:3-12.

<sup>20</sup> Document No. **E-278.2**, ‘Overview of Revised Annexes 12 and 13’, 9 April 2013; Document No. **E-223/2/7.2**, ‘Confidential Annex I. Written Statements of Civil Parties who Have not Given Oral Evidence’, 3 March 2013.

counsel for Khieu Samphan objected that the document was outside the scope of Case 002/01. Judge Lavergne gave the ruling of the Chamber as follows:

The Chamber is of the view that the documents that are currently being presented by the Office of the Co-Prosecutors have to do with the directives that are to be implemented as part of policies concerning cooperatives and directives established at the level of the Centre. So we are not dealing with implementation on the ground. It is indeed implementation on the ground – on the field that should not be part of the presentation of key documents as part of this trial.<sup>21</sup> (emphasis added)

9. The following day, before the Civil Parties began their presentation as to the alleged cooperatives policy, counsel for Khieu Samphan objected again that the documents which the Lead Co-Lawyers intended to present were largely civil party applications describing ‘the implementation of policies on the ground’.<sup>22</sup> The Nuon Chea defence supported the objection.<sup>23</sup> The Co-Prosecutors responded as follows:

I believe that in this court room, we are all conscious of the fact that it is a question of presenting documents that are related to the existence of a policy, as the civil party legal co lawyer has just reiterated; a policy that was not communicated to local authorities. There was no decision. It's a theoretical policy, a policy that was elaborated by the leaders of the CPK, but that is not what the Chamber is interested in. A policy that was drawn up and considered as directives, that had to be absolutely implemented.

Secondly, we are talking of a policy such as we saw on the Democratic Kampuchea regime. We don't have specific dates but it is evolving and in most -- in one particular direction and some details were not envisaged initially. And so we have complimentary directives related to a policy that was developed at a top and communicated to the base. Why do we have an evolution of a policy? Precisely, because there is interaction between the leaders at a Centre and reports from the ground -- from the field. These reports have to do with implementation but they assist in the development of the policy that takes on other dimensions. In this regard, in my view, there is total interaction between the policy itself and its application. This application helps with the development of the policy. So we are talking of a very concrete policy but not theoretical aspects. The existence of a policy can be established in many ways and I'm still talking about existence of policy and not its implementation. Either we find it in the documents from the Centre showing that these directives were the official directive of the Party. We find that in the Revolutionary Flag reports of meetings, telegrams, statements of leaders at meetings. This helps establish the existence of the policy and it shows that disseminating these policies was compulsory. So another approach is to find

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<sup>21</sup> Draft Transcript (EN), 25 June 2013, pp. 9:20-10:2.

<sup>22</sup> Draft Transcript (EN), 26 June 2013, p. 35:4-5.

<sup>23</sup> Draft Transcript (EN), 26 June 2013, pp. 35:22-36:3, 46:17-47:22.

that this policy is coming from the base. It has been accepted by international tribunals that a policy can be established through certain conduct that is generalized on the ground, which shows that a policy necessarily exists at national level in order to be implemented everywhere at the same time by individuals who are not communicating with one another.

We have the Kunarac (phonetic) decision; it's an appeals decision before the International Criminal Tribunal for the former Yugoslavia, paragraph 98. We also have the Dragovich decision, a Trial Chamber decision, paragraph 721. I just wanted to refer to these two decisions and I would like to read out the relevant passages in English because I do not have the English -- the French -- I beg your pardon. It says: "The Trial Chamber finds that there is evidence of a common plan to commit the crimes of murder, extermination, persecutions, through capturing, detaining, executing and burying over 7,000 Bosnian Muslim men and boys. The Trial Chamber infers the existence of such a plan from the fact that over 7,000 men and boys were captured, detained, murdered and buried in the space of only five days. This would not have been possible unless there was a planned coordination between the members of the Joint Criminal Enterprise." This is just an example of the proof and deductions made on the basis of the reality on the ground.

A third manner in which we can prove who established existence of a policy is to combine the two; that is, to prove that there were documents from the Centre establishing a policy or we can deduce that a policy existed from the various speeches and documents of the Party. We can also establish it on the basis of the fact that on the ground, lower down the line, it was implemented everywhere.<sup>24</sup> (emphasis added)

10. Counsel for Khieu Samphan replied as follows:

Mr. President, we are precisely at the very heart of what I tried to avoid when I made my objection yesterday or the day before yesterday. What I said was that we are, in a very subtle manner, sliding towards another case. This should be clear.

[...]

We have always said before this Chamber, we of the Khieu Samphan defence team have always stated that our main preoccupation, our main concern, is to correctly defend our client. Whether in Case 002/1 or in subsequent trial segments, we must know exactly the case against us.

We have before us today, in very concrete terms, a situation in which the Co Prosecutors and the civil party lead co lawyers are telling you that we cannot talk about the three other policies that do not concern Case 002/1 without talking about implementation on the ground. What does that mean legally speaking? It means that you are authorizing, in one way or the other, the

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<sup>24</sup> Draft Transcript (EN), 26 June 2013, pp. 40:8-42:25.

presentation of the evidence, in this case, on policies that are not concerned by Case 002/1, which means that a certain number of pieces of evidence that should not be the subject of this trial, 002/1, are brought before you, and we are supposed to respond to those issues even when we do not have any evidence brought before this Chamber through witnesses who are giving evidence before this Chamber. And we have not been able to cross-examine them on this evidence. And in the few pages that are allotted to us for the Closing Arguments; we will not be able to do so.

The issue before us today is how do we defend correctly the accused if we have to respond, on the one hand, to issues defined by the Chamber and others that are supposed to be defined in the second trial segment, and it's precisely to avoid reaching this stage that I make my objection, and this is precisely because we do not want to face this problem we find in the severance decision.

[...]

For the purpose of legal certainty, we should focus on what should be in this trial segment and not in subsequent segments. If we are to discuss matters that are not concerned, in light of your severance decision, how are we going to talk about the same issue in the subsequent trial segments? This is an extremely serious legal matter and a very important one for that matter and we have seen clearly from what both the Co Prosecutors and the civil party lead co lawyers have just told us, they are saying we cannot draw the line between existence of policy and implementation. They are inextricably bound and if they are inextricably bound, it is normal that we should talk about them in the subsequent trial segments, as decided by the Chamber, in its severance decision. Otherwise, what is the purpose of issuing a severance decision if it is not to be executed -- if it's not to be abided by?

It's a serious problem of legal certainty and this is extremely important, and again, I urge the Chamber to consider this point for the purpose of a fair trial. We haven't appealed against your last severance decision and I remind everyone that when the Khieu Samphan defence team was called upon to speak up, the only point we made was the following: We want to know the charges against us that we have to respond to.

If there is a slip or a slide towards other policies, we do not have a (unintelligible) fair trial, and the rights of the accused must be respected, they must know the case against them, and they must be able to respond. And if we are moving from one policy to the other and if we are being presented both theoretical and factual issues, we cannot call this is a fair trial and that is why I want to urge the Chamber not to allow this slip from the case issue to the subsequent trial segments.<sup>25</sup>

11. Counsel for Nuon Chea concurred, adding:

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<sup>25</sup> Draft Transcript (EN), 26 June 2013, pp. 43:9-46:14.



Mr. President, for the record, we completely concur with the observations made by the Khieu Samphan defence team. We are not talking today and yesterday about policies. We're talking about JCE policies, criminal policies. And like I said before, our client has not been -- is not being prosecuted, is not being accused in this segment of the trial, of having anything to do with forced marriages; that is, the implementation of one of those five policies, which is not the underlying issue right now.

So we have a big problem if we are now, indeed, in the words of my learned friend, getting slipped into the remaining three policies without having a proper possibility to defend ourselves against that.

So again, we understand the consequences of the severance decision that the two policies underlying the crimes, which we are talking about, can be discussed. That's why we didn't object to the targeting on Lon Nol officials, for instance, because that is the underlying policy in respect of Tuol Po Chrey. But if we're now talking about forced marriages, then of course, we have a big problem in Case 2/2, because if you have established a JCE policy, for instance, in respect of forced marriage, how are we doing to deal with the obvious bias, from your side, in respect of the crimes which are the consequence or the implementation of this policy?<sup>26</sup>

12. The Chamber dismissed the objection, ruling as follows:

The Chamber acknowledges that documents which parties may wish to emphasize during the course on this hearing on key documents may contain information that tends to point both to the existence or development of a policy and to its implementation. However, the Chamber wishes to emphasize that the parties have the right to comment on any aspect of the documents that have been referred to during this hearing, as to their relevance and probative value, and the Chamber will make those determinations in the course of its verdict.

It is necessary, however, to emphasize that Case 002/01 includes only -- includes policies only insofar as they exist or have been developed and that the implementation of policies other than the evacuation of the cities is irrelevant to that case. President, I think that's the extent of the ruling. Thank you.<sup>27</sup>

#### IV. ARGUMENT

##### A. Severance is Not Workable

13. The exchange before the Trial Chamber on 26 June 2013 is a pointed illustration of the conflicting imperatives within which the severed Case 002/01 trial now finds itself trapped. The premise underlying the Trial Chamber's theory of severance -- that there is a

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<sup>26</sup> Draft Transcript (EN), 26 June 2013, pp. 46:17-47:22.

<sup>27</sup> Draft Transcript (EN), 26 June 2013, pp. 49:3-16.

workable distinction between the existence of the JCE policies and their implementation – has been proven false. The Co-Prosecutors summarized that problem (and with it the essential thrust of the Appeal) eloquently: ‘there is total interaction between the policy itself and its application.’<sup>28</sup>

14. The evolution (or devolution) from Judge Lavergne’s statement of principle on 25 June 2013 to Judge Cartwright’s ruling the following day demonstrates the Chamber’s inability to maintain in practice a distinction which may have had some appeal in theory. Under the weight of the prosecution’s (perfectly logical) arguments, the Chamber had no alternative but to allow the Lead Co-Lawyers an unfettered opportunity to present before the Chamber documents concerning the alleged conditions in cooperatives and the pain and suffering of the civil parties.<sup>29</sup> Indeed, Judge Lavergne’s instruction that ‘implementation on the ground [...] should not be part of the presentation of key documents’ led to the exclusion of exactly zero documents.
15. Judge Cartwright’s ruling on 26 June 2013 held that parties would be entitled in their responses to address the ‘relevance and probative value’ of the documents presented by the civil parties in their response.<sup>30</sup> Yet, despite the nod to ‘relevance’, the Chamber has repeatedly held that responses to document presentation hearings should concern only probative value and not admissibility, which is presumed to have been decided.<sup>31</sup> By allowing the documents to be presented, the Chamber conceded their relevance to Case 002/01 and acknowledged their place within the pool of the evidence on which the Chamber may rely in reaching a verdict.
16. One illustration of the Trial Chamber’s approach with special relevance to the Appeal is the Co-Prosecutors’ detailed presentation of documents concerning S-21. The Co-Prosecutors devoted two full hours on 27 June 2013 to a presentation which included a series of confessions and a detailed analysis of Nuon Chea’s alleged role in relation to that crime site.<sup>32</sup> While this Chamber reviews the parties’ extensive submissions and deliberates as to whether S-21 ought to be part of the Case 002/01 trial, the Trial

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<sup>28</sup> See para. 9, *supra*.

<sup>29</sup> See para. 12, *supra*.

<sup>30</sup> See para. 12, *supra*.

<sup>31</sup> See e.g., Document No. **E-167.1**, ‘Message to the parties in advance of tomorrow morning’s informal TMM’, 2 February 2012 (‘The hearing commencing 13 February 2012 is therefore not intended to reopen the issue of the admissibility of any documents proposed to be put before the Chamber.’).

<sup>32</sup> Draft Transcript (EN), 27 June 2013, pp. 44:25-64:12.

Chamber is proceeding in parallel to consider the evidence and prepare to make findings of fact.

17. The Co-Prosecutors say that the defendants have never been refused an opportunity to explore questions of fact relevant to Case 002/01.<sup>33</sup> But that position does not survive even superficial scrutiny. If ‘facts on the ground, lower down the line’<sup>34</sup> are part of the offer of proof in relation to the existence of policies outside the scope of Case 002/01, then the Chamber is either being urged to make those findings on the basis of an incomplete record or there was never any significance in severance to begin with. Neither the Co-Prosecutors nor the Trial Chamber have ever succeeded in explaining which ‘facts on the ground’ are relevant to the ‘existence’ of JCE policies and hence within the scope of Case 002/01, which are not, and why.
18. In fact, the Defence fully agrees that evidence concerning the details of events at individual crime sites could be relevant to the existence (or non-existence) of a so-called ‘policy’. For instance, evidence that the entities or places described by the CIJs as ‘cooperatives’ in fact varied widely across geographic regions could suggest either that no policy existed or that, if it did exist, its parameters were loosely defined. Similarly, the absence of any evidence from cooperative leaders that they systematically reported to the party center would tend to establish that, if these cooperatives did exist, they functioned autonomously and not pursuant to a so-called ‘policy’. It would therefore have been entirely proper for the Chamber to adduce evidence of cooperatives, subject that evidence to adversarial argument, and make findings on the basis of that evidence concerning the alleged CPK cooperatives ‘policy’.
19. Alternatively, the Chamber could have decided that the existence of a cooperatives policy could be established merely through the direct evidence of a very limited set of facts which directly concern the decisions and conduct – the ‘policies’, in the regular sense of the word – of the party center. It could equally have held that ‘policies’ outside the scope of Case 002/01 were not at issue in the present trial at all.
20. The Chamber cannot, however, decide to call no witnesses, prohibit the parties from examining any witness who is called in relation to ‘facts on the ground’, and then rely on

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<sup>33</sup> See para. 4, *supra*.

<sup>34</sup> See para. 9, *supra*.

the evidence which has been put before it, haphazardly and for no clear purpose,<sup>35</sup> to make sweeping conclusions about a supposed ‘policy’ set by the CPK.

### **B. Nuon Chea’s Fundamental Rights are at Risk**

21. By proceeding in this manner the Trial Chamber would violate numerous fundamental fair trial rights. First, any finding of fact concerning the existence of JCE policies outside the scope of Case 002/01 would violate Nuon Chea’s right to confront the evidence against him to the extent it relies on any evidence of ‘facts on the ground’.<sup>36</sup> Since those facts were systematically excluded from the scope of the Defence’s examination of live witnesses at trial, untested documentary ‘evidence’ may not form the basis of any of the Chamber’s conclusions.
22. Second, the conclusions made by this Chamber on the basis of partial evidence would form the basis for findings of fact concerning policies at issue in Case 002/02, and would necessarily bias this Chamber in its adjudication of that second trial.<sup>37</sup> The allegations concerning CPK policies as to cooperatives and worksites, the regulation of marriage, security centers and the targeting of groups other than former soldiers and officials of the Khmer Republic will be of central importance in subsequent trials. Having made conclusions in that regard in Case 002/01, the Trial Chamber will be unable to fairly adjudicate those questions again in Case 002/02.
23. Third, there is an ongoing violation of all of the parties’ rights to legal certainty. Perhaps two months remain until closing briefs are to be filed with the Trial Chamber.<sup>38</sup> The Chamber has indicated that by the end of trial, over 6,000 documents are expected to be in evidence.<sup>39</sup> Yet none of the parties have any clear indication of how the evidence which concerns facts outside the scope of Case 002/01 will be used. The Trial Chamber’s rulings at the document hearing amount to the ‘incorporation of new facts and circumstances into the subject matter of the trial [which] would alter the fundamental scope of the trial.’<sup>40</sup> As such, they are inconsistent with the right of the accused to “be

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<sup>35</sup> See para. 7, *supra*.

<sup>36</sup> Appeal, paras 11-19.

<sup>37</sup> Appeal, para. 21.

<sup>38</sup> Document No. E-1/207.1, ‘Transcript of Trial Proceedings’, 13 June 2013, p. 48:19-22.

<sup>39</sup> Document No. E-1/207.1, ‘Transcript of Trial Proceedings’, 13 June 2013, p. 26:3-20.

<sup>40</sup> *Prosecutor v. Lubanga*, ‘Judgment on the Appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants


informed promptly and in detail of the nature, cause and content of the charge” [and] to “have adequate time and facilities for the preparation of the defence.”<sup>41</sup> The ability of the parties to assess the need to challenge the substance of the evidence before the Chamber has already been affected. Valuable preparation time in relation to the closing briefs continues to be lost every day.

24. Finally, the Defence notes that, according to the Co-Prosecutors, the Nuon Chea defence has previously acquiesced in the Trial Chamber’s use of evidence beyond the scope of Case 002/01 for the purpose of establishing the existence of all five alleged policies of Democratic Kampuchea.<sup>42</sup> That claim is incorrect. The Defence previously agreed only with the uncontroversial notion that ‘if evidence exists that has been put before the Chamber which is relevant to S-21 and District 12 executions’, that evidence could be used to establish ‘the development of the five criminal policies alleged in the Closing Order.’<sup>43</sup> There is hardly a question that crime base evidence ‘could be’ used in relation to alleged policies outside the scope of Case 002/01 (*see* para. 18, *supra*). But the Defence never conceded there any such evidence existed. It goes without saying that, if such evidence were to be used, it would first require admission in a manner consistent with Nuon Chea’s right to a fair trial. It is the Trial Chamber’s failure in that regard which prompted the instant objection.
25. For these reasons, the Defence respectfully requests that the Supreme Court Chamber:
- a. ADMIT the present Addendum; and
  - b. CONSIDER it in conjunction with the Appeal.

CO-LAWYERS FOR NUON CHEA



SON Arun



Victor KOPPE

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that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009 (‘Lubanga Decision’), para. 85.

<sup>41</sup> Lubanga Decision, para. 94.

<sup>42</sup> Response, para. 10.

<sup>43</sup> Response, para. 10.