

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

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**CO-PROSECUTORS' RESPONSE TO NUON CHEA'S "ADDENDUM TO REPLY TO OCP
RESPONSE TO NUON CHEA'S IMMEDIATE APPEAL AGAINST THE TRIAL
CHAMBER'S SECOND DECISION ON SEVERANCE"**

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. On 26 April 2013 the Trial Chamber issued its second severance decision.¹ On 10 May 2013, the Co-Prosecutors appealed the Trial Chamber's second severance decision.² On 27 May 2013, the Defence for Nuon Chea ("Defence") filed a combined appeal of the second severance decision and response to the Co-Prosecutors appeal.³ On 30 May 2013, the Defence filed an addendum to their appeal.⁴ On 17 June 2013, the Co-Prosecutors responded to the Defence filing⁵, and on 24 June 2013 the Defence filed a reply.⁶
2. On 3 July 2013, the Defence filed the instant Addendum⁷, requesting to admit, and at the same time submitting, additional argument and purported evidence allegedly related to their claims on appeal. As described by the Defence, the Addendum is premised on "the Trial Chamber's likely intention to make finding of fact in Case 002/01 based on evidence to which the Defence have not been given an opportunity to respond."⁸
3. The Co-Prosecutors hereby respond, requesting that the Supreme Court Chamber dismiss the Addendum as premature, unripe, not relevant and without merit. The Co-Prosecutors take this opportunity to note some of the many factual and legal errors with which the Addendum is riddled.

II. ARGUMENT

A. On its Own Terms, the Addendum is Premature

4. The Addendum should be rejected as a threshold matter because it is premature. By the Defence's own description, the Addendum's arguments are premised on what they think the Trial Chamber might do in the Judgement in Case 002/01. The Defence introduce their Addendum by stating that it is based on alleged concerns of the Trial Chamber's "likely intention" and "indications" regarding findings the Trial Chamber will make in the Case 002/01 Judgement.⁹ However, the trial in Case 002/01 is not complete and no judgement has yet been issued. Should it become necessary, the Defence will have the opportunity to address

¹ E284 Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013.

² E284/2/1 Co-Prosecutors' Immediate Appeal of Second Decision on Severance of Case 002, 10 May 2013.

³ E284/4/1 Immediate Appeal Against Trial Chamber's Second Decision on Severance and Response to Co-Prosecutors' Second Severance Appeal, 27 May 2013.

⁴ E284/4/2 Addendum to Immediate Appeal Against Trial Chamber's Second Decision on Severance, 30 May 2013.

⁵ E284/4/3 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.

⁶ E284/4/4 Reply to Co-Prosecutors' Response to Nuon Chea's Immediate Appeal Against the Severance of Case 002, 24 June 2013.

⁷ E284/4/5 Addendum to Reply to OCP Response to Nuon Chea's Immediate Appeal Against Trial Chamber's Second Decision on Severance, 3 July 2013 ("Addendum").

⁸ E284/4/5 Addendum, at para. 1.

⁹ E284/4/5 Addendum, at para. 1.

to this Chamber what the Trial Chamber actually does in an appeal from the final judgement. At that time the Defence may, if they choose, bring forth any of their claims contained in the Addendum regarding purported violations of Nuon Chea's fair trial rights, but it is not appropriate to do so at this juncture. The Defence's filing is unripe for appellate scrutiny, and therefore irrelevant.

B. The Addendum is Misleading and Premised on Misrepresentations

5. The Defence's Addendum brings no new relevant information to their argument on appeal of severance, and should be dismissed outright for that reason alone. Indeed, through the misstatements of law and fact contained therein, the Defence do nothing except to attempt to mislead this Chamber.
6. The Addendum, aimed at showing that "severance is not workable,"¹⁰ continues to highlight the hypocrisy of the Defence's last-minute about-face regarding severance. Not only did the Defence previously describe severance as "without a doubt the most sensible decision to emerge from the ECCC,"¹¹ but it also defended the severance of charges along the parameters implemented by the Trial Chamber as "very workable."¹²
7. Moreover, the Addendum is based on misrepresentations to the Supreme Court Chamber regarding the scope of Case 002/01. For example, the Defence assert that the Trial 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. Parties were furthermore entitled to question any witness on facts outside the scope of Case 002/01 where strictly necessary to establish questions of administrative, communication or military structure."¹³
8. In fact, since the first severance decision in September 2011 the Trial Chamber made clear that evidence in Case 002/01 would relate not only to the specific charges in that trial, but also serve as foundational evidence intended to support any additional charges that might later be included in Case 002/01 or any additional trials that may take place.¹⁴ The Trial Chamber expressly instructed the parties prior to the start of evidentiary proceedings that, notwithstanding the September 2011 Severance Order, "the Accused must confront all

¹⁰ E284/4/5 Addendum, Title Section IV(A).

¹¹ E124/5 Response to Co-Prosecutors' Request for Reconsideration of the Severance Order, 11 October 2011, at para. 3.

¹² E163/5/1/4 Response to Co-Prosecutor's Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, 19 November 2012, at para. 31 (internal citations omitted).

¹³ E284/4/5 Addendum, at para. 6.

¹⁴ E124 Severance Order Pursuant to Internal Rule 89ter, 22 September 2011, at paras. 1(d), 5; see also E284 Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, at para. 8.

allegations contained in the Indictment in Case 002, and ... it is envisaged that the first trial will provide a general foundation for all the charges, including those which will be examined in later trials.”¹⁵ The Co-Prosecutors have already made this point in their Response to similarly misleading statements in the Defence’s appeal of the second severance decision.¹⁶

9. As is clear from the above instruction of the Trial Chamber, as well as its list of paragraphs relevant to Case 002/01,¹⁷ evidence of administrative, communication, and military structures are not the “strict” exception to otherwise circumscribed evidence that the Defence would have this Chamber believe, but rather one of the core evidentiary issues of Case 002/01.
10. The broad nature of foundational evidence in Case 002/01 also extends to the existence of the CPK policies alleged to comprise the joint criminal enterprise. As the Trial Chamber stated when clarifying the scope of Case 002/01, it will “give consideration to the roles and responsibilities of the Accused in relation to all policies relevant to the entire Indictment.”¹⁸ The Trial Chamber recently observed that “[f]rom the outset, the Chamber has ruled that all parties may lead evidence in relation to the roles and responsibilities of all Accused in relation to all policies of the DK era.”¹⁹
11. The Defence have been fully aware that these topics formed part of the evidentiary record, even advocating themselves at one point that evidence collected concerning crime sites not encompassed by Case 002/01 “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.”²⁰
12. In presenting evidence of the existence of the JCE policies, international jurisprudence is clear that evidence of implementation of similar crimes on a widespread or systematic basis can be evidence of a policy to commit those crimes. As the Appeals Chamber of the ICTY has held,

¹⁵ **E131** Scheduling Order for Opening Statements and Hearing on the Substance in Case in Case 002, 18 October 2011.

¹⁶ **E284/4/3** 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, at para. 9.

¹⁷ **E124/7.3** Annex, at section 1.

¹⁸ **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, para. 11.

¹⁹ **E284** Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, para. 117.

²⁰ **E284/4/3** 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, at para. 10, quoting E163/5/1/4 at para. 35 (internal quotations and citations omitted).

“[i]t may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.”²¹ In the court hearing referenced by the Defence in its Addendum, the Trial Chamber was simply recognizing that some documents are relevant to both the existence and implementation of policies, and that the Defence continue to have the right and opportunity, as they have all along, to present evidence and arguments related to the existence of the JCE policies.²²

13. Conveniently, the Defence’s illustrative example of alleged error²³ is also the best vehicle to show that their arguments are completely without merit. The Defence argue that presentation of documents showing Nuon Chea’s role in S-21 was outside of the scope of Case 002/01, and claim that the presentation made thereon in court by the Co-Prosecutors was somehow improper.²⁴ However, reference to the Trial Chamber’s list of Closing Order paragraphs included in Case 002/01 shows that paragraphs 877 to 879 are expressly included in the scope of trial.²⁵ Those paragraphs concern Nuon Chea and his role in regards to S-21, and speak for themselves in rebutting the Defence’s argument:

877. In interviews conducted after the CPK regime, Nuon Chea explains that he did not know about S-21 before 1979 and that any documents implicating him must have been fabricated. He adds that Duch was working for the Ministry of Defence and Internal Security and that Son Sen was the one accountable for that Ministry. Nevertheless there is strong evidence that Nuon Chea was in charge of the S-21 security centre and its associated worksite S-24 (Prey Sar) from the time of their establishment until 6 January 1979.

...
879. On 15 August 1977, when Son Sen left Phnom Penh to be closer to the front lines in the conflict with Vietnam and Nuon Chea summoned Duch to his office at the Buddhist Institute. From this point on, Duch understood he had to report to Nuon Chea, who became his direct supervisor. Duch states that Nuon Chea told him “the Chairman at S-21 was not me, Duch, but he, Nuon Chea, was Chairman”. Although reporting directly to Nuon Chea, Duch maintained communication with Son Sen who would contact him once or twice a month by phone. Although Duch no longer sent confessions to Son Sen directly, Son Sen still participated in monitoring S-21 activities and, according to Duch, considered himself to be Duch’s supervisor.²⁶

²¹ *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23/1-A, Appeals Judgement, 12 June 2002, para. 98.

²² **E1/213.1** Transcript, 26 June 2013, p. 50.

²³ **E284/4/5** Addendum, at para. 16.

²⁴ **E284/4/5** Addendum, at para. 16.

²⁵ **E124/7.3** Annex, at p. 1.

²⁶ **D427** Closing Order, 15 September 2010, at paras. 877, 879 (internal citations omitted).

14. The Accused's assertions that his fair trial rights are being violated by the presentation of evidence outside the scope of Case 002/01 are thus erroneous. The Addendum is without merit and should be dismissed.

III. CONCLUSION

15. For the reasons stated above, the Co-Prosecutors respectfully request this Chamber to **REJECT** the Addendum.

Respectfully submitted,

Date	Name	Place	Signature
15 July 2013	CHEA Leang Co-Prosecutor	Phnom Penh	
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