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

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# CO-PROSECUTORS' IMMEDIATE APPEAL OF DECISION CONCERNING THE SCOPE OF TRIAL IN CASE 002/01 WITH ANNEX I AND CONFIDENTIAL ANNEX II

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## I. INTRODUCTION

1. Pursuant to Rules 104, 105, 106(2) and 107 of the Internal Rules ("Rules"),[1] the Co-Prosecutors submit this immediate appeal ("Appeal") to the Supreme Court Chamber ("Chamber") against the Trial Chamber's memorandum entitled *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* ("Impugned Decision").[2]

2. The Impugned Decision, if uncorrected, will result in a trial and a legacy that fails to adequately represent the enormity and gravity of the crimes committed during the period of Democratic Kampuchea. The Co-Prosecutors are profoundly concerned that the prospect of a subsequent trial in Case 002 that might encompass additional charges and crime sites is exceedingly remote. The Co-Prosecutors submit that the exercise of the Trial Chamber's discretion to limit the scope of the trial, while due a margin of deference, has exceeded its proper bounds under the circumstances and relied on incorrect legal and factual grounds.

3. For the reasons stated below, the Co-Prosecutors submit that: (1) the Appeal is admissible; (2) the Impugned Decision contains errors of law, errors of fact and/or errors in the exercise of the Trial Chamber's discretion; (3) the Impugned Decision should be amended to include **Security Centre S-21** (and the related execution site at Choeung Ek) and executions at **Kampong Tralach Leu District (District 12)**, as requested by the Co-Prosecutors in document E163, within the scope of trial in Case 002/01.

## II. PROCEDURAL HISTORY

4. On 22 September 2011, acting pursuant to Rule 89*ter*, the Trial Chamber ordered the severance of proceedings in Case 002 into several discrete trials that incorporate particular factual allegations and legal issues ("Severance Order").[3] The Trial Chamber indicated that it:

> *...may at any time decide to include in the first trial additional portions of the Closing Order in Case 002, subject to the right of the Defence to be provided with opportunity to prepare an effective defence and all parties to be provided with timely notice.*[4]

The Trial Chamber decided to include several core factual issues that cut across the entire Case 002 in the scope of the first trial (Case 002/01) – such as the history and structure of the Democratic Kampuchea regime, roles of the Accused prior to and during the Democratic

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1 Extraordinary Chambers of the Courts of Cambodia, Internal Rules (Rev. 8), as revised on 3 August 2011 ("Rules").
2 **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").
3 **E124** Severance order pursuant to Rule 89*ter*, 22 September 2011 ("Severance Order").
4 **E124** *Ibid.* at para. 6.

Kampuchea regime, lines of communication, and the five criminal policies alleged in the Closing Order.[5] Under the Severance Order, the limitations in the scope of this trial related primarily to: (i) the extent to which the criminal policies will be dealt with in Case 002/01 (while the development of all five policies is included, only the *implementation* of the policy relating to forced movements of populations was to be considered);[6] and (ii) the specific crime sites to be addressed (only "population movement phases 1 and 2").[7]

5. On 3 October 2011, the Co-Prosecutors requested that the Trial Chamber reconsider the Severance Order and include an additional nine crime sites within the scope of Case 002/01.[8] The Co-Prosecutors' request was opposed by Nuon Chea[9] and supported by Ieng Sary (with respect to his request for a public, oral hearing only).[10] The Civil Parties supported the Co-Prosecutors' request by their own Notice of Request for Reconsideration of the Severance Order on 6 October 2011, and filed a further substantive Request for Reconsideration on 18 October 2011.[11] On 18 October 2012, the Trial Chamber denied the request of the Co-Prosecutors (and the Civil Parties) ("Decision on the Reconsideration Request").[12] Nonetheless, it stated:

> *[The Trial Chamber] did not exclude the possibility of adding additional charges or counts to the first trial in Case 002 where circumstances permit. The Chamber takes note of the Co-Prosecutors' indication in its Request of possible additional topics for inclusion in the first trial and will be guided by its views as to the priority allegations for consideration during later phases of the trial* …[13]

6. Noting the terms of this decision, on 27 January 2012, the Co-Prosecutors requested the Trial Chamber to include just three of the nine crime sites referred to above within the scope of the trial in Case 002/01.[14] The request was opposed by Ieng Sary[15] and Khieu Samphan.[16]

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5 See **E124/7.1/corr-1** List of Paragraphs and Portions of the Closing Order Relevant to Trial One in Case 002, 27 October 2011 (the original list of relevant paragraphs following severance), at paras. 1 and 3.

6 **E141** Response to Issues Raised by Parties in Advance of Trial and Scheduling of Informal Meeting with Senior Legal Officer on 18 November 2011, 17 November 2011 at p. 2.

7 **E124** Severance Order at para. 5.

8 **E124/2** Co-prosecutors' Request for Reconsideration of Severance Order Pursuant to Internal Rule 89ter, 3 October 2011.

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

10 **E124/3** Ieng Sary's Conditional Support to the Co-Prosecutors' Notice of Request for Reconsideration of the Terms of the "Severance Order pursuant to Rule 89*ter*," 3 October 2011.

11 **E124/4** Lead Co-Lawyer's Notice of Request for Reconsideration of the Terms of "Severance Order Pursuant to Internal Rule 89*ter*"; **E124/8** Lead Co-Lawyers and Civil Party Lawyers' Request for Reconsideration of the Terms of Severance Order E124, 18 October 2011.

12 **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 at para. 12.

13 **E124/7** *Ibid.* at para. 12 (emphasis added).

14 **E163** Co-Prosecutors' Request to Include Additional Crime Sites Within the Scope of the Trial in Case 002/1, 27January 2012.

15 **E163/1** Ieng Sary's Response to the Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of the Trial in Case 002/1, 3 February 2012.

16 **E163/4** Khieu Samphan Response to the Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of the First Trial of Case 002, 17 February 2012.

7. By memorandum dated 17 February 2012, the Trial Chamber noted the Co-Prosecutors' request and stated that it "may on its own motion decide in due course to extend the scope of trial in Case 002/01, in the exercise of its trial management discretion."[17]

8. On 3 August 2012, the Trial Chamber notified all parties of a Trial Management Meeting ("TMM"), which was "designed to facilitate planning for the remaining phases of Case 002/01 and to provide notice of further measures intended to expedite proceedings in the trial."[18] Having considered, but not disposed of, the Co-Prosecutors' 27 January 2012 request to expand the scope of the trial, the Trial Chamber indicated that it "may be willing to contemplate" a "modest extension" to include executions of evacuees at District 12 and of former Lon Nol soldiers and officials at Tuol Po Chrey, and crimes committed at Security Centre S-21 and the related execution site Choeung Ek, and invited specific submissions on this point.[19] The Trial Chamber also stated that it "agrees with the Co-Prosecutors that addition of these proposed additional sites may be in keeping with the chronological and logical sequence of events to be heard in Case 002/01."[20]

9. In advance of the TMM, the Co-Prosecutors notified the Trial Chamber that the inclusion of crime sites at S-21, District 12 and Tuol Po Chrey would significantly assist the Co-Prosecutors to meet their burden of proof by providing "strong evidence of the criminal intent behind the forced movements of the population."[21] The Co-Prosecutors indicated that witnesses relevant to these sites "would need to be heard by the Chamber in any event, as part of the Co-Prosecutors' proof of the true purpose behind the 17 April 1975 evacuation."[22] This position was reiterated at the TMM.[23] The Trial Chamber presumably disagreed with these arguments and disposed of the Co-Prosecutors' 27 January 2012 request by the Impugned Decision. It considered itself "unable to extend the scope of trial … so as to include factual allegations concerning S-21 and District 12,"[24] but included within the scope of the trial those killings at Tuol Po Chrey that "occurred immediately after the evacuation of Phnom Penh."[25] The Trial Chamber also included consideration of the *implementation* of the alleged policy relating to the "treatment of targeted

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17 **E172** Next group of Witnesses, Civil Parties and Experts to be heard in Case 002/01, 17 February 2012 at para. 9.
18 **E218** Scheduling of trial management meeting to enable planning of the remaining trial phases in Case 002/01 and implementation of further measures designed to promote trial efficiency, 3 August 2012.
19 **E218** *Ibid.* at paras. 13 and 15; **E218.1** Annex to Memorandum Regarding Co-Prosecutors' proposed extension of scope of trial in Case 002/1 (E163), 3 August 2012.
20 **E218.1** Annex to Memorandum Regarding Co-Prosecutors' Proposed Extension of Scope of the Trial in Case 002/1 (E163), 3 August 2012 at para. 3.
21 **E218/2** Notice of Co-Prosecutors' Position on Key Issues to be Discussed at the 17 August 2012 Trial Management Meeting (with Confidential Annex A), 15 August 2012 at para. 20.
22 **E218/2** *Ibid.* at para. 21.
23 **E1/114.1** Transcript, 17 August 2012 at pp. 95 ln. 21-102 ln. 3.
24 **E163/5** Impugned Decision at para. 2.
25 **E163/5** *Ibid.* at para. 3.

groups," in Case 002/01 but only insofar as it relates to the targeting of former officials of the Khmer Republic at Tuol Po Chrey.[26] On 19 October 2012, the Trial Chamber indicated in a separate memorandum that "no further extensions of the scope of trial in Case 002/01 would be entertained (163/5)."[27]

## III. ADMISSIBILITY

10. The Impugned Decision is subject to immediate appeal pursuant to Rule 104(4)(a), which allows for immediate appeals of "decisions which have the effect of terminating the proceedings." It is reasonable to conclude that the Impugned Decision effectively terminates proceedings in relation to: (1) execution of evacuees at sites in District 12; and (2) Security Centre S-21 and its related execution site at Choeung Ek. The exclusion of these crime sites from Case 002/01 and the improbability of further trials in Case 002 places the Impugned Decision firmly within the fold of the Chamber's prior jurisprudence allowing immediate appeals under Rule 104(4)(a).

### A. Rule 104(4)(a) envisages appellate review in circumstances where the prospect of future proceedings is intangibly remote

11. The Chamber has previously found that Rule 104(4)(a) must be subject to a "reasonable reading"[28] in light of its purpose, rather than a strict one. The Chamber's interpretation of Rule 104(4)(a) has held it to encompass a Trial Chamber's action that, while not amounting to a formal, legal termination of "proceedings," nevertheless "does not carry a tangible promise of resumption [and therefore] effectively terminates the proceedings."[29] Thus, the Chamber has held that where the consequences of a Trial Chamber's decision halting further judicial resolution of an issue are "grave enough" and implicate the same concerns as a termination of proceedings, immediate appeal is permissible.[30] As the Chamber noted, this interpretation "is confirmed by the specific choice of words in Internal Rule 104(4)(a) ('the *effect* of terminating the proceedings' as opposed to decisions simply 'terminating the proceedings')."[31] As a result,

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26 **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) at para. 1(vii).

27 **E223/2** Forthcoming document hearings and response to Lead Co-Lawyers' memorandum concerning the Trial Chamber's request to identify Civil Party applications for use at Trial (E208/4) and Khieu Samphan Defence request to revise corroborative evidence lists (E223), 19 October 2012.

28 **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; see also **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 (rejecting "the implicit proposition that this Chamber's jurisdiction over immediate appeals is strictly limited to the narrow circumstances listed in Rule 104(4)").

29 **E138/1/7** *Ibid.* at para. 15.

30 **E138/1/7** *Ibid.* at para. 15.

31 **E138/1/7** *Ibid.* at para. 15

termination of proceedings rationally must be read to encompass issues forestalled so far into an uncertain future that they have little chance of being heard. In the Co-Prosecutors' submission, any other reading would circumvent the intention of Rule 104(4)(a).

12. The need for immediate appeal under the current circumstances becomes even more apparent when considering that the only available alternative under the Rules is "appeal at the same time as an appeal against the judgment on the merits."[32] In its decision concerning the release of Accused Ieng Thirith, the Chamber considered the legal implications of a stay of proceedings that would bar "arriving at a judgment on the merits."[33] The Chamber's rationale applies equally to effective termination of proceedings in relation to specific factual allegations and charges, even when other charges continue to move forward.

13. In view of the practical, factual considerations set out below, the Impugned Decision bars the adjudication of charges related to the excluded crime sites. Furthermore, by the time of issuance of judgment in Case 002/01, the Co-Prosecutors will have no effective remedy before this Chamber in relation to the errors alleged, as no legal mechanism would be available and feasible to include the excluded crime sites on appeal. In sum, there will no opportunity to appeal this issue after final judgment on the merits. [34]

14. The Co-Prosecutors submit that a reasonable reading of Rule 104 must allow for an effective right to appellate review. In many cases, that right can be secured by appeal after judgment, but in some instances, the present one included, that right can only be protected at this juncture. That principle is reflected in other grounds authorised for immediate appeal under Rule 104(4). Harms of lost liberty under Rule 104(4)(b) and harms implicating the safety and identity of witnesses under Rule 104(4)(c) cannot be effectively remedied after judgment because the damage will have been irreparable, and therefore immediate appeal must be available. The same is true here.

### B. The prospect of future trials in Case 002 is, at most, intangibly remote

15. The Co-Prosecutors submit that it is reasonable to conclude that future trials in Case 002 will not occur, or that their possibility is at best intangibly remote. Counsel for Ieng Sary,[35] Nuon Chea[36]

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32 Internal Rule 104.

33 **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.

34 **E95/8/1/4** Decision on Ieng Sary's Appeal Against Trial Chamber's Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 19 March 2012 at para. 9 ("The right of appeal provided for in Internal Rule 104(4)(a) ensures that an avenue of appeal exists where the proceedings are terminated without arriving at a judgement and therefore without an opportunity to appeal against it.").

35 Julia Wallace, "Justice in the dock at Khmer Rouge Trials," 30 September 2012 *available at*: http://www.aljazeera.com/indepth/features/2012/09/20129251415569174 63.html (Quote attributed to Mr. Karnavas:

and the Lead Co-Lawyers for the Civil Parties[37] have all expressed this view. With the possibility of further trials so remote, there will be no opportunity to address the criminal responsibility of the Accused concerning the excluded crime sites. The Co-Prosecutors deeply regret this fact, and would have wished to see the Accused stand trial for all of the crimes alleged in the Closing Order. However, the Co-Prosecutors, and indeed the Court, must operate within the practical realities they face (including those set out below), rather than the ideal conditions they would desire.

16. The three remaining Accused in Case 002 are all of an advanced age. Ieng Sary is 87 years old. Nuon Chea is 86 years old. Khieu Samphan is 81 years old. The life expectancy of males in Cambodia is approximately 57.[38] These facts alone speak volumes. As the Court has witnessed in relation to Ieng Thirith, it is not only the possibility of demise, but also health concerns which become more serious with age that can divest the Court of further opportunities to try the Accused. Indeed, Ieng Sary and Nuon Chea have repeatedly purported that these concerns affect their ability to physically, and in some instances mentally, attend trial to different degrees.[39]

17. The likelihood of a health-related stay of proceedings against one or more of the remaining Accused that would prevent further trials becomes even higher when one considers that additional time will lapse before the conclusion of trial in Case 002/01, issuance of judgment, and a likely interstitial period of delay for a variety of potential reasons even if a Case 002/02 goes forward. The Trial Chamber itself has noted that "there is a real concern as to whether the Accused will be physically and mentally able to participate in a lengthy trial."[40] The Trial Chamber's recent decision to reduce the number of sitting days per week from four to three compounds this concern.[41]

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"Anyone experienced in these sort of mega-cases would readily foresee, when factoring the evidence involved and ages of the accused, that the odds of trying the remainder ... was nil. Fantasy.").

36 **E1/136.1** Transcript, 22 October 2012 at p 9 ln. 3-12 (Mr Ianuzzi: "…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.").

37 **E124/8** Lead Co-Lawyers and Civil Party Lawyers' Request for Reconsideration of the Terms of the Severance Order E124, 18 October 2011 at para. 1 ("…we believe there is a possibility that this trial could be the last.").

38 World Health Organization, "Cambodia: Figures for 2009," *available at*: http://www.who.int/countries/khm/en/.

39 See *e.g.* **E1/125.1** Transcript, 21 September 2012 (hearing discussing Ieng Sary's health condition); **E1/120.1** Transcript, 3 September 2012 at pp. 2 ln. 4-25 and 51 ln. 3-16 (noting Ieng Sary and Nuon Chea's requests to follow proceedings from a holding cell due to health concerns); **E1/121.1** Transcript, 4 September 2012 at p. 2 ln. 4-25 (noting Ieng Sary's request to follow proceedings from holding cell due to health); **E1/122.1** Transcript, 5 September 2012 at pp. 2 ln. 4-23 and 53 ln. 2-17 (noting Ieng Sary's and Nuon Chea's requests to follow proceedings from holding cell due to health concerns); **E1/123.1** Transcript, 6 September 2012 at pp. 1 ln. 22-25, 3 ln. 1-18 and 68 ln. 11-25 (same).

40 **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 at para. 11.

41 Press release, "Trial Chamber reduces number of weekly hearing days in Case 002/1," 23 October 2012, *available at*: http://www.eccc.gov.kh/en/articles/trial-chamber-reduces-number-weekly-hearing-days-case-0021.

18. Indeed, there remain numerous unresolved issues as to how and when any potential Case 002/02 trial could go forward. There is at least the potential that a judgment on *appeal* in Case 002/01 may need to be issued before any hypothetical Case 002/02 may proceed. The legal and practical issues yet to be resolved include concerns relating to how to address judicial notice of adjudicated facts and *res judicata* with respect to any findings in Case 002/01.[42] The Co-Prosecutors have previously raised these concerns with the Trial Chamber, which indicated that it did not consider "that any appeal of the first verdict prevents continuation of the subsequent trials in Case 002."[43] At the very least, however, a full exploration of the issues may be necessary. That process itself will inevitably be time-consuming.

19. Rule 21 provides further interpretative guidance in support of the admissibility of this Appeal. Rule 21 directs that the Internal Rules "shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings." Although there is no general right to interlocutory appeal,[44] the plain language of Rule 21 establishes that the rights of victims and the interests of legal certainty and transparency are among interests that are paramount in the interpretation of the Rules. Allowing an immediate appeal in this instance would have no adverse impact on the rights of any Party, but would protect the rights of victims seeking to have the crimes committed against them prosecuted. It would also promote legal certainty and transparency for the Accused, Civil Parties and the Co-Prosecutors regarding the validity of, and the reasoning behind, the severance process, and whether there is any realistic expectation that the Court will adjudicate allegations concerning the excluded crime sites in the foreseeable future.

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42 **E124/2** Co-Prosecutors' Request for Reconsideration of "Severance Order Pursuant to Internal Rule 89*ter*," 3 October 2011 at paras. 26-28. The Co-Prosecutors noted that there may be legal impediments to using the factual and legal foundation from the first trial in subsequent trials. The methods through which subsequent trials could be expedited are judicial notice of adjudicated facts, and *res judicata*. However these principles may be legally barred pending final appeal judgement in the first trial. International jurisprudence indicates that the necessary condition for "judicial notice of adjudicated facts" is that the facts be "truly adjudicated", one aspect of which is that the relevant facts from the trial judgement: (1) have not been appealed, or (2) have been finalised on appeal. The application of the principle of *res judicata* likewise requires that the legal issues have been fully litigated. Thus, there is some question regarding the ability of the Trial Chamber to take advantage of these mechanisms prior to the issuance of an appeal judgement. Potential issues of law that could impact the second trial include amnesty and pardon, definitions of international crimes and modes of liability, and admissibility and proper use of evidence. Further complicating the utilization of adjudicated facts is that the Trial Chamber itself has stated that "there is no legal basis in the Law on the Establishment of the ECCC or in the Internal Rules for the Chamber to take judicial notice of adjudicated facts or for facts of common knowledge to be applied before the ECCC." **E69/1** Decision on Ieng Sary's Motions Regarding Judicial Notice of Adjudicated Facts from Case 001 and Facts of Common Knowledge Being Applied in Case 002, 4 April 2011 at p. 3.

43 **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 at paras. 7 and 8, and fn. 10.

44 **E154/1/1/4** Decision on Ieng Sary's Appeal Against the Trial Chamber's Decision on its Senior Legal Officer's Ex Parte Communications, 25 April 2012.

### C. The Appeal is filed within the applicable deadline

20. This Appeal is filed within the time limit prescribed in Rule 107(1), namely within 30 days of the Impugned Decision. While the initial Severance Order was made in September 2011, the Trial Chamber explicitly left open the possibility of including further crime sites in this trial, both in the Severance Order, and in the Decision on the Reconsideration Request. The issue of further crime sites therefore remained open, and the Co-Prosecutors refrained from appealing the original order, until the scope of the severance was finally defined. It is only following the Impugned Decision that the severance has taken its full force, effectively terminating the proceedings in relation to the S-21 and District 12 crime sites.

## IV. SUBMISSIONS IN SUPPORT OF THE APPEAL

### A. The Trial Chamber erred in law, and/or erred in the exercise of its discretion, by failing to apply the correct legal standard for severance of charges

21. The Co-Prosecutors submit that the Trial Chamber erred in law, or discernibly erred in the exercise of its discretion, by, *inter alia*, failing to apply the correct legal standard for severance of charges in rejecting the District 12 and Security Centre S-21 crime sites. As indicated above, it was the Impugned Decision that definitively set the scope of trial in Case 002/01. The Trial Chamber clarified the legal consequences of the decision in a memorandum dated 19 October 2012, stating that "no further extensions of the scope of trial in Case 002/01 would be entertained."[45] The Impugned Decision is thus equally governed by the applicable law on severance of charges as it forms an integral part of the Trial Chamber's severance of the case.

22. As stated by the Trial Chamber, the Impugned Decision was directed by consideration of the following factors: risk of the substantial prolongation of the trial in Case 002/01; whether the crime sites were "closely connected to the existing factual allegations in Case 002/01"; and whether the inclusion of the additional sites "fits within the logical sequence of the trial in Case 002 as described in the Severance Order."[46] The Trial Chamber also noted that it was conscious of previous "delays," and therefore did not "consider significant expansion of the scope of trial to be a prudent exercise of its trial management discretion."[47] The Co-Prosecutors will address the errors relating to these considerations in **Section (C)** below.

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45 **E223/2** Forthcoming document hearings and response to Lead Co-Lawyers' memorandum concerning the Trial Chamber's request to identify Civil Party applications for use at trial (E208/4) and Khieu Samphan Defence request to revise corroborative evidence lists (E223), 19 October 2012 at para. 3.

46 **E163/5** Impugned Decision at para. 2.

47 **E163/5** *Ibid* at para. 2.

23. In this section, the Co-Prosecutors will illustrate how the Trial Chamber erred in the exercise of its discretion under Rule 89*ter* by failing to consider whether the charges included in Case 002/01 would be reasonably representative of the crimes charged in the Closing Order. The exclusion of the crime sites requested by the Co-Prosecutors leaves charges which are, in fact, not reasonably representative of the crimes charged, to the detriment of the rights and interests of victims, the Co-Prosecutors, and the goals of national reconciliation and an accurate historical record. Viewed from the perspective of an error of law, the Trial Chamber's incorrect determination of the law on severance has resulted in a decision contrary to that which would have followed a correct application of the law. Viewed from the perspective of an error in the exercise of discretion, the Trial Chamber's erroneous assessment of the appropriateness and impact of the proposed extensions occasions irreparable prejudice to the Co-Prosecutors and the interests they represent.

i. *Appellate review of the Trial Chamber's exercise of discretion*

24. The Trial Chamber describes the Impugned Decision as an exercise of its "trial management discretion."[48] The Co-Prosecutors accept that routine trial management discretion should not be lightly disturbed on appeal, in recognition of a trial chamber's "organic familiarity with the day-to-day conduct of the parties and practical demands of the case."[49] It is well established in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") that deference should be accorded on appeal to "various types of decisions for purposes of fair and expeditious management of a trial."[50]

25. The deference due to trial chambers' discretionary decisions is not, however, total. It does not foreclose appellate review of whether a given action was within the bounds of a trial chamber's discretion, or was premised on incorrect law or facts. In the words of the ICTY Appeals Chamber, an appeals court should overturn a trial chamber's decision on a discretionary issue where "it is found to be (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse

48 **E163/5** *Ibid.* at para. 2.

49 *Prosecutor v. Nikola Šainović (formerly Prosecutor v. Milan Milutinović et al.)*, Case No. IT-05-87-AR73.1, Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution From Adding General Wesley Clark to its 65*ter* Witness List (ICTY Appeals Chamber), 20 April 2007 at para. 8.

50 *Ibid.* at para. 8.

of the Trial Chamber's discretion."[51] The ECCC Pre-Trial Chamber has followed the jurisprudence of the Appeals Chambers of the *ad hoc* Tribunals on this issue.[52]

26. These principles also apply to discretionary trial management decisions. Examples of such decisions that have been subjected to appellate review include decisions on provisional release,[53] and decisions as to the number of witnesses to be called in a case.[54]

27. The ICTY Appeals Chamber in *Haradinaj* was seized of an appeal brought by the Prosecution claiming a violation of the right to a fair trial based on witness scheduling decisions by the trial chamber.[55] The Appeals Chamber noted that "Trial Chamber decisions related to trial management, such as those determining the time available to a party to present its case as well as requests for additional time to present evidence, are discretionary decisions to which the Appeals Chamber accords deference."[56] However, the Appeals Chamber also stressed the importance of assessing a discretionary decision in light of all of the relevant factors, and not in the abstract.[57]

28. The Appeals Chamber in *Haradinaj* ultimately found that the Trial Chamber had abused its discretion because it had failed to make its decisions regarding the scheduling of witnesses with a full consideration of the relevant factors including the ultimate goals of the trial. It held that the Trial Chamber had placed "undue emphasis" on factors that, viewed abstractly, were legitimate (such as respecting time allotments for presentation of evidence)[58] but that, under the circumstances, were a "misplaced priority."[59] The Appeals Chamber also criticised "the Trial Chamber's preference for meeting its deadlines over assisting the Prosecution in overcoming"

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51 *Prosecutor v. Jadranko Prlić et al.,* Case No. IT-04-74, Decision on Prosecution's Appeal Against the Trial Chamber's Decision on Slobodan Praljak's Motion for Provisional Release (ICTY Appeals Chamber), 8 July 2009 at para. 5.

52 **D164/4/13** Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, ERN 00402746-62 at paras. 22-27 (citing *Prosecutor v. Slobodan Milošević*, Case No. IT 02-S4-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Assignment of Defence Counsel (ICTY Appeals Chamber), 1 November 2004 at paras. 9-10); **D140/9/5** Decision on Ieng Sary's Appeal against the Co-Investigating Judges' Order Denying his Request for Appointment of an Additional Expert to Re-examine the Subject Matter of the Expert Report submitted by Ms Ewa Tabeau and Mr Theay Kheam, 28 June 2010 at paras. 15-17; **D356/2/9** Decision on Nuon Chea's Appeal Against the Co-Investigating Judges' Order Rejecting the Request for a Second Expert Opinion, 1 July 2010 at paras. 16-18.

53 *Prosecutor v. Jadranko Prlić et al,* Case No. IT-04-74, Decision on Prosecution's Appeal Against the Trial Chamber's Decision on Slobodan Praljak's Motion for Provisional Release (ICTY Appeals Chamber), 8 July 2009 at para. 4.

54 *Prosecutor v. Nikola Šainović (formerly Prosecutor v. Milan Milutinović et al.),* Case No. IT-05-87-AR73.1, Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65*ter* Witness List (ICTY Appeals Chamber), 20 April 2007 at para. 9; *Prosecutor v. Milan Martić,* Case No. IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić (ICTY Appeals Chamber), 14 September 2006 at para. 6 and fn. 7.

55 *Prosecutor v. Ramush Haradinaj, et al.,* Case No. IT-04-84-A, Judgement (ICTY Trial Chamber), 19 July 2010 at paras. 14-33.

56 *Ibid.* at para. 17.

57 *Ibid.* at para. 39.

58 *Ibid.* at para. 40.

59 *Ibid.* at para. 40.

hurdles in the way of a full and fair trial, and the prioritisation of logistical considerations over substantive ones.[60] As a result, while "[t]hese efforts might have been within the scope of [the Trial Chamber's] discretion in a trial conducted under normal circumstances … the context of this trial was far from normal and required the Trial Chamber to proactively focus on ensuring the fairness of the proceedings … This required flexibility from the Trial Chamber with regard to subsidiary issues of witness scheduling, trial logistics, and deadlines."[61] The Appeals Chamber held that the Trial Chamber's failure to account for the full range of relevant factors, and its "form over function" approach had undermined the fairness of the proceedings and resulted in a miscarriage of justice.[62]

29. Furthermore, while trial management discretionary decisions are subject to deferential but meaningful review, the Co-Prosecutors submit that decisions on severance of charges, while necessarily *involving* issues of trial management, are of a broader significance. The discretion to sever proceedings is concerned with fundamental legal interests beyond issues of witness schedules and filing deadlines, and therefore invites closer scrutiny on appellate review.

30. As the Co-Prosecutors will demonstrate below, by failing to apply the correct legal principles in the Impugned Decision, misdirecting itself to the relevant considerations in the exercise of its discretion, and misconstruing the facts before it, the Trial Chamber has arrived at a wholly unreasonable decision which has a direct adverse effect on the fundamental rights and legal interests of the Parties. It is therefore entirely appropriate for the Supreme Court Chamber to amend the Impugned Decision and order a modification of the scope of Case 002/01.

ii. *In severing charges, primary consideration must be given to the requirement of reasonable representativeness*

31. Rule 89*ter* provides, in the relevant part, that "[w]hen the interest of justice so requires, the Trial Chamber may at any stage order the separation of proceedings in relation to one or several accused and concerning part or the entirety of the charges in an Indictment." The Trial Chamber's discretion under this Rule is limited by the requirement that separation must be in the "interests of justice." There is no guidance provided in the Rules, in the ECCC Law or in Cambodian criminal procedure as to the elements to be taken into account in considering the "interests of justice" in the context of a severance. It is therefore appropriate to look to international practice, in accordance with Article 33 new of the ECCC Law.

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60 *Ibid.* at paras. 41, 43 and 46.
61 *Ibid.* at para. 48.
62 *Ibid.* at para. 49.

32. The ICTY Rules of Procedure and Evidence provide a mechanism for a trial chamber to, directly or indirectly, order a reduction of the number of counts charged in an indictment and fix the number of factual allegations (crime sites and/or incidents) to be adjudicated.[63] Under Rule 73*bis* (D), a chamber may, after hearing the Prosecutor:

> *[F]ix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes, are reasonably representative of the crimes charged.*[64]

33. Although the Trial Chamber has previously disagreed with the Co-Prosecutors' arguments regarding the role of the prosecution in the severance process, which were based in part on ICTY jurisprudence,[65] the Trial Chamber did not disagree that, where further trials are unlikely, the charges should be reasonably representative of the Closing Order as a whole. However, it held that since "no allegations or charges in the Indictment are discontinued in consequence of the Severance Order, there is no need for the first trial to be reasonably representative of the totality of charges in the Indictment."[66] As the Co-Prosecutors have argued in relation to admissibility, in **Section III** above, the likelihood that there will be further trials in Case 002 is intangibly remote. Given this reality, the Trial Chamber was required to ensure that Case 002/01 is, *to the extent possible*, reasonably representative of the charges in the case as a whole. The Trial Chamber acknowledges that "there is real concern as to whether the Accused will be physically and mentally able to participate in a lengthy trial."[67] The same concern holds true, *a fortiori*, in regards to any subsequent trials in Case 002.

34. Where ICTY Trial Chambers have considered severance, they have been centrally conscious of the need to retain a reasonably representative selection of the crimes charged. Indeed, the Trial Chamber in *Haradinaj* declined to reduce the scope of the indictment, even after it had invited

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63 See also ICTY Rules of Procedure and Evidence, IT/32/Rev. 47, 28 August 2012 Rule 73bis (E) and Rule 82(b) (separation of trials of co-accused) and ICTR Rules of Procedure and Evidence, 9 February 2010 Rule 72 (A) (severance of counts and separation of trials) and Rule 82 (separation of trials). At the ICC, the Prosecutor may amend the charges with the permission of the Trial Chamber. In one case, the Prosecutor was effectively 'invited' during a status conference to invoke his power to amend the charges. See *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Transcript (ICC Trial Chamber I), 20 November 2007 at p. 36 ln. 10- 37 ln. 16.

64 ICTY Rules of Procedure and Evidence, IT/32/Rev. 47, 28 August 2012, Rule 73*bis* (D).

65 **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 at paras. 3-6 (addressing only the "procedural modalities before the ECCC where severance is contemplated"). The Co-Prosecutors submit that those criteria concerning the substantive decision of how to sever a case are equally applicable to inquisitorial as to adversarial systems, and therefore should be applied at the ECCC. The Trial Chamber previously concluded that the Co-Prosecutors' role in regards to severance at the ECCC was not similar to that at the ICTY because the latter's proceedings are adversarial and the former's are "inquisitorial and [its] indictments are judicially controlled". **E124/7** *Ibid.* at para. 4.

66 **E124/7** *Ibid.* at para. 9.

67 **E124/7** *Ibid.* at para. 11.

the Prosecutor to suggest ways to do so, because it was persuaded that "[t]he resulting reduced indictment may no longer be reasonably representative of the case as a whole."[68] The Trial Chamber in *Šešelj*, while reducing the crime sites on which it heard evidence, was careful to ensure that the crime sites or incidents remaining were "reasonably representative of the crimes charged,"[69] and emphasised that the reduction in evidence in relation to specific crime sites "will not have the effect of removing any of the charges under the counts."[70] As required by Rule 73*bis*, the *Šešelj* Trial Chamber took into account the variety and number of the affected victims, and the geographical scope of the charges in the Indictment.[71] The *Milutinović* Trial Chamber, recognising the need to obtain "reasonable representativeness…having regard to the factors listed in the Rule, and in light of all the relevant circumstances of the case,"[72] included those charges that were representative of the "fundamental nature or theme of the case."[73]

35. What all of these decisions demonstrate is that a trial chamber must ensure that its exercise of discretion to sever proceedings upholds the legal obligation to adequately reflect the crimes with which an accused has been charged. This ensures that the severed trial does not provide an inaccurate portrait of the potential culpability of the accused, nor deny victims the opportunity to see justice done.

iii. *The Impugned Decision fails to consider or apply the requirement of reasonable representativeness of charges and cannot satisfy the "interests of justice" test*

36. In the Impugned Decision, the Trial Chamber does not consider whether the crime base events included in Case 002/01 are reasonably representative of the crimes charged. Indeed, they are not. Case 002/01 now focuses on crimes committed as part of two forced transfers of civilian populations, and the execution of officials of the Khmer Republic regime (only one category of the CPK's perceived enemies) over a very limited period of time, in one location. Given the substantial risk that the Accused will not be subject to further trials at the ECCC, the Impugned Decision effectively excludes judicial accounting for some of most serious criminal conduct alleged in the Closing Order. The exclusion of S-21, a mass crime site which was central to the implementation of the CPK's alleged policy of killing its perceived enemies, removes from the first trial consideration of events which are crucial to a proper understanding of Case 002 as a

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68 *Prosecutor v. Ramush Haradinaj et al.*, Case No. Case IT-04-84-A, Decision Pursuant to Rule 73 *bis* (D) (ICTY Trial Chamber), 22 February 2007 at para. 11.

69 *Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67, Decision on the Application of Rule 73 *bis* (ICTY Trial Chamber), 8 November 2006 at paras. 10 and 12.

70 *Ibid.* at para. 32.

71 *Ibid.* at paras. 25 and 30.

72 *Prosecutor v. Milutinović*, Case No. IT-05-87, Decision on Application of Rule 73 *bis* (ICTY Trial Chamber), 11 July 2006 at para. 11.

73 *Ibid.* at para. 1; see also *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-I, Order to the Prosecution Under Rule 73 *bis* (D) (ICTY Trial Chamber) 22 July 2009 at para. 3.

whole. In stark contrast to international practice, such severance is not representative of the crimes alleged in the Closing Order, taking into account their classification, nature and scale, where they were committed, and their impact on victims.

37. The exclusion of even a small representative sample of security centres and execution sites from the first trial will lead to a situation in which the Accused – alleged senior leaders of Democratic Kampuchea – may never stand trial for some of the most important core crimes with which they have been charged. The impact of such an outcome on the Civil Parties and the millions of victims, whose interests the Co-Prosecutors represent, must not be underestimated.

38. Furthermore, the unduly narrow character of Case 002/01, as defined by the Impugned Decision, will diminish the ECCC's impact on furthering national reconciliation in Cambodia and producing an accurate historical record of the crimes allegedly committed pursuant to the CPK's criminal policies. The United Nations General Assembly has recognised the pursuit of national reconciliation and justice as a key objective of the ECCC.[74] The Pre-Trial Chamber has held that:

> *[The ECCC Agreement] guides the Judges and Chambers of the ECCC to not only seek the truth about what happened in Cambodia, but also to pay special attention and assure a meaningful participation for the victims of crimes committed as part of its pursuit for national reconciliation.*[75]

39. The importance of establishing an accurate historical record of mass crimes in proceedings before internationalised tribunals has also been recognised by the ICTY. In *Nikolić*, the Trial Chamber recognised the role of international criminal tribunals in contributing to the ascertainment of "the truth about the possible commission of war crimes, crimes against humanity and genocide ... thereby establishing an accurate, accessible historical record."[76]

40. Therefore, any severance of the Closing Order, while necessary, must be undertaken in a manner that facilitates the attainment of an accurate historical record, justice and national reconciliation. In the present case, focusing on the first two phases of forced movements and executions of former Khmer Rouge officials in one location over a limited period of time would significantly diminish the Court's advancement of these objectives.

41. For these reasons, the Co-Prosecutors submit that the Trial Chamber's failure to consider and apply the correct legal principles and factual considerations amounts to an error of law or a

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74 United Nations General Assembly Resolution 57/228 "Khmer Rouge Trials," U.N. Doc. No. A/RES/57/228, 27 February 2003 at para. 2; Internal Rules at para. 2 of the Preamble.

75 **D404/2/4** Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011 at para. 65.

76 *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, Sentencing Judgment (ICTY Trial Chamber), 2 December 2003 at para. 60.

discernible error in the exercise of its discretion. Had the Trial Chamber correctly applied the applicable principles, it could only have upheld the Co-Prosecutors' modest request for an expansion of Case 002/01. Its error therefore invalidates the Impugned Decision, and causes prejudice to the Co-Prosecutors.

### B. The Trial Chamber erred in law by failing to render a proper decision in form and content, including the provision of adequate reasons

42. The Co-Prosecutors further submit that the Trial Chamber erred in law by failing to provide adequate reasons for the Impugned Decision, falling short of the standard set by this Chamber, as well as the applicable international principles.

43. The applicable law on reasoned decisions clearly establishes that judicial bodies have a duty to provide decisions whose *form* reflects an authoritative judicial act and whose *content* provides adequate reasons. As this Chamber observed in disposing of a recent Defence appeal:

> *The Supreme Court Chamber observes that, in the first place, a court's decision must display* indicia *of an authoritative judicial act. In this respect, it is necessary for a judicial decision to dispose of a legal matter before it in a definite manner. As such, a judicial decision should contain an operative part ("enacting clause" or "disposition") which resolves the substantive and/or procedural issue by creating, altering, dissolving or confirming a law-based relation concerning the parties... Further, as held by the Trial Chamber on a different occasion, all judicial decisions - whether oral or written - must comply with a court's obligation to provide adequate reasons as a corollary of the accused's fundamental fair trial rights. Indeed, the right to receive a reasoned decision forms part of the right to be heard.*[77]

44. Equally, the statutes governing the ICC, the ICTY and the ICTR require reasoned opinions for judicial decisions.[78] The ICTY Appeals Chamber has held that a reasoned decision helps to secure fundamental human rights principles governing a defendant's right to a fair trial and the right to an appeal.[79] A trial chamber therefore "has a general obligation to set out a reasoned opinion"[80] that provides sufficient reasoning for their assessment and "adequately balanc[es] all the relevant factors."[81] The "extent of the [Chamber's] reasoning will depend on the

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77 **E176/2/1/4** Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012 at para. 25 (internal citations omitted).

78 *See* Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res 827, Art. 23 (1993); Statute of the International Tribunal for Rwanda, S.C. Res. 955, Art. 22 (1994); Rome Statute of the International Criminal Court, Art. 74 (17 July 1998).

79 International Covenant on Civil and Political Rights, art. 14, 999 U.N.T.S. 171 (9 December 1996). See also *Prosecutor v. Momir Nikolić,* Case No. IT-02-60/1-A, Judgment on Sentencing Appeal (ICTY Appeals Chamber), 8 March 2006 at para. 96; *Prosecutor v. Dragoljub Kunarac*, et al., Case Nos. IT-96-23 & IT-96-23/1-A, Judgment (ICTY Appeals Chamber), 12 June 2002 at para. 41.

80 *Prosecutor v. Momir Nikolić,* Case No. IT-02-60/1-A, Judgment on Sentencing Appeal (ICTY Appeals Chamber), 8 March 2006 at para. 96.

81 *Prosecutor v. Dragoljub Kunarac*, et al., Case Nos. IT-96-23 & IT-96-23/1-A, Judgment (ICTY Appeals Chamber), 12 June 2002 at para. 324.

circumstances of the case."[82] However, at a minimum, a trial chamber must "provide reasons in support of its findings on the substantive consideration relevant for its decision."[83] The Co-Prosecutors respectfully submit that the Impugned Decision fails to comply with these requirements.

45. First, concerning the *formal* requirements for judicial decisions identified by this Chamber, the Co-Prosecutors observe that the Impugned Decision takes the form of a four-paragraph memorandum to the Parties over the signature of the President, three paragraphs of which concern the Impugned Decision. There is no formal operative part, enacting clause or disposition. Indeed, as set out in paragraph 21 above, the legal consequences of the Impugned Decision (the Chamber's decision to finally exclude consideration of any further sites in Case 002/01) became fully apparent only through a subsequent memorandum from the Trial Chamber.[84] The form of the Impugned Decision therefore fails to comply with the Supreme Court Chamber's directive that a decision must "display *indicia* of an authoritative judicial act."[85] This is of particular concern considering that the matters with which the decision deals are of enormous legal and historical significance, and go to the very heart of Case 002.

46. In addition, memoranda have no defined legal status under the Internal Rules. Where decisions on matters of substance are rendered in this fashion, parties are placed in a position of relative uncertainty regarding the timing and availability of appeal, the unanimity or super-majority supporting the decision and whether the decision-making procedure differed from that adopted when issuing formal, written decisions.

47. Second, concerning the *content* of the Impugned Decision, the Co-Prosecutors have argued above that the Impugned Decision excludes consideration of a centrally "relevant factor,"[86] being the directly-applicable international standards on severance of charges. Under the applicable international standards considered above, this would, in itself, indicate that the Impugned Decision is inadequately reasoned. The summary reasons canvassed in support of the

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82 *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 (OA 5), Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I Entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" (ICC Appeals Chamber), 14 December 2006 at para. 20.

83 *Prosecutor v. Édouard Karemera*, Case No. ICTR-98-44-AR73.1, Decision on Mathieu Ngirumpatse's Appeal from the Trial Chamber Decision of 17 September 2008 (ICTR Appeals Chamber), 30 January 2009 at para. 19.

84 **E223/2** Forthcoming document hearings and response to Lead Co-Lawyers' memorandum concerning the Trial Chamber's request to identify Civil Party applications for use at trial (E208/4) and Khieu Samphan Defence request to revise corroborative evidence lists (E223), 19 October 2012 at para. 3.

85 **E176/2/1/4** Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012 at para. 25.

86 *Prosecutor v Dragoljub Kunarac*, et al., Case No. IT-96-23 & IT-96-23/1-A, Judgment (ICTY Appeals Chamber), 12 June 2002 at para. 324.

Impugned Decision amount to suppositions, all of which the Co-Prosecutors will demonstrate (in **Section (C)** below) to be ill-founded.

48. Furthermore, the Impugned Decision fails to provide reasons justifying a significant change of view on the part of the Trial Chamber. In the Decision on the Reconsideration Request, while leaving open the matter of adding further crime sites in Case 002/01, the Trial Chamber stated that it would be "guided" by the Co-Prosecutors' views "as to priority allegations for consideration during later phases of the trial."[87] As indicated in the Procedural History, on 3 August 2012, the Trial Chamber agreed with the Co-Prosecutors that the addition of Security Centre S-21 and the District 12 executions "may be in keeping with the chronological and logical sequence of events to be heard in Case 002/01."[88] Two months later, in the Impugned Decision, the Trial Chamber held that such an extension would risk a "substantial prolongation of the trial in Case 002/01," indicating that it "remains unconvinced that these additional crime sites are closely connected to the existing factual allegations in Case 002/01 or that their inclusion fits within the logical sequence of the trial."[89] No explanation is given for this fundamental modification of the Trial Chamber's view on a core issue in Case 002. This failure to give adequate reasons further invalidates the Impugned Decision.

### C. The Trial Chamber's errors in the consideration of a risk of "substantial prolongation of the trial" and a nexus between the sites

49. The Impugned Decision excludes S-21 and executions in District 12 from the scope of trial in Case 002/01 on the basis of:

a) The "risk of a substantial prolongation of the trial in Case 002/01" arising from (i) likely Defence objections to the proposed extensions, (ii) anticipated difficulties in limiting the scope of the extensions, and (iii) the number of witnesses sought by the parties.

b) The ostensibly insufficient nexus between these crime sites and the existing factual allegations in Case 002/01, or a lack of a logical sequence in adding the proposed crime sites to the current trial.

c) Delays occasioned by issues such as the health / fitness of the Accused to stand trial.[90]

50. The Co-Prosecutors submit that the Chamber has erred (in fact, law, and in exercising its discretion) by, *inter alia*, failing to apply the correct legal criteria, taking into account extraneous

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87 **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 at para. 12.
88 **E218.1** Co-Prosecutors' proposed extension of scope of trial in Case 002/1 (E163), 3 August 2012 at para. 3.
89 **E163/5** Impugned Decision at para. 2.
90 **E163/5** *Ibid.* at para. 2.

considerations, failing to construe correctly the factors impacting the length of the trial, and misunderstanding the nexus between the current issues dealt with in Case 002/01 and the proposed additional sites. Considered individually or combined, these errors of law, fact, and discretion (as applicable) invalidate the Impugned Decision, have occasioned a miscarriage of justice, and have caused injustice to the Co-Prosecutors. This is simply because a proper application of the relevant law and facts, or a correct exercise of the Trial Chamber's discretion, would have resulted in a different decision – namely the inclusion of the proposed sites in Case 002/01. This section of the Appeal addresses each set of the Trial Chamber's considerations listed above.

i. *Reliance on "anticipated Defence objections"*

51. The Trial Chamber's consideration of "likely Defence objections" to the inclusion of S-21 and executions in District 12 as a factor that would risk a substantial prolongation of the trial amounts to an error of law and/or fact.

52. First, anticipated objections from any Party are not a legitimate factor in the consideration of the severance of a case, or in the determination of the specific terms of severance. One of the Trial Chamber's core functions is to resolve disputes between the parties, and the fact that a party may take issue with the Trial Chamber's decision should not have weighed on the Chamber's application of the law.

53. Second, the Chamber also erred by considering that Defence objections may substantially prolong the trial. At the 17 August 2012 TMM, the Defence were invited to make submissions on the expansion of the scope of trial, in response to prior written notice of the Co-Prosecutors' position.[91] Each Defence team took the opportunity to put their submissions on the record.[92] Once the Trial Chamber rendered its decision on the scope of trial, any further Defence objections became entirely redundant. As the Trial Chamber has correctly stated on a number of occasions, while its decisions are subject to appeal before the Supreme Court Chamber, they are not open to objections or critique by parties in the course of proceedings.[93] Therefore, no

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91 **E1/114.1** Transcript, 17 August 2012 at p. 93 ln. 7 and following.

92 See *e.g.* **E1/114.1** *Ibid.* at p. 105 ln. 12 and following, p. 113 ln. 5 and following and p. 116 ln. 12 and following.

93 See *e.g.* **E214** Decision on Nuon Chea Defence Counsel Misconduct, 29 June 2012 at para. 12; **E214/4** Addendum - Continuing professional misconduct of lawyer admitted to your Bar Association, 26 October 2012 at p. 2 (quoting Judge Lavergne's ruling on 19 October 2012: "Over the course of this morning's hearing, Counsel Ianuzzi, international counsel for the defence of the accused person Nuon Chea, proceeded once again to make several and various comments with the view to contest or criticize the decisions that had just been issued by the Chamber with respect to the conduct of proceedings. On many occasions, counsel had been forewarned that such behaviour and such comments were inappropriate and that he was no longer authorized to continue.").

Defence "objections" made after a ruling on the scope of the case could cause a prolongation of the trial.

ii. *Reliance on difficulties in "limiting the scope of the proposed extensions"*

54. In concluding that an expansion of Case 002/01 to include S-21 and District 12 crime sites would risk a substantial prolongation, the Trial Chamber additionally relies on unspecified "anticipated difficulties in limiting the scope of [the] proposed extensions."[94] The Co-Prosecutors submit that this reliance amounts to a discernible error in the exercise of the Chamber's discretion insofar as the Trial Chamber has failed to take into account the powers available to it to manage the proceedings and control the scope of evidence adduced.

55. The Trial Chamber clearly has extensive powers (and an obligation) to manage the proceedings effectively and has indeed exercised those powers in this trial. For example, the Chamber has the authority to determine the number of witnesses, civil parties and experts to be heard in each phase of the trial, and the length of time available to the Parties to examine these individuals.[95] It has exercised this authority by, *inter alia*, deciding on witnesses to be called, by devising and modifying the order of call, and by prescribing specific time limits for the examination of each individual heard thus far.[96] The Chamber has the power to define and limit the scope of issues on which witnesses, civil parties and experts can be examined,[97] and has exercised this power by giving instructions as to the relevant matters[98] and disallowing questions which it deemed to be dealing with facts beyond the scope of the current trial.[99] The Trial Chamber also has the power

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94 **E163/5** Impugned Decision at para. 2.

95 Internal Rules 84, 85, 91 and 91*bis*.

96 See *e.g.*, **E131/1.1** Partial List of Witnesses, Experts and Civil Parties for First Trial in Case 002, 26 October 2011; **E35/2** Decision on Defence Requests Concerning the Filing of Material in Preparation for Trial and Preliminary Objections, 4 April 2011 at para. 11 ("According to the ECCC legal framework, the decision as to which individuals are to be heard is ultimately for the Chamber"); **E141** Response to Issues by Parties in Advance of Trial and Scheduling of Informal Meeting with Senior Legal Officer on 18 November 2011, 22 November 2011 at p. 4 ("Time limits will be imposed by the Chamber where this is considered necessary."); **E93** Directive in advance of Initial Hearing concerning proposed witnesses, 3 June 2011 at p. 1; **E172/29** Next Witnesses in Current Segment of Case 002/01, 7 August 2012; **E233** Directions to Parties Following Hearing of 21 September 2012, 24 September 2012; **E236/1** Preliminary Indication of Individuals to be Heard During Population Movement Trial Segments in Case 002/01, 2 October 2012.

97 Internal Rules 85(1) and 91(2); see also Article 318 of the Code of Criminal Procedure of Cambodia.

98 See *e.g.*, **E141** Response to Issues Raised by Parties in Advance of Trial and Scheduling of Informal Meeting with Senior Legal Officer on 18 November 2011, 22 November 2011 at p.3 ("Questions to be put to the Accused on 5 December 2011 and subsequent days shall commence with questions relevant to historical background (above). In any case, this questioning shall be limited to topics relevant to the scope of Case 002/01"); **E145** Notice of Trial Chamber's Disposition of Remaining Pre-trial Motions (E20, E132, E134, E135, E124/8, E124/9, E124110, E136 and E139) and Further Guidance to the Civil Party Lead Co-Lawyers, 29 November 2011 at p. 3 ("…may also be questioned on other areas within their knowledge relevant to the scope of Case *002/01.* No questioning on areas outside the scope of this trial will, however, be permitted.").

99 See *e.g.*, **E1/17/1** Transcript, 6 December 2011 at p. 66 ln. 8-22 (President: "…So once again, I would like to remind you that you should confine yourself to the time that is relevant to the first phase of the trial and if you go beyond the scope of times that is confined to this first segment, it's going to be out of the scope of our hearing in this

to determine the scope of documentary evidence to be admitted,[100] and has exercised this power throughout the trial.[101] Finally, dealing with the recent limited extension of the trial to include the Tuol Po Chrey crime site, the Chamber has exercised its power to limit the scope of the extension to killings "which occurred immediately after the evacuation of Phnom Penh … but not otherwise extending to killings that occurred between 1976 and 1977."[102] In light of these considerations, the Chamber has clearly erred in the exercise of its discretion by holding that "anticipated difficulties" in limiting the scope of the proposed extensions would risk a *substantial* prolongation of the trial.

56. Furthermore, it is not clear how unspecified anticipated difficulties (even if they were present) would militate against including S-21 and District 12 executions in Case 002/01. Presumably, any difficulties which apply to Case 002/01 would also apply to any subsequent trial in which

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phase.") (To Civil Party Lawyer); **E1/34.1** Transcript, 26 January 2012 at p. 15 ln.15-19 (President: "Taking into account the facts in the Severance Order, in the first mini-trial, as indicated in document E124/7.2, this is the scope of the alleged facts that parties should examine and bring up evidence relating to the facts set out in the scope of this trial, which is known as Case 002/01") (to Defence Counsel); **E1/52.1** Transcript, 21 March 2012 at pp. 18-19 ln. 22-25, 1-5 (President: "The National Prosecutor, you should re-focus - you should re-focus your questions as indicated in document E124/2.2 concerning the first phase of the trial; particularly, relevant paragraphs, paragraphs 18 to 32 concerning the historical background of the Communist Kampuchea and, then, you move on to discuss the administrative structure of the Democratic Kampuchea both at the local and national levels and the roles of the Accused concerning the administrative structure and communication of the Democratic Kampuchea"); **E1/64.1** Transcript, 19 April 2012 at p. 10 ln.18-20 (President: "And Co-Prosecutor is now advised to rephrase the question in order to be in line with the facts at issue in this scope of Case File 002/1"); **El/135.1** Transcript, 19 October 2012 at p. 112 ln. 17-21 (President: "Mr. Prosecutor, could you please try to stay within the temporal framework regarding this trial segment, regarding forced transfer number 1 and number 2? And you seem to move beyond that, especially the facts in Pursat; it's related only to Tuol Po Chrey"); **E1/100.1** Transcript, 01 August, 2012 at p. 83 ln. 6-8 (President: "Witness, you don't need to respond to this question. The question is not within the scope of the alleged facts."(to Defence Counsel); **E1/108.1** Transcript, 15 August, 2012 at pp. 35-36 ln. 18-25, 1-2 (President: "Your question has nothing to do with the personality of the Accused; it is related to other individuals who are not mentioned in the Closing Order. Of course, we do not forbid you from using this document, but your question is far from the facts mentioned in the Closing Order. Your question so far only relates to one or two individuals outside the scope of this trial") (to Defence Counsel); **E1/126.1** Transcript, 25 September 2012 at p. 4 ln. 2-7 (President: "And parties are actually instructed by the Chamber to put questions in certain cases in regard to all the scopes within Case 002. That is for those witnesses that the Chamber did not restrict or limit the scope of questions to be put to that particular witness, so questions can be put within the scope and facts before the Chamber") (to Defense Counsel).

100 Internal Rule 87(3) and (4).

101 See *e.g.*, **E223/2** Forthcoming document hearings and response to Lead Co-Lawyers memorandum concerning the Trial Chamber's request to identify Civil Party applications for use at trial (E208/4) and Khieu Samphan Defence Request to Revise Corroborative Evidence Lists (E223), 19 October 2012 at para. 9 ("To permit effective adversarial challenge to these statements, the Chamber, in accordance with its previous directions and the criteria outlined in its decision E96/7, advises the Co-Prosecutors that only those statements which can be made available in all official ECCC languages by Friday 29 February 2013 may be proposed to be put before the Chamber as evidence."); **E96/7** Decision on Co-Prosecutors' Rule 92 Submission Regarding The Admission Of Witness Statements And Other Documents Before The Trial Chamber, 20 June 2012 at paras. 17 and 35 ("The Chamber will therefore rely on the Internal Rule 87(3) admissibility criteria to decide if, and under which conditions, written statements (including annexes) or transcripts proposed to be put before the Chamber without in-court examination are "allowed under the law" (Internal Rule 87(3)(d))."); **E190** Decision Concerning New Documents and Other Related Issues 30 April 2012 at para. 1 ("The present decision identifies the criteria to be satisfied and the procedural steps for putting new documents *( i.e.* those presented after the start of trial) before the Chamber pursuant to this Rule.").

102 **E163/5** Impugned Decision at para. 3.

these crime sites would be addressed. The inclusion of the sites now would simply bring forward the task of dealing with those difficulties and thus promote legal certainty and judicial efficiency.

57. In any event, the Co-Prosecutors submit that the Trial Chamber has overstated any challenges in managing the proposed extensions, and failed to take into account its significant powers to manage an efficient and fair trial process. This error is especially apparent in light of the limited scope of the evidence actually required to be heard as part of these extensions (as described in Section (iii) below).

iii. *Failure to properly assess the number of additional witnesses required to be heard concerning S-21 and District 12*

58. In the Impugned Decision the Trial Chamber held that the number of witnesses sought by the Parties in relation to S-21 and District 12 would risk a substantial prolongation of the trial in Case 002/01.[103]

59. The Trial Chamber has committed a discernible error in the exercise of its discretion by basing its finding on an irrelevant consideration (the number of witnesses *sought*) and failing to properly consider and decide on the number of witnesses that would actually be required to be heard. This section of the Appeal will demonstrate that the hearing of evidence in relation to the two proposed crime sites would require a very short extension in the overall length of the trial.

60. The Co-Prosecutors have sought to call a total of 11 witnesses for the two sites: six in relation to District 12,[104] and five in relation to S-21.[105] They have estimated that this evidence can be heard in approximately 16 trial days.[106] This estimate is consistent with recent Trial Chamber directives pursuant to which only one day of court time is allocated for the examination of each crime base witness (or Civil Party) by all counsel.[107] The Civil Party Lead Co-Lawyers, Ieng Sary and Khieu Samphan have not sought to hear any further witnesses on either of the two sites.

61. The Nuon Chea Defence has not proposed any witnesses in relation to District 12. They have, however, requested 31 witnesses[108] to be heard in relation to S-21, four of whom are also

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103 **E163/5** *Ibid.* at para. 2.

104 TCW-386, TCW-162, TCW-160, TCW-422, TCW-651 and TCW-298. **E218/2** Notice of Co-Prosecutors' Position on Key Issues to be Discussed at 17 August 2012 Trial Management Meeting, 15 August 2012, Annex A.

105 TCW-281, TCW-698, TCW-540, TCCP-21 and TCW-232. **E218/2** *Ibid.*

106 **E218/2** *Ibid.* at para. 16.

107 These instructions are issued by email from the Trial Chamber's legal officers, and confirmed in directions at the start of the examinations: see *e.g.* **E1/136.1** Transcript, 22 October 2012 at p. 31 ln. 8-14; **E1/137.1** Transcript, 23 October 2012 at p. 5 ln. 17-22.

108 TCW-49, TCW-53, TCW-115, TCW-88, TCW-118, TCW-125, TCW-140, TCW-232, TCW-290, TCW-316, TCW-348, TCW-367, TCW-379, TCW-405, TCW-410, TCW-441, TCW-470, TCW-474, TCW-479, TCW-491, TCW-

proposed by the Co-Prosecutors.[109] The remaining 27 witnesses (one of whom may be deceased)[110] include numerous individuals who appear to have no connection to S-21 or whose in-court testimonies are otherwise not necessary.

62. The Nuon Chea Defence has failed to offer tangible justifications in support of the witnesses it has proposed.[111] Nevertheless, a basic analysis of their proposal would have made it manifestly apparent that the Trial Chamber need not call most of those individuals to give evidence.

63. First, several of the proposed witnesses who are described by the Nuon Chea Defence as former S-21 detainees appear to lack any connection to S-21:

a) In Case 001, the Trial Chamber held there was "no objective evidence" to support the allegation that TCW-523 was detained, tortured or interrogated at S-21.[112]

b) In relation to TCW-379, the Trial Chamber held that while it did not doubt that the witness "suffered severe harm as a result of detention, interrogation and torture during the DK period, no evidence was provided to show this occurred at S-21."[113]

c) The Trial Chamber held that there was doubt whether TCW-405 was detained at S-21.[114]

d) According to his written record of interview, TCW-441 was detained at Sâng Prison and not at S-21.[115]

64. Second, the Defence seek to summon two psychologists who testified in Case 001, in order to provide evidence on issues such as "fair trial," "OCIJ investigation," "Duch's testimony" and "credibility of Duch."[116] These issues are obviously not matters on which the opinions of psychologists can properly assist the Trial Chamber in ascertaining the truth in relation to S-21.

65. Third, Counsel for Nuon Chea proposes a number of witnesses whose evidence would be largely repetitious. According to the Defence's own summaries, over half of the witnesses they propose

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499, TCW-512, TCW-523, TCW-540, TCW-598, TCW-632, TCW-655, TCW-698, TCCP-21, TCCP-22 and TCCP-93. See **E236** Individuals sought by the parties to be heard at trial (as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer), 2 October 2012 at para. 7.

109 TCW-540, TCW-698, TCW-232 and TCCP-21.

110 TCW-499. See **E236** Individuals sought by the parties to be heard at trial (as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer), 2 October 2012 at para. 7 **Annex II**.

111 See generic witness summaries given in **Annex II**.

112 **E188** Judgment Case 001, 26 July 2010 at para. 647.

113 **E188** *Ibid.* at para 647.

114 **E188** *Ibid.* at para 647.

115 **D25/1** Written Record of Interview of Witness, 15 February 2008 at p. 3; **D390** Final Submission, 16 August 2010 at para. 494.

116 TCW-655 and TCW-290. See **E236** Individuals sought by the parties to be heard at trial (as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer), 2 October 2012 at para. 7 and **Annex II**.

are former S-21 staff.[117] No information has been provided as to why all these witnesses are necessary, or indeed why any of them would be in a position to testify to central issues in the case, such as the relationship between S-21 and Nuon Chea.

66. The Co-Prosecutors support the right of Nuon Chea to call a reasonable number of witnesses who have direct knowledge of S-21 in order to challenge the evidence relating to the Security Centre (or, where relevant, the Accused's involvement in it). However, the Defence bears the onus of showing how that evidence is relevant and non-repetitious. Providing generic labels such as "S-21," "Credibility of Duch" or "offer insight into Duch's testimony" simply does not suffice.[118] The Chamber has an independent duty to ensure that the trial is fair and expeditious, including by allowing the presentation of evidence that is conducive to ascertaining the truth and excluding evidence which is repetitious, irrelevant or not suitable to prove the facts it purports to prove.[119] The number of witnesses *sought* by the Parties is, strictly speaking, irrelevant, as long as the Chamber discharges its duties properly and in accordance with the law.

67. As a corollary to this argument, the Trial Chamber is also well within its powers to determine a reasonable number of witnesses to be heard *viva voce* and admit additional evidence by way of written statements in lieu of oral testimony. This would be entirely consistent with the Trial Chamber's decision on the use of witness statements and transcripts which do not go to proof of acts and conduct of the Accused.[120] As the Chamber has ruled, there is no positive right, either in national or international law, for an accused to examine *every* crime base witness whose written statements are admitted into evidence.[121] Most of the available written statements relating to the internal functioning of S-21 do not touch upon the acts and conduct of the Accused.

68. While Nuon Chea is entitled to make a reasoned request for a limited number of witnesses to be heard, his frivolous demand to hear dozens of witnesses whose relevance is described in the vaguest terms cannot be a legitimate basis to conclude that S-21-related proceedings would substantially prolong the trial. The Trial Chamber has erred in the exercise of its discretion by failing to provide any analysis of the proposed testimonial evidence and relying on irrelevant considerations in coming to its conclusion as to the prolongation of the trial.

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117 TCW-88, TCW-698, TCW-632, TCW-598, TCW-540, TCW-53, TCW-512, TCW-499, TCW-491, TCW-474, TCW-470, TCW-410, TCW-367, TCW-348, TCW-316, TCW-232 and TCW-125. See **E236** Individuals sought by the parties to be heard at trial (as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer), 2 October 2012 at para. 7 and **Annex II**.

118 See **Annex II**.

119 Internal Rule 87; Article 318 of the Code of Criminal Procedure of Cambodia.

120 **E96/7** Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, 20 June 2012 at paras. 17-25.

121 **E96/7** *Ibid.* at paras. 21-25.

iv. *Failure to properly assess the nexus and logical sequencing between the current scope of trial and S-21 and District 12 executions*

69. In the Impugned Decision, the Trial Chamber states that it "remains unconvinced that the additional crime sites are closely connected to the existing factual allegation in Case 002/01 or that their inclusion fits within the logical sequence of the trial in Case 002/01."[122] In light of the facts which *are already accepted* as within the scope of Case 002/01, as well as the nature and volume of the evidence which *has been adduced* thus far, the Trial Chamber's finding on this issue is manifestly incorrect in fact and amounts to a discernible error in the exercise of its discretion. It is a decision that no reasonable trier of fact, informed of all the evidence which is now before the Trial Chamber, could have reached.

70. As stated in the Procedural History, Case 002/01 includes an examination 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.[123] In the course of the trial since November 2011, the Trial Chamber has heard a significant amount of evidence on these areas. As will be illustrated in paragraphs 77-80 below, much of that evidence goes directly to the development and enforcement of the CPK policy to destroy its perceived enemies, including at S-21.

71. The crime base events which are currently within the scope of Case 002/01 are (i) the forced evacuation of Phnom Penh (part of the broader policy of evacuating the Cambodian urban centres in April 1975), (ii) mass executions at Tuol Po Chrey in the immediate aftermath of the fall of Phnom Penh, and (iii) the second forced movement of the civilian population starting in late 1975.[124] The first two criminal episodes are directly and inextricably related to the CPK criminal policy to destroy its perceived enemies – the policy implemented at S-21 and through the District 12 executions.

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122 **E163/5** Impugned Decision at para. 2.

123 **E124/7.1/corr-1** List of Paragraphs and Portions of the Closing Order Relevant to Trial One in Case 002, 27 October 2011 (the original list of relevant paragraphs), at paras. 1 and 3; **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), 8 October 2011 at para. 2.

124 **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), 8 October 2011 at para. 2.

72. The CPK policy of identifying, rooting out and destroying its enemies was a key factor underpinning the decision to forcibly evacuate the urban centres in April 1975.[125] The evacuations of the urban centres were designed to suppress the urban classes whom the Party considered its natural enemies, and to identify and destroy the most dangerous elements within those classes.[126] This was the initial act in the implementation of a policy that would continue, uninterrupted, with the establishment of security centres such as S-21 shortly after the evacuations. Even during the evacuations, supposed enemies such as members of the fallen Khmer Republic regime, were removed from the masses and summarily executed by the Khmer Rouge military.[127] The executions which took place at Tuol Po Chrey, which the Chamber has now included in the scope of Case 002/01, were a part of this process.

73. In light of the inclusion of the Tuol Po Chrey site, it is difficult to understand the Trial Chamber's dismissal of the District 12 events as not "closely connected" to the factual allegations in Case 002/01. The crimes which took place in District 12 occurred immediately following 17 April 1975, and are alleged to have involved mass executions of "new people," hundreds of whom were evacuees from Phnom Penh.[128] The exclusion of this site, especially when considered in light of the inclusion of Tuol Po Chrey (which is located in the Pursat Province), is a clear illustration of the Trial Chamber's failure to properly construe the facts on which it based its decision. The executions at District 12 were indeed more "closely connected" to Case 002/01 than the executions at Tuol Po Chrey, because the victims at the former site were evacuees from Phnom Penh and other towns, while the victims at the latter site were officials and soldiers of the Khmer Republic who were summoned to a meeting at the Pursat provincial headquarters and then taken for execution.

74. As noted above, there is an inherent link between S-21 and the forced evacuation of Phnom Penh and ensuing executions at crime sites such as Districr 12 and Tuol Po Chrey. In requesting the Chamber to include S-21 in Case 002/01, the Co-Prosecutors submitted: "the decision to evacuate Phnom Penh was predicated on the basis that, in flushing out the cities, the Party would be able to identify 'enemies' and eliminate them at security centres and killing sites."[129] The identification and killings of these supposed enemies continued throughout the period with

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125 This is supported by the Co-Investigating Judges' findings in the Closing Order: **D427** Closing Order, 15 September 2010 at para. 248.

126 See *e.g.,* **D199/26.2.35** Pol Pot on Evacuation of Phnom Penh City Residents, 4 October 1977 at ERN 00390921; **E3/745** Revolutionary Flag, August 1975 at ERN 00401486; **E1/92.1** Transcript, 19 July 2012 at pp. 69-70, 75-76 and 78-79.

127 See *e.g.*, the evidence referred to in the Closing Order: **D427** Closing Order, 15 September 2010 at paras. 234-235.

128 **D427** Closing Order, 15 September 2010 at paras. 693-697.

129 **E163** Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of the Trial in Case 002/1, 27 January 2012 at para. 10.

which the Closing Order is concerned. Within this context, S-21 is alleged to have been a "very important security centre" and an organ of the CPK answerable to individuals at the highest levels of the Party.[130] Crucially, as the Trial Chamber held in Case 001, S-21's victims included "former Lon Nol cadres and soldiers,"[131] the group which was especially targeted during the forced evacuation of Phnom Penh and in the executions at Tuol Po Chrey.[132]

75. In light of these considerations, the Trial Chamber's finding that S-21 is not closely connected to the current factual allegations in Case 002/01, or that its addition would not fit within the logical sequence of the trial, is clearly erroneous as a matter of fact.

76. The Co-Prosecutors further submit that the Trial Chamber committed an additional error of fact or a discernible error in the exercise of its discretion by failing to take into account the extensive evidence which has been put before it in Case 002/01, and which is relevant to S-21 and the District 12 executions.

77. In the course of the proceedings thus far, considerable time has been devoted to hearing evidence on the development and enforcement of the CPK enemy policy throughout the period covered by the Closing Order (a period that extends well beyond the time of the first and second forced movements). The Co-Prosecutors provide a representative sample of that evidence in **Annex I**. Witnesses such as Kaing Guek Eav *alias* Duch, Professor David Chandler, Phy Phuon and Meas Voeun have testified to the existence and enforcement of the enemy policy. Both Duch and Professor Chandler testified to S-21's mission and its relationship with the CPK Party Centre, which is alleged to have included the Accused.[133] Several other witnesses testified to the arrests and removals of perceived enemies who were imprisoned and killed either at S-21 or in other parts of the country. As illustrated in **Annex I**, the Trial Chamber has also heard evidence on the alleged involvement of the Accused in the implementation of the CPK enemy policy and their authority in relation to S-21.

78. It is important to note that, just as the Co-Prosecutors and the Civil Party Lead Co-Lawyers were permitted to elicit evidence from witnesses on these issues, the Defence were given an equal opportunity to test that evidence, and indeed availed themselves of that opportunity. A review of the transcripts of the testimonies referred to in **Annex I** will confirm this fact.

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130 **D427** Closing Order, 15 September 2010 at paras. 421-422.
131 **E188** Judgment Case 001, 26 July 2010 at para. 140.
132 As a result of the Impugned Decision, the implementation of the policy of targeting the former officials of the Khmer Republic is now within the scope of Case 002/01: **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 the Trial in Case 002/01 (E163) 8 October 2011 at para. 1(vii).
133 See **Annex I**, at p.1.

79. A significant amount of *documentary* evidence relating to the enforcement of the enemy policy and functioning of S-21 has also been put before the Trial Chamber in the proceedings in Case 002/01. As **Annex I** illustrates, that evidence includes documents produced at S-21, internal regime communications, decisions, meeting minutes and other contemporaneous records which evidence the enforcement of the enemy policy. This evidence has been referred to, or presented to witnesses by, Prosecutors, Defence Counsel, Civil Party Lawyers and Trial Chamber Judges.

80. The proceedings conducted thus far have advanced significantly the ascertainment of the truth with respect to the creation and evolution of the CPK enemy policy, and its enforcement in security centres such as S-21. This policy permeated all aspects of the CPK / DK regime, including its history, administrative and military structures, and the roles of the Accused. The evidence which has been put before the Chamber is extensive and compelling. It has been tested by all Parties. Much of it goes well beyond the facts which would have been strictly necessary to prove the narrow crime base events within the original scope of Case 002/01. To have heard this evidence, and to fail to use it to account, in this trial, for one of the most symbolic and gruesome manifestations of the CPK crimes, is contrary to the interests of justice and good trial management. In light of the very remote likelihood of a second trial in which the Accused could face justice for the crimes committed at S-21 and in District 12, and the very limited extension of proceedings needed to incorporate these sites, the Trial Chamber's decision amounts to a clear error in the exercise of its discretion under Rule 89*ter*.

81. Moreover, this error, if uncorrected, risks undermining the possibility of a properly contextualised assessment of the purposes of the crimes and crime sites already included in Case 002/01 (forced evacuation of Phnom Penh and executions at Tuol Po Chrey), as well as their connection to the "enemy" policy. As such, the error is doubly harmful.

v. *The Trial Chamber's misplaced reliance on the health concerns of the Accused*

82. The Impugned Decision also rests, in part, on an assessment of delays resulting from the health concerns of the Accused that have arisen during the course of trial.[134] The Trial Chamber considers that, in light of the "trial management challenges" resulting from the current hospitalisation of Ieng Sary, the expansion of the trial to include S-21 and the District 12 site would not "be a prudent exercise of its trial management discretion."[135]

[134] **E163/5** Impugned Decision at para. 2.
[135] **E163/5** *Ibid.* at para. 2.

83. The Impugned Decision refers to the assessment and review of Ieng Thirith's fitness to stand trial as an example of a "lengthy process" occasioning delays in the proceedings.[136] However, contrary to this reasoning, only two days of court time have been used in dealing with Ieng Thirith's fitness since the commencement of the evidentiary proceedings in Case 002.[137] The second day of that hearing occurred as a special sitting of the Court on a Friday,[138] meaning that the trial of Case 002/01 was delayed by only one court day. Additional activities related to Ieng Thirith's fitness to stand trial, such as medical assessments and preparations for hearings, took place concurrent to the trial itself and did not occasion any delays.

84. Turning to the issues arising out of the current hospitalisation of Ieng Sary, a review of the trial record to date shows that the Trial Chamber and the parties have ably accommodated changes in the trial schedule so as to reduce to the minimum any disruptions to the smooth conduct of proceedings. In particular, Ieng Sary has waived his right to be present for the examination of a number of witnesses and Civil Parties.[139] Based on this waiver, the Trial Chamber will be able to continue evidentiary proceedings without further delay until the end of December 2012, if not longer, particularly given the Chamber's recent decision to reduce the number of sitting days.[140] The witnesses whose hearing has been delayed due to Ieng Sary's hospitalisation are a limited number of individuals whose evidence relates to the role of the Accused and the structure and functioning of the DK regime.

85. The recent switch to crime base witnesses has also confirmed a critical basis for the Co-Prosecutors' request to expand the scope of Case 002/01 – that crime sites can be tried relatively quickly. As indicated in paragraph 60 above, Parties are generally allocated only one day (combined) for the examination of crime base witnesses and Civil Parties. The Trial Chamber began hearing forced movement evidence on the afternoon of 19 October 2012, and in 6 days of court time completed the testimony of seven witnesses and Civil Parties.[141] This illustrates that such testimonial evidence can be completed at a significantly faster pace than that of witnesses who provide evidence on the structure of the regime and its policies. These facts further

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136 **E163/5** *Ibid.* at para 2.
137 30 and 31 August 2012. **E1/118.1** Transcript, 30 August 2012; **E1/119.1** Transcript, 31 August 2012.
138 31 August 2012 was a Friday.
139 **E236/1** Preliminary Indication of Individuals to be Heard During Population Movement Trial Segments in Case 002/01, 2 October 2012; **E237** Ieng Sary's Limited Waiver of Right to be Present During Court Proceedings, 2 October 2012; **E237/1** Ieng Sary's Limited Waiver of Right to be Present During Court Proceedings, 31 October 2012.
140 See **E1/128** Transcript, 2 October 2012 at p. 86 ln.18-22 and following; Press release, "Trial Chamber reduces number of weekly hearing days in Case 002/1," 23 October 2012, *available at*: http://www.eccc.gov.kh/en/articles/trial-chamber-reduces-number-weekly-hearing-days-case-0021.
141 TCCP-169; TCCP-25; TCW-661; TCCP-64; TCW-362; TCW-690; and TCCP-89.

demonstrate the error of the Trial Chamber's decision to drastically limit the scope of the crime base due to considerations of "substantial prolongation."

86. In any event, the Co-Prosecutors submit that concerns arising out of the health and age of the Accused should militate in favour of, rather than against, the inclusion of the proposed sites in Case 002/01. The health problems which have affected the Accused from time to time, as well as their advancing age, are stark reminders that further trials in Case 002 are unlikely. Even if a Case 002/02 were to go forward, the additional time required to arrive at its final conclusion virtually guarantees added risk of health problems preventing a final judgment from being rendered. The best hope of the ECCC as an institution, indeed the most logical course, is to try the Accused in Case 002/01 for charges which can be reasonably accommodated with relatively minor extensions of trial time. This is exactly what the limited expansions proposed by the Co-Prosecutors were designed to achieve.

## V. RELIEF SOUGHT

87. For these reasons, the Co-Prosecutors request that the Supreme Court Chamber:

1) **admit** the instant Appeal;

2) **hold** that an extension of the scope of trial in Case 002/01 as proposed by the Co-Prosecutors is in the interests of justice; and

3) **amend** the Impugned Decision so as to include **Security Centre S-21** (together with the related execution site at Choeung Ek) and the executions in **Kampong Tralach Leu District (District 12)** within the scope of the trial in Case 002/01, as requested by the Co-Prosecutors in document E163, and direct the Trial Chamber to implement these extensions in the exercise of its trial management discretion.

Respectfully submitted,

| Date | Name | Place | Signature |
|---|---|---|---|
| 7 November 2012 | CHEA Leang<br>Co-Prosecutor | Phnom Penh | |
| | Andrew CAYLEY<br>Co-Prosecutor | | |