

**BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**NUON CHEA'S RESPONSE TO TRIAL CHAMBER'S REQUEST FOR
SUBMISSIONS CONCERNING THE SCOPE OF CASE 002/02**

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The Co-Lawyers for Nuon Chea ('the Defence') hereby present this response to the Trial Chamber's request for submissions concerning the scope of Case 002/02:

1. On 24 December 2013, the Trial Chamber invited all parties to file written submissions as to the scope of Case 002/02 by 31 January 2014.¹ The Defence hereby files these submissions concerning the scope of Case 002/02 in addition to certain ancillary issues.

Scope of Case 002/02

2. In accordance with the instructions of the Supreme Court Chamber, the Case 002/02 trial is required to begin as soon as possible following closing submissions in Case 002/01 and must be reasonably representative of the Case 002 Closing Order. Such a trial must furthermore include, at a minimum, the allegations concerning S-21, genocide of the Cham and the Vietnamese, one cooperative and one worksite.²
3. Nuon Chea's principal interest in regard to the scope of the Case 002/02 trial is that he has a full opportunity to adduce exculpatory evidence in support of his defence. As the Defence has long argued, facts beyond the narrow scope of the allegations in the Closing Order are relevant to the ascertainment of the truth.³ During the Case 002/01 trial, the Trial Chamber was unduly restrictive in its approach to the admission of evidence outside the scope of Case 002/01, and beyond the Closing Order more generally.
4. Nuon Chea's position in regard to the severance of the Closing Order is therefore that relevant evidence – including documents, witnesses called by the Chamber and questions posed during live examination – must not be excluded from the proceedings merely because it does not link directly to a crime site included within the scope of the trial. Any evidence on any subject within the scope of the Case 002 Closing Order should be deemed relevant and *prima facie* admissible. Evidence on subjects outside the Case 002 Closing Order should be treated with considerably more leniency than during the Case 002/01 trial. Important areas of inquiry may include, for instance, the total number of deaths during the Democratic Kampuchea period and factional conflict within the CPK.

¹ Document No. E301/5, 'Trial Chamber Workplan for Case 002/02 and Schedule for Upcoming Filings', 24 December 2013, para. 5.

² Document No. E284/4/8, 'Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002', 25 November 2013 ('SCC Decision on Severance'), para. 76.

³ See e.g., Document No. E295/6/3, 'Nuon Chea's Closing Submissions in Case 002/01', 26 September 2013, paras 51-59.

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5. The Supreme Court Chamber has held that the ECCC legal framework permits the Trial Chamber to hear evidence as to only a portion of the charges in the Closing Order.⁴ In light of that holding, the Defence concurs with the Co-Prosecutors that Case 002/02 should be the final trial of the Case 002 Closing Order. Such a trial would put to rest any prospective uncertainty concerning the adjudication of further charges in a subsequent trial and permit the parties to engage freely with the evidence in relation to the full Closing Order. Disputes concerning matters ‘outside the scope of the trial’ would be a relic of the past.
6. If the Trial Chamber does intend to narrowly limit the scope of inquiry during Case 002/02 to the crime sites directly at issue, Nuon Chea is forced to insist that the Chamber include within that scope the crime sites through which he is most likely to be able to establish facts relevant to his affirmative defence. The Defence made a similar request in Case 002/01, seeking the adjudication of cooperatives and worksites as a means of establishing Nuon Chea’s intent with regard to the evacuation of Phnom Penh.⁵ The Supreme Court Chamber denied that request on the grounds that any party was entitled to adduce any evidence relevant to the charges at issue.⁶ In practice, however, the limitations imposed by severance made a comprehensive assessment of the cooperatives policy – and hence Nuon Chea’s intent in relation to the evacuation of Phnom Penh – impossible.
7. In Case 002/02, the facts necessary to Nuon Chea’s defence include primarily the alliance between Northwest and East Zone forces against Pol Pot and Nuon Chea and the role of the Vietnamese government in supporting these factions throughout the Democratic Kampuchea regime. The most important allegations are those alleged to have taken place in the Northwest and East Zones: (i) the Trapeang Thma Dam worksite (paragraphs 323 through 350 of the Closing Order); (ii) either Wat Kirirum security center (paragraphs 551 through 571 of the Closing Order) or Wat Tlork Security Center (paragraphs 644 through 666 of the Closing Order); (iii) the alleged policy of internal purges (paragraphs 192-203 of the Closing Order); and (iv) the alleged third phase population movement (paragraph 283 through 301 of the Closing Order).

Bias

⁴ See paras 9-11, *infra*.

⁵ Document No. **E284/4/1**, ‘Immediate Appeal Against Trial Chamber’s Second Decision on Severance and Response to Co-Prosecutors’ Second Severance Appeal’, 27 May 2013, paras 12-15.

⁶ SCC Decision on Severance, para. 52.

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8. The Defence notes, in response to an oral inquiry from the Chamber,⁷ that there is a strong likelihood that it will seek disqualification from Case 002/02 of any member of the Trial Chamber to have adjudicated Case 002/01. Although a final determination is not possible until a judgment in Case 002/01 is issued, the findings of this Chamber in Case 001 may, in the estimation of the Defence, be sufficient grounds for such an application in regard to S-21.⁸ The Chamber's findings in Cases 002/01 are likely to heighten the reasonable apprehension of bias, and accordingly the grounds for an application for disqualification pursuant to Rule 34.

Charges excluded from the scope of Case 002/02

9. A final issue concerns the status of crimes not tried in Case 002/02. The Supreme Court Chamber has recently issued guidelines in that regard, and expressly recognized the 'duty of the Trial Chamber to dispose of matters pending before it so that the proceedings into a criminal charge are decided on the merits or dismissed.'⁹ In that regard, the Supreme Court Chamber invoked the French principle that a trial court must *vider sa saisine*, or empty its docket of the charges before it.¹⁰ Accordingly, charges confirmed in the Closing Order may not be left by this Chamber in suspended animation.¹¹ A concrete resolution is required.
10. The question which remains open following the Supreme Court Chamber's ruling concerns the precise nature of that resolution. Although the Supreme Court Chamber held that the Co-Prosecutors' right to withdraw charges was not 'foreclosed' at the ECCC, nor did it grant the Co-Prosecutors the freedom to withdraw charges as of right. Rather, the Co-Prosecutors are entitled to withdraw charges following 'consideration of the interests of justice and fair trial rights involved'.¹² The Supreme Court Chamber failed to specify which interests of justice might justify such a decision within the procedural framework of the ECCC.
11. The Supreme Court Chamber also recognized the possibility of a 'decision [from the Trial Chamber] on closure that does not pronounce on criminal responsibility.'¹³ Yet, the Supreme Court Chamber did not analogize this 'decision on closure' to any specific

⁷ Document No. **E1/238.1**, 'Transcript of Trial Proceedings', 11 December 2013, pp. 95:1-98:14.

⁸ Document No. **E54**, 'Urgent Application for Disqualification of the Trial Chamber Judges', 24 February 2011.

⁹ SCC Decision on Severance, para. 62

¹⁰ SCC Decision on Severance, fn 176.

¹¹ SCC Decision on Severance, para. 43.

¹² SCC Decision on Severance, para. 61.

¹³ SCC Decision on Severance, para. 63.

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domestic or international procedure. The only civil law example cited by the Chamber, from the German Code of Criminal Procedure, contemplates a highly selective reduction of charges inapplicable to the much broader form of severance under consideration before this Chamber.¹⁴ The Supreme Court Chamber furthermore recognized that other civil law jurisdictions prohibit such a practice and noted that, under Cambodian law, charges can be dismissed only under narrowly defined and exhaustive circumstances.¹⁵ Nor does such a procedure exist, to the knowledge of the Defence, in the French procedure upon which the Cambodian code is based. Accordingly, numerous questions remain unanswered about the nature of such a decision; most importantly, under what circumstances is it appropriate, and may those charges later be taken up by a prosecutorial or judicial authority outside the framework of the ECCC?

12. In this case, the Chamber's assessment of the interests of justice and the fair trial rights of the Accused must take into account both the procedural and political realities of proceedings before the ECCC. As the decision to withdraw or dismiss charges has no clear precedent in domestic or international procedure, such that the legal status of those charges remains unclear, the possibility that a domestic court could seek to prosecute those charges in the future cannot be excluded.¹⁶ Indeed, this Chamber has previously held that even a judgment on the merits does not trigger the application of *res judicata* under Cambodian law where a trial proceeds *in absentia*.¹⁷
13. It is incumbent on this Chamber to ensure that charges confirmed in the Closing Order are not adjudicated beyond the framework of the ECCC. The Case 002 investigation (and Nuon Chea's detention) have been ongoing for more than six years, and an appellate judgment in Case 002/02 is unlikely for several years more. Subsequent proceedings would almost certainly violate Nuon Chea's right to an expeditious proceeding. Such proceedings would also run afoul of the premise of this Tribunal's existence: that a fair trial is not possible within the ordinary Cambodian jurisdiction.¹⁸ The interests of justice and the fair trial rights of the Accused require that this Chamber issue a final judgment

¹⁴ The German procedure cited by the Supreme Court Chamber contemplates the severance of 'parts of' an offence or some violations of law committed as part of an offence prosecuted. See SCC Decision on Severance, fn 173. The portion severed must be 'not particularly significant'. *Id.*

¹⁵ SCC Decision on Severance, fn 174.

¹⁶ Pursuant to Article 16 of the Cambodian Code of Cambodian Procedure, *res judicata* applies to 'any person who has been finally acquitted by a court judgment'.

¹⁷ Document No. E51/15, 'Decision on IENG Sary's Rule 89 Preliminary Objections (Ne bis in idem and Amnesty and Pardon)', 3 November 2011, para. 30.


¹⁸ David Scheffer, 'The Extraordinary Chambers in the Courts of Cambodia', pp. 5, 9-10, available online at http://www.cambodiatribunal.org/wp-content/uploads/2013/08/history_history-analysis-scheffer_english.pdf.

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on the merits with regard to every charge in the Closing Order, and ensure that no future proceedings are held in respect of those charges.

14. The (un)likelihood of a future proceeding against Nuon Chea is not a relevant consideration in this regard. The Chamber has previously acted to protect Duch's right to remain silent – to the detriment of Nuon Chea's right to cross-examine the evidence against him – because of the risk that he may later be prosecuted for crimes allegedly committed at M-13.¹⁹ The Co-Prosecutors supported that holding on the basis that 'there always remains a possibility of a prosecution'.²⁰ In any event, the mere possibility that charges could be brought implicates Nuon Chea's right to legal certainty.²¹
15. Finally, the Cambodian government has demonstrated its willingness to assert the elements of Nuon Chea's guilt by legislative fiat in a manner which directly affects his legal rights, including his right to free speech.²² The existence of a judicial order finding Nuon Chea guilty on a balance of probabilities – as the Closing Order does – aggravates this possibility considerably. Given the public effort of the Prime Minister and other leading members of the Cambodian government to brand Nuon Chea a 'killer' and a 'genocidaire' – and the realities of Cambodian politics – a clear statement from this Chamber that the Co-Prosecutors have failed to establish Nuon Chea's criminal liability in respect of charges excluded from Case 002/02 is in the interests of justice and, indeed, necessary.

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¹⁹ Document **E1/58.1**, 'Transcript of Trial Proceedings', 3 April 2012, pp. 72:10-73:5.

²⁰ Document **E1/58.1**, 'Transcript of Trial Proceedings', 3 April 2012, p. 74:24.

²¹ Opinion of Advocate General Ruiz-Jarabo Colomer, delivered on 19 September 2002, in C-187/05 and C-385/01 Götziok and Brügge [2003] ECR I-5859, para. 49 (right to legal certainty is one of the two pillars of *ne bis in idem*).

²² See Document No. **E284/4/2**, 'Addendum to Immediate Appeal Against Trial Chamber's Second Decision on Severance', 30 May 2013.