

**BEFORE THE TRIAL CHAMBER****EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** Mr KHIEU Samphân**Filed to:** The Trial Chamber**Original Language:** French**Date of Document:** 5 February 2014**CLASSIFICATION****Classification of the Document Suggested by the Filing Party:** Public**Classification by the Trial Chamber:** Public**Classification Status:****Records Officer's Name:**


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**Mr Khieu Samphân's Submissions on the Need to Wait for a Final Judgment in Case 002/01  
Before Commencing Case 002/02**

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## MAY IT PLEASE THE TRIAL CHAMBER

1. On 24 December 2013, the Trial Chamber (“the Chamber”) issued its workplan for Case 002/02.<sup>1</sup> In the workplan, the Chamber invites the Defence for Mr KHIEU Samphân (“the Defence”) to file by 5 February 2014 its submissions regarding “its view that Case 002/01 should be adjudicated, including the appeal process, if any, before the evidentiary hearings in Case 002/02 can start”.<sup>2</sup>

2. The question of the sequencing of separate trials has been posed since the severance of Case 002 (I). The Defence is of the view that the consequence of the severance by the Trial Chamber is that Case 002/01 must be finally adjudicated before Case 002/02 can start (II). Furthermore, decisions that may be subject to appeal at the same time as the substantive judgment in Case 002/01 must be finally adjudicated before Case 002/02 can start with the same trial judges (III). Lastly, the issue of the time required for the appeals process cannot justify a decision to commence Case 002/02 before these stages have been completed (IV).

### **I. (Non-exhaustive) Procedural History**

3. On 22 September 2011, the Chamber ordered the severance of proceedings in Case 002 pointing out that “all allegations [of, *inter alia*, genocide, persecution on religious grounds as a crime against humanity and Grave Breaches of the Geneva Conventions of 1949] have been deferred to later phases of the proceedings in Case 002.” At the same time, the Chamber announced that “further information regarding subsequent cases to be tried in the course of Case 002 will be provided [...] in due course”.<sup>3</sup>

4. On 3 October 2011, the Co-Prosecutors made a request for reconsideration of the Severance Order and extension of the scope of the first trial. They argued, *inter alia*, that:

The likely delay between the commencement of the first and second trial due to issues relating to adjudicated facts and *res judicata*: It may be legally impossible to expedite subsequent trials by relying on the foundation established in the first trial concerning the roles of the Accused. [...] The two legal mechanisms by which the Trial Chamber might take expeditious account of issues examined in the first trial as a basis of subsequent trials are the principles of judicial notice of adjudicated facts and *res judicata*. Neither mechanism may be available to the Trial Chamber in a second trial before any

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<sup>1</sup> Trial Chamber Workplan for Case 002/02 and Schedule for Upcoming Filings, Memorandum, 24 December 2013, E301/5, (“Workplan, E301/5”).

<sup>2</sup> Workplan, E301/5, para. 7.

<sup>3</sup> Severance Order Pursuant to Internal Rule 89*ter*, 22 September 2011, E124, para. 7 and disposition.

possible appeals are resolved from the first trial. This significant delay, in light of the advanced age of the Accused, will consequently make a second trial unlikely.<sup>4</sup>

5. On 18 October 2011, the Civil Parties in turn requested reconsideration of the Severance Order, pointing out that:

Like the Prosecution, the Civil Parties believe that it is very unlikely that there could be a series of “mini-trials” based on specific factual charges. They are concerned about the feasibility of the scenario whereby “mini-trials” could be held in succession given the complexity of the case, the advanced age of the accused and of the Civil Parties and the potentially complex and legal and procedural issues which might come out of the Severance Order such as *res judicata*.<sup>5</sup>

6. On 18 October 2011, the Chamber rejected the Co-Prosecutors’ request for reconsideration, stating that:

The Severance Order is relevant only to the order and sequencing of the trials in Case 002, enabling the Chamber to issue a first verdict limited to certain counts and factual allegations at an earlier stage, without the need to await a conclusion of the whole trial in relation to all portions of the Indictment.<sup>6</sup>

7. The Chamber accordingly held that the first trial would serve as a “foundation” for subsequent trials.<sup>7</sup>

8. On 27 January 2012, the Co-Prosecutors requested an extension of the scope of Case 002/01 to include certain charges and facts set out in the Closing Order.<sup>8</sup>

9. On 17 August 2012, during a Trial Management Meeting regarding a possible extension of the scope of Case 002/01, which had already started, the Co-Prosecutors again made mention of “the legal hurdles of moving to a second trial without a judgment in the first trial or an appellate determination in that trial”, which Mr CAYLEY “[did not know] how we’re going to get around this to move to a second trial”.<sup>9</sup>

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<sup>4</sup> Co-Prosecutors’ Request for Reconsideration of “Severance Order Pursuant to Internal Rule 89 *ter*”, 3 October 2011, **E124/2**, paras. 24 and 26 to 28.

<sup>5</sup> Lead co-lawyers and civil party lawyers request for reconsideration of the terms of the severance order E124, 18 October 2011, **E124/8**, para. 27.

<sup>6</sup> 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, **E124/7** (“Decision on Request for Reconsideration of Severance Order **E124/7**”), para. 8.

<sup>7</sup> Decision on Request for Reconsideration of Severance Order **E124/7**, para. 10; Scheduling Order for Opening Statements and Hearing on the Substance in Case 002, Trial Chamber, 18 October 2011, **E131**, para 3.

<sup>8</sup> Co-Prosecutors’ Request to Include Additional Crime Sites Within the Scope of Trial in Case 002/1, 27 January 2012, **E163**.

<sup>9</sup> Trial Transcript (“T.”) 17 August 2012, **E1/114.1**, p. 98, L. 8 to 12, between [14.11.12] and [14.12.56].

10. On 8 October 2012, the Chamber rejected in part the Co-Prosecutors' request for an extension of the scope of trial.<sup>10</sup>

11. On 7 November 2012, the Co-Prosecutors appealed the partial rejection of their request arguing that the question of the legal impediments to moving to a second trial had still not been resolved. This is how they re-stated their position on the issue:

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. (...) 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.<sup>11</sup>

12. On 8 February 2013, the Supreme Court Chamber ("the Supreme Court") set aside the Severance Order issued by the Trial Chamber on 22 September 2011, holding that the Chamber had erred by not responding to the questions raised by the Co-Prosecutors and Civil Parties in their respective requests for reconsideration of the 2011 Severance Order. The Supreme Court also held that "in the event of a renewed severance of Case 002, the Supreme Court considers that the ECCC should explore the establishment of another panel within the Trial Chamber to support the timely adjudication of the remainder of Case 002."

13. On 18 and 20 February 2013, at a hearing on the consequences of setting aside the severance decision, both the Co-Prosecutors<sup>12</sup> and the Civil Parties,<sup>13</sup> followed by the NUON Chea<sup>14</sup> and KHIEU Samphân<sup>15</sup> Defence teams, pointed out that it would be very difficult to do otherwise than to wait for the appeals judgement in Case 002/01 before commencing Case 002/02.

14. On 26 April 2013, the Chamber again severed the case (with a first trial having the same scope as the one that had been previously defined on 8 October 2012) announcing that:

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<sup>10</sup> 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, **E163/5**.

<sup>11</sup> Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 with Annex I and Confidential Annex II, 7 November 2012, **E163/5/1/1**, para. 18, Footnote 42.

<sup>12</sup> T. 18 February 2013, **E1/171.1**, p. 92 L. 4 to p. 94 L. 21, between [15.15.27] and [15.21.03].

<sup>13</sup> T. 18 February 2013, **E1/171.1**, p. 95 L. 2 to p. 96 L. 22, between [15.21.03] and [15.23.00].

<sup>14</sup> T. 20 February 2013, **E1/171.1**, p. 23 L. 11 to p. 25 L. 9, between [09.55.24] and [09.59.46].

<sup>15</sup> T. 20 February 2013, **E1/171.1**, p. 63 L. 24 to p. 68 L. 4 between [11.49.28] and [12.00.51]; p. 73, L. 5 to 20 between [13.38.54] and [13.40.30].

The Trial Chamber proposes holding a Trial Management Meeting later in the year, when the issue can be revisited anew in the light of the circumstances then prevailing. In the interim, the Trial Chamber emphasizes that no factual allegations or charges in the Case 002 Closing Order are dismissed as the result of the present Decision.<sup>16</sup>

15. The Chamber therefore did not respond to the questions relating to the conduct of subsequent trials.

16. On 10 May 2013, the Co-Prosecutors appealed the new severance decision, complaining about the Chamber's failure to answer those questions.<sup>17</sup>

17. On 14 May 2013, the Defence for Mr KHIEU Samphân appealed a decision rejecting a request for release and complained about the Chamber's failure to answer the questions.<sup>18</sup>

18. On 27 May 2013, Mr NUON Chea's Defence appealed the new severance decision and also complained about the Chamber's failure to answer the questions.<sup>19</sup>

19. On 13 June 2013, at a Trial Management Meeting on the final stages of Case 002/01, the Civil Parties asked the Chamber to state its position regarding *res judicata*.<sup>20</sup> Judge Cartwright then responded as follows:

In reference to the second issue that the Lead Co-Lawyers raised concerning whether the Chamber has a position on the legal issue of *res judicata* in relation to Case 002/02 and subsequent trials, the Chamber considers it premature to discuss these issues at this point; first because we await a decision from the Supreme Court Chamber which may well clarify a few of these issues. But secondly, we have indicated to the parties that after closing addresses are completed in Case 002/01, we will be holding a trial management meeting where the issues such as *res judicata* can be raised and all parties can make their submissions at that point. So, I hope that that is sufficient answer for the Lead Co-Lawyers at this point.<sup>21</sup>

20. On 23 July 2013, the last day of the evidentiary hearings in Case 002/01, the Supreme Court issued a summary of the grounds for its decision on the appeals against the new severance decision. It held therein that the Trial Chamber had erred by "[declining] to adjust its original position on severance in order to accommodate the parties' requests and address any of the parties

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<sup>16</sup> Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, **E284** ("New Severance **E284**"), paras. 154-155.

<sup>17</sup> Co-Prosecutors' Immediate Appeal of Second Decision on Severance of Case 002, 10 May 2013, **E284/2/1**, para. 78.

<sup>18</sup> Appeal against the Decision on Mr KHIEU Samphân's Application for Immediate Release on Bail, 14 May 2013, **E275/2/1**, paras. 68-69.

<sup>19</sup> Immediate Appeal against Trial Chamber's Second Decision on Severance and Response to Co-Prosecutors' Second Severance Appeal, 27 May 2013, **E284/4/1**, paras. 6 and 24.

<sup>20</sup> T. 13 June 2013, **E1/207.1**, p. 57 L. 18 to p. 58 L. 10, between [11.17.43] and [11.19.00].

<sup>21</sup> T. 13 June 2013, **E1/207.1**, p. 56 L. 5 to 16, between [11.23.20] and [11.25.02].

concerns with the consequences of renewed severance for any future trials". It added that Case 002/02 must therefore "commence as soon as possible" and the establishment of a second panel of judges is "imperative".<sup>22</sup>

21. On 20 November 2013, the Co-Prosecutors requested that the agenda of the Trial Management Meeting scheduled for December 2013:

include what impact the factual findings in the Case 002/01 Trial Judgement could have on Case 002/02. It will be the Co-Prosecutors' position that there is no necessity to take any type of judicial notice of adjudicated factual findings from Case 002/01. The factual findings and judgement in Case 002/01 should instead be based on the testimony, documents and other evidence before the Trial Chamber at the conclusion of those proceedings, including the evidence on record introduced in Case 002/01.<sup>23</sup>

22. On 25 November 2013, the Supreme Court issued its fully reasoned decision on the appeals against the new severance order. Although it sets out the grounds for its view that the Trial Chamber erred in abstaining from resolving "the issue as to when Case 002/02 will commence and how proceedings as to any remaining charges might be concluded," and "perpetuating the state of uncertainty for the parties", it does not explain how feasible it is to commence Case 002/02 "as soon as possible after the end of closing submissions in Case 002/01" without waiting for a final judgement in Case 002/01. It merely invites the President of the Trial Chamber "to avail himself of the existing possibilities" to designate a second panel of judges "to ensure a final determination of the remaining charges as expeditiously as possible".<sup>24</sup>

23. On 11 and 12 December 2013, at the Trial Management Meeting, the parties made submissions on these "existing possibilities" that the President could avail himself of to appoint a new panel of judges. Even though the issue was not on the agenda, the Defence for Mr KHIEU Samphân, alone reiterated its view that Case 002/02 cannot commence before final judgement is rendered in Case 002/01.<sup>25</sup>

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<sup>22</sup> Decision on Immediate Appeal against Trial Chamber's Second Severance of Case 002- Summary of Reasons, 23 July 2013, **E284/4/7** ("Decision on Immediate Appeal against Trial Chamber's Second Severance – Summary of Reasons **E284/4/7**"), paras. 9, 10, 11.

<sup>23</sup> Co-Prosecutors' Comments on Agenda of Trial Management Meeting for Case 002/02, 20 November 2013, **E301/1**, para. 3.

<sup>24</sup> Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002, Supreme Court Chamber, 25 November 2013, **E284/4/8** ("Decision on Appeals against Decision on Severance **E284/4/8**"), paras. 69 and 72, 73, 74 *inter alia*.

<sup>25</sup> T. 11 December 2013, **E1/238.1**, T. 12 December 2013, **E1/238.2**.

24. On 22 December 2013, the President stated that “it is unclear whether a legal basis for the establishment of a second panel of the Trial Chamber exists” and even to what extent such an appointment comes under his competence. He considered that “appointing a second Trial Chamber panel to hear the remaining charges in Case 002/02 is not in the interests of justice”.<sup>26</sup>

## II. The need to wait for a final judgement

25. As a result of the severance of Case 002, the principles of *res judicata* and judicial certainty require that final judgement be rendered in Case 002/01 before Case 002/02 commences, whether Case 002/02 is heard by different judges or by the same judges.

### A. Separation of trials

26. In all legal systems, severance of proceedings means a separation (or split) of proceedings. The severed proceedings are then heard and adjudicated in several separate trials and no longer in one and the same all-encompassing trial. They can therefore be considered and determined by the same judges or by different judges.

27. Before the ECCC (which has only one Trial Chamber, seised *in rem et in personam*<sup>27</sup>), Rule 89 *ter* of the Internal Rules governing severance of proceedings provides that:

When 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 of the entirety of the charges contained in an indictment. The cases as separated shall be tried and adjudicated in such order as the Trial Chamber deems appropriate.<sup>28</sup>

28. In case of severance, the same Closing Order thus gives rise to separate and distinct trials in relation to the accused or facts concerning different charges (that are the subject of separate proceedings). A separate judgement is rendered at the end of each trial.

29. In Case 002, the Chamber carried out both types of severance envisaged in Rule 89 *ter* of the Internal Rules. It severed not only the charges and facts relating thereto,<sup>29</sup> but also the accused

<sup>26</sup> President’s Memorandum on the Proposal to Appoint a Second Panel of the Trial Chamber to Try the Remaining Charges in Case, 22 December 2013, E301/4, paras. 3 and 9 *inter alia*.

<sup>27</sup> Rules 98(2) and 98(3) of the Internal Rules.

<sup>28</sup> The English version of this provision reads as follows: “When 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 contained in an Indictment. The cases as separated shall be tried and adjudicated in such order as the Trial Chamber deems appropriate.”

<sup>29</sup> Severance Order pursuant to Rule 89 *ter* of the Internal Rules, 22 September 2011, E124; New Severance Order

themselves.<sup>30</sup> Accordingly, after the proceedings against Mrs IENG Thirith were separated from the case,<sup>31</sup> her case was heard by the Chamber separately from Case 002/01.

30. By ordering the severance of the charges and factual allegations, the Chamber decided that it would consider them successively, one after the other. The severance of the proceedings, as such, was upheld by the Supreme Court.<sup>32</sup> In these trials that are now separate and successive, the parties to the proceedings remain the same while the facts and charges are different.

31. However, although the facts under consideration are different, Mr NUON Chea and Mr KHIEU Samphân are nevertheless charged with commission of all the crimes alleged in the Closing Order within the context of a large-scale and systematic attack against the civilian Cambodian population (“chapeau elements”) and joint criminal enterprise (“JCE”).

32. The fundamental question posed by the severance has been raised several times by the Defence.<sup>33</sup> It was grave cause for concern to the accused since it is part of the issues that the Chamber will consider in determining any mode of criminal responsibility and in particular JCE. The Chamber’s position remains mysterious. Yet, since the severance decision, the theory of JCE set out by the Co-Investigating Judges and adopted by the Co-Prosecutors is not valid in law.

33. The Defence is now compelled to engage in a difficult exercise because it does not know what will be the Chamber’s ruling on this issue. If the Chamber were to find the accused guilty on the basis of JCE on account of the 5 criminal policies alleged in the Closing Order, whereas only two of those policies have been (partially) considered in Case 002/01, the Defence will appeal the judgement. Yet, how the proceedings in Case 002/02 will be conducted will definitely be affected by the appeal decision on the mode of responsibility, be it how evidence will be presented on this point or concerning the scope of Case 002/02.

34. The Chamber has chosen to split the Closing Order and has justified its severance by its intention to:

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**E284.**

<sup>30</sup> Decision on IENG Thirith’s Fitness to Stand Trial, 17 November 2011, **E138**.

<sup>31</sup> Decision on IENG Thirith’s Fitness to Stand Trial, 17 November 2011, **E138**, para. 61.

<sup>32</sup> Decision on Immediate Appeals against Trial Chamber’s Second Severance of Case 002- Summary of Reasons; **E284/4/7**, Decision on Appeals against Severance **E284/4/8**.

<sup>33</sup> Urgent Request by the Defence Team of Mr KHIEU Samphan for an Immediate Stay of Proceedings, 1 August 2013, **E275/2/1/1**, paras. 19 to 68 and *Addendum*, 4 September 2013, **E275/2/1/3**; Closing Statements, 26 September 2013, **E295/6/4**; T. 25 October 2013, **E1/234.1**.

- provide a **foundation** for a more detailed examination of the remaining charges and factual allegations against the Accused in later trials,<sup>34</sup>

- ensure as far as possible that the issues examined in the first trial provide a **basis** for the consideration of the mode of liability of joint criminal enterprise by including all Accused.<sup>35</sup>

35. The Chamber announced at the same time that “it is envisaged that the first trial will provide a general **foundation** for all the charges, including those which will be examined in later trials.”<sup>36</sup>

36. The Defence knows very little else about this notion of “general foundation”. It notes that the Chamber uses the expression “as far as possible”, thereby allowing the assumption that it is aware of the difficulties of restricting the principle of adversarial proceedings in a separate trial. In fact, it is pursuant to this principle and the right to meet the separate charges in a second trial that the Defence has opposed the Co-Prosecutors’ request for a systematic transfer of evidence from Case 002/01 to Case 002/02.<sup>37</sup>

37. Furthermore, the Defence recalls that judges conducting a trial may avail themselves of, or rely on, issues and facts considered in another trial only under certain conditions, especially in a trial involving the same parties.

38. This observation underscores the need to wait for a final judgement in Case 002/01 before commencing Case 002/02. In fact, judicial economy requires that a second trial should not be commenced on a legal basis that may turn out to be erroneous. Accordingly, if the legal underpinnings of the first trial are erroneous, those of the second trial will also be necessarily erroneous. Such a situation would guarantee neither a fair nor expeditious trial.

39. Impatience poses the risk of bringing down the entire judicial edifice, that is, the opposite of the goal sought.

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<sup>34</sup> Decision on Co-Prosecutors’ Request for Reconsideration of the Terms of the Trial Chamber’s Severance Order, **E124/7**, para. 10. Emphasis added.

<sup>35</sup> Decision on Co-Prosecutors’ Request for Reconsideration of the Terms of the Trial Chamber’s Severance Order, **E124/7**, para. 10. Emphasis added.

<sup>36</sup> Scheduling Order for Opening Statements and Hearing on the Substance in Case 002, Trial Chamber, 18 October 2011, **E131**, para. 3. Emphasis added.

<sup>37</sup> Response by the Defence for Mr KHIEU Samphan to the “Co-Prosecutors’ Submission Regarding the Use of Evidence and Procedure for Recall of Witnesses from Case 002/01 in Case 002/02”, 27 January 2013, **E302/1**.

40. So long as the facts considered in Case 002/01 have not been finally admitted or adjudicated, it will not be possible to start Case 002/02 on a “general foundation” supposedly laid in Case 002/01.

41. All the foregoing also applies to the chapeau elements.

## **B. Res judicata and judicial certainty**

42. According to the principles of *res judicata* and judicial certainty, a final ruling must be made on the facts considered in Case 002/01, which are relevant or serve as a “foundation” to Case 002/02 before Case 002/02 can start. Furthermore, an appeals judgement will enable the real scope of Case 002/01 to be finally and accurately determined.

### **1. Res judicata and previous proceedings**

43. *Res judicata* can be defined as “[TRANSLATION] all the effects of a court decision, such as legal truth”.<sup>38</sup> This attribute of any court decision on issues in dispute that are settled by the decision, “prevent, subject to the appeals process, a retrial of the same case between the same parties in another trial.”<sup>39</sup>

44. The underpinnings of this principle, expressed by the Latin adage *res judicata pro veritate habetur* or *res judicata pro veritae accipitur* (literally translated as: “what is adjudicated is considered as the truth”<sup>40</sup>), above all, uphold the judicial decision and judicial certainty. According to the European Court of Human Rights (“ECHR”) :

One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question.<sup>41</sup>

45. It follows that *res judicata* can be characterized as “positive” and “negative”: positive in the sense that it favours judicial economy by avoiding unjustified proceedings and negative because it prevents the holding of new proceedings on adjudicated facts.

<sup>38</sup> G. CORNU, *Vocabulaire juridique, V<sup>o</sup> Autorité [de la chose jugée]*, 2003, PUF.

<sup>39</sup> G. CORNU, *Vocabulaire juridique, II<sup>o</sup> Chose [autorité de la chose jugée]*, 2003, PUF.

<sup>40</sup> *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998 (“*Delalić* Judgement”), paras. 228 and footnote 260.

<sup>41</sup> ECHR, *Brumărescu v. Romania* (Application No. 28342/95), 28 October 1999, para. 61.

46. In criminal law, the protection of a judicial decision by *res judicata* is two-fold: protection of the interests of society and the judicial system, on the one hand, and protection of the interests of the individual or the defence, on the other.

47. *Res judicata* exists in all legal systems, be they national or international, adversarial or inquisitorial, civil or criminal. Whatever may be the form or derivative in which it is presented, such as the principle *Ne bis in idem*, or “collateral estoppel” in the adversarial system, the basis for the protection it affords to judicial decisions is invariably the same. So also are its consequences.

48. *Res judicata* is an accepted principle and is part of the jurisprudence in international criminal law.<sup>42</sup> The *ad hoc* tribunals, for example, have held that *res judicata* “is limited [...] to the question of whether, when the previous trial of a particular individual is followed by another of the same individual, a specific matter has already been fully litigated”.<sup>43</sup> The *ad hoc* tribunals apply the principle in its “positive” meaning (to promote judicial economy and harmonization of jurisprudence),<sup>44</sup> by means of the mechanism of judicial notice of facts that are of common knowledge or facts admitted in other cases.

49. In the case of judicial notice of facts that are of common knowledge, the facts in question “are notorious, and not subject to reasonable dispute” (for example, facts that are “commonly accepted or universally known facts, such as general facts of history or geography, or the laws of nature”).<sup>45</sup> When judicial notice is taken of such facts, they are considered as conclusively established.<sup>46</sup>

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<sup>42</sup> See for example: *Delalić* Judgement, para. 228; *Prosecutor v. Simić et al.*, Case No. IT-95-9-PT, Decision on (1) Application by Stevan Todorović to re-open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 February 2000, paras. 9-10; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza’s Second Motion to Dismiss for Deprivation of his Right to Trial Without Undue Delay, 29 May 2007, para. 6; *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Motion to Strike Allegation of Conspiracy with Juvenal Kajelijeli on the Basis of Collateral Estoppel, 16 July 2008, para. 4; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused’s Motion to Strike Scheduled Shelling Incident on Grounds of Collateral Estoppel, 31 March 2010, para. 5.

<sup>43</sup> *Delalić* Judgement, para. 228.

<sup>44</sup> *Prosecutor v. Krajisnik*, Case No. IT-00-39-PT, Decision on prosecution motions for judicial notice of adjudicated facts and for admission of written statements of witnesses pursuant to rule 92bis, 28 February 2003, para. 11; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 (“*Karemera* Decision”), para. 39; *Prosecutor v. Perisic*, Case No. IT-04-81-PT, Decision on Motion for Judicial Notice of ICTY Convictions, 25 September 2008 (“*Perisic* Decision”), para. 7.

<sup>45</sup> *Karemera* Decision, para. 22; *Perisic* Decision, paras. 8-9.

<sup>46</sup> *Karemera* Decision, para. 42; *Perisic* Decision, para. 8.

50. Meanwhile judicial notice of facts admitted in other cases deals with facts established in another case involving third parties.<sup>47</sup> Judicial notice of such facts therefore has the effect of relieving the Prosecution of its initial burden to produce evidence on the impugned issue. The facts thus established are mere presumptions which the Defence may challenge by leading evidence at trial.<sup>48</sup>

51. The Appeals Chamber of the *ad hoc* Tribunals has held that:

This approach is consistent with practice in national jurisdictions: whereas judicial notice of facts of common knowledge may be treated as conclusive, the final adjudication of facts in judicial proceedings is treated as conclusively binding only, at most, on the parties to those proceedings (*res judicata*).<sup>49</sup>

52. In other words, pursuant to the doctrine of *res judicata*, the final adjudication of any fact in a first trial is conclusively binding on the parties to a second trial.

53. Although the ECCC has not envisioned the mechanism of judicial notice, it is no less true that the doctrine of *res judicata* is part of its rules and jurisprudence.<sup>50</sup> In the absence of such a mechanism, only a final decision will be binding on parties to the second trial.

54. However, so long as the facts considered in the first trial and which are related to or serve as a “foundation” to the second trial will not be finally adjudicated, they cannot be considered as adjudicated in Case 002/02.

## **2. *Res judicata* and the actual scope of Case 002/01**

55. Furthermore, the Defence lays emphasis on the fact that it still does not know the actual and concrete scope of Case 002/01. It elaborated on this question in its request for a stay of proceedings.<sup>51</sup> Considering the request premature, the Supreme Court noted that the Defence could again raise the issue in an appeal of the substantive judgement.<sup>52</sup>

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<sup>47</sup> *Karemera* Decision, para. 40; *Perisic* Decision, para. 12.

<sup>48</sup> *Karemera* Decision, para. 42; *Perisic* Decision, para. 12.

<sup>49</sup> *Karemera* Decision, para. 42; *Perisic* Decision, para. 18.

<sup>50</sup> Decision on IENG Sary’s Rule 89 Preliminary Objections (*NE BIS IN IDEM*) and Amnesty and Pardon, 3 November 2011, **E51/15**, para. 27 and references cited in footnotes 64 to 66.

<sup>51</sup> Urgent Request by the Defence Team of Mr KHIEU Samphân for an Immediate Stay of Proceedings, 1 August 2013, **E275/2/1/1** and *Addendum*, 4 September 2013, **E275/2/1/3**.

<sup>52</sup> Decision on Request by Defence for KHIEU Samphan for Immediate Stay of Proceedings, 18 October 2013, **E275/2/1/4**, para. 7.

56. In fact, the scope of the subsequent trials depends on that of Case 002/01. This is an extremely contentious issue and the various parties' requests for clarification have still not been clearly addressed by the Trial Chamber to date.<sup>53</sup>

57. It is therefore the pending judgement in Case 002/01 that will enable the parties to know the actual, real and concrete scope of Case 002/01. In the event of an appeal (which is more than likely), it will therefore be imperative to wait for the Supreme Court to finally adjudicate and establish the actual scope of the first trial in the appeal judgement. For all these reasons, the Defence submits that Case 002/02 cannot commence before all appeals processes have run their full course.

58. Furthermore, Case 002/02 must not start so long as the Supreme Court has not ruled on all the decisions that are subject to appeal only concurrently with the substantive judgement.<sup>54</sup>

### **III. The need to wait for the outcome of appeals of decisions other than the substantive judgement**

59. The Defence regrets the extent to which the Internal Rules limit interlocutory appeals. As the second trial has to be adjudicated by the same judges who conducted the first trial, it will be necessary to wait for the Supreme Court to rule on all the decisions that the Trial Chamber rendered in Case 002/01 and which will be subject to appeal concurrently with the substantive judgement.

60. In fact, these decisions are related, *inter alia*, to the admissibility and introduction of evidence and will have a crucial impact on the conduct and preparation of the second trial.

61. Conducting Case 002/02 under the same conditions as Case 002/01 without waiting for the outcome of the appeals would have grave consequences on the second trial and would jeopardize "the effective and meaningful exercise of the right to appeal" as well as the accused's right "to have time and facilities to prepare a defence". It would also jeopardize "the economy of

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<sup>53</sup> See, for example, the last two requests for clarification filed after the closing statements, while final briefs were being drafted: Co-Prosecutors' Request for Clarification of Findings Regarding the Joint Criminal Enterprise Alleged in Case 002/01, 7 August 2013, **E284/5**; [Mr KHIEU Samphân's] Urgent Request for Clarification of the Trial Chamber Decision of 15 August 2013 concerning Objections to the Admissibility of Written Statements and Deferral of the Timeline for Filing Final Briefs, 2 September 2013, **E299/1**.

<sup>54</sup> Rule 104 (4) of the Internal Rules.

proceedings”. As the Supreme Court has held “legal certainty” must be ensured “to all the parties” and “the proceedings in Case 002/01” should be “as expeditious and efficient as possible”.<sup>55</sup>

62. The Defence for Mr KHIEU Samphân stresses the fact that certainty increases efficiency and reduces delays. Accordingly, it is in the interests of justice and the organisation of a fair trial to wait for the Supreme Court’s ruling.

#### **IV. The issue of the effect of delays occasioned by the appeal process**

63. The Defence for Mr KHIEU Samphân agrees with Judge CARTWRIGHT that it is important to do “[a] little bit of reality testing” and to “take the time that the Supreme Court needs into account”.<sup>56</sup> The Defence is well aware of the time that elapsed between the trial and appeals judgements in Case 001 (18 months). Similarly, it deplores the time that elapsed in Case 002/01 between the filing of the appeal against the new severance decision and the Supreme Court’s issuance of a reasoned decision on those appeals (6 months).

64. However, these considerations cannot justify a decision to commence Case 002/02 before the Supreme Court determines Case 002/01. As the Supreme Court itself noted, regarding the justification for the continued detention of an accused in complex cases, deprivation of liberty may be justified only “where the competent authorities have demonstrated ‘special diligence’ in the conduct of proceedings”. For example, due consideration should be given to “the way in which the judicial system is organised and whether domestic authorities have allocated additional resources or established a special unit thereto”.<sup>57</sup>

65. The Defence for Mr KHIEU Samphân is very realistic and knows that there are inevitable delays during the deliberations and drafting of decisions (which is why it is of the view that the Chamber cannot draft the judgement in Case 002/01 in six months while conducting hearings in Case 002/02). However, the Defence submits that the time the Supreme Court Chamber will require to hear the appeals in Case 002/01 could be reduced and that the Supreme Court Chamber could start getting ready right now by immediately ordering the administration to recruit staff. Indeed,

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<sup>55</sup> Decision on Co-Prosecutors' Request for Clarification, 26 June 2013, **E284/2/1/2**, para. 6.

<sup>56</sup> T. 12 December 2013, **E1/238.2**, p. 71, L. 13 to 22, at about [11.45.48].

<sup>57</sup> Decision on Immediate Appeal against the Trial Chamber’s Decision on KHIEU Samphân’s Application for Immediate Release, 22 August 2013, **E275/2/3**, para. 50.

[g]iven the advanced age and declining health of the Co-Accused, as well as the gravity of the alleged crimes remaining in the Indictment, it is imperative that the ECCC utilize every available day to ensure a final determination of the remaining charges as expeditiously as possible.<sup>58</sup>

66. While Mr KHIEU Samphân is the first to call for an expeditious trial, he considers, in view of his rights to a fair trial and judicial certainty, that the commencement of Case 002/02 should be postponed until final judgement is rendered in Case 002/01.

67. **FOR THESE REASONS**, the Defence for Mr KHIEU Samphân requests the Chamber to:

- RULE that Case 002/02 shall not commence before judgement in Case 002/01 becomes final;
- RULE that Case 002/02 shall not commence before the Supreme Court has ruled on all the decisions that may be appealed concurrently with the substantive judgement in Case 002/01.

	Mr KONG Sam Onn	Phnom Penh	[signed]
	Ms Anta GUISSÉ	Paris	[signed]
	Mr Arthur VERCKEN	Paris	[signed]

<sup>58</sup> Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, Supreme Court Chamber, 8 February 2013, E163/5/1/13, para. 51.