BEFORE THE SUPREME COURT CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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Mr KHIEU Samphân's Immediate Appeal Against the Decision on Additional Severance of Case 002 and Scope of Case 002/02

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Before:

The Supreme Court Chamber
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MAY IT PLEASE THE SUPREME COURT

1. On 22 September 2011, the Trial Chamber ("the Chamber") ordered the separation of proceedings in Case 002 to be adjudicated upon in a series of discrete trials, each comprising finite portions of the factual allegations set out in the Closing Order, and each of which would, in turn, conclude with a judgement.[1]

2. On 8 February 2013, after finding numerous errors and prejudices caused to the parties as a result of the severance, the Supreme Court Chamber ("the Supreme Court") annulled the decision.[2]

3. At a hearing on 29 March 2013, the Chamber announced that it had decided to sever the charges anew, and provided written reasons for its decision on 26 April 2013.[3]

4. On 23 July 2013, the Supreme Court ruled on the new severance and provided only a summary of its reasons for the decision. Detailed reasons were issued on 25 November 2013.[4] While the Supreme Court did not annul the second severance, it nevertheless found that numerous errors had been committed by the Chamber, and exercised its discretion to amend the decision.

5. On 4 April 2014, while drafting of the judgement in Case 002/01 is underway, the Chamber decided to separate the proceedings in Case 002 anew and determined the scope of a second trial (002/02) once again limiting the trial to part of the factual allegations contained in the Closing Order.[5]

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[1] Severance Order Pursuant to Internal Rule 89ter, 22 September 2011, **E124**.

[2] Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 8 February 2013, **E163/5/1/13** ("First Severance Decision of the Supreme Court, **E163/5/1/13**").

[3] Trial Transcript of ("T.") 29 March 2013, **E1/176.1**, p. 2 L. 21 to p. 5 L. 20 (between [09.04.36] and [09.16.23]); Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, **E284**.

[4] Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002 – Summary of Reasons, 23 July 2013, **E284/4/7** ; Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, **E284/4/8** ("Second Severance Decision of the Supreme Court, **E284/4/8**").

[5] Decision on Additional Severance of Case 002 and Scope of Case 002/02, 4 April 2014, **E301/9/1** ("Impugned Decision").

6. On the basis of Rule 104 of the Internal Rules, the Defence team for Mr KHIEU Samphân ("the Appellant") hereby immediately appeals the Chamber's 4 April 2014 decision ("the Impugned Decision"), which must be annulled as it is vitiated by errors on questions of law and discernible errors in the exercise of the Chamber's discretion.

I. ADMISSIBILITY OF THE APPEAL

7. Under Rule 104(4)(a) of the Internal Rules and the jurisprudence of the Supreme Court, the Impugned Decision is subject to immediate appeal.

8. The Supreme Court has interpreted Rule 104(4)(a) to include "*decisions to stay the proceedings that do not carry a tangible promise of resumption, thereby barring arrival at a judgment on the merits.*"[6]

9. Similarly to the severance decisions previously issued by the Chamber and considered to be subject to immediate appeal by the Supreme Court, the Impugned Decision results in a *de facto* stay of all proceedings placed outside the scope of the trial which it delineates. Similarly to previous stays, this new stay still does not carry a sufficiently tangible promise of resumption as to permit arrival at a judgement on the merits.

10. Indeed, in the words of the Chamber itself, its new severance, "*excludes certain facts, charges and crime sites from the scope of Case 002/02.*"[7] Yet, the Chamber is silent on their fate. The Chamber simply alludes to the possibility of "*withdrawing certain charges*" raised by the Supreme Court, while indicating that it had not been seised of any such request by the Co-Prosecutors.[8] In the disposition of the Impugned Decision, the Chamber "*FINDS the disposition of the remaining charges in Case 002/02 does not arise at this time and will be addressed in due course.*"[9]

11. Yet, the Supreme Court has held twice that by severing the proceedings, the Chamber had committed an error by failing to provide a "*tangible plan*" regarding the subsequent cases to be

[6] Second Severance Decision of the Supreme Court, **E284/4/8**, para. 21.
[7] Impugned Decision, para. 45.
[8] Second Severance Decision of the Supreme Court, **E284/4/8**, para. 45.
[9] Impugned Decision, disposition, penultimate paragraph.

tried after the first trial.[10] The inevitable conclusion is that the Chamber has, once again, committed the same error.

12. Moreover, the other circumstances prevailing at the time of the previous severance decisions still prevail today.[11] Indeed, in the Impugned Decision, the Chamber repeatedly points to the need for expeditiousness and reiterates that its chief concern is to be able to obtain *"a verdict on at least some of the charges in the Closing Order within the lifetime of the Accused, the Civil Parties, and victims*."[12]

13. In light of the foregoing, the Impugned Decision effectively constitutes a stay of the proceedings involving all the charges falling beyond the scope of Case 002/02 which, in the current circumstances, does not carry a sufficiently tangible promise of resumption of the proceedings as to permit arriving at a judgment on the merits.

14. The Impugned Decision is therefore subject to immediate appeal and must be annulled because the Chamber has committed errors invalidating the decision and which cause prejudice to the Appellant.

II. THE NEW SEVERANCE IS NOT IN THE INTERESTS OF JUSTICE

15. In deciding to again separate the proceedings in Case 002, the Chamber failed to abide by the applicable law as articulated by the Supreme Court. In so doing, the Chamber committed several errors on questions of law and discernible errors in the exercise of its discretion which are prejudicial to the Appellant.

16. It is evident from a reading of the applicable law section[13] of the Impugned Decision that the Chamber omitted general provisions that the Supreme Court has specifically enunciated, and which it then failed to take into account in the reasons for its decision to sever the proceedings.

17. As a matter of fact, the Supreme Court has already noted that "*decisions on severance*

[10] Second Severance Decision of the Supreme Court, **E284/4/8**, paras. 23 and 24.
[11] Second Severance Decision of the Supreme Court, **E284/4/8**, paras. 23 and 25.
[12] Impugned Decision, paras. 13, 23, 27, 28.
[13] Impugned Decision, paras. 13 and 14.

constitute exceptions to the general preference for joint trials."[14] In addition, it has also held that the Chamber's discretion to sever is tempered, particularly in cases as complex and large as Case 002, where the mode of severance inevitably has greater and more significant impact on the parties.[15]

18. Moreover, the Supreme Court has provided specific guidance on the interpretation of the requirement that severance must be in the "interest of justice": "[…] *notwithstanding the breadth of discretion vested in the Trial Chamber in deciding on the severance, the "interest of justice" needs to be demonstrated with adequate reasoning which points to concrete and relevant circumstances and explains their common effect on the severed case as a whole*." [16] Also, as previously articulated by the Supreme Court, "*decisions on severance therefore involve balancing different legitimate interests by comparing the benefits and disadvantages of holding a single trial on all charges contained in an indictment as opposed to those of holding multiple trials on these same charges."*[17]

19. However, in the Impugned Decision, the Chamber failed to abide by all of these general requirements and, above all, totally disregarded them in its reasoning. In fact, while the Chamber's reasoning more specifically considers the factors to be taken into account in determining the appropriateness of severance, the Chamber misinterpreted the requirements articulated by the Supreme Court and failed to draw the necessary inferences.

I. A. ERRORS COMMITTED IN CONSIDERING THE PREJUDICE CAUSED TO THE RIGHTS OF THE ACCUSED

II. A. 1. Right to predictability and legal certainty

20. At paragraph 24 of the Impugned Decision, the Chamber considers that its new severance decision does not offend the principles of predictability and legal certainty because it has issued a list of paragraphs relevant to Case 002/02 as delimited by the Chamber. In the view of the

[14] First Severance Decision of the Supreme Court, **E163/5/1/13**, para. 33.
[15] First Severance Decision of the Supreme Court, **E163/5/1/13**, para. 40.
[16] Second Severance Decision of the Supreme Court, **E284/4/8**, para. 36, citing the First Severance Decision of the Supreme Court, **E163/5/1/13**, para. 35 (emphasis added).
[17] Second Severance Decision of the Supreme Court, **E284/4/8**, para. 37, referring to the First Severance Decision of the Supreme Court, **E163/5/1/13**, para. 50 (emphasis added).

Chamber, the circumstances are analogous to those prevailing at the time of the previous severance, and it bases its reasoning on a Supreme Court decision stating that the concerns of the Defence were no longer valid where severance had again been ordered and then upheld on appeal. The Chamber adds that the parties had ample opportunity to examine the evidence on the case file and to raise objections pursuant to the Internal Rules. The Chamber "*considers that issuance of a severance decision clearly defining the scope of the next stage of the trial serves to inform the Accused of the charges against them and permit them to participate in the preparation of their defence.*" The Chamber's reasoning is completely flawed.

II. A. 1. a. Lack of predictability and certainty concerning the totality of the charges

21. On each occasion that the Chamber severed the proceedings, it consistently failed to define the scope of any phase beyond the one immediately following. Yet, the Supreme Court instructed it that in severing proceedings, the Chamber had to define all of the subsequent phases by providing a "*tangible plan regarding subsequent cases to be tried after*" the trial so delineated.[18] In fact, not only is the Chamber seised of the entirety of the charges contained in the Closing Order and has the duty to dispose of all those charges,[19] the Accused must also know whether or not and how he shall be tried on the entirety of those charges. This information is of paramount importance for the preparation of the defence as a whole, both from a material and strategic perspective. As such, defining only the subsequent phase and leaving the others in limbo and therefore open to all possibilities is not enough to comply with these fundamental principles and places the parties in a position of complete unpredictability and uncertainty. As the Supreme Court recalled:

> [T]he effects of severance are assessed in relation to the entirety of charges so reconfigured and not just a portion thereof. As such, where severance is ordered, the status of the entirety of charges encompassed by the indictment is resolved and no criminal procedure that observes the right to a speedy trial and the principle of efficiency permits leaving any severed portion unattended.[20]

22. Moreover, the Chamber misinterpreted the findings of the Supreme Court on submissions

[18] Second Severance Decision of the Supreme Court, **E284/4/8**, para. 24.
[19] Second Severance Decision of the Supreme Court, **E284/4/8**, para. 62, footnote 176.
[20] Second Severance Decision of the Supreme Court, **E284/4/8**, para. 43.

made by the Defence at the first trial. The Supreme Court had made a determination on the matter of Mr KHIEU Samphân's provisional detention in relation to the charges covered by the first trial. While it considered that predictability and legal certainty had been restored by a new severance which was upheld on appeal, at issue was "*the predictability and certainty of the end of the proceedings and judgment in Case 002/01*."[21] The Supreme Court had accordingly specified that "*[t]he matter of KHIEU Samphân's detention in relation to Case 002/02 and subsequent trials, if any, will therefore require new and separate justification and scrutiny by the assigned primary triers of fact.*"[22] In the view of the Supreme Court, the Chamber's silence on the charges placed outside the scope of Case 002/01 "*render[ed] KHIEU Samphân's continued detention in relation to those charges increasingly unjustified.*"[23]

23. The Chamber can therefore not rely on the findings of the Supreme Court while remaining silent on the fate of the charges placed outside the scope of Case 002/02 without committing an error of law and violating the principles of predictability and legal certainty.

II. A. 1. b. Lack of predictability and certainty concerning the clear delineation of the scope of the trials

24. Moreover, the fact that the parties have received lists of paragraphs of the Closing Order and were afforded the (theoretical[24]) opportunity to examine the evidence and raise objections does not in and of itself give them notice of the actual scope of the first two trials determined by the Chamber.

25. In fact, the list of paragraphs of the Closing Order relevant to Case 002/01 and the opportunity to object to the evidence have not averted the difficulties nor estopped numerous requests for clarification from the parties on the presentation of evidence and selection of facts to be used and weighed in the characterization of joint criminal enterprise and crimes against

[21] Decision on Immediate Appeal Against the Trial Chamber's Decision on KHIEU Samphân's Application for Immediate Release, 22 August 2013, **E275/2/3** ("Supreme Court Decision on Detention, **E275/2/3**), para. 52 (Emphasis added).
[22] Supreme Court Decision on Detention, **E275/2/3**, para. 51.
[23] Supreme Court Decision on Detention, **E275/2/3**, para. 49; see also Second Severance Decision of the Supreme Court, **E284/4/8**, para. 72.
[24] Urgent Request by the Defence Team of Mr KHIEU Samphân for an Immediate Stay of Proceedings, 1 August 2013, **E275/2/1/1** (« Request for Immediate Stay of Proceedings, **E275/2/1/1**), paras. 78-91.

humanity. These matters, moreover, are still pending.[25]

26. In addition, it is evident from the list of paragraphs of the Closing Order relevant to Case 002/02, annexed to the Impugned Decision, that the experience of 002/01 will recur and will certainly be amplified as a result of the overlapping of the two trials. In fact, the Chamber included therein paragraphs within the scope of Case 002/01 on the ground that certain matters "*may not have been fully examined in Case 002/01 due to its limited scope and may also be relevant in the context of Case 002/02 (...) insofar as they contain factual allegations relevant to the factual allegations in this case and not previously or fully examined.*"[26]

27. This approach spurs confusion and will inevitably lead to new difficulties and further delays in the conduct of the proceedings.

II. A. 1. c. Lack of predictability and certainty concerning the procedural consequences of the severance

28. By severing anew and issuing unclear and contradictory decisions, the Chamber makes the procedural framework of the entirety of Case 002 unpredictable and uncertain for the parties.

29. In fact, the Chamber has recently claimed that separate trials resulting from severance are not distinct trials, but successive "phases" or "portions" of a single trial.[27] On the other hand and at the same time, the Chamber is issuing decisions that contradict this assertion. This inconsistency has serious consequences on the conduct and timeliness of the proceedings.

30. At paragraph 23 of the Impugned Decision, the Chamber stated that as it had noted "*from the outset of the trial, Case 002/01 will serve as a foundation for a more detailed examination of the remaining charges and factual allegations against the Accused in later trials.*" The Chamber adds that it has "*clarified that evidence already put before the Chamber in Case 002/01 will be maintained in Case 002/02.*" In the Chamber's opinion, this would prevent a repetition of a

[25] Mr KHIEU Samphân's Submissions on the Scope of Case 002/02, 31 January 2014, **E301/5/2** ("Submissions on the Scope of Case 002/02, **E301/5/2**"), paras. 9-12 and cited references; Request for Immediate Stay of Proceedings, **E275/2/1/1** and Addendum, 4 September 2013, **E275/2/1/3**.
[26] Impugned Decision, para. 42.
[27] Clarification regarding the use of evidence and the procedure for recall of witnesses, civil parties and experts from Case 002/01 in Case 002/02, 7 February 2014, **E302/5** ("Memo of 7 February 2014, **E302/5**"), para. 5.

process that was "*time and resource intensive*" during Case 002/01.

31. However, while the Chamber effectively announced its intention as early as 2011 to use the first trial as a "general foundation" for subsequent trials, it never explained precisely what that meant, nor its consequences on the proceedings (aside from the fact that because of this reason, the parties' opening statements would have to encompass the entirety of the charges in the Closing Order)[28] It was not until February 2014, in response to a request from the Co-Prosecutors, that the Chamber stated that evidence put before the Chamber in the first trial shall serve as a foundation for subsequent trials and was therefore automatically admitted in Case 002/02 without further qualification.[29] However, at paragraph 46 of the Impugned Decision, the Chamber invites the parties to file the lists of witnesses and documents that they would want admitted in Case 002/02. Yet, in the order setting out the timelines and modalities for filing these lists, the Chamber asks parties to include evidence that it has otherwise already admitted for Case 002/02.[30] This repetition of processes which mobilises time and resources is baffling and compels one to ask whether the severed trials are not separate trials.

32. This contradiction between the "continuation"[31] of proceedings in multiple phases of a single trial recently referred to by the Chamber, and the repetition of procedural steps during separate trials[32] is further reinforced by the invitation to the parties to again file lists of uncontested facts under Rule 80(3)(e) of the Internal Rules.[33] The scheduling of a new initial hearing[34] which, according to the Internal Rules, marks the opening of trial[35] is a particularly flagrant example of this contradiction.

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[28] Response by the Defence for Mr KHIEU Samphân 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 2014, **E302/1** ("Response, E302/1"), paras. 20-22 ; Mr KHIEU Samphân's Submissions on the Need to Wait for a Final Judgment in Case 002/01 Before Commencing Case 002/02, 5 February 2014, **E301/5/5** ("Submissions on the Need to Wait for Final Judgment, **E301/5/5**"), paras. 34-36.
[29] Memo of 7 February 2014, **E302/5**, para. 7.
[30] Order to File Updated Material in Preparation for Trial in Case 002/02, 8 April 2014, **E305** ("Order, **E305**"), para. 11 and footnote 12.
[31] Memo of 7 February 2014, **E302/5**, para. 7.
[32] Response, E302/1, paras. 6-17 and paras. 30-32.
[33] Order, **E305**, para. 9.
[34] Trial Chamber Workplan for Case 002/02 and Schedule for Upcoming Filings, 24 December 2013, **E301/5** (Workplan, **E301/5**), para.8; Impugned Decision, para. 46; Order, **E305**, para 15.
[35] Internal Rules, Rule 80 bis(1): "The trial begins with an initial hearing."

33. The lack of clarification and explanation of this notion of "general foundation" upon which the Chamber premises the need for effective and expeditious proceedings is prejudicial because it has a monumental impact on the preparation of the defence. The Defence must know exactly how the Chamber intends to use Case 002/01 as a "general foundation" for subsequent trials in order to prepare for these trials accordingly. It does not know.

34. Moreover, according to the Appellant, this notion of "general foundation" is the reason why Case 002/02 cannot begin before final judgement is rendered in Case 002/01.[36] In disregarding this impossibility, the Chamber has remained completely silent concerning this notion.[37]

35. By being vague and contradictory, the Chamber exacerbates the legal and procedural uncertainty for the parties.

II. A. 2. Right to be tried without undue delay

36. In the Impugned Decision,[38] the Chamber considers that a new severance will not result in undue delays and will not run counter to the right of the Accused to be tried without undue delay. In reaching this conclusion, the Chamber has once again misconstrued the decisions of the Supreme Court, as well as relevant international jurisprudence. Moreover, the Chamber took into account irrelevant factors and misapprehended the experience to be drawn from Case 002.

II. A. 2. a. Misinterpretation of jurisprudence

37. By way of preliminary comment, the Appellant points out that the Chamber misconstrued his submissions.[39] Contrary to what the Chamber asserts at paragraph 19 of the Impugned Decision, the Appellant never stated that the Supreme Court held that severance would inevitably result in longer proceedings than a single trial. In fact, the Appellant simply quoted the Supreme Court which had listed factors taken into account by case law and pointed out that judges (from

[36] Submissions on the Need to Wait for Final Judgment, **E301/5/5**; T. 11 February 2014, **E1/239.1**, p. 29 L. 15 to p. 35 L.17 (between [10.16.23] and [10.34.22]).
[37] Decision on KHIEU Samphan's Request to Postpone Commencement of Case 002/02 Until a Final Judgment is Handed Down in Case 002/01, 21 March 2014, **E301/5/5/1**.
[38] Impugned Decision, paras. 18-23.
[39] Impugned Decision, para. 19 and footnote 52.

other tribunals and not those of the Supreme Court) had found in particular that two successive trials would inevitably last longer than a single trial.[40]

38. At paragraph 19 (sic) of the Impugned Decision, the Chamber states that *"[t]he trial of Case 002 is an unavoidably lengthy endeavour considering the number of facts set forth in the 772-page Closing Order*." This is abundantly clear. Yet the Chamber never truly asked itself if the proceedings required to examine these 772 pages would not have taken even longer with several successive trials rather than a single trial, nor did it ever make the required comparison.[41] (See also *infra*, Part II.B.).

39. Rather than doing so, the Chamber simply misconstrued two cases cited by the Supreme Court and wrongly considered that "*it is not clear that the ICTY Chambers*'[42] *respective concerns regarding the rights of the Accused are applicable to a possible severance of Case 002*."[43]

40. At paragraph 20 of the Impugned Decision, the Chamber claims that in the *Milošević* case, "*the Appeals Chamber considered that two successive trials would be particularly onerous to Milošević as he was representing himself*," which is not the case for the two Accused in Case 002.

41. In the *Milošević* case, the Appeals Chamber justified a joinder while recognising that there was "*no doubt*" that a single trial would "*indeed be long and complex*."[44] However, the Appeals Chamber did not justify the joinder because of the particularly onerous burden for the Accused due to absence of counsel. It started by – broadly – comparing the onerousness of a joint trial to the onerousness of "*two successive trials which in total would inevitably take even longer than a single trial*."[45] In both scenarios, the length of proceedings took on an onerous

[40] Submissions on the Scope of 002/02, **E301/5/2**, paras. 5 and 6.
[41] Second Severance Decision of the Supreme Court, **E284/4/8**, para. 37.
[42] French Version reads: "[TRANSLATION]: The two Trial Chambers of the ICTY; The English version reads: "the ICTY Chambers."
[43] Impugned Decision, para. 20.
[44] *Prosecutor v. Slobodan Milošević*, Cases IT-99-37-AR73, IT-01-50-AR73 & IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("*Milošević* Decision"), para. 25.
[45] *Milošević* Decision, para. 27.

nature. It is the difference in the duration of the onerous nature for all parties that was taken into consideration in favour of the joinder, and not the absence of counsel for the Accused:

> As has been shown to be necessary in all long trials before this Tribunal, the Trial Chamber will from time to time have to take a break in the hearing of evidence to enable the parties to marshal their forces and, if need be, for the unrepresented accused to rest from the work involved. The responsibility for the accused's decision not to avail himself of defence counsel, however, cannot be shifted to the Tribunal.[46]

42. Moreover, it is certainly worth emphasizing that in this case, the Appeals Chamber ruled in favour of the joinder, resulting in a long and complex trial by insisting on the heavy responsibility borne by the Prosecution to ensure that the Chamber and the Defence were not overloaded with unnecessary material. It also underscored the Trial Chamber's duty to exercise its powers under the Rules to make the trial as manageable as possible.[47]

43. At paragraph 21 of the Impugned Decision, the Chamber points out that in *Mladić*, the Trial Chamber considered that the severance and conduct of two trials could prejudice the Accused as it might overburden him to be involved in pre-trial matters in one case while simultaneously participating in the judgement or appeal stage of another. The Chamber added that the ICTY judges considered that the need to coordinate two Defence teams, each one representing the Accused in a different trial, would complicate his ability to participate in the preparation of his defence. In the view of the Chamber, these considerations do not apply to Case 002 because "*many pre-trial matters have already been completed*". Moreover, the Accused are represented by a single defence team and therefore do not need to coordinate two distinct teams of lawyers.

44. However, the Chamber omitted to mention that in *Mladić*, the judges of the ICTY had most particularly considered that "*the division of time and attention that would be required of the Accused to participate in his defence to both cases could render his participation less effective and also necessitate a slower pace of proceedings for both trials.*"[48] This fact is applicable in

[46] *Milošević* Decision, para. 27.
[47] *Milošević* Decision, paras. 25-26.
[48] *Prosecutor v. Ratko Mladić*, Case n° IT-09-92-PT, Decision on Consolidated Prosecution Motion to Sever the Indictment, to Conduct Separate Trials, and to Amend the Indictment, 13 October 2011 ("*Mladić* Decision"), para. 31.

case of simultaneous proceedings whatsoever and is all the more applicable in Case 002 where the two Accused are 83 and 87 years old. Moreover, while certain pre-trial matters have already been completed, not all have, and the ongoing preparation of Case 002/02 including the procedural stages required by the Chamber is proof that this preparatory phase is not an idle one. Lastly, this fact is always applicable in the case of a defence represented by a single team of lawyers. No human being can duplicate himself or herself. Participation in simultaneous proceedings whatsoever necessarily entails an internal division of tasks. Thus, the Accused may very well need to coordinate two groups within his defence team, both working on different but simultaneous proceedings.

45. At paragraph 22 of the Impugned Decision, the Chamber again disregards (rather surreptitiously), the reasoning of the judges in *Mladić*, according to which "*in the case of a lengthy appeals process, the potential delay of the second trial could be substantial.*"[49] In the present case, the Chamber "*does not consider that a severance of the remaining proceedings would create undue delay by requiring a postponement of a second trial to give the Accused adequate time to prepare his case.*" The Chamber notes that the defence lawyers were assigned in 2007 and that they have been involved in the proceedings from the investigative phase, unlike at the ICTY. Consequently, according to the Chamber, each defence team has had sufficient time and resources to prepare its respective case against all the charges in the Closing Order.

46. To start with, the comparison to ICTY lawyers is irrelevant to the extent that if they are not involved in the proceedings from the investigative phase it is because the adversarial system of the ICTY does not include an investigative phase. In any event, these lawyers are assigned and begin preparing their case years prior to the start of hearings, and better still since they are the ones who conduct their own investigations. Further, the Appellant must point out that his current lawyers were not involved during the investigative phase: the first among them was only appointed in November 2011,[50] that is to say when substantive hearings in Case 002/01 started.

47. Above all, the Chamber obfuscates the complex nature of the appeal phase (and now

[49] *Mladić* Decision, para. 32.
[50] Mr KONG Sam Onn on 18 November 2011, Mr Arthur VERCKEN on 21 November 2011, Ms Anta GUISSÉ on 19 January 2012.

several appeal phases) in Case 002, in addition to the complex nature of the legal and procedural issues that stem in part from its own severance decisions, most of which are unprecedented and for which none of the parties were able to prepare at the investigative phase. As a matter of fact, Rule 89*ter,* which provides for the separation of proceedings, was only introduced into the Internal Rules in February 2011, i.e. after the Chamber was seised of Case 002. The interpretation and application of this rule has been extensively challenged on appeal, as is presently the case. Moreover, the hybrid nature of the proceedings before the ECCC is unique; interventions from the Supreme Court are rather rare as very few decisions are subject to immediate appeal.

48. The *Milošević* and *Mladić* cases referred to by the Supreme Court are therefore relevant and applicable in Case 002. They are buttressed by other cases from the Appeals Chamber of the International Criminal Tribunals (see *infra*, Part II. B), and the Chamber ought to have sought guidance therefrom in determining the advisability of a fresh severance in Case 002. By not doing so and by failing to compare, at any time, the length of a single trial to that of several trials involving the same charges before concluding that a fresh severance would not entail any delay, the Chamber committed an error of law that invalidates its decision.

II. A. 2. b. <u>Misapprehension of the experience of Case 002</u>

49. At paragraph 23 of the Impugned Decision, the Chamber wrongly states that "[*t*]*he argument that severance of trials would necessarily create undue delay is not borne out by the experience of Case 002."* The Chamber's reasoning is flawed as it does not consider the most relevant factors.

50. Indeed, the Chamber simply states that evidence already put before it in Case 002/01 will be deemed to have been put before the Chamber in Case 002/02. As seen *supra (*Part II. A. 1. c., this does not preclude the mobilisation of the parties' time and resources nor a repetition of other procedural steps.

51. Again, the Chamber simply states that certain witnesses relevant to the totality of Case 002 were heard in Case 002/01 and that this will reduce the need to recall them for future trials.

As shall be demonstrated *infra* (see Part II. C.), the Chamber wildly overstates this reduction in the need to recall witnesses.

52. At no point does the Chamber take into account the additional delays – in fact, largely foreseeable as borne out by the experience of Case 002 – inevitably caused by a severance. These delays arise, first, from the significant time devoted to all the written and oral procedural battles resulting from the first two severance decisions, including during the evidentiary hearings.[51] They also arise from a repetition of the pre-trial stages of each trial (see *supra,* Part II. A. 1. c.). Then there is the repetition of the final stages of each trial: parties' closing submissions, closing statements, deliberations and drafting of the judgement and appeal phase.

53. In addition to the many serious errors committed by Chamber in considering the prejudice caused to the rights of the Accused, the Chamber has committed errors with respect to the manageability and efficiency of the proceedings.

II. B. ERRORS COMMITTED WITH RESPECT TO THE EFFICIENCY AND MANAGEABILITY OF THE PROCEEDINGS

54. At paragraph 30 of the Impugned Decision, after calculating at paragraphs 26 and 27 the number of witnesses to be heard and the number of paragraphs of the Closing Order that remain to be addressed, the Chamber considers that an additional severance of the proceedings is in the interest of justice. There again, the Chamber's conclusion is erroneous because the method it employs is flawed.

55. In short, at paragraph 26 of the Impugned Decision, the Chamber explains that hearing 96 witnesses during a second trial is more manageable than hearing all of the witnesses proposed by all the parties for the entirety of the Closing Order, excluding those witnesses who have already testified in the first trial. This assumption leads the Chamber to conclude that *"[...] the trial of Case 002 would involve significantly more witnesses [...]*". At paragraph 27 of the Impugned Decision, the Chamber finds that it would be easier to manage fewer paragraphs of the Closing

[51] Submissions on the Scope of 002/02, **E301/5/2**, paras. 9-10; Request for Immediate Stay of Proceedings, **E275/2/1/1** and Addendum **275/2/1/3**; Immediate Appeal [of the Defence for Mr NUON Chea] Against Trial Chamber's Second Decision on Severance and Response to Co-Prosecutors' Second Severance Appeal, 27 May 2013, **E284/4/1**, paras. 12, 14, 18-20.

Order than all of 1,147 that remain to be addressed.

56. The Chamber's reasoning therefore amounts to claiming that less is better than more. It is obvious that managing part of a whole is always easier than managing a whole. However, the question that emerges is whether managing all the parts of the whole several times is easier and more efficient – or not – than managing the whole all at once.

57. The instructions of the Supreme Court, founded upon international jurisprudence, were nonetheless very clear on that point, as they were on the method the Chamber was to follow when entertaining severance. The calculation must involve comparing "[…] *holding a single trial on all charges contained in an indictment as opposed to those of holding multiple trials on these same charges* […]"[52]. And if the judges of international criminal tribunals considered that "[…] *"two successive trials [...] would inevitably take even longer than a single trial*",[53] it is because they had undertaken that comparison.

58. This method was also followed in cases other than *Milošević* and *Mladić, supra* (part II. A.2.a.) in concluding in favour of joint trials. For example, in *Gotovina et al.*, the ICTY Appeals Chamber endorsed the reasoning of the Trial Chamber which considered that "[…] *while one separate trial could be expected to be shorter than a joint trial, the joint trial would be more expedient than two or three separate trials.*"[54] The Appeals Chamber added that "*[t]wo separate trials, whether conducted simultaneously or otherwise, are still likely to require more court hours in total than one joint trial and require more judicial time and resources. Furthermore, two separate trials will likely lead to duplication of efforts.*"[55]

59. In *Pandurević et al.* and *Tolimir et al.*, the Appeals Chamber of the ICTY endorsed the reasoning of the trial judges who joined the proceedings by considering that if each trial was held separately, all of the trials would last a total of 93-95 months, while a joint trial would only last

[52] Second Severance Decision of the Supreme Court, **E284/4/8**, para. 37.
[53] Second Severance Decision of the Supreme Court, **E284/4/8**, para. 38
[54] *Prosecutor v. Gotovina et al*, Case IT-01-45-AR73.1, Case IT-03-73-AR73.2 & Case IT-03-73-AR73.2. Decision On Interlocutory Appeals Against The Trial Chamber's Decision To Amend The Indictment And For Joinder, 25 October 2006 ("*Gotovina et al.* Decision"), para. 43
[55] *Gotovina et al.* Decision, para. 44.

for 18 to 24 months.[56] Accordingly, the four to ten month extension of one of the trials that would have lasted 14 months was deemed to be in the interests of judicial economy.[57]

60. In the present case, the Chamber neither endeavoured to assess nor to compare the duration of a succession of several separate trials to the duration of a single trial. Had the Chamber done so, it would have reasonably concluded that in terms of duration and efficiency of the proceedings, it was preferable to adjudicate in a single trial all of the facts and charges still remaining to be addressed. This conclusion would have been reinforced by the issue of recalling witnesses.

II. C. ERRORS COMMITTED IN CONSIDERING THE POTENTIAL INCONVENIENCE TO WITNESSES

61. At paragraph 23 of the Impugned Decision, the Chamber claims that the fact that certain witnesses relevant to the totality of Case 002 were heard in Case 002/01 *"[...] will reduce the need for certain witnesses to be recalled during subsequent phases of Case 002*", even though it will make an assessment on a case by case basis. At paragraph 28 of the same decision, the Chamber adds that "*[a]lthough dependent upon the precise delimitation of the scope of subsequent proceedings, the Chamber considers that the number of individuals who might be recalled after appearing in Case 002/02 will be limited*" and that [the Internal Rules] *"[...] will function as a safeguard against irrelevant or repetitious evidence and will restrict the potential burden on these individuals."*

62. The Chamber underestimates the need to recall witnesses, experts and civil parties as a result of the severances and, consequently, the delays resulting from these recalls, in addition to the inconvenience caused to these individuals.

63. First, the argument that the Internal Rules will function as a safeguard against irrelevant or repetitious evidence is invalid, insofar as severed trials are supposed to involve the

[56] *Prosecutor v. Pandurević et al.* Case IT-05-86-AR73.1, Decision on Vinko Pandurević's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 24 January 2006 ("*Pandurević et al.* Decision"), para. 20; *Prosecutor v. Tolimir et al.*, Case IT-04-80-AR73.1, Decision on Radivoje Miletic's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006, ("*Tolimir et al.* Decision"), para. 26.
[57] *Pandurević et al.* Decision, para. 21; *Tolimir et al.* Decision, para. 26.

consideration of different facts.

64. Further, the experience of the trial in Case 002/01 is very edifying. Indeed, only 5 individuals were heard in this trial with regard to the totality of the facts in Case 002.[58] For the reasons set out in prior submissions, while the two experts who testified could have theoretically been heard with regard to the entirety of Case 002, this is not what happened.[59] CHANDLER, for example, was not able to testify on the details of S-21 in Case 002/01.[60] Since S-21 is within the scope of Case 002/02, he would therefore have to be recalled. SHORT, for example, was not able to testify on genocide in Case 002/01.[61] As genocide is within the scope of Case 002/02, he would therefore have to be recalled.

65. Moreover, among those who were heard, those whose testimony was relevant to other facts in Case 002 were unable to testify beyond the scope of Case 002/01.[62] Their testimony in the subsequent trials cannot therefore be deemed irrelevant or repetitious. Nothing prevents them from being recalled for subsequent trial or trials whose scope is yet to be specified (upon which the recall depends, as stated by the Chamber itself).

III. CONCLUSION

66. The numerous errors of law committed by the Chamber have led to discernible errors in the exercise of its discretion which have resulted in prejudice to the Appellant. The new severance decision issued by the Chamber creates a marked imbalance between the rights of the

[58] LONG Norin, alias Rith (TCW-395); SAKIM Lmut, alias Mey (TCW-583); SAO Sarun (TCW-604); YUN Kim, alias Kham (TCW-797); KHIEV Neou (TCW-321).

[59] Response, **E302/1**, para. 23 and footnote 23, para. 24 and footnote 25; Request for Immediate Stay of Proceedings, **E275/2/1/11**, paras. 63 to 65; Mr KHIEU Samphan's Immediate Appeal Against the Decision Issued in the Form of an Email sent from Ms LAMB on 21 February 2013, 26 February 2013, **E264/1/2/1**, paras. 38 to 46 and 50 and Complementary Brief of 25 March 2013, **E264/1/2/1/1**, para. 17.

[60] Judge CARTWRIGHT, T. 18 July 2012, **E1/91.1**, p. 19, lines 15-25, p. 20, lines 1-25, p. 21, line 1 (between [09.49.41] and [09.53.58]); Mr ABDULHAK speaking for the Co-Prosecutors, T. 19 July 2012, **E1/92.1**, p. 133, lines 1-13 (between [15.31.09] and [15.32.46], p. 134, lines 17-19 (at [15.34.46]); Judge CARTWRIGHT, T. 20 July 2012, **E1/93.1**, p. 3 lines 20-25 and p. 4 lines 1-25 (between [09.08.02] and [09.11.31]; Mr ABDULHAK speaking for the Co-Prosecutors, T. 20 July 2012, **E1/93.1**, p. 7, lines 1-4; Judge LAVERGNE, T. 23 July 2012, **E1/94.1**, p. 119, lines 16-20 (between [15.01.50] and [15.03.28]).

[61] Response to Internal Rule 87(4) Requests to Place New Documents on the Case File concerning the Testimony of Witnesses François PONCHAUD and Sydney SCHANBERG (E243) and Experts Philip SHORT (E226, 226/1 and 230) and Elizabeth BECKER (E232 and E232/1), **E260**, paras. 7 and 8; T. 6 May 2013, **E1/189.1**, p. 59, lines 15-19 (between [11.52.32] and [11.54.06]).

[62] Response, **E302/1**, para. 22

parties. It violates Mr KHIEU Samphân's right to predictability and legal certainty as well as his right to be tried without undue delay and to have adequate facilities for the preparation of his defence. The uncertainty surrounding the facts not included in the scope of Case 002/02, as defined by the Chamber, is an obvious case in point.

67. As manager of the case and guardian of the rights of the Defence, the Chamber should have, as directed by the Supreme Court, compared the benefits and the disadvantages of having one trial as opposed to several. It should also have considered all of the existing possibilities (given the numerous powers it enjoys) in order to try to properly conduct a single and final trial in Case 002 by improving the manageability and efficiency of the proceedings by means other than a new severance.

68. The fact of the matter is that the Chamber dispensed itself from such an analysis and that its new severance order is not in the interests of justice. Accordingly, the Impugned Decision should be annulled.

69. **FOR THESE REASONS** , the Supreme Court Chamber is requested to:

- FIND the present appeal admissible;
- ANNUL the Impugned Order.

	Mr KONG Sam Onn Ms Anta GUISSE Mr Arthur VERCKEN	Phnom Penh Paris Paris	*[Signed]* *[Signed]* *[Signed]*
Date	Name	Place	Signature