ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

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អង្គជំនុំជម្រះតុលាការកំពូល
Supreme Court Chamber
Chambre de la Cour suprême

សំណុំរឿងលេខ: ០០២/១៩-កញ្ញា-២០០៧-អ.វ.ត.ក-អ.ជ.ស.ដ/អ.ជ.ត.ក(២៩)
Case File/Dossier N°. 002/19-09-2007-ECCC-TC/SC(29)

Before:	**Judge KONG Srim, President** **Judge Chandra Nihal JAYASINGHE** **Judge SOM Sereyvuth** **Judge Agnieszka KLONOWIECKA-MILART** **Judge MONG Monichariya** **Judge Florence Ndepele Mwachande MUMBA** **Judge YA Narin**
Date:	**29 July 2014**
Language(s):	**Khmer/English**
Classification:	**PUBLIC**

DECISION ON KHIEU SAMPHÂN'S IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S DECISION ON ADDITIONAL SEVERANCE OF CASE 002 AND SCOPE OF CASE 002/02

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Accused
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1. **THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 ("Supreme Court Chamber" and "ECCC", respectively) is seized of the "*Appel immédiat de la Défense de M. KHIEU Samphân interjeté contre la Décision portant nouvelle disjonction des poursuites et fixant l'étendue du procès 002/02*" filed on 5 May 2014 ("Appeal").[1]

I. INTRODUCTION

2. The Appeal concerns a decision of the Trial Chamber issued on 4 April 2014 to sever the remaining proceedings in the present case ("Case 002") and to confine the scope of the second trial ("Case 002/02") to a limited set of the remaining charges ("Impugned Decision").[2]

a. Background

3. On 22 September 2011, acting pursuant to Rule 89*ter* of the Internal Rules,[3] the Trial Chamber severed the proceedings in Case 002 for the first time into discrete trials, each comprising finite portions of the Indictment,[4] and each of which would, in turn, conclude

[1] E301/9/1/1/1.
[2] Decision on Additional Severance of Case 002 and Scope of Case 002/02, E301/9/1, 4 April 2014.
[3] Internal Rules of the ECCC, Revision 8, 3 August 2011 ("Internal Rules").
[4] On 16 September 2010, the Co-Investigating Judges issued the Closing Order in Case 002, indicting NUON Chea and KHIEU Samphân (together, "Co-Accused") of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 12 August 1949, and violations of the Cambodian Penal Code of 1956, and establishing the factual allegations for the Trial Chamber to determine ("Indictment"). *See* Closing Order, D427, dated 15 September 2010 and filed on 16 September 2010 ("Closing Order"). IENG Thirith and IENG Sary were also indicted jointly with the Co-Accused. The charges against IENG Thirith have since been severed and the proceedings against her indefinitely stayed in light of her having been found unfit to stand trial. *See* Decision on Reassessment of Accused IENG Thirith's Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011, E138/1/10, 13 September 2012; Decision on IENG Thirith's Fitness to Stand Trial, E138, 17 November 2011. The proceedings against IENG Sary have since been terminated pursuant to his death on 14 March 2013. *See* Termination of the Proceedings against the Accused IENG Sary, E270/1, 14 March 2013. *See also Post Mortem* Dismissal of IENG Sary's Immediate Appeals, E238/9/1/5, 22 March 2013. Following a series of appeals, the Pre-Trial Chamber confirmed the Indictment, subject to some amendments. *See* Decision on IENG Sary's Appeal Against the Closing Order, D427/1/30, 11 April 2011; Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order, D427/2/15 *and* D427/3/15, 15 February 2011; Decision on IENG Sary's Appeal Against the Closing Order: Reasons for Continuation of Provisional Detention, D427/1/27, 24 January 2011; Decision on IENG Thirith's and NUON Chea's Appeals Against the Closing Order: Reasons for Continuation of Provisional Detention, D427/2/13 *and* D427/3/13, 21 January 2011; Decision on KHIEU Samphân's Appeal Against the Closing Order, D427/4/15, 21 January 2011; Decision on IENG Sary's Appeal Against the Closing Order's Extension of his Provisional Detention, D427/5/10, 21 January 2011; Decision on IENG Sary's Appeal Against the Closing Order, D427/1/26, 13 January 2011; Decision on IENG Thirith's and NUON Chea's Appeals Against the Closing Order, D427/2/12, 13 January 2011; Decision on KHIEU Samphân's Appeal Against the Closing Order, D427/4/15, 21 January 2011; Decision on IENG Sary's Appeal Against the Closing Order's Extension of his Provisional Detention, D427/5/9, 13 January 2011. Pursuant to Rules 79 and 80*bis* of the Internal Rules, the Trial Chamber was thereby

with a verdict and sentence in the event of a conviction ("First Severance Decision").[5] With respect to the first trial ("Case 002/01"), the Trial Chamber specified that its scope would be limited to: the history and structure of Democratic Kampuchea; the roles of the Co-Accused prior to and during the regime of Democratic Kampuchea; when their roles were assigned, what their responsibilities were, and the extent of their authority; the lines of communication; the movement of the population from Phnom Penh in 1975 ("Phase 1"); the movement of the population from the Central (Old North), Southwest, West and East Zones from September 1975 to 1977 ("Phase 2"); and, five types of crimes against humanity (murder, extermination, persecution (except on religious grounds), forced transfer and enforced disappearances), but only insofar as they pertain to Phases 1 and 2.[6]

4. On 27 January 2012, the Co-Prosecutors requested that the Trial Chamber expand the scope of Case 002/01 by adding three crime sites, namely the District 12 execution sites ("District 12"),[7] the Tuol Po Chrey execution site ("Tuol Po Chrey"),[8] and the S-21 security centre (together with the related Choeung Ek execution site), including the purges of cadres from the New North, Central (Old North) and East Zones sent to S-21, but excluding the Prey Sar worksite ("S-21").[9] On 8 October 2012, the Trial Chamber denied the Request for Expansion with respect to District 12 and S-21,[10] but granted the requested incorporation of Tuol Po Chrey, "insofar as they [...] occurred immediately after the evacuation of Phnom Penh [...], but not otherwise extending to killings that occurred between 1976 and 1977."[11] On 7 November 2013, the Co-Prosecutors appealed the Decision on Expansion, requesting the Supreme Court Chamber to include District 12 and S-21 within the scope of Case 002/01.[12]

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seized of the Indictment and held an initial hearing from 27 to 30 June 2011. *See* T. (EN), 27 June 2011, E1/4.1, T. (EN), 28 June 2011, E1/5.1, T. (EN) 29 June 2011, E1/6.1, *and* T. (EN), 30 June 2011, E/7.1. At the Initial Hearing, the Trial Chamber announced the order in which it intended to proceed with the hearing of the substance in Case 002. *See* T. (EN), 27 June 2011, E1/4.1, pp.7-8.

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

[6] First Severance Decision, paras. 1, 5.

[7] Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/1, E163, 27 January 2012 ("Request for Expansion"), paras. 4(a), 33(a), *referring to* Closing Order, paras. 691, 693-697.

[8] Request for Expansion, paras. 4(b), 33(b), *referring to* Closing Order, paras. 698-711.

[9] Request for Expansion, paras. 4(c), 33(c), *referring to* Closing Order, paras. 192-204, 415-475.

[10] Memorandum from Judge NIL Nonn, President of the Trial Chamber, entitled "Notification of Decision on Co-Prosecutors' Request to Include Additional Crimes Sites within the Scope of Trial in Case 002/01 (E163) and deadline for submission of applicable law portion of Closing Briefs", E163/5, 8 October 2012 ("Decision on Expansion"), para. 2.

[11] Decision on Expansion, para. 3.

[12] Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 with Annex I and Confidential Annex II, E163/5/1/1, 7 November 2012 ("First Severance Appeal").

5. On 8 February 2013, the Supreme Court Chamber found that the Trial Chamber had erroneously interpreted Rule 89*ter* of the Internal Rules resulting in a violation of the parties' right to a reasoned opinion and their right to be heard, as well as errors in the exercise of the Trial Chamber's discretion which caused prejudice.[13] The Supreme Court Chamber further determined that the Trial Chamber's failure to create a plan regarding the handling of the remaining charges to be tried in Case 002 had also caused prejudice.[14] The Supreme Court Chamber decided that the cumulative effect of the errors committed by the Trial Chamber occasioned the invalidity of the First Severance of Case 002, which comprised the First Severance Decision along with related subsequent decisions and memoranda.[15] The Supreme Court Chamber specified that its decision was without prejudice to the Trial Chamber's reassessment of severing Case 002, but that "it must first invite the parties' submissions on the terms thereof, and only after *all* parties' respective interests are balanced against *all* relevant factors may a severance of Case 002 be soundly undertaken".[16] The Supreme Court Chamber added that "[i]t is also necessary that the Trial Chamber determine, based on its organic familiarity with Case 002, whether the gist of such severance is judicial manageability, in which case there is necessity for a tangible plan for the adjudication of the entirety of the charges in the Indictment, and not merely a portion thereof."[17]

6. After having heard the parties, the Trial Chamber announced in court on 29 March 2013 that it decided to re-sever Case 002 pursuant to Rule 89*ter* of the Internal Rules, and that the scope of Case 002/01 would be confined to the charges related to Phase 1, Phase 2, and Tuol Po Chrey ("Second Severance of Case 002"),[18] and provided its written reasons on 26 April 2013 ("Second Severance Decision").[19] On 10 and 27 May 2013 respectively, the Co-Prosecutors and NUON Chea appealed the Second Severance Decision.[20] The Co-Prosecutors requested the inclusion of S-21 within the scope of Case 002/01,[21] whereas NUON Chea requested the annulment of the Second Severance of Case 002 with prejudice to

[13] Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, E163/5/1/13, 8 February 2013 ("First Severance Appeal Decision"), para. 48.
[14] First Severance Appeal Decision, paras. 23, 48.
[15] First Severance Appeal Decision, para. 49.
[16] First Severance Appeal Decision, para. 50 (emphasis in original).
[17] First Severance Appeal Decision, para.50.
[18] T. (EN), 29 March 2013, E1/176.1, p. 4.
[19] Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, E284, 26 April 2013.
[20] Co-Prosecutors' Immediate Appeal of Second Decision on Severance of Case 002, E284/2/1, 10 May 2013 ("Co-Prosecutors' Second Severance Appeal"); Immediate Appeal against Trial Chamber's Second Decision on Severance and Response to Co-Prosecutors' Second Severance Appeal, E284/4/1, 27 May 2013 ("NUON Chea's Second Severance Appeal").
[21] Co-Prosecutors' Second Severance Appeal, para. 84.

future severance orders, or, alternatively, the expansion of the scope of Case 002/01 to include crimes of genocide and those committed at worksites and cooperatives.[22] Neither KHIEU Samphân nor the Civil Party Lead Co-Lawyers ("Civil Parties") offered any submissions in this respect.

7. On 23 July 2013, the Supreme Court Chamber issued a summary of its decision to: uphold the Second Severance of Case 002, require that the evidentiary hearings for Case 002/02 commence as soon as possible, and order that Case 002/02 must comprise of, at minimum, charges relating to S-21, a worksite, a cooperative, and genocide.[23] The Supreme Court Chamber issued its full reasons on 25 November 2013 ("Second Severance Appeal Decision").[24]

8. On 24 December 2013, the Trial Chamber issued a workplan for Case 002/02 and invited the parties' submissions on its scope.[25] Written submissions on the matter were filed by 31 January 2014,[26] and oral arguments were heard on 11 February 2014.[27] The Co-Prosecutors and Civil Parties supported the severance of the remaining proceedings in Case 002 into further discrete trials and requested the inclusion of several different charges and crime sites.[28] NUON Chea took no position on severing the remaining charges in Case 002, requesting only that certain crime sites be included in Case 002/02 in the event of severance.[29] KHIEU Samphân opposed any further severance.[30]

9. On 4 April 2014, the Trial Chamber issued the Impugned Decision severing the remaining proceedings in Case 002 ("Additional Severance of Case 002") and determining to

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[22] NUON Chea's Second Severance Appeal, para. 84.
[23] Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002: Summary of Reasons, E284/4/7, 23 July 2013, paras. 6, 11, 13.
[24] Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002, E284/4/8, 25 November 2013.
[25] Trial Chamber Workplan or Case 002/02 and Schedule for Upcoming Filings, E301/5, 24 December 2013, para. 5; Case 002/02 – Trial Chamber Workplan (detailed), E301/5.1, 24 December 2013.
[26] Co-Prosecutors' Submission Regarding the Scope of Case 002/02 and Trial Schedule with Annex A, E301/2, 5 December 2013 ("OCP on Scope"); Annex A to Co-Prosecutors' Submission re Scope of Case 002/02 & Trial Schedule, E301/2.1, 5 December 2013 ("Annex to OCP on Scope"); Co-Prosecutors' Submission Regarding the Scope of Case 002/02, E301/5/1, 31 January 2014 ("Addendum to OCP on Scope"); Civil Parties' Submission on the Scope of Case 002/02, E301/5/3, 31 January 2014 ("Civil Parties on Scope"); NUON Chea's Response to Trial Chamber's Request for Submissions Concerning the Scope of Case 002/02, E301/5/4, 31 January 2014 ("NUON Chea on Scope"); *Conclusions de la Défense de M. KHIEU Samphân relatives à la portée du procès 002/02*, E301/5/2, 31 January 2014 ("KHIEU Samphân on Scope").
[27] T. (EN), Adversarial Hearing, E1/239.1, 11 February 2014 ("Hearing on Case 002/02").
[28] OCP on Scope, paras. 9, 10, 12-14, 16, 27; Civil Parties on Scope, paras. 1, 2, 10-32; Hearing on Case 002/02, p. 61.
[29] Hearing on Case 002/02, p. 41, 43, 44; NUON Chea on Scope, paras. 6, 7.
[30] Hearing on Case 002/02, p. 52; KHIEU Samphân on Scope, paras. 3-6.

include within the scope of Case 002/02 the charges relating to: the genocide of the Cham (and related religious persecution in the forced movement of the Cham minority); the genocide of the Vietnamese; forced marriages and rape nationwide; internal purges; S-21; the Kraing Ta Chan Security Centre; the Au Kanseng Security Centre; the Phnom Kraol Security Centre; the 1st January Dam Worksite; the Kampong Chhnang Airport Construction site; the Trapeang Thma Dam Worksite; the Tram Kok Cooperatives; the treatment of Buddhists (limited to Tram Kok Cooperatives); and, political persecution/targeting of former Khmer Republic Officials (implementation limited to Tram Kok Cooperatives, 1st January Dam Worksite, S-21 Security Centre and Kraing Ta Chan Security Centre).[31] The Trial Chamber further declared that the charges remaining outside the scope of Case 002/02 will be addressed in due course.[32]

b. The Appeal

10. On 5 May 2014, KHIEU Samphân filed his Appeal, submitting that it is admissible and that the Impugned Decision contains errors of law and discernible errors in the exercise of the Trial Chamber's discretion.[33] KHIEU Samphân accordingly requests that the Supreme Court Chamber annul the Additional Severance of Case 002.[34] The Co-Prosecutors responded to the Appeal on 16 May 2014, submitting that it is inadmissible and lacks merit.[35]

c. Oral Arguments

11. Rule 109(1) of the Internal Rules provides that immediate appeals may be decided on the basis of written submissions only. Having considered the ample written submissions of the parties, the Supreme Court Chamber does not deem it necessary to hear oral arguments in this case, and hereby renders its decision.

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[31] *See* Impugned Decision, paras. 31-44, p. 21. *See also* Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, E301/9/1.1, 4 April 2014 ("Annex to Impugned Decision").
[32] Impugned Decision, p. 21.
[33] Appeal, paras. 6-67.
[34] Appeal, paras. 68-69.
[35] Co-Prosecutors' Response to KHIEU Samphân's Immediate Appeal against the Trial Chamber's Decision on the Additional Severance of Case 002 and the Scope of Trial in Case 002/02, E301/9/1/1/2, 16 May 2014 ("OCP Response"), paras. 1-19.

II. STANDARDS OF APPELLATE REVIEW

12. Pursuant to Rule 104(4) of the Internal Rules, only the following decisions of the Trial Chamber are subject to immediate appeal: (a) decisions which have the effect of terminating the proceedings; (b) decisions on detention and bail under Rule 82 of the Internal Rules; (c) decisions on protective measures under Rule 29(4)(c) of the Internal Rules; and, (d) decisions on interference with the administration of justice under Rule 35(6) of the Internal Rules. Other decisions may only be appealed at the same time as an appeal against the judgment on the merits.

13. Pursuant to Rules 104(1) and 105(4) of the Internal Rules, the Supreme Court Chamber shall decide immediate appeals on the following grounds: (a) an error on a question of law invalidating the decision; (b) an error of fact which has occasioned a miscarriage of justice; or, (c) a discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the appellant.

III. ADMISSIBILITY

14. KHIEU Samphân submits that his Appeal is admissible pursuant to Rule 104(4)(a) of the Internal Rules, arguing that the Impugned Decision results in a *de facto* stay of proceedings in respect of all charges placed outside the scope of Case 002/02, and that such stay does not carry a sufficiently tangible promise of resumption as to permit arrival at a judgment on the merits.[36] He argues that, by staying silent on the fate of the remaining charges, the Trial Chamber errs in failing to provide a tangible plan for the case(s) to be tried after Case 002/02.[37] He further contends that the circumstances prevailing at the time of the First and Second Severance Decisions, appeals against both of which the Supreme Court Chamber found to be admissible for the same reasons he now submits, continue to prevail at the present time.[38]

15. The Co-Prosecutors respond that the Appeal is inadmissible for the following three reasons: (1) the Impugned Decision does not amount to an effective termination or a *de facto* stay of the proceedings in relation to any charges;[39] (2) the current circumstances afford a sufficiently tangible promise of resumption of trial;[40] and (3) the Appeal violates the principle of *allegans contraria non est audiendus*.[41] The Supreme Court Chamber will address these in turn.

a. "Charges" or "Crime Sites"

16. With respect to their first reason, the Co-Prosecutors aver that "the Impugned Decision ensures that *all* remaining legal 'charges' are included in the next trial",[42] arguing that the scope of Case 002/02 "[does not] drop any 'count' from the Indictment but rather, in the interests of an expeditious and representative trial, […] limit[s] the evidence presented to prove each of the charges by excluding certain events and crime sites from the trial."[43] As such, the Co-Prosecutors essentially submit that an appeal is admissible if it is against a decision that effectively terminates the proceedings in relation to "charges" (*i.e.* "counts"), but not if the proceedings are in relation to "crime sites" (*i.e.* "evidence" or "events").

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[36] Appeal, paras. 7-14.
[37] Appeal, paras. 10-11.
[38] Appeal, para. 12.
[39] OCP Response, paras. 3(a), 5, 8-10.
[40] OCP Response, paras. 3(b), 7, 11.
[41] OCP Response, paras. 3(c), 6, 12.
[42] OCP Response, para. 8 (emphasis in original).
[43] OCP Response, para. 8.

17. The Supreme Court Chamber recalls that the Rule 104(4)(a) of the Internal Rules ensures that an avenue of immediate appeal exists where the proceedings are terminated without arriving at a judgment and therefore without an opportunity to appeal against it.[44] The Supreme Court Chamber has interpreted Rule 104(4)(a) of the Internal Rules 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.[45] There is nothing in Rule 104(4)(a) of the Internal Rules which requires that the effectively terminated proceedings relate to the entirety of the Closing Order or specific charges (or counts), as opposed to crime sites (or events). There is also nothing in the Supreme Court Chamber's holding on the application of Rule 104(4)(a) of the Internal Rules that would support similarly limiting its interpretation.[46]

18. The Supreme Court Chamber notes the Co-Prosecutors' effort to differentiate the usage of the terms "charges" and "crime sites" in the direction of reserving the former to denote a legal characterisation of a crime (that is, a crime in a formal sense). In the context of the ECCC, however, the limits of criminal action that seizes the court are determined by the factual allegations set out in an indictment rather than by their legal characterisation, which is not binding.[47] Moreover, considering that definitions of international crimes falling under the jurisdiction of the ECCC are broad and intrinsically comprise clusters of events each of which could be charged as a crime in itself, to attach the right to appeal only to decisions that

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[44] *See* Second Severance Appeal Decision, para. 21 *and* First Severance Appeal Decision, para. 22, *referring to* Decision on IENG Sary's Appeal against Trial Chamber's Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes against Humanity, E95/8/1/4, 19 March 2012, para. 9.

[45] *See* Second Severance Appeal Decision, para. 21 *and* First Severance Appeal Decision, para. 22, *referring to* Decision on Immediate Appeal against the Trial Chamber's Order to Release the Accused IENG Thirith, E138/1/7, 13 December 2011, para. 15.

[46] In examining the First Severance of Case 002, the Supreme Court Chamber found that the Trial Chamber's decision "denying inclusion of S-21 and District 12 from the scope of Case 002/01 ha[d] the effect of terminating the proceedings in relation to those charges". *See* First Severance Appeal Decision, para. 25. *See also* Second Severance Appeal Decision, para. 22. In examining the Second Severance of Case 002, the Supreme Court Chamber similarly found that the Trial Chamber's decision "to confine the scope of Case 002/01 to the charges related to Phase 1, Phase 2, and Tuol Po Chrey ha[d] the effect of terminating the proceedings in relation to the balance of the remaining charges in the Closing Order." *See* Second Severance Appeal Decision, para. 26. The Supreme Court Chamber's basis for so concluding was that the Trial Chamber's decisions resulted in a *de facto* stay of proceedings in relation to all charges placed outside the scope of Case 002/01, and that, under the circumstances prevailing at the time, such stay did not carry a sufficiently tangible promise of resumption as to permit arriving at a judgment on the merits. *See* Second Severance Appeal Decision, para. 26; First Severance Appeal Decision, para. 25. *See also* Second Severance Appeal Decision, para. 22. The Impugned Decision also explicitly states that "[t]he severance outlined above excludes certain *facts, charges and crime sites* from the scope of Case 002/02" (*see* Impugned Decision, para. 45 (emphasis added)), which will require the Trial Chamber's eventual disposition. *See* Impugned Decision, p. 21 ("the disposition of the remaining charges in Case 002/02 does not arise at this time and will be addressed in due course"). In fact, the Co-Prosecutors equally state that "[t]here is every indication on the present facts that the Trial Chamber will dispose of the *remaining charges* in due course." *See* OCP Response, para. 11 (emphasis added).

[47] *See* Rules 98(2) *and* 110(2) of the Internal Rules.

dispose of an entire category of acts falling outside any given legal characterisation would belie the purpose of Rule 104(4)(a) of the Internal Rules. Therefore, for the purpose of the question at hand, a bar on arriving at a judgment on the merits becomes a ground for immediate appeal whenever, as a result of a first instance decision, proceedings have been terminated or suspended in respect to a discrete unit of the indictment, to be understood as each such factual allegation which, when proven in its objective and subjective elements, would allow the attribution of responsibility for a crime under the jurisdiction of the ECCC.

19. For the issue at hand, it is therefore irrelevant whether the portions of the Closing Order which remain outside of the scope of Case 002/02 affect the legal characterisation of the "charges". The operative questions are: (1) whether the decision on which portions of the Closing Order to include in the scope of Case 002/02 creates a situation whereupon there remain judiciable portions that are effectively stayed; and, (2) whether the stay of proceedings in relation to such portions carries a sufficiently tangible promise of resumption as to permit arriving at a judgment on the merits.[48] The Supreme Court Chamber therefore finds that the question whether the Impugned Decision results in a *de facto* stay of proceedings may be validly asked in relation to the entirety of charges or crime sites placed outside the scope of Case 002/02.

20. The Co-Prosecutors' first reason to purport that the Appeal is inadmissible accordingly falls to be rejected.

b. Withdrawal of Charges

21. With respect to their second reason, the Co-Prosecutors submit that, in contrast to the circumstances prevailing during the previous severance, there is now a sufficient promise of resumption of trial and judgment on all charges due to new circumstances, namely the Supreme Court Chamber's clarification of the applicable law on the possibility of withdrawing charges and the Trial Chamber's anticipation that the Co-Prosecutors will make a request to withdraw charges.[49] In essence, the Co-Prosecutors argue that there now exists a tangible plan to withdraw or extinguish the remaining charges that carries a sufficient

[48] It is noteworthy that the Co-Prosecutors' First Severance Appeal specifically contains the argument that the notion of "effect of terminating the proceedings" envisaged by Rule 104(4)(a) of the Internal Rules "must be read to encompass *issues* forestalled so far into an uncertain future that they have little chance of being heard." *See* Co-Prosecutors' First Severance Appeal, para. 11 (emphasis added).
[49] OCP Response, paras. 5, 11.

promise of resumption of proceedings in relation thereto as to permit arriving at a judgment dismissing those charges.[50]

22. A review of the Co-Prosecutors' submissions elaborating its position on these new circumstances shows that they are contradictory and misrepresentative. For instance, contrary to the Co-Prosecutors' contentions that "[KHIEU Samphân] is on notice that proceedings in relation to the unadjudicated crime sites or criminal events may, in the future, be terminated or discontinued",[51] and that "the Impugned Decision itself anticipates a direct request to withdraw charges by the Co-Prosecutors to the Trial Chamber",[52] the Impugned Decision in fact merely states that, "the Trial Chamber has not been seised of a request by the Co-Prosecutors to withdraw charges from the Closing Order",[53] even specifying that "[t]he Co-Prosecutors do not seek to withdraw any of the facts from the Closing Order, instead proposing 'to limit the evidence presented to prove each of the charges by excluding certain events and crime sites from the [Case 002/02] trial.'"[54]

23. The Supreme Court Chamber notes, moreover, that, since the issuance of the Impugned Decision, the Co-Prosecutors have neither requested the withdrawal of any charges, nor have they indicated any firm intention to do so in their response to the Appeal. The Trial Chamber, having noted that it had not been seised of a request by the Co-Prosecutors to withdraw charges, decided that it "need not address this issue at the current stage of proceedings."[55] The fact that the Supreme Court Chamber clarified in the Second Severance Appeal Decision that, under certain conditions, a positive answer to the question of whether it is possible to withdraw charges within the context of the ECCC is not foreclosed does not, on its own, create a situation that would constitute a tangible plan for the remaining parts of the Closing Order, including through eventual withdrawal, extinction, or dismissal of charges or crime sites remaining outside the scope of Case 002/02.

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[50] OCP Response, paras. 3(b), 7, 11.
[51] OCP Response, para. 9, *referring to* Impugned Decision, para. 45.
[52] OCP Response, para. 11(c), *referring to* Impugned Decision, para. 45 *and* fn. 99.
[53] Impugned Decision, para. 45 (internal citation omitted).
[54] Impugned Decision, fn. 99. In further contradiction to their suggestion that the portions of the Closing Order remaining outside the scope of Case 002/02 will be withdrawn, terminated, or discontinued, the Co-Prosecutors claim that "[t]here is every indication on the present facts that the Trial Chamber will dispose of the remaining charges in due course" and that "[t]his conclusion is bolstered by the recent findings, made following expert assessments, that each of the [Co-]Accused are in reasonably good health and fit to stand trial", while concurrently expressing the clashing view that "it is unlikely that judgments can be rendered on all crime sites and criminal events included in the Closing Order within the lifetime of the [Co-]Accused and many of the victims." *See* OCP Response, paras. 9, 11.
[55] Impugned Decision, para. 45.

24. The Co-Prosecutors' second reason to purport that the Appeal is inadmissible accordingly falls to be rejected.

c. *Allegans Contraria Non Est Audiendus*

25. With respect to their third reason, the Co-Prosecutors contend that KHIEU Samphân's previous submissions on admissibility are wholly and irreconcilably inconsistent with those in his Appeal, which runs contrary to the long-standing general principle of law that a party cannot benefit from advancing arguments inconsistent with that party's prior submissions (*allegans contraria non est audiendus*).[56] They argue that it would be unfair for KHIEU Samphân to thereby benefit from an expansion of the current interpretation of Rule 104(4)(a) of the Internal Rules to admit the Appeal, and accordingly request that the Supreme Court Chamber refuse to hear his inconsistent arguments.[57]

26. The Co-Prosecutors do not substantiate their assertion that acceptance of KHIEU Samphân's position on the admissibility of the present Appeal would require expanding the current interpretation of Rule 104(4)(a) of the Internal Rules, and it is not at all apparent that such supposed expansion would be required. The Supreme Court Chamber recalls that it has found that Rule 104(4)(a) of the Internal Rules includes decisions to stay the proceedings that do not carry a tangible promise of resumption, thereby barring arrival at a judgment on the merits,[58] and that the application of this Rule in the First and Second Severance Appeal Decisions resulted in declaring the relevant severance appeals admissible. KHIEU Samphân's current position adopts the Supreme Court Chamber's holding regarding Rule 104(4)(a) of the Internal Rules nearly *verbatim*.

27. As to whether KHIEU Samphân now adduces arguments which are contradictory to those he made in the past, the Supreme Court Chamber notes that, in his submissions leading up to the First Severance Appeal Decision, KHIEU Samphân maintained that the Co-Prosecutors' First Severance Appeal sought to overly extend the ambit of Rule 104(4)(a) of the Internal Rules and was thereby inadmissible because the First Severance of Case 002 did *not* stay the proceedings or bar arrival at a judgment on the merits in respect of charges

[56] OCP Response, paras. 3(c), 6, 12.
[57] OCP Response, para. 12.
[58] *See* Second Severance Appeal Decision, para. 21 *and* First Severance Appeal Decision, para. 22, *referring to* Decision on Immediate Appeal against the Trial Chamber's Order to Release the Accused IENG Thirith, E138/1/7, 13 December 2011, para. 15.

excluded from the scope of Case 002/01.[59] KHIEU Samphân made no submissions in respect of the Second Severance Appeal Decision. The Co-Prosecutors therefore correctly qualify KHIEU Samphân's current position on admissibility as being wholly inconsistent with his previous position on the matter.

28. The Supreme Court Chamber considers that to apply the principle of *allegans contraria non est audiendus* in the present case and refuse to hear KHIEU Samphân's current arguments would require it to make a pronouncement on admissibility which is equally inconsistent with the First and Second Severance Appeal Decisions. At the time of KHIEU Samphân's prior submissions, the issue of the admissibility of severance appeals was a contentious one, and he legitimately expressed a position opposite to that eventually decided by the Supreme Court Chamber. Ever since, the context in which the parties make their submissions on the severance of Case 002 has been transformed first, by the Supreme Court Chamber's jurisprudence on the admissibility of appeals against severance, and second, by the Trial Chamber's subsequent decisions on severance. The Co-Prosecutors' request to apply the principle of *allegans contraria non est audiendus* in the present case to the effect of disallowing KHIEU Samphân to adjust his position to the binding position of the Supreme Court Chamber on the admissibility of severance appeals is therefore untenable.

29. The Co-Prosecutors' third reason to purport that the Appeal is inadmissible accordingly falls to be rejected.

d. Conclusion

30. The Supreme Court Chamber will now turn to the question of whether the Impugned Decision results in a *de facto* stay of proceedings in relation to all charges or crime sites placed outside the scope of Case 002/02, and whether or not, in the present circumstances, such stay carries a sufficiently tangible promise of resumption as to permit arriving at a judgment on the merits.

31. The circumstances prevailing at the time of the First Severance Appeal Decision included: the advanced age and declining health of the Co-Accused; the Trial Chamber's failure to provide a tangible plan or any information regarding subsequent cases (after the close of Case 002/01) to be tried in the course of Case 002; the difficulties expressed by the

[59] *Réponse à l'appel immédiat des co-procureurs concernant la portée du dossier 002/01*, E163/5/1/9, 30 November 2012, paras. 8-20.

Trial Chamber in meeting its workload demands; the fact that, in the context of the ECCC, judgments on the merits are not final until having passed through the appellate stage; and, the views of the parties and of the Trial Chamber that the first trial would be the only trial to ever reach judgment.[60] The Supreme Court Chamber conceded that the same circumstances prevailed at the time of the Second Severance Appeal Decision,[61] noting that the Trial Chamber had reiterated that its primary consideration in re-ordering severance was to maintain the ability to render "any verdict" in Case 002.[62]

32. In ordering the additional severance of Case 002, the Trial Chamber considered the advanced age and declining health of the Co-Accused and of many of the victims,[63] and the corresponding need to manage the remaining proceedings in Case 002, which still comprise a significantly large portion of the Closing Order, as efficiently and expeditiously as possible.[64] After rejecting KHIEU Samphân's submissions that further severance would violate his fair trial rights,[65] the Trial Chamber concluded that "an additional severance of Case 002, which will reduce the wait for a judgment on certain charges, will serve th[e] aim [of safeguarding the interest of those victims who are of an advanced age and in deteriorating health in seeing justice done within their lifetimes], while balancing the rights of the [Co-]Accused".[66] The Trial Chamber also took these considerations into account when deciding which charges to include within the scope of Case 002/02.[67]

33. The Supreme Court Chamber notes that the Trial Chamber has now clearly established, for the first time, which charges will be included in the scope of Case 002/02,[68] and has annexed a detailed list of paragraphs and portions of the Closing Order relevant to Case 002/02 to the Impugned Decision.[69] However, the Trial Chamber takes no procedural action and provides no plan whatsoever to deal with the charges remaining outside the scope of Case 002/02, stating rather that their "disposition […] does not arise at this time and will be addressed in due course",[70] and declaring briefly in relation to the possibility of their withdrawal merely that, "as the Trial Chamber has not been seised of a request by the Co-

[60] First Severance Appeal Decision, para. 24. *See also* Second Severance Appeal Decision, para. 23.
[61] Second Severance Appeal Decision, paras. 24, 25.
[62] Second Severance Appeal Decision, para. 25, *referring to* Second Severance Decision, paras. 8, 135, 161.
[63] Impugned Decision, para. 26-28.
[64] Impugned Decision, paras. 27, 28.
[65] Impugned Decision, paras. 18-25.
[66] Impugned Decision, para. 28. *See also ibid*., para. 30.
[67] Impugned Decision, paras. 36, 39.
[68] Impugned Decision, paras. 31-44.
[69] Annex to Impugned Decision.
[70] Impugned Decision, p. 21.

Prosecutors to withdraw charges from the Closing Order, the Trial Chamber need not address this issue at the current stage of proceedings."[71]

34. The Supreme Court Chamber is, moreover, *ex officio* informed of the fact – as are all the parties – that the Co-Prosecutors proposed an amendment to the Internal Rules, whereby charges pending before the ECCC could be reduced with respect to certain elements of their factual foundation. At the date of the publication of this decision, however, the proposed amendment has not been forwarded to the ECCC Plenary. As such, a possibility of formally disposing of the parts of the Closing Order excluded from the scope of Case 002/02 is purely speculative. The fact of the matter remains that no procedural action has been taken in relation to these charges.

35. The Supreme Court Chamber notes that a few circumstances have changed since the First and Second Severance Appeal Decisions. Most notably, the trial judgment for Case 002/01 is now scheduled to be pronounced on 7 August 2014,[72] and that the initial hearing for Case 002/02 will commence on 30 July 2014.[73] The prospect of Case 002/02 going to trial and reaching judgment is now more proximate than it previously was. However, the scope of Case 002/02 is significantly larger than the scope of Case 002/01 and it is to be expected that the proceedings will be accordingly time-consuming. At the same time, the Supreme Court Chamber notes that the Trial Chamber has rejected its recommendation regarding the establishment of another trial panel in order to enable parallel disposal of Case 002 segments.[74] With the concern about the health of the Co-Accused remaining valid at all times, the prospect of any proceedings going beyond Case 002/02 must be considered precarious.

36. In light of the above, the Supreme Court Chamber considers that the Impugned Decision results in a *de facto* stay of proceedings in relation to all charges placed outside the scope of Case 002/02, and that, under the present circumstances, such stay does not carry a sufficiently tangible promise of resumption as to permit arriving at a judgment on the merits. The Supreme Court Chamber accordingly finds that the decision to additionally sever Case 002 and confine the scope of Case 002/02 to a limited set of the charges which remained

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[71] Impugned Decision, para. 45.
[72] Scheduling Order for Pronouncement of the Judgement in Case 002/01, E310, 29 May 2014, p. 2 ("Scheduling Order for Trial Judgement").
[73] Scheduling Order for Further Initial Hearing, E311, 11 June 2014, p. 2 ("Scheduling Order for Initial Hearing").
[74] Memorandum from Judge NIL Nonn, President of the Trial Chamber, entitled "President's Memorandum on the Proposal to Appoint a Second Panel of the Trial Chamber to Try the Remaining Charges in Case 002", E301/4, 20 December 2013, para. 10.

outside the scope of Case 002/01 has the effect of terminating the proceedings in relation to the balance of the remaining charges in the Closing Order.

37. The Appeal is therefore admissible under Rule 104(4)(a) of the Internal Rules.

IV. MERITS

38. In the Impugned Decision, the Trial Chamber concluded that the additional severance of the remaining charges in Case 002 "is in the interests of judicial efficiency and does not impede unduly upon the rights of the [Co-]Accused".[75] In so concluding, the Trial Chamber reasoned that it had examined "all relevant factors",[76] namely those related to case management, as well as the possible impacts to the rights of the Co-Accused to be tried without undue delay and to be informed of the charges against them.[77]

39. KHIEU Samphân submits that the Additional Severance of Case 002 is not in the interests of justice, and that, the Trial Chamber committed several errors on questions of law and discernible errors in the exercise of its discretion that cause him prejudice by violating his right to predictability and legal certainty, as well his right to be tried without undue delay and to have adequate facilities for the preparation of his defence.[78] He accordingly requests that the Supreme Court Chamber annul the Impugned Decision.[79]

40. The Co-Prosecutors respond that the Appeal misapplies the jurisprudence of the Supreme Court Chamber and falls manifestly short of the standard of appellate review.[80] The Co-Prosecutors accordingly request that the Supreme Court Chamber dismiss the Appeal on the merits.[81]

a. Preliminary Remarks

41. Faced with a third appeal on the issue of severance, coupled with KHIEU Samphân's complaints regarding confusing pronouncements made by the Trial Chamber since the Second Severance Appeal Decision about the procedural consequences of severance in Case 002,[82] the Supreme Court Chamber considers that there is a need for clarification about the nature of severance. The severance of proceedings at the ECCC is foreseen under Rule 89*ter* of the Internal Rules as follows:

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[75] Impugned Decision, para. 30.
[76] Impugned Decision, paras. 16, 17.
[77] Impugned Decision, paras. 18-29.
[78] Appeal, paras. 15-68.
[79] Appeal, paras. 68, 69.
[80] OCP Response, paras. 13-18.
[81] OCP Response, para. 19.
[82] *See* Appeal, paras. 25-35. KHIEU Samphân's complaints in this regard are discussed more fully below. *See infra*, paras. 70-86.

> 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 [i]ndictment. The cases as separated shall be tried and adjudicated in such order as the Trial Chamber deems appropriate.

42. The language of Rule 89*ter* of the Internal Rules readily announces that severance denotes a separation (or split) of proceedings, consequent to which, instead of one criminal case, there are two or more criminal cases. The separation of the proceedings against IENG Thirith from Case 002 resulted in precisely this consequence: her case was dissected from that against the Co-Accused and thereby took on a life of its own.[83] Whether severance occurs in relation to accused or to charges, procedural consequences are the same. Centrality of the main hearing in the criminal process however causes that severance is not evidence neutral and begs a distinction between severance for the purpose of trial and adjudication,[84] or only for the purpose of adjudication.[85] In most legal systems, severance may be ordered "at any time", that is, either before or after the start of the main hearing, depending on the circumstances that warrant severance in the interest of justice. This dual possibility is also foreseen under Rule 89*ter* of the Internal Rules, which allows the Trial Chamber to sever

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[83] *See* Decision on IENG Thirith's Fitness to Stand Trial, E138, 17 November 2011, para. 61, p. 29. *See also* Decision on Immediate Appeal against the Trial Chamber's Order to Release the Accused IENG Thirith, E138/1/7, 13 December 2011; Decision on Reassessment of Accused IENG Thirith's Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011, E138/1/10, 13 September 2012; Decision on Immediate Appeal against the Trial Chamber's Order to Unconditionally Release the Accused IENG Thirith, E138/1/10/1/5/7, 14 December 2012.

[84] *See* Second Severance Appeal Decision, para. 41 *and* fn. 118, *referring to* Canadian, American, English and Welsh, German, and French law. *See also* Sect. 193 of the Australian Criminal Procedure Act 2009 (Victoria):

Order for separate trial

(1) If an indictment contains more than one charge, the court may order that any one or more of the charges be tried separately.
(2) If an indictment names more than one accused, the court may order that charges against a specified accused be tried separately.
(3) The court may make an order under subsection (1) or (2) if the court considers that:
    a. the case of an accused may be prejudiced because the accused is charged with more than one offence in the same indictment; or
    b. a trial with the co-accused would prejudice the fair trial of the accused; or
    c. for any other reason it is appropriate to do so.
(4) The court may make an order under subsection (1) or (2) or under section 195 before trial or during a trial.
(5) If the court makes an order under subsection (1) or (2) or under section 195, the prosecutor may elect which charge is to be tried first.
(6) If an order under subsection (1) or (2) or under section 195 is made after a jury is empanelled, the court may order that the jury be discharged from giving a verdict on the indictment.
(7) The procedure on the separate trial of a charge is the same in all respects as if the charge had been set out in a separate indictment.
(8) If the court makes an order for a separate trial under subsection (1) or (2) or under section 195, the court may make any order for or in relation to the bail of the accused that the court considers appropriate.

[85] *See* Second Severance Appeal Decision, para. 41 *and* fn. 118, *referring to* Italian law, *i.e.* Articles 17-19 of the Italian Code of Criminal Procedure ("A judge must order separation, for instance: […] if evidentiary hearings in relation to some accused or some charges are concluded, while in relation to other accused or other charges there is a need to take further action.

proceedings "at any stage". Therefore, in the ECCC context, separating a case already advanced in trial is authorised.[86] Rule 89*ter* of the Internal Rules does not, however, announce any unique form of separation of cases that would be different from what the term severance ordinarily denotes in the legal language.

43. Whereas the question of consequences of severance for the preliminary issues may be conventionally resolved in different ways,[87] separating a case before the main hearing (severance for trial and adjudication) causes that no trial evidence is common to the severed cases. When relevant, facts from one case may be introduced to another case pursuant to general rules, that is, through leading the evidence again, or through introducing it as indirect evidence from file or, eventually, the findings, when final, may enter through judicial notice, with all the attaching limitations.[88] On the other hand, where the results of the main hearing, in particular the evidence presented, are highly relevant to the entirety of the case, there hardly can be an interest of justice in severing the case prior to the main hearing. Separating cases after the commencement of the main hearing is usually prompted by an arising necessity, or possibility, of disposing of one portion of the case earlier than others (severance for adjudication only). Although such severance typically takes place for procedural reasons unique to one accused, for instance where it becomes necessary to adjourn or suspend proceedings due to flight or unfitness for trial, it may also take place for other reasons that become apparent during the trial. The Italian Code of Criminal Procedure favours such severance, particularly in situations where evidence adduced in the main hearing allows adjudication of an unrelated part of the charges earlier than others.[89] In this way, separating a case during the main hearing causes that there is a commonality of a portion of evidence that has been submitted to the cognisance by the trying panel.

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[86] The Supreme Court Chamber notes that Rule 89*ter* of the Internal Rules provides that "[t]he cases as separated shall be *tried and adjudicated* in such order as the Trial Chamber deems appropriate" (emphasis added), which could suggest that only severance before the start of the main hearing (*i.e.* for trial and adjudication) is contemplated. The added possibility of severing for adjudication only is, however, confirmed, by the Rule's language otherwise foreseeing severance "at any stage" of the proceedings.

[87] *See*, *e.g.*, Article 591(4.2) of the Canadian Criminal Code ("Unless the court is satisfied that it would not be in the interests of justice, the decisions relating to the disclosure or admissibility of evidence or the Canadian Charter of Rights and Freedoms that are made before any [severance] order […] takes effect continue to bind the parties if the decisions are made — or could have been made — before the stage at which the evidence on the merits is presented."); Rule 14(b) of United States Federal Rules of Criminal Procedure ("Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.").

[88] *See* Rule 87 of the Internal Rules. *See also* Rules 92*bis* and 94 of the ICTR and ICTY Rules of Procedure and Evidence. *See also Prosecutor v. Edouard KAREMERA et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, paras. 48-52, *and references cited therein*.

[89] *See supra*, fn. 85.

44. Describing severance as a mere trial management tool must not divert from the fact that it does have implications for the fair trial rights. Severance delineates the area of the criminal court's cognisance and adjudication in each case; accordingly, whether it is ordered before the commencement of the main hearing or thereafter, in order to safeguard an accused's right to notice of the charges, it is material that the decision to sever clearly determines the point wherefrom it takes effect and the scope of each severed case. A related consequence of severance is that issues of rights arising from the duration of proceedings and pre-trial detention must be thereafter evaluated separately for each of the criminal cases so created.[90] In any event, as previously stressed by the Supreme Court Chamber, no part of the charges may be left unattended.[91]

45. Each severed case can be considered and determined by the same judges or by different judges; the original nexus, however, causes it to come at a price, namely that changes in the bench after the advancement of the main hearing disturb continuity in direct cognisance of evidence. Where, however, the same judges consider and determine multiple counts against the same accused, questions arise regarding judicial impartiality, to the extent that adjudicating a portion of charges may in the same or subsequent trials cause a bias (or appearances of bias) against the accused or a bias resulting from having made findings of fact relevant to the other case, a concern, as previously signalled, contemplated in international jurisprudence and municipal systems.[92] Hence, in most legal systems, severance depends on the divisibility of the case, which albeit concerns mainly the postulate not to disturb the identity of complex criminal acts, also encompasses the duty to pre-empt problems that may be posed by the commonality of the factual panoply. In systems that use trial by jury, the concern about potential prejudice may even warrant severance in and by itself;[93] in other

[90] *See* Decision on Immediate Appeal against the Trial Chamber's Decision on KHIEU Samphân's Application for Immediate Release, E275/2/3, 22 August 2013, para. 40. *See also* Second Severance Decision, paras. 42, 72.
[91] *See* Second Severance Appeal Decision, para. 43. *See also ibid*., paras. 24, 69.
[92] *See* Second Severance Appeal Decision, paras. 39, 41, 46, *and* fn 118.
[93] *See, e.g., Zafiro v United States*, 506 U.S. 534 ("Severance should be granted only if there is a serious risk that a joint trial would compromise a specific trial right of a properly joined defendant or prevent the jury from making a reliable judgment about guilt or innocence. The risk of prejudice will vary with the facts in each case, and the Rule leaves determination of the risk, and the tailoring of any necessary remedy, to the sound discretion of the district courts."). The concern is oriented towards whether it is probative or prejudicial to cross-admit evidence in joined trials and whether severance should occur if it causes prejudice. For example, in *DE Jesus v. R*, 4 (1986) 61 ALJR 1, the High Court set down the principle that severance is necessary in such cases because of the risk that the jury will improperly use the evidence on all counts when determining guilt on individual counts. Although cross-admissibility does not determine the issue, the general rule is that unless the evidence of one complainant is admissible in relation to the other complainants, separate trials should be ordered. *See also R v. Hayter* (Appellant) (On Appeal from the Court of Appeal (Criminal Division)) [2005] UKHL 6, para. 35 ("The defendants were tried together. This was clearly the best course to adopt in the interests of justice, because it saved time and resources and also eliminated the risk of different juries returning inconsistent

instances there is a question of establishing a new jury or releasing the jury from trying a severed part of the case.[94] In systems that do not use juries, the standard to doubt impartiality is higher; still, the interest of justice criterion will encompass relevant concerns, upon which the trying court is obligated to reflect *ex officio*.[95]

b. Alleged Errors Regarding Undue Delay

46. In addressing concerns of undue delay, the Trial Chamber recalled the Supreme Court Chamber's examination of the *Milošević* and *Mladić* cases before the International Criminal Tribunal for the former Yugoslavia ("ICTY"), which concluded that severance would be less expeditious and efficient, and distinguished Case 002 from those cases.[96] The Trial Chamber added that, by relying on Case 002/01 as "a foundation" for a more detailed examination of

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verdicts. Nevertheless, the defendants could have been tried separately and if, for example, one of them had been taken ill, this might well have been the appropriate course to follow. Whether the defendants are tried together or separately, however, the general law of evidence is the same and what the Crown have to prove against each of the defendants also remains the same. There are, in effect, three separate trials and the jury must consider the case against each of the defendants separately.").

[94] *See, e.g.,* Section 193(6) of the Australian Criminal Procedure Act 2009 (Victoria) *at supra*, fn. 84 ("If [a severance order] is made after a jury is empanelled, the court may order that the jury be discharged from giving a verdict on the indictment."); Article 591(4) of the Canadian Criminal Code ("[A severance order] may be made before or during the trial but, if the order is made during the trial, the jury shall be discharged from giving a verdict on the counts: (a) on which the trial does not proceed; or (b) in respect of the accused or defendant who has been granted a separate trial.").

[95] *See Karttunen v. Finland,* Human Rights Committee, Communication No. 387/1989, U.N. Doc. CCPR/C/46/D/387/1989 (1992) ("'Impartiality'" of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider *ex officio* these grounds and to replace members of the court falling under the disqualification criteria."); *Remli v. France*, ECHR, Application No. 16830/90, Judgment, 23 April 1996, para. 48 ("Like the Commission, the Court considers that Article 6 para. 1 (art. 6-1) of the Convention imposes an obligation on every national court to check whether, as constituted, it is 'an impartial tribunal' within the meaning of that provision (art. 6-1) where, as in the instant case, this is disputed on a ground that does not immediately appear to be manifestly devoid of merit."); *Piersack v. Belgium*, Application No. 8692/79, Judgment, 1 October 1982, para. 30 (citing the Belgian Court of Cassation in that any judge in respect of whom there is a legitimate reason to fear lack of impartiality is obligated to refrain from taking part in the decision); *Prosecutor v. Anto FURUNDŽIJA*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 175 (in which the Appeals Chamber states that the fact that a party may have waived its right to raise the issue of impartiality does not relieve a judge of "his or her duty to withdraw from a particular case if he or she believes that his or her impartiality is in question"). *See also* Rule 34 of the Internal Rules ("(1) A judge may recuse him/herself in any case in which he or she has, or has had, a personal or financial interest, or concerning which the Judge has, or has had, an association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias. […]"); Rule 15(A) of the ICTR Rules of Procedure and Evidence ("A Judge may not sit in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in any such circumstance withdraw from that case. […]"); Rule 15(A) of the ICTY Rules of Procedure and Evidence ("A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.").

[96] Impugned Decision, paras. 19-21, *referring to Prosecutor v. Slobodan MILOŠEVIĆ*, Case No. IT-99-37-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("*Milošević* Decision") *and Mladić* Decision.

the remaining charges in later trials, and by admitting evidence accrued in Case 002/01 to Case 002/02, the streamlining and expeditious completion of Case 002/02 would be ensured.[97] The Trial Chamber further considered that certain witnesses relevant to the totality of Case 002 were heard in Case 002/01 and would therefore not need to be recalled.[98] The Trial Chamber accordingly found that KHIEU Samphân had failed to demonstrate that additional severance would create undue delay.[99]

47. KHIEU Samphân submits that the Trial Chamber never made the required comparison between the length of time it would have taken to examine the entirety of Closing Order with several successive trials rather than a single trial, and that it erred in failing to seek guidance from the relevance and applicability of the *Milošević* and *Mladić* Decisions, which found that severance would cause undue delay and onus on the accused.[100] He further contends that the admission of evidence from Case 002/01 to Case 002/02 has not precluded the mobilisation of the parties' time and resources nor a repetition of other procedural steps, and asserts that the Trial Chamber underestimates the various delays which inevitably arise from severance, such as the procedural battles which have resulted therefrom, including the evidentiary hearings, as well as the need to recall witnesses and the repetition of the pre-trial and final stages of each trial.[101]

48. The Co-Prosecutors respond that KHIEU Samphân's complaints regarding undue delay are "vague", and that the Impugned Decision falls within the trial management discretion of the Trial Chamber, to which a degree of deference is owed.[102]

49. The Supreme Court Chamber recalls that decisions on severance 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.[103] In articulating the factors which international jurisprudence has deemed relevant in this balancing exercise, the Supreme Court Chamber relied on the *Milošević* and *Mladić* Decisions to note the following:

[97] Impugned Decision, para. 23.
[98] Impugned Decision, para. 23. *See also ibid*., para. 28.
[99] Impugned Decision, paras. 18, 23.
[100] Appeal, paras. 37-48. *See also* Appeal, paras. 54-60, 67.
[101] Appeal paras. 49-52. *See also* Appeal, paras. 61-65.
[102] OCP Response, para. 18.
[103] Second Severance Appeal Decision, para. 37, *referring to* First Severance Appeal Decision, para. 50.

> Potential prejudice to the rights of accused persons has been considered principally in relation to the right to be tried without undue delay owing to circumstances particular to certain accused or "in relation to evidence relevant to certain crimes and not others in the joint trial". In particular, it has been considered that severance of charges may affect the accused's ability to participate in the preparation of his defence for the second trial, as it would require the accused's simultaneous involvement in two cases. Relevant, moreover, has been the risk of severance impairing the accused's right to be tried without undue delay in relation to charges adjudicated in the second trial, considering that "two successive trials […] would inevitably take even longer than a single trial."[104]

50. In the Impugned Decision, the Trial Chamber doubted the applicability of the ICTY Chambers' respective concerns about the rights of the accused to a severance of Case 002, and distinguished Case 002 from the *Milošević* and *Mladić* cases in rejecting KHIEU Samphân's concerns about further severance affecting his right to be tried without undue delay.[105] Even if the *Milošević* and *Mladić* Decisions were distinguishable on the grounds advanced by the Trial Chamber,[106] the consideration of an accused's right to be tried without undue delay as a relevant factor in the analysis as to whether severance is in the interests of justice cannot reasonably be distinguished on such grounds.

51. The Supreme Court Chamber reiterates that "decisions on severance constitute exceptions to the general preference for joint trials".[107] The factual presumption that a series of severed trials would take longer to adjudicate than a single joint trial is not only borne out by the international jurisprudence quoted above and supported by the Supreme Court Chamber's prior jurisprudence on severance, it is also a matter of common sense. In the *Milošević* Decision, for example, the ICTY Appeals Chamber was concerned about "the time which necessarily elapses between hearing the evidence and the final submissions and writing the judgment."[108] Indeed, the experience of Cases 002/01 and 002/02 readily reinforces this conclusion by the consequences of consecutive courses of proceedings. It is noteworthy, for

[104] Second Severance Appeal Decision, para. 38 (internal citations omitted), *referring to Mladić* Decision, paras. 25, 31, 32, *and Milošević* Decision, para. 27.
[105] Impugned Decision, paras. 20-22.
[106] In particular, the Trial Chamber stated that the ICTY Appeals Chamber in the *Milošević* Decision considered that two successive trials would be particularly onerous to the accused as he was representing himself, and distinguished Case 002 by the fact that the Co-Accused are represented by defence teams. *See* Impugned Decision, para. 20. The Trial Chamber similarly distinguished the *Mladić* Decision's consideration that two separate trials might overburden the accused in the preparation of his defence in two separate trials by indicating the following differences in Case 002: the judicial investigation is concluded; many pre-trial matters have already been completed; the Co-Accused are represented by a single defence team; and, defence counsel are involved in the proceedings from the investigative phase. *See* Impugned Decision, paras. 21, 22. A review of the *Milošević* and *Mladić* Decisions shows that the ICTY Chambers' respective concerns pinpointed by the Trial Chamber were not focal points in their overall consideration that severed trials would be less expeditious than a single trial.
[107] First Severance Appeal Decision, para. 33. *See also* Second Severance Appeal Decision, para. 39.
[108] *Milošević* Decision, para. 24.

instance, that the evidentiary proceedings in Case 002/01 closed on 23 July 2013,[109] whereas the trial judgment is scheduled to be rendered more than one year later on 7 August 2014.[110] In the same vein, the closing submissions in Case 002/01 concluded on 31 October 2013,[111] whereas the initial hearing in Case 002/02 is scheduled to commence nine months later on 30 July 2014,[112] despite the Supreme Court Chamber's order "that the evidentiary hearings in Case 002/02 shall commence as soon as possible after closing submissions in Case 002/01",[113] and the Trial Chamber's efforts to implement it.

52. Procedural consequences that the Trial Chamber indicated to be capable of reducing potential delays, such as the reliance on Case 002/01 as "a foundation" for later trials and the admission of evidence accrued in Case 002/01 to Case 002/02, do not detract from the real delays that have already arisen and other potential delays arising from severance identified by KHIEU Samphân, such as the procedural battles which have resulted therefrom, the need to recall witnesses, and the repetition of the pre-trial and final stages of each trial. Besides, the propriety of relying on Case 002/01 as "a foundation" for future trials and admitting evidence from one severed trial to another is disputed and an issue which is discussed more fully below.[114]

53. It bears emphasizing, however, that the relevant concern is not whether there could be any delay at all, but rather whether the delay, if any, might be *undue*, and whether there are nevertheless sufficient other equally if not more important factors weighing in favour of severance. One such factor considered in the Impugned Decision, as well as throughout the litigation on the question of severance, is "the advantage of obtaining a verdict on at least some of the charges in the Closing Order within the lifetime of the [Co-]Accused, the [c]ivil [p]arties, and victims".[115] Such advantage would presumably be gained by virtue of the forthcoming trial judgment in Case 002/01, a primary reason for which the Trial Chamber ordered the previous severance, namely in order to preserve its ability reach *any* timely verdict in Case 002.[116]

[109] T. (EN), E1/227.1, 23 July 2013.
[110] Scheduling Order for Trial Judgement.
[111] T. (EN), E1/237.1, 31 October 2013.
[112] Scheduling Order for Initial Hearing.
[113] Second Severance Appeal Decision, para. 76. *See also ibid*., para. 72.
[114] *See infra*, paras. 77-86.
[115] Impugned Decision, para. 23.
[116] Second Severance Appeal Decision, para. 50.

54. Nevertheless, the Supreme Court Chamber also deemed that the scope of Case 002/01 failed to fulfil the requirement of reasonable representativeness, and accordingly ordered that Case 002/02 comprise, at minimum, the charges related to S-21, a worksite, a cooperative, and genocide, so that the combination of Case 002/01 and 002/02 will be reasonably representative of the Indictment.[117] As such, another consideration is still valid in that there remains the advantage of obtaining a verdict that is reasonably representative of the Indictment within the lifetime of the Co-Accused, the civil parties, and the victims. In this respect, the Supreme Court Chamber reiterates that "[e]valuation of the elements relevant for the expeditiousness factor […] inherently requires a great deal of discretion", and that, in light of the loss of IENG Thirith and IENG Sary, as well as the remaining Co-Accused's age- and health-related disruptions to the trial, "the Trial Chamber's resort to severance of the Indictment in order to ensure that at least a portion thereof is adjudicated within the lifespan of the Co-Accused is not unreasonable".[118] The Supreme Court Chamber further reaffirms that, "once articulated, such a goal is not excluded by the notion of 'interest of justice', *including that it may prevail over other concerns*".[119]

55. The Supreme Court Chamber accordingly finds that delays occasioned to future trials by further severance may be mitigated by the more pressing interests of ensuring meaningful justice through obtaining a verdict within the lifespan of the Co-Accused on at least those remaining charges which will render the combination of Cases 002/01 and 002/02 reasonably representative of the Indictment.

c. Alleged Errors Regarding Efficiency and Manageability of the Proceedings

56. In addressing concerns of case management, the Trial Chamber determined that severance would significantly reduce the number of witnesses to be heard and the number of paragraphs in the Closing Order to be dealt with in the next trial, thereby rendering it more efficient and manageable.[120] It also considered 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".[121] The Trial Chamber further indicated that it "will apply the

[117] *See* Second Severance Appeal Decision, paras. 70, 71, 76.
[118] Second Severance Appeal Decision, para. 51.
[119] Second Severance Appeal Decision, para. 51 (emphasis added).
[120] Impugned Decision, paras. 26, 27.
[121] Impugned Decision, para. 28.

same legal framework and the same evidentiary and procedural rules in each phase of the Case 002 proceedings" and that therefore "any risk of inconsistencies between separate phases will be minimal and do not constitute an impediment to severance".[122]

57. KHIEU Samphân avers that the Trial Chamber erred in focusing on the factors that would make a single severed trial more efficient and manageable as opposed to the totality of the severed trials.[123] He adds that the Trial Chamber underestimates the need to recall witnesses, experts, and civil parties as a result of severance, and the inconvenience thus caused to these individuals.[124]

58. The Co-Prosecutors respond that KHIEU Samphân's submissions regarding judicial efficiency and manageability are vague, as well as "factually frivolous, insufficiently substantiated or out of time".[125]

59. With respect to manageability, the Trial Chamber determined that "at least 237 individuals from the Co-Prosecutors' initial [witness] list remain to testify [after Case 002/01]", and that "[p]roceedings involving 96 OCP witnesses, experts and civil parties would clearly be more manageable than if all 237 were to be heard, particularly given that all other parties will also seek to have their own witnesses testify".[126] The Trial Chamber further determined that "[w]ithout further severance, Case 002/02 would need to address at least an additional 1147 paragraphs of the Closing Order", and that "[a] trial involving such a broad collection of geographic areas and crime sites, in addition to the extraordinary number of proposed witnesses, experts, and civil parties, would be exceedingly difficult to manage efficiently and expeditiously".[127] KHIEU Samphân concedes as obvious that managing part of a whole is easier managing than the whole, but counters that the question before the Trial Chamber is to determine whether severance would render the entire trial more manageable, not just its severed parts.[128] In the Supreme Court Chamber's view, and as already previously expressed, manageability is a valid criterion in considering whether severance is in the interest of justice. Accordingly, if a large and complex trial is difficult to manage, and severance is necessary to create more manageable parts, then the case is necessarily rendered

[122] Impugned Decision, para. 29.
[123] Appeal, paras. 54-60. *See also* Appeal, paras. 37-48, 67.
[124] Appeal, paras. 61-65. *See also* Appeal, para. 51.
[125] OCP Response, para. 18.
[126] Impugned Decision, para. 26.
[127] Impugned Decision, para. 27.
[128] Appeal, para. 56.

more manageable as a result of severance,[129] and the question that remains is about weighing the advantage of manageability against other factors that may speak *pro* and *contra* severance in order to determine the overarching interest of justice.

60. In this regard, the Supreme Court Chamber notes that KHIEU Samphân's submissions on the efficiency of the proceedings are mostly limited to reiterating his complaints about the Trial Chamber's failure to "compare the duration of a succession of several separate trials to the duration of a single trial",[130] relying once again on the *Milošević* and *Mladić* Decisions, as well as additional ICTY jurisprudence, to reaffirm that a series of severed trials would take longer to complete than a joint trial.[131] The Supreme Court Chamber has already addressed at length KHIEU Samphân's allegations of errors regarding undue delay.[132] The ICTY jurisprudence that he quotes as relevant to the factor of efficiency as distinct from expediency is the Appeals Chamber in the *Gotovina et al*. case, which stated that two separate trials will likely lead to a duplication of efforts.[133] In this respect, KHIEU Samphân reiterates his concerns about the Trial Chamber's underestimation of the need to recall witnesses and the commensurate burden this risks posing upon them, focusing in particular on two witnesses who testified in Case 002/01 and who will eventually need to be recalled.[134] However, any witness who may need to be recalled from Case 002/01 is a relative inefficiency that results from the separation of Case 002/01, the rationale of which has been confirmed, and not from the Impugned Decision. KHIEU Samphân's complaints are therefore speculative, as they are *vis-à-vis* any trials subsequent to Case 002/02.

61. As articulated on the issue of delay,[135] the relevant concern when severing is not whether there could be any inefficiencies at all, but rather whether the factors weighing in favour of severance outweigh the inefficiencies that could arise therefrom. In this respect, the Trial Chamber indicated that "[t]he persistent concerns related to the health of the [Co-]Accused are also a major factor to be considered by the [Trial] Chamber before embarking

[129] *Cf. Milošević* Decision, para. 24 ("It is important that the Trial Chamber described a single trial as being *less* manageable than two separate trials; it did not state that a single trial would be unmanageable. What the Trial Chamber said was no more than common sense." (Emphasis added)).
[130] Appeal, para. 60.
[131] *See* Appeal, paras. 57-60, *and references cited therein.*
[132] *See supra*, paras. 46-55.
[133] Appeal, para. 58, *referring to Prosecutor v. Ante GOTOVINA et al.*, Case Nos. IT-01-45-AR73.1, IT-03-73-AR73.1, & 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, para. 44.
[134] Appeal, paras. 61-65.
[135] *See supra*, para. 53.

on such a lengthy trial."[136] Considering the remaining need to obtain a verdict that is reasonably representative of the Indictment within the lifetime of the Co-Accused, the civil parties, and the victims, the Supreme Court Chamber considers that the hypothetical inefficiencies pointed out by KHIEU Samphân concerning the interface of Case 002/02 and any future cases do not preclude a severance of the remaining charges in Case 002.[137]

62. The Supreme Court Chamber accordingly finds that inefficiencies occasioned to future trials by further severance may be mitigated by the more pressing interests of ensuring meaningful justice through obtaining a verdict within the lifespan of the Co-Accused on at least those remaining charges which will render the combination of Cases 002/01 and 002/02 reasonably representative of the Indictment.

d. Alleged Errors Regarding Notice of Charges

63. In addressing concerns of legal predictability and certainty, the Trial Chamber stated that "issuance of a severance decision clearly defining the scope of the next stage of the trial serves to inform the [Co-]Accused of the charges against them and permit them to participate in the preparation of their defence".[138]

64. KHIEU Samphân contends that the Trial Chamber has violated his right to predictability and legal certainty in several ways, including:[139] by failing to provide a tangible plan for dealing with all charges left outside the scope of Case 002/02, which causes him prejudice because the knowledge as to whether or not, and if so, how, he will be tried on the entirety of the charges in the Closing Order is of paramount importance for the preparation of the entirety of his defence;[140] by issuing unclear and contradictory decisions regarding the procedural consequences of severance, for instance regarding the admissibility of evidence from Case 002/01 to Case 002/02, and whether the trials are separate or continuous, which has had a negative impact on the preparation of his defence.[141]

65. The Co-Prosecutors respond that the Supreme Court Chamber's exercise of its corrective jurisdiction in the Second Severance Appeal Decision to order that the scope of Case 002/02 comprise a minimum set of specified charges to satisfy the legal standard of

[136] Impugned Decision, para. 27.
[137] *See supra*, paras. 54, 55.
[138] Impugned Decision, para. 24.
[139] Appeal, paras. 20-35.
[140] Appeal, para. 21.
[141] Appeal, paras. 28-35.

reasonable representativeness precludes the necessity, according to the reasoning in the First Severance Appeal Decision, for the Trial Chamber to formulate a tangible plan for charges remaining outside the scope of a severed trial.[142] They contend that, "[a]t this stage of the proceedings, there is no legal uncertainty that [KHIEU Samphân] is being tried on all remaining legal charges of Case 002 through a minimum set of reasonably representative crime sites and criminal events contained in the Closing Order".[143]

66. At the outset, the Supreme Court Chamber dispels the Co-Prosecutors' assertion that the First Severance Appeal Decision has established mutually exclusive requirements of either ensuring that the first severed trial is reasonably representative of the Indictment, or creating a tangible plan for the adjudication of the entirety of the charges in the Indictment.[144] The Supreme Court Chamber recalls that, in its First Severance Appeal Decision, it instructed the following:

> It is necessary that the Trial Chamber determine, based on its organic familiarity with Case 002, whether the gist of such severance is in judicial manageability, in which case there is necessity for a tangible plan for the adjudication of the entirety of the charges in the Indictment, and not merely a portion thereof. If, however, faced with the deteriorating health of the Co-Accused, the principal motivation is that justice is better served by concluding with a judgement, whether in a conviction or acquittal, of at least one smaller trial on some portion of the Indictment, then the Trial Chamber should state this clearly and give due consideration to reasonable representativeness of the Indictment within the smaller trial(s).[145]

67. This instruction must be read in its context, where the most pressing need was to determine the rationale for severing the case in the first place, and should not be taken to mean that the underlying requirement of addressing the severed case as a whole is lifted when the reasonable representativeness criterion is implemented. To the extent that there was any confusion in this regard, the Supreme Court Chamber repeatedly clarified the matter in its Second Severance Appeal Decision, where it reiterated, recalling the First Severance Appeal Decision, that both requirements had been elucidated to the Trial Chamber as cumulative guidelines.[146] In addition, the Supreme Court Chamber used its corrective jurisdiction to order the Trial Chamber to fulfil the criterion of reasonable representativeness, while at the

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[142] OCP Response, paras. 14, 15.
[143] OCP Response, para. 16.
[144] *See* OCP Response, para. 15(a), *referring to* First Severance Appeal Decision, para. 50.
[145] First Severance Appeal Decision, para. 50.
[146] Second Severance Appeal Decision, paras. 59 *and* 69. *See also* Second Severance Appeal Decision, para. 54 ("renewed severance must entail a tangible plan for the adjudication of the entirety of the charges in the Indictment *and* due consideration to reasonable representativeness of the Indictment within the smaller trials" (emphasis added)), *referring to* First Severance Appeal Decision, para. 50.

same time emphasizing the necessity for a tangible plan for the adjudication of the entirety of the charges in the Indictment and discussing different possibilities to ensure that all remaining proceedings are duly attended to, that is, adjudicated on the merits, suspended, or dismissed.[147] This duty remains valid. As indicated above, the Trial Chamber has taken no such procedural steps,[148] except to declare briefly in relation to the possibility of withdrawal that, "as [it] has not been seised of a request by the Co-Prosecutors to withdraw charges from the Closing Order, the Trial Chamber need not address this issue at the current stage of proceedings."[149]

68. The Supreme Court Chamber notes, however, that the Co-Prosecutors did propose that the charges remaining outside the scope of Case 002/02 be terminated either by way of withdrawal or reduction. In particular, they submitted that "the Trial Chamber has the option [...] to authorise the withdrawal of charges with the 'agreement' of the Co-Prosecutors",[150] and that "the ICTY procedure for 'reduction of charges' is available to this Court as a 'trial management tool'".[151] They concluded by stating that "[r]egardless of the specific legal procedure ultimately adopted in relation to the excluded crime sites and events, the Co-Prosecutors do not anticipate a third trial of the Accused in relation to these matters",[152] and that "[i]n order to provide clarity to the victims, Accused and donors, the Co-Prosecutors thus submit that Case 002/02 should conclude the trial of [the Co-Accused] at the ECCC on the Case 002 Indictment."[153]

69. The Trial Chamber took no decision in this respect. The Supreme Court Chamber considers that reducing or withdrawing charges requires an explicit decision of the Trial Chamber, this requirement being dictated by concerns of legal certainty as to the scope of the charges,[154] transparency,[155] as well as legitimacy, as it requires resorting to powers under Article 12 of the ECCC Agreement.[156] As such, the Supreme Court Chamber cannot agree

[147] Second Severance Appeal Decision, paras. 61, 62, 69, 72-74.
[148] *See supra*, para. 33.
[149] Impugned Decision, para. 45.
[150] OCP on Scope, para. 26.
[151] OCP on Scope, para. 26.
[152] OCP on Scope, para. 28.
[153] OCP on Scope, para. 28.
[154] *See* First Severance Appeal Decision, paras. 46-48; Second Severance Appeal Decision, para. 43. *See also* First Severance Appeal Decision, paras. 17, 24, 25, 35, 37, 45, 49-51; Second Severance Appeal Decision, paras. 24, 26, 62, 68, 69, 72.
[155] *See* Second Severance Appeal Decision, para. 62.
[156] Article 12(1) of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea; Article 33*new* of the Law on the Establishment of Extraordinary Chambers in the Courts of

with the Co-Prosecutors' suggestion that termination of charges would take effect automatically upon the sole fact that charges now selected for trial in Case 002/02 satisfy the criterion of representativeness. The fact that the Trial Chamber has now clearly established, for the first time, which charges will be included in the scope of Case 002/02,[157] does not serve to inform the Co-Accused of the charges against them in future trials and, *arguendo*, in addition to a delay, gives rise to a claim of prejudice. It moreover indicates a lack of vision as to managing the entirety of the charges.

70. Turning to KHIEU Samphân's allegation that the Trial Chamber issued unclear and contradictory decisions regarding the procedural consequences of severance, the Supreme Court Chamber notes inconsistencies in the Trial Chamber's treatment of the severed cases as separate or continuous. In its First Severance Decision, the Trial Chamber clearly indicated that it had "decided, pursuant to […] Rule [89*ter* of the Internal Rules] to *separate* the proceedings in Case 002 into a number of *discrete* cases",[158] and that "[a]t the conclusion of the first *trial*, a verdict in relation to the[] allegations [included therein], and appropriate sentence in the event of conviction, will be issued."[159] In this Decision, the Trial Chamber used the terms "trial(s)",[160] "cases",[161] and "phases"[162] interchangeably to denote the separate or discrete elements of the proceedings in Case 002 which would result from severance.[163] This position is in line with the nature of severance, as discussed above, which has the procedural consequence of creating separate and distinct trials.[164]

Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea; Rule 2 of the Internal Rules.

[157] Impugned Decision, paras. 31-44. *See also* Annex to Impugned Decision.

[158] First Severance Decision, para. 2 (emphasis added).

[159] First Severance Decision, para. 6 (emphasis added). *See also ibid*., paras. 2, 4, 5, 8, p. 4.

[160] First Severance Decision, paras. 2, 5, 6, 8, 9, p. 4.

[161] First Severance Decision, paras. 2, p. 4.

[162] First Severance Decision, paras. 7, p. 4.

[163] Only on one occasion in the First Severance Decision does the Trial Chamber appear to confuse the separate or continuous nature of the severed trials, stating, at para. 9, that "[i]n view of the subject-matter of the first trial, decision on the Co-Prosecutors' [Request] […] (E99) is also premature at this stage and has been deferred to later stages of the trial." It is not clear whether the Trial Chamber meant later stages of Case 002/01, or of Case 002.

[164] *See supra*, paras. 41-45.

71. By contrast, the Trial Chamber recently stated the following in a memorandum clarifying the use of evidence and procedural issues from Case 002/01 to Case 002/02 ("Clarification Memo"):[165]

> Regarding the status of evidence from Case 002/01 and the Khieu Samphan Defence submission that Case 002 is now two separate and distinct trials, the Chamber recalls that severance is "exclusively a trial management tool", the only purpose of which is to modify the order in which the charges in the Indictment are adjudicated (E284, para. 98). Since the outset of trial in Case 002, the parties have been on notice that Case 002/01 would serve as a foundation for the trial of the remaining charges in Case 002 (E124/7, para. 10; E284, para. 15). **The effect of the Trial Chamber's severance of Case 002 was to separate the charges which would normally be adjudicated in a single trial into two or more manageable phases, not to create two separate and distinct trials.**[166]

72. In the Impugned Decision, both positions are expressed, with the Trial Chamber referring at times to severance as creating or having created separate and distinct trials,[167] while at other times alluding to phases of a single trial.[168] A review of the trial record shows many similarly differing expressions used by the Trial Chamber, often within the same document.[169] Minor linguistic inconsistencies are commonplace throughout the ECCC,

[165] Memorandum from Judge NIL Nonn, President of the Trial Chamber, entitled "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", E302/5, 7 February 2014.
[166] Clarification Memo, para. 5 (emphasis added).
[167] *See* Impugned Decision, paras. 2 ("On 22 September 2011, the Chamber issued an order severing the proceedings in Case 002 into *two or more cases*"), 4 ("the Trial Chamber decided […] to sever the proceedings and confined the scope of *the first trial* in Case 002 […] The Chamber further considered that the addition of S-21 to the scope of Case 002/01 would not significantly advance the objective of reasonable representativeness of *this first trial*"), 13 ("Important factors in this analysis include […] the desire to avoid inconsistencies between *separate trials*"), 18 ("The severance of the proceedings concerning the remaining charges in Case 002 must be viewed, *inter alia*, in light of the effect it may have on […] [the Co-Accused's] ability to participate in the preparation of their defence for *subsequent trials*", "Defence has failed to advance any convincing reasons which demonstrate that severing […] would result in a lengthier process than continuing with a *single unsevered trial*"), 19 ("[The Supreme Court Chamber] took no position on whether *two separate trials* would take longer than *a single unsevered trial*"), 22 ("The Chamber does not consider that a severance […] would […] requir[e] a postponement of *a second trial*"), 23 ("Case 002/01 will serve as a foundation for […] *later trials*"), 24 ("identification of the relevant paragraphs […] will provide notice to the Accused of the scope of *the subsequent trial or trials*"), 29 ("has considered the need to avoid inconsistencies between *separate trials*").
[168] Impugned Decision, paras. 2 ("The Chamber decided that *the first part* of Case 002, later termed 'Case 002/01', should comprise…"), 14 ("such prejudice would persist *in subsequent phases*", "a severance decision clearly defining the scope of *the next stage of the trial*"), 23 ("resources necessary to repeat such procedures will therefore be limited *in each subsequent trial phase*", "this will reduce the need for certain witnesses to be recalled during *subsequent phases* of Case 002"), 29 ("[a]s the Trial Chamber will apply the same legal framework and the same evidentiary and procedural rules in *each phase* of Case 002 proceedings, the Chamber finds that any risk of inconsistencies between *separate phases* will be minimal and do not constitute an impediment to severance").
[169] *See, inter alia,* Decision on Co-Prosecutors' Request for Reconsideration of the Terms of the Trial Chamber's Severance Order (E124/2) and related motions and annexes, E124/7, 18 October 2011 ("Decision on Reconsideration"), paras. 5 ("[Rule 89*ter* of the Internal Rules] was intended to grant […] [the discretion] to separate proceedings and to examine *in different trials* different parts of the Indictment"), 8 ("The Chamber does not consider that any appeal of the first verdict prevents continuation of the *subsequent trials* in Case 002"), 10 ("To divide Case 002 into manageable *parts*"); Scheduling Order for Opening Statements and Hearing on the

including this Chamber, as the pressure inherent to criminal proceedings does not allow editing at the level of a law journal. In this instance, they *per se* do not announce attributing the severance an effect different from Rule 89*ter* of the Internal Rules. In fact, it is only since the issuance of the Clarification Memo on 7 February 2014 that the Trial Chamber's language has definitively shifted from expressing severance as entailing separate trials to, by contrast, continuous phases or segments of the one and same trial, commensurate with its decision to allow evidence to remain common throughout the adjudication of all charges in the Closing Order. From this shift, it may be inferred that the Trial Chamber did not intend to have severance take effect at the time of its first or second pronouncement as definitive. The Supreme Court Chamber therefore agrees with KHIEU Samphân that it is unclear what the Trial Chamber means by "severance", and the confusion occasioned by keeping the First Severance of Case 002 open to change has apparently not ended with the confirmation of the Second Severance Decision, in which the Trial Chamber announced that the effect of

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Substance on Case 002, E131, 18 October 2011 ("Scheduling Order Opening Statements"), p. 2 ("the Chamber's Severance Order of 22 September 2011 (E124) separates proceedings into a *series of smaller trials*"); Memorandum from Judge NIL Nonn, President of the Trial Chamber, entitled "Scheduling of Trial Management Meeting to enable planning of the remaining trial phases in Case 002/01 and implementation of further measures designed to promote trial efficiency", E218, 3 August 2012, para. 20 ("As the Trial Chamber currently intends to conclude Case 002/01 as expeditiously as possible and then to *commence trial on other portions* of the indictment in Case 002"); T. (EN) 27 August 2012, p. 13 ("As the conclusion of Case 002/01 is merely *an interim phase* in Case 002/02, the Chamber is concerned to avoid unreasonable delays to proceedings in *subsequent parts* of Case 002"); Second Severance Decision, paras. 10, ("further information regarding *subsequent cases to be tried* in Case 002 would be provided to the parties and the public in due course. The Trial Chamber has always borne in mind that the ECCC's ability to hold *such future trials* depends on unknown contingencies" (internal citation omitted)), 98 ("The only purpose of severance at the trial stage is to modify the way in which all charges in the Indictment are to be adjudicated. Charges which would normally be adjudicated in a single trial are separated, *to be heard in two or more trials*, but otherwise remain unchanged."), 99 ("no final determination can as yet be made concerning the fate of *future trials* after Case 002/01"); Scheduling of and Agenda for Trial Management Meeting in Case 002/02 (11-13 December 2013), E301/3, 5 December 2013, para. 1 ("The Trial Chamber initially gave notice of its intention to raise two issues for discussion: (i) the scope of Case 002/02 (and *future trial segments*)"), p. 3 ("The Chamber would therefore start hearings in Case 002/02 soon afterwards, provided that the scope of the *second trial segment* has been determined by then."); T. (EN), 11 December 2013, pp. 2 ("scope of Case 002/02 *and future trial segments*"), 7 ("once the *second phase of Case 002* is started"); Hearing on Case 002/02, p. 74 ("the Chamber indicated that proceedings in Case 002/02 are a *continuation* of those in Case 002/01", "the Chamber reiterated that the Case 002 case file remained the same for both *phases* of the trial"); Memorandum from Judge NIL Nonn, President of the Trial Chamber, entitled "Decision on Parties' Joint Request for Clarification regarding the Application of Rule 87(4) (E307) and the NUON Chea Defence Notice of Non-Filing of Updated Lists Evidence (E305/3)", E307/1, 11 June 2014, paras. 1 ("They assert that a new Initial Hearing must be convened at the outset of *any trial including Case 002/02 although this case is part of*, and is the result of the severance of *the entire Case 002*"), 2 ("Accordingly, *proceedings in Case 002/02 shall be seen as being part of a whole case* where general preliminary matters were taken into account at the opening of the trial in Case 002, that is the Initial Hearing in June 2011. Any additional hearing that may be held to further clarify issues before the start of Case 002/02 does not change the fact that *the trial in Case 002 commenced in June 2011* and that procedural issues the Chamber dealt with at that time concern *all subsequent trials following the severance of Case 002*.").

severance is that "[c]harges which would normally be adjudicated in a single trial are *separated*, to be heard *in two or more trials*".[170]

73. With respect to confusion, KHIEU Samphân thus advances the specific *gravamen* of the uncertain evidentiary status of the case. In particular, his grievance lies with how the Trial Chamber can, on the one hand, speak of severance, while on the other hand, maintain that evidence adduced in severed trials or phases stays common. Indeed, in the Impugned Decision, the Trial Chamber stated that it had "clarified that evidence already put before the Chamber in Case 002/01 will be maintained in Case 002/02",[171] referring to the Clarification Memo, in which it stated the following:

> As stated above, proceedings in Case 002/02 are a continuation of those in Case 002/01. The evidence put before the Chamber in Case 002/01 has undergone extensive examination by the parties and has been subject to the requirements of Internal Rule 87. It would serve no purpose to repeat these same procedural steps within the same trial. **Based on the foregoing, the Chamber reiterates that the Case 002 Case File remains the same for both phases of the trial and the evidence already put before the Chamber in Case 002/01 shall serve as a foundation for Case 002/02.** […] The Chamber notes that the use of evidence already heard in a case involving the same parties before the same Chamber and based on the same case-file satisfies the requirement of fair and adversarial proceedings (Internal Rule 21(1)(a)).[172]

74. The presence of contradictions acknowledged, a question material to this Appeal is whether there has occurred actual prejudice and not merely annoyance. The Supreme Court Chamber recalls that, on 8 February 2013, it declared the invalidity of the First Severance of Case 002, and that the Second Severance of Case 002 was not finally determined until the Second Severance Appeal Decision on 23 July 2013. As such, Case 002 had not become definitively severed before the closure of evidentiary proceedings falling on the same date, and the evidence accrued until that point remained common to the entirety of Case 002. It is therefore correct that evidence adduced in Case 002/01 remains part of Case 002/02; this, as discussed above,[173] follows as a consequence of having held a single (formally speaking) main hearing, while the severance remained under dispute.

75. There is thus no formal need to repeat evidentiary proceedings in order to maintain the principle of direct cognisance of evidence by the trying court. For the sake of argument, the Supreme Court Chamber considers moreover that even if a valid severance occurred prior

[170] Second Severance Decision, para. 98.
[171] Impugned Decision, para. 23. *See also ibid.*, para. 42.
[172] Clarification Memo, para. 7 (emphasis added).
[173] *See supra*, para. 43.

to the main hearing and the material from Case 002/01 were to be incorporated in Case 002/02 as evidence from file, a formal indirectness would not have an impact on its abstract probative value, considering that the evidence has been led by the same parties and before the same panel of judges. The issue lies elsewhere, namely in the changed subject of proceedings, such that the charges in Case 002/02 differ from those in Case 002/01. Given the shift in focus of proof, the formal commonality of evidence adduced in the first trial does not prejudge questions of relevance or sufficient opportunity to test in relation to charges in the second trial, nor does it preclude reverting to certain means and sources of evidence, if necessary. Should such needs arise, the Trial Chamber would be required to address them as a matter of fair trial. Indeed, the Appeal suggests that instructions in this direction have been issued by the Trial Chamber.[174]

76. However, should the Additional Severance of Case 002 now be confirmed, the Trial Chamber's decision to sever prior to taking evidence in Case 002/02 will cause that evidence taken henceforth will not be formally common to any future proceedings on the charges remaining outside its scope. Therefore, if the Trial Chamber's intention is to continue to have successive "phases" or "segments" of a single trial, one potentially encompassing all the other charges, rather than separate and distinct trials between Case 002/02 *et sequitur*, the question of rationality of severing the case at this point must be brought up again.

77. A related complaint expressed by KHIEU Samphân concerns the impact that actual findings and decisions taken on the basis of evidence in prior cases may have in subsequent trials.[175] The Impugned Decision states that "[a]s noted by the Chamber 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".[176] Indeed, as early as 18 October 2011, the Trial Chamber indicated 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",[177] and explained that its rationale for the First Severance Decision was, *inter alia*: (1) "[t]o ensure that the first trial encompasses a thorough examination of the fundamental issues and allegations against all Accused"; (2) "[t]o provide a foundation for a more detailed examination of the remaining charges and factual allegations against the Accused in later

[174] *See* Appeal, para. 31, *referring to* Impugned Decision, para. 46. *See also* Appeal, para. 32, *referring to* Order to File Updated Material in Preparation for Trial in Case 002/02, E305, 8 April 2014.
[175] Appeal, paras. 31-35.
[176] Impugned Decision, para. 23 (emphasis added).
[177] Scheduling Order Opening Statements, p. 2.

trials"; and (3) "[t]o 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 [("JCE")] by including all Accused".[178]

78. KHIEU Samphân contends that the Trial Chamber has nonetheless never clarified or explained how it intends to use Case 002/01 as a foundation for subsequent proceedings, and that such failure is prejudicial to the preparation of his defence.[179] He adds that, in any event, reliance on Case 002/01 as a foundation for later trials should preclude the commencement of Case 002/02 until final judgment is rendered in Case 002/01,[180] that is, after facts relevant for Case 002/02 would have acquired a status of *res judicatae*, whereas incursions into the same factual area would violate the principle of *ne bis in idem*.[181] He is particularly concerned about the Trial Chamber's treatment of crimes against humanity and JCE.[182] The Supreme Court Chamber recalls that the Co-Prosecutors advanced a similar proposition when they sought reconsideration of the Trial Chamber's First Severance Decision.[183] The Trial Chamber dismissed both the Co-Prosecutors' and KHIEU Samphân's complaints in this regard.[184]

79. The Supreme Court Chamber recalls that, in alleging the Co-Accused's responsibility under JCE, the Closing Order states: "The common purpose of the C[ommunist] P[arty of] K[ampuchea ("CPK")] leaders was to implement rapid socialist revolution in Cambodia

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[178] Decision on Reconsideration, para. 10.
[179] Appeal, para. 33.
[180] Appeal, para. 34, *referring to Conclusions de la Défense de M. KHIEU Samphân sur la nécessité d'attendre un jugement definitif dans le procès 002/01 avant de commencer le procès 002/02*, E301/5/5, 5 February 2014 ("Submissions on Need to Wait for Final Judgment").
[181] *See* Submissions on Need to Wait for Final Judgment, paras. 42-58.
[182] Appeal, paras. 25-27, *and references cited therein.*
[183] *See* Co-Prosecutors' Request for Reconsideration of "Severance Order Pursuant to Internal Rule 89*ter*", E124/2, 3 October 2011, paras. 26-28.
[184] Decision on KHIEU Samphan Request to Postpone Commencement of Case 002/02 until a Final Judgment is Handed Down in Case 002/01, E301/5/5/1, 21 March 2014 ("Decision on Need to Wait for Final Judgment"), para. 8 ("The Trial Chamber has previously held that the principle of *res judicata* applies only where a first case in respect of the same parties and facts results in a final judicial decision. Under the ECCC legal framework, judgements on the merits are not final until the appellate stage has concluded. Accordingly, until the judgement in Case 002/01 becomes final, *res judicata* does not apply. This being so, it cannot serve as a basis for delaying the start of proceedings in Case 002/02 until Case 002/01 is finally adjudicated. As clarified later in this decision, nor can the argument that judicial economy would be better served if the Chamber waits until the judgement becomes final be linked to the principle of *res judicata*."); Decision on Reconsideration, paras. 7, 8 ("The Request (E124/2) assumes, erroneously, a) that subsequent proceeding in Case 002 could rely on findings in the first trial only through the mechanisms of judicial notice of adjudicated facts and *res judicata*, and b) that the commencement of subsequent proceedings in Case 002 could occur only substantially after the conclusion of the first trial and/or following determination of any appeals from that trial, thereby frustrating the objective of expeditiousness. […] The Chamber does not consider that any appeal of the first verdict prevents continuation of the subsequent trials in Case 002 in relation to the remaining counts and factual allegations in the Indictment.").

through a "great leap forward" and to defend the Party against internal and external enemies, by whatever means necessary. The purpose itself was not entirely criminal in nature but its implementation resulted in and/or involved the commission of crimes within the jurisdiction of the ECCC."[185] The CPK leaders included the four accused, as members of the JCE, who are alleged to have designed and implemented five policies to achieve the common purpose, and to have contributed to its furtherance with the requisite intent as set out in the Closing Order.[186]

80. In the First Severance Appeal the Co-Prosecutors described the evidentiary condition of the case as follows: "Case 002/01 includes an examination of several overarching themes in Case 002, including the history, authority structure and communications of the CPK and the Democratic Kampuchea regime, roles and positions of the Accused, as well as the development of the five criminal policies alleged in the Closing Order."[187] The Co-Prosecutors went on to state:

> In the course of the proceedings thus far, considerable time has been devoted to hearing evidence on the development and enforcement of the CPK enemy policy throughout the period covered by the Closing Order (a period that extends well beyond the time of the first and second forced movements). […][188]
>
> A significant amount of *documentary* evidence relating to the enforcement of the enemy policy and functioning of S-21 has also been put before the Trial Chamber in the proceedings in Case 002/01. As **Annex I** illustrates, that evidence includes documents produced at S-21, internal regime communications, decisions, meeting minutes and other contemporaneous records which evidence the enforcement of the enemy policy. This evidence has been referred to, or presented to witnesses by, Prosecutors, Defence Counsel, Civil Party Lawyers and Trial Chamber Judges.[189]
>
> The proceedings conducted thus far have advanced significantly the ascertainment of the truth with respect to the creation and evolution of the CPK enemy policy, and its enforcement in security centres such as S-21. This policy permeated all aspects of the CPK / DK regime, including its history, administrative and military structures, and the roles of the Accused. The evidence which has been put before the Chamber is extensive and compelling. It has been tested by all Parties. Much of it goes well beyond the facts which would have been strictly necessary to prove the narrow crime base events within the original scope of Case 002/01. To have heard this evidence, and to fail to use it to account, in this trial, for one of the most symbolic and gruesome manifestations of the CPK crimes, is contrary to the interests of justice and good trial management. In light of the very remote likelihood of a second trial in which the Accused could face justice for the crimes committed at S-21 and in District 12, and the very limited extension of proceedings needed to incorporate these sites, the Trial

[185] Closing Order, para. 1524.
[186] Closing Order, para. 1525.
[187] First Severance Appeal, para. 70.
[188] First Severance Appeal, para. 77.
[189] First Severance Appeal, para. 79 (emphasis in original).

> Chamber's decision amounts to a clear error in the exercise of its discretion under Rule 89*ter*.[190]

81. Taking this description as *prima facie* accurate, the Supreme Court Chamber notes that the issues concerned may exceed questions of good trial management and raise questions of divisibility of the case, which, notably, is a question never before tabled on appeal against decisions on severance.

82. Regarding the *ne bis in idem* argument of the Appeal, the Supreme Court Chamber notes that the Trial Chamber's justification for denying KHIEU Samphân's Submissions on Need to Wait for Final Judgment does not entirely address his motion in that it puts emphasis on the lack of finality of Case 002/01 as a circumstance alleviating concerns of *rei judicatae.*[191] Objections based on *ne bis in idem,* if well founded, should also be relevant in the aspect of *litis pendentio* because, even absent an explicit prohibition to such effect, the trial court must avoid duplication in proceeding over issues that in all probability will become *res judicata*. The Supreme Court Chamber concedes, however, that broad terms of the indictment, often in the alternative, may cause that these notions are not co-terminous. Nevertheless, in the present case, the submissions on this point go too far in that they invoke *ne bis in idem*, or *lis pendens*, generally in relation to common factual issues. *Idem* may be conventionally defined in several ways;[192] in the context of the ECCC, however, relevant is *idem* as determined by the Cambodian Code of Criminal Procedure ("CCP")[193] and international standards of fair trial. Considering that the CCP defines *res judicata* too narrowly by limiting it only to an acquittal,[194] the normative scope of *ne bis in idem* must be brought in line with an international standard, that of the International Covenant on Civil and Political Rights ("ICCPR"), where *idem* concerns issues of criminal responsibility, that is, acquittal or conviction related to the crime charged.[195] As long as there is no sameness of the

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[190] First Severance Appeal, para. 80.
[191] *See supra*, fn. 184, *referring to* Decision on Need to Wait for Final Judgment, para. 8.
[192] *See*, *e.g.*, *Prosecutor v. Zejnil Delalić et al.,* Case No. IT-96-21-T, Judgment (ICTY Trial Chamber), 16 November 1998, para. 228.
[193] Code of Criminal Procedure of the Kingdom of Cambodia, 7 June 2007.
[194] *See* Article 12 of the CCP.
[195] *See* General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32, 23 August 2007, para. 54 ("Article 14, paragraph 7 of the Covenant, providing that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with the law and penal procedure of each country, embodies the principle of *ne bis in idem*. This provision prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence.").

offence in question (legal characterization alone being immaterial for this determination),[196] evidentiary base is immaterial for the purpose of *ne bis in idem*.

83. However, a problem does arise from severance on the evidentiary base, that is with respect to possibly prejudicial findings on matters commonly relevant. The Supreme Court Chamber notes that, at the international *ad hoc* tribunals, there is a strong presumption of impartiality of professional judges, even in cases that have overlapping evidence or fact patterns, which allowed dismissing objections regarding repeated adjudication on contextual elements of crimes against humanity, on other factual elements of events, on specific legal issues and on the use of specific means of evidence.[197] This body of jurisprudence, however, originates from cases that had neither a common main hearing nor common accused. Two elements marking differences with the severance of Case 002 are notable: (1) at the *ad hoc* tribunals, impartiality was confirmed upon an assumption that there is an autonomous body of evidence in each case, and that the judges are not only trained to, but will, rely solely and exclusively on the evidence adduced in each particular case;[198] and, (2) objections were rejected because the judges' prior findings had never determined issues of criminal responsibility of the relevant accused. Conversely, where prior findings would have pronounced on criminal responsibility, this jurisprudence confirms that the presumption of impartiality would have been lifted.[199] The ICTY Chambers in the *Milošević* and *Mladić*

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[196] *See* Article 12 of the CCP, *in fine*. *See also Sergey ZOLOTUKHIN v. Russia*, ECHR, Application No. 14939/03, Judgment, 10 February 2009, para. 82 (in which the notion of "same offence" is now understood as an offence arising out of "identical facts or facts which are substantially the same").

[197] *See, e.g., Prosecutor v. Mićo STANIŠIĆ et al.*, Case No. IT-08-91-A, Decision on Motion Requesting Recusal, 3 December 2013 ("*Stanišić* Decision"), para. 23 ("on numerous occasions, the Tribunal has observed that a reasonable apprehension of bias of a Judge in a case will not arise merely because he or she previously dealt with evidence related to the same facts in other cases"), *and references cited therein*; *Tharcisse RENZAHO v. The Prosecutor*, Case No. ICTR-97-31-A, Judgement, paras. 25-49 (discussing in detail each common factual circumstance and autonomous evidence presented); *Ferdinand NAHIMANA et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana et al*. Appeal Judgement"), para. 78 ("It is assumed, in the absence of evidence to the contrary, that, by virtue of their training and experience, the Judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case. The Appeals Chamber agrees with the ICTY Bureau that 'a judge is not disqualified from hearing two or more criminal trials arising out of the same series of events, where he is exposed to evidence relating to these events in both cases'" (internal citation omitted)).

[198] *See especially Nahimana et al*. Appeal Judgement, para. 78.

[199] *Prosecutor v. Stanislav GALIĆ*, Case No. IT-98-29-T, Decision on Galić's Application Pursuant to Rule 15(B), 28 March 2003, para. 16 ("Judges may be subject to disqualification if they make a ruling on the ultimate issue of an individual's culpability in a connected prosecution"); *Dominique NTAWUKULILYAYO v. The Prosecutor*, Case No. ICTR-05-82-A, Decision on Motion for Disqualification of Judges, 8 February 2011, paras. 16-18 (analyzing minutiae of statements made by the judges as to whether reference to the Ntawukulilyayo's conduct in an earlier case evinced a pronouncement on his culpability). *See also Prosecutor v. Shefqet KABASHI*, Case No. IT-04-84-R77.1-S, T. (EN), 26 August 2011, pp. 68, 69 (in which Judges MOLOTO and DELVOIE recused themselves from the contempt case against Mr. Kabashi because it overlapped with the Haradinaj et al. retrial, in which case they were simultaneously sitting, and in which Mr. Kabashi testified. Both Judges felt this gave rise to an appearance of bias on their part and accordingly asked to

Decisions, which dealt with the same accused and charges arising from the same alleged common plan, also raised the issue of impartiality in their test that led to refusal to sever the case. In a nutshell, two solutions were mentioned: exclude the evidence to which the judges had been exposed,[200] or exclude the judges who had been exposed to evidence.[201]

84. In its decisions on severance, the Trial Chamber did not explain how the overarching themes would be affected, except to indicate that it would consider the roles and responsibilities of the accused in relation to the policies relevant to the whole Indictment in the severed case, even though the detailed factual consideration would be more limited.[202] In response to the Co-Prosecutors' request for confirmation on which of the five policies forming part of the joint criminal enterprise would be subject to definitive factual findings or legal conclusions in Case 002/01, the Trial Chamber issued a memorandum in which it referred to the factual themes of the subcase (namely, forced movement and execution of purported enemies of the regime), and reiterated that "the presentation in general terms of all five policies was permissible in order to enable consideration of the manner in which the policy was developed".[203] Most recently, the Clarification Memo discusses the foundation function of Case 002/01 mainly in the aspect of the depository of admitted evidence.[204]

85. Noting the controversy surrounding the notion of "general foundation", the Supreme Court Chamber stresses that it will not, in any event, be acceptable for the Trial Chamber to import any attribution of criminal responsibility, should such follow in Case 002/01, into any future trials, before the finality of a conviction. Even though evidence remains formally common to the severed cases, this commonality does not extend to findings, and common factual elements in all cases resulting from Case 002 must be established anew. In the event that the verdict in Case 002/01 leads to a conviction, there is a risk of an overlap of findings

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be replaced.); *Ferrantelli and Santangelo v. Italy,* European Court of Human Rights ("ECHR"), Application no. 19874/92, Judgment, 7 August 1996, paras. 59, 60 (in which the fact that an appeals judge in a murder case had previously sat on the appeals of other defendants on the same facts and the impugned judgment cited passages from the previous decision in which the roles of the accused in the event had been discussed was sufficient to establish a "legitimate doubt" as to impartiality).

[200] *See Milošević* Decision, paras. 28, 29 (re-interpreting the ICTY Trial Chamber's statement that prejudicial evidence would have had to be excluded to mean that it would need to be excluded from the judges' minds).

[201] *Mladić* Decision, para. 35 ("Further, if the indictment were severed and there were two trials, the Chamber and bench of judges assigned to the current case may also be assigned to the second case […]. The Chamber considers that there are significant legal and managerial concerns under this scenario. The partiality and appearance of partiality of the Chamber could be raised if the same Chamber were to hear both cases.").

[202] *See* Second Severance Decision, para. 16, *referring to* Decision on Reconsideration, para. 11.

[203] Memorandum from Judge NIL Nonn, President of the Trial Chamber, entitled "Co-Prosecutors' Request for Clarification of Findings Regarding the JCE alleged in Case 002/01 (E284/5)", E284/6, 27 August 2013, para. 2.

[204] Clarification Memo, paras. 5-7.

that determine individual criminal responsibility with the question of individual criminal responsibility in subsequent trials. In abstract terms, this risk increases with a further fragmentation of the case, but the problem is valid for Case 002/02, irrespective of severance. Given the dismissal of the motions to wait for the finality of Case 002/01 and, at the same time, a refusal to create a second panel within the Trial Chamber, two propositions, either one of which would serve to alleviate this concern, the Supreme Court Chamber can only assume that the Trial Chamber will not make findings in Case 002/01 which would evince attributing criminal responsibility to the Co-Accused in relation to charges to be adjudicated in subsequent cases. At this stage, however, without a verdict in hand, the question of overlap posed by the Appeal does not yet arise as a concrete prejudice.

86. For the reasons stated above, the Supreme Court Chamber finds that the Impugned Decision does not provide requisite legal certainty regarding the status of the remaining charges and the procedural consequences of the Additional Severance of Case 002. The Supreme Court Chamber considers, however that, in light of the clarification provided in the present decision, the prior confusion is hereby remedied and should no longer impeach the preparation of the defence.

e. Conclusion

87. For the reasons indicated above, the Supreme Court Chamber has found that delays and inefficiencies occasioned to future trials by further severance may be mitigated by the more pressing interests of ensuring meaningful justice through obtaining a verdict on at least those remaining charges which will render the combination of Cases 002/01 and 002/02 reasonably representative of the Indictment.[205] The Supreme Court Chamber acknowledges that assessing the whole spectrum of the charges in Case 002 remains unlikely due to health and age-related concerns of the Co-Accused, which remain valid. Considering the pace of trial proceedings before the ECCC, there appears to be no capacity to adjudicate the remaining charges without undermining the objective of attaining a representative verdict during the lifespan of the Co-Accused. Therefore, advantages of relative expediency and manageability bear heavy weight in the circumstances of the present case. In the Supreme Court Chamber's view, the scope of Case 002/02, in combination with Case 002/01, meets the requirement of representativeness and, as such, the charges therein, once adjudicated, are capable of fulfilling broad goals of criminal justice.

[205] *See supra*, paras. 55 *and* 62.

88. The Supreme Court Chamber has also found that, for the reasons indicated above, the Impugned Decision does not provide requisite legal certainty regarding the status of the charges and the procedural consequences of the Additional Severance of Case 002.[206] The Supreme Court Chamber provided necessary clarification concerning the procedural consequences of severance, but the status of the remaining charges remains unclear due to the Trial Chamber's repeated indecision regarding charges remaining outside the scope of a severed trial not currently underway.

89. The Supreme Court Chamber reiterates that comprehensive case management requires a tangible plan for the adjudication of the entirety of the charges in the Indictment and recalls that no part of proceedings may be left "in limbo"; rather, all cases created as a result of a severance must be attended to, that is, adjudicated on the merits, suspended, or dismissed.[207] Recognizing the lack of capacity to put the remaining charges to trial in the foreseeable future, the Supreme Court Chamber accordingly considers that the pending proceedings in relation to the charges remaining outside the scope of Cases 002/01 and 002/02 must be formally stayed. The declaration of such status only serves the goal of transparency by declaring what *de facto* has been done since the outset of the trial in Case 002. The proceedings in relation to the remaining charges may be resumed in whole or in part, whenever the possibility of adjudication on the merits or other definitive disposal arises.

90. This stay is provisional but, although it clarifies the formal status of the remaining charges, it does not alleviate concerns about the right to be tried within a reasonable time. To this end, the Supreme Court Chamber urges the Trial Chamber to fulfil its duty to bring closure to the entirety of the cases before it. Possible solutions placed before the Trial Chamber include the establishment of a second trial panel, the use of powers under Article 12 of the ECCC Agreement, and/or the convening of a Plenary meeting in the subject of the Co-Prosecutors' proposal for amendment of the Internal Rules to allow for the withdrawal or reduction of charges at the ECCC.

[206] *See supra*, para. 86.
[207] Second Severance Appeal Decision, paras. 61, 62, 69, 72-74.

V. DISPOSITION

91. For the foregoing reasons, the Supreme Court Chamber:

ADMITS the Appeal under Rule 104(4)(a) of the Internal Rules;

UPHOLDS the Additional Severance of Case 002; and,

DECLARES the stay of the proceedings in relation to the charges remaining outside the scope of Cases 002/01 and 002/02 pending appropriate disposal by the Trial Chamber.

Phnom Penh, 29 July 2014

President of the Supreme Court Chamber

KONG Srim