



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

ព្រះរាជាណាចក្រកម្ពុជា  
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

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(១៨)  
Case File/Dossier N°. 002/19-09-2007-ECCC-TC/SC(18)

**Before:** Judge KONG Srim, President  
Judge Chandra Nihal JAYASINGHE  
Judge Agnieszka KLONOWIECKA-MILART  
Judge MONG Monichariya  
Judge Florence Ndepele Mwachande MUMBA  
Judge SOM Sereyvuth  
Judge YA Narin

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**DECISION ON THE CO-PROSECUTORS' IMMEDIATE APPEAL OF THE TRIAL CHAMBER'S DECISION CONCERNING THE SCOPE OF CASE 002/01**

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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 “Co-Prosecutors’ Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 with Annex I and Confidential Annex II” filed on 7 November 2012 (“Immediate Appeal”).<sup>1</sup>

## I. INTRODUCTION

2. This appeal concerns a decision of the Trial Chamber denying, in part, a request by the Co-Prosecutors to expand the scope of the first trial in the present case (“Case 002/01” and “Case 002”, respectively).<sup>2</sup>

### a. Background

3. On 16 September 2010, the Co-Investigating Judges issued the Closing Order in Case 002, indicting IENG Sary, NUON Chea, and KHIEU Samphan (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”).<sup>3</sup> Following a series of appeals, the Pre-Trial Chamber confirmed the Indictment, subject to some amendments.<sup>4</sup> Pursuant to Rules 79 and 80*bis* of the Internal Rules,<sup>5</sup> the Trial Chamber was thereby seized of the Indictment and held

<sup>1</sup> E163/5/1/1.

<sup>2</sup> 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 (“Impugned Decision”), *disposing of* Co-Prosecutors’ Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01, E163, 27 January 2012 (“Request for Expansion”).

<sup>3</sup> Closing Order, D427, dated 15 September 2010 and filed on 16 September 2010 (“Closing Order”). IENG Thirith was also indicted jointly with the Co-Accused, but the charges against her 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 Reassessment of IENG Thirith’s Fitness”); Decision on IENG Thirith’s Fitness to Stand Trial, E138, 17 November 2011 (“Decision on IENG Thirith’s Fitness”).

<sup>4</sup> *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 Samphan’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 Samphan’s Appeal Against the Closing Order, D427/4/14, 13 January 2011; Decision on IENG Sary’s Appeal Against the Closing Order’s Extension of his Provisional Detention, D427/5/9, 13 January 2011.

<sup>5</sup> Internal Rules of the ECCC, Revision 8, 3 August 2011 (“Internal Rules”).

an initial hearing from 27 to 30 June 2011.<sup>6</sup> 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.<sup>7</sup>

4. On 22 September 2011, acting pursuant to Rule 89*ter* of the Internal Rules, the Trial Chamber severed the proceedings in Case 002 into discrete trials, each comprising finite portions of the Indictment, and each of which would, in turn, conclude with a verdict and sentence in the event of a conviction.<sup>8</sup> With respect to the first trial, namely 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 forced disappearances), but only insofar as they pertain to Phase 1 and Phase 2.<sup>9</sup> The Trial Chamber also indicated that:

No co-operatives, worksites, security centres, execution sites or facts relevant to the third phase of population movements will be examined during the first trial. Further, all allegations of, *inter alia*, genocide, persecution on religious grounds as a crime against humanity and Grave Breaches of the Geneva Conventions of 1949 have also been deferred to later phases of the proceedings in Case 002.<sup>10</sup>

5. On 3 October 2011, the Co-Prosecutors objected to not having been invited to make submissions on the substance of the Severance Order prior to its issuance,<sup>11</sup> and accordingly requested that the Trial Chamber reconsider and revise the Severance Order such that the scope of Case 002/01 include Phase 1 but exclude Phase 2, and add the following nine crime sites: the District 12 and Tuol Po Chrey execution sites; the S-21 security centre, including the purges of cadres from the New North, Central (Old North) and East Zones sent to S-21, but excluding the

<sup>6</sup> 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, E1/7.1 (together, “Initial Hearing”).

<sup>7</sup> See T. (EN), 27 June 2011, E1/4.1, pp. 7-8.

<sup>8</sup> Severance Order pursuant to Internal Rule 89*ter*, E124, 22 September 2011 (“Severance Order”).

<sup>9</sup> Severance Order, paras. 1, 5.

<sup>10</sup> Severance Order, para. 7.

<sup>11</sup> Co-Prosecutors’ Request for Reconsideration of “Severance Order pursuant to Internal Rule 89*ter*”, E124/2, 3 October 2011 (“Request for Reconsideration”), paras. 2, 7, 14-16, 20-23. See also Co-Prosecutors’ Notice of Request for Reconsideration of the Terms of “Severance Order pursuant to Internal Rule 89*ter*”, E124/1, 23 September 2011 (“Notice of Request for Reconsideration”), para. 4(b). The Civil Party Lead Co-Lawyers also objected to not having been heard on the terms of the Severance Order and similarly sought reconsideration thereof. See Lead Co-Lawyers and Civil Party Lawyers Request for Reconsideration of the Terms of the Severance Order E124, E124/8, 18 October 2011 (“Civil Party Request for Reconsideration”). See also Lead Co-Lawyers Notice of Request for Reconsideration of the Terms of “Severance Order pursuant to Internal Rule 89*ter*”, E124/4, 6 October 2011 (“Civil Party Notice of Request for Reconsideration”).

Prey Sar worksite; the North Zone, Kraing Ta Chan, and Au Kanseng security centres; the Kampong Chhnang Airport construction site; and, the Tram Kok cooperatives.<sup>12</sup> The Co-Prosecutors argued that the Severance Order was not in the interests of justice because the charges selected for Case 002/01, which they contended would likely be the only trial in Case 002,<sup>13</sup> were not representative of the Co-Accused's criminal conduct as alleged in the Indictment,<sup>14</sup> would not promote an accurate historical record,<sup>15</sup> and would diminish the legacy of the ECCC in advancing national reconciliation.<sup>16</sup> On 18 October 2011, the Trial Chamber rejected the Request for Reconsideration in its entirety.<sup>17</sup>

6. On 27 January 2012, the Co-Prosecutors requested that the Trial Chamber expand the scope of Case 002/01 by adding three of the nine previously requested crime sites, namely the District 12 execution sites ("District 12"),<sup>18</sup> the Tuol Po Chrey execution site ("Tuol Po Chrey"),<sup>19</sup> 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").<sup>20</sup> On 3 August 2012, the Trial Chamber indicated it may be willing to expand the scope of Case 002/01 in the manner proposed by the Co-Prosecutors and invited the parties to make submissions on the matter at the next trial management meeting,<sup>21</sup> which took place on 17 August 2012.<sup>22</sup>

7. On 8 October 2012, the Trial Chamber rendered the Impugned Decision, denying the Request for Expansion with respect to District 12 and S-21,<sup>23</sup> but granting the requested incorporation of Tuol Po Chrey, "insofar as they [...] occurred immediately after the evacuation

<sup>12</sup> Request for Reconsideration, paras. 1, 36, 42-43. The Co-Prosecutors also requested, in the alternative, that the Trial Chamber "hear the parties, either in writing or orally, on alternate formats of severance in Case 002". See Request for Reconsideration, para. 45(2). See also Request for Reconsideration, para. 1.

<sup>13</sup> Request for Reconsideration, paras. 3, 15, 24-27, 29-30, 36.

<sup>14</sup> Request for Reconsideration, paras. 3, 18-19, 21-24, 29-32, 36, 44. See also Notice of Request for Reconsideration, para. 4(a).

<sup>15</sup> Request for Reconsideration, paras. 3, 32-34. See also Notice of Request for Reconsideration, para. 4(a).

<sup>16</sup> Request for Reconsideration, paras. 3, 32, 34. See also Notice of Request for Reconsideration, para. 4(a).

<sup>17</sup> Decision on Co-Prosecutors' Request for Reconsideration of the Terms of the Trial Chamber's Severance Order (E124/2) and Related Motions and Annexes, E124/7, 18 October 2011 ("Decision on Reconsideration").

<sup>18</sup> Request for Expansion, paras. 4(a), 33(a), referring to Closing Order, paras. 691, 693-697.

<sup>19</sup> Request for Expansion, paras. 4(b), 33(b), referring to Closing Order, paras. 698-711.

<sup>20</sup> Request for Expansion, paras. 4(c), 33(c), referring to Closing Order, paras. 192-204, 415-475.

<sup>21</sup> 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 ("3 August 2012 Memorandum"), paras. 13-15. See also Memorandum from Judge NIL Nonn, President of the Trial Chamber, entitled "Co-Prosecutors' proposed extension of scope of trial in Case 002/01 (E163)", E218.1, 3 August 2012 ("Annex to 3 August 2012 Memorandum").

<sup>22</sup> T. (EN), 17 August 2012, E1/114.1 ("17 August 2012 Trial Management Meeting").

<sup>23</sup> Impugned Decision, para. 2.

of Phnom Penh [...], but not otherwise extending to killings that occurred between 1976 and 1977.”<sup>24</sup>

### **b. The Immediate Appeal**

8. On 7 November 2012, the Co-Prosecutors filed the Immediate Appeal, submitting that it is admissible and that the Impugned Decision contains errors of law, fact, and in the exercise of the Trial Chamber’s discretion.<sup>25</sup> The Co-Prosecutors accordingly request that the Supreme Court Chamber amend the Impugned Decision so as to include District 12 and S-21 within the scope of Case 002/01.<sup>26</sup> Each Co-Accused responded in opposition to the Immediate Appeal,<sup>27</sup> whereas the Civil Party Lead Co-Lawyers responded in support thereof.<sup>28</sup> The Co-Prosecutors filed separate replies to each Co-Accused’s response.<sup>29</sup>

### **c. Oral Arguments**

9. Rule 109(1) of the Internal Rules provides that immediate appeals may be decided on the basis of written submissions only. On 21 November 2012, the Co-Prosecutors requested a public oral hearing be held in relation to the Immediate Appeal,<sup>30</sup> a request that the Supreme Court Chamber denied on 18 December 2012.<sup>31</sup> Having considered the written submissions of the parties, the Supreme Court Chamber does not deem it necessary to hear oral arguments in this case.

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<sup>24</sup> Impugned Decision, para. 3.

<sup>25</sup> Immediate Appeal, paras. 2-3, 10-86.

<sup>26</sup> Immediate Appeal, paras. 3, 87.

<sup>27</sup> IENG Sary’s Response to the Co-Prosecutors’ Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, E163/5/1/3, 19 November 2012 (“IENG Sary Response”); Response to Co-Prosecutors’ Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, E163/5/1/4, 19 November 2012 (“NUON Chea Response”); *Réponse à l’appel immédiat des co-procureurs concernant la portée du dossier 002/01*, E163/5/1/9, 30 November 2012 (“KHIEU Samphan Response”). See also Decision on Request by Co-Lawyers for KHIEU Samphan for Extension of Time to Respond to Co-Prosecutors’ Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, E163/5/1/2/1, 20 November 2012.

<sup>28</sup> Civil Party Lead Co-Lawyers Support to the Co-Prosecutors’ Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, E163/5/1/5, 21 November 2012 (“Civil Party Response”).

<sup>29</sup> Co-Prosecutors’ Reply to IENG Sary Response to Appeal of Decision Concerning the Scope of Trial in Case 002/01, E163/5/1/8, 26 November 2012 (“Reply to IENG Sary”); Co-Prosecutors’ Reply to NUON Chea Response to Appeal of Decision Concerning the Scope of Trial in Case 002/01, E163/5/1/10, 3 December 2012 (“Reply to NUON Chea”); Co-Prosecutors’ Reply to KHIEU Samphan Response to Appeal of Decision Concerning the Scope of Trial in Case 002/01, E163/5/1/11, 7 December 2012 (“Reply to KHIEU Samphan”).

<sup>30</sup> Co-Prosecutors’ Request for a Public Oral Hearing of the Immediate Appeal of the Decision Concerning the Scope of Trial in Case 002/01 or in the Alternative Request to File a Joint Reply to the Three Defence Responses, E163/5/1/6, 21 November 2012.

<sup>31</sup> Decision on Co-Prosecutors’ Request for Appeal Hearing on Scope of Trial in Case 002/01 or Leave to File Joint Reply, E163/5/1/12, 18 December 2012.

**d. Amicus Curiae Briefs**

10. Rule 33 of the Internal Rules provides that, at any stage of the proceedings, the Co-Investigating Judges or the Chambers may, if they consider it desirable for the proper adjudication of the case, invite or grant leave to an organization or person to submit an *amicus curiae* brief in writing concerning any issue, subject to affording all parties the opportunity to respond. On 4 January 2012, Dr. Stan STARYGIN requested leave to file an *amicus curiae* brief in relation to the Immediate Appeal.<sup>32</sup> Having considered the written submissions of the parties, as well as the fact that under normal circumstances the Immediate Appeal must be decided no later than 8 February 2013,<sup>33</sup> the Supreme Court Chamber does not deem it desirable for the proper adjudication of the Immediate Appeal to receive an *amicus curiae* brief in this case.

11. The Supreme Court Chamber hereby renders its decision.

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<sup>32</sup> Electronic mail from Dr. Stan STARYGIN, entitled “Request for Leave to File Amicus Curiae Brief”, sent on 4 January 2013 at 14h26.

<sup>33</sup> See Rule 108(4bis)(b) of the Internal Rules (“The [Supreme Court] Chamber shall decide on immediate appeals[] [...] against decisions made pursuant to [Rule 104(4)(a) of the Internal Rules] within three months of the receipt of [the case file together with certified copies of the decision and each immediate appeal]. In exceptional circumstances, however, the Supreme Court Chamber may extend this period by one further month. If a decision is not issued within the prescribed period, the decision of the Trial Chamber shall stand.”). In the present case, the case file together with the Impugned Decision and Immediate Appeal were notified and received on 8 November 2012.

## 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. The Co-Prosecutors submit that the Impugned Decision is subject to immediate appeal pursuant to Rule 104(4)(a) of the Internal Rules because it effectively terminates the proceedings in relation to District 12 and S-21.<sup>34</sup> In particular, the Co-Prosecutors contend that Rule 104(4)(a) of the Internal Rules envisages appellate review in circumstances such as the present case where the prospect of future proceedings is intangibly remote,<sup>35</sup> and that the Immediate Appeal is filed within the applicable deadline.<sup>36</sup>

15. Each Co-Accused responds that the Immediate Appeal is inadmissible under the Internal Rules and should accordingly be rejected.<sup>37</sup> IENG Sary and KHIEU Samphan also contend that the Immediate Appeal should be dismissed as untimely.<sup>38</sup> The Civil Party Lead Co-Lawyers make no specific submissions in respect of admissibility.

#### a. Timeliness

16. The Co-Prosecutors submit that they refrained from appealing the Severance Order until the scope of Case 002/01 was finalized, which was only following the Impugned Decision.<sup>39</sup> IENG Sary responds that the Immediate Appeal is time-barred for failure to appeal the Severance Order or Decision on Reconsideration.<sup>40</sup> KHIEU Samphan responds similarly, with the added argument that untimeliness is demonstrated when, considering the advanced stages of the proceedings in Case 002/01, a decision to grant the Immediate Appeal within the time limits prescribed under Rule 108(4bis)(b) of the Internal Rules to dispose of appeals under Rule 104(4)(a) of the Internal Rules would “compromise”<sup>41</sup> and “have a profound impact”<sup>42</sup> on the current trial.<sup>43</sup> On this point, the Co-Prosecutors reply that KHIEU Samphan’s reliance on Rule 108(4bis)(b) of the Internal Rules to deny the Immediate Appeal is improper and misplaced, and

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<sup>34</sup> Immediate Appeal, paras. 3, 10-19. *See also* Immediate Appeal, paras. 2, 20; Reply to IENG Sary, para. 19; Reply to NUON Chea, para. 27; Reply to KHIEU Samphan, para. 11.

<sup>35</sup> Immediate Appeal, paras. 11-19. *See also* Reply to IENG Sary, paras. 10-18; Reply to NUON Chea, paras. 3-4.

<sup>36</sup> Immediate Appeal, para. 20. *See also* Reply to IENG Sary, paras. 3-9; Reply to KHIEU Samphan, para. 3.

<sup>37</sup> IENG Sary Response, p. 1, paras. 30-49; NUON Chea Response, paras. 1, 3-5, 36; KHIEU Samphan Response, paras. 8-20, 56.

<sup>38</sup> IENG Sary Response, p. 1, paras. 21-29, 49; KHIEU Samphan Response, paras. 21-24.

<sup>39</sup> Immediate Appeal, para. 20. *See also* Reply to IENG Sary, paras. 2-9.

<sup>40</sup> IENG Sary Response, paras. 21-29. *See also* IENG Sary Response, paras. 6, 9, 12.

<sup>41</sup> KHIEU Samphan Response, para. 22.

<sup>42</sup> KHIEU Samphan Response, para. 24.

<sup>43</sup> KHIEU Samphan Response, paras. 21-24.

that there is no basis to contend that the addition of S-21 and District 12 at this stage of the proceedings would violate the Co-Accused's fair trial rights.<sup>44</sup>

17. At the outset, the Supreme Court Chamber rejects any notion that prescribed time limits for the disposal of immediate appeals should have any impact on the timeliness, admissibility or merits thereof. As to the argument that the Co-Prosecutors are time-barred for lack of diligence, the Supreme Court Chamber considers that the Impugned Decision is intrinsically linked to the Severance Order and Decision on Reconsideration and forms a final episode in a year-long decision-making process that was marked by multiple pronouncements on the same matter in the same factual and legal circumstances.<sup>45</sup> In this regard, a review of the procedural history shows that, between the time of the Severance Order and the Impugned Decision, the Trial Chamber consistently kept the limits of the scope of Case 002/01 uncertain and open to change, without defining any criteria that could influence a change.<sup>46</sup> In fact, the Supreme Court Chamber notes that the Trial Chamber did not express finality on the scope of Case 002/01 until 19 October 2012, that is 11 days after the issuance of the Impugned Decision, when it definitively stated for the first time that “no further extensions on the scope of trial in Case 002/01 would be entertained”.<sup>47</sup> Under these circumstances, the Supreme Court Chamber considers that the

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<sup>44</sup> Reply to KHIEU Samphan, paras. 4-7.

<sup>45</sup> See also *infra*, paras. 37, 49.

<sup>46</sup> See, e.g., Severance Order, para. 6 (“The Trial Chamber may at any time decide to include in the first trial additional portions of the Closing Order in Case 002/01”); Decision on Reconsideration, para. 12 (“In its Severance Order, the Trial Chamber did not exclude the possibility of adding additional charges or counts to the first trial in Case 002 where circumstances permit. Although the Chamber takes note of the Co-Prosecutors’ indication in its Request [for Reconsideration] of possible additional topics for inclusion in the first trial and will be guided by its views as to priority allegations for consideration during later phases of the trial, it finds no basis to reconsider its Severance Order at this stage.” (Internal reference omitted)); Memorandum from Judge NIL Nonn, President of the Trial Chamber, entitled “Next group of witnesses, Civil Parties and Experts to be heard in Case 002/01”, E172, dated 17 February 2011 and filed on 21 February 2011, p. 4 (“The Chamber is also in receipt of the [Request for Expansion]. As the Chamber has previously indicated in the Severance Order and in other related decisions, it may on its own motion decide in due course to extend the scope of trial in Case 002/01, in the exercise of its trial management discretion. Should this occur, the parties will be informed in a timely manner.”); 3 August 2012 Memorandum, para. 13 (“[T]he Co-Prosecutors have repeatedly urged extension of the scope of charges to be addressed in Case 002/01 [...]. Although the principal focus of the Chamber’s efforts to date has been to ensure greater streamlining and trial efficiency, the Chamber has nonetheless also devoted significant time and resources to assessing the impact of acceding to the Co-Prosecutors’ request to expand the scope of Case 002/01 in the manner proposed by [the Request for Expansion]. The attached annex provides an indication of a modest extension the Chamber may be willing to contemplate in relation to [District 12 and Tuol Po Chrey].”); Annex to 3 August 2012 Memorandum, paras. 1 (“The Trial Chamber has [...] repeatedly indicated that, in the exercise of its trial management discretion, an extension of the scope of the trial may be considered if practicable to do so, at which stage the Co-Prosecutors’ suggestions regarding possible additional topics for inclusion in the first trial would be taken into account.” (Internal reference omitted)), 5 (“To guide discussion of the proposed extensions to the scope of Case 002/01 at the Trial Management Meeting, the Trial Chamber provides the following analysis of the extensions sought by the Co-Prosecutors, and indicates areas it may be prepared to contemplate including within the scope of Case 002/01.”).

<sup>47</sup> Memorandum from Judge NIL Nonn, President of the Trial Chamber, entitled “Forthcoming document hearings and response to Lead Co-Lawyers’ memorandum concerning the Trial Chamber’s request to identify Civil Party applications for use at trial (E208/4) and KHIEU Samphan Defence request to revise corroborative evidence lists (E223/1)”, E223/2, 19 October 2012, para. 3.

Severance Order, Decision on Reconsideration, and Impugned Decision, along with all related memoranda, constitute one comprehensive decision regarding the severance of Case 002 and the scope of Case 002/01. The Supreme Court Chamber therefore finds that omission to appeal the Severance Order or the Decision on Reconsideration has no bearing on the right to appeal the Impugned Decision.

18. Rule 107(1) of the Internal Rules provides that appeals from decisions open to immediate appeal under Rules 104(4)(a) and 104(4)(d) of the Internal Rules must be filed within 30 days of the date of the decision or its notification. The Impugned Decision was filed on 8 October 2012, and the Immediate Appeal was filed on the thirtieth day thereafter, that is, on 7 November 2012.

19. The Immediate Appeal was therefore filed in accordance with Rule 107(1) of the Internal Rules.

**b. Rule 104(4)(a) of the Internal Rules**

20. The Co-Prosecutors submit 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.”<sup>48</sup> They argue that the circumstances of the present case fall within the scope of Rule 104(4)(a) of the Internal Rules so interpreted because the possibility of future trials in Case 002 is intangibly remote due to the advanced age and health concerns of the Co-Accused, and because numerous issues remain unresolved with respect to how and when a potential second trial (“Case 002/02”) could go forward.<sup>49</sup> The Co-Prosecutors contend that the Impugned Decision therefore bars the adjudication of charges related to the excluded crime sites, which effectively terminates the proceedings in relation thereto.<sup>50</sup> The Co-Prosecutors further aver that their right to appeal the errors alleged cannot be secured by requiring them to wait until the issuance of the trial judgment on the merits,<sup>51</sup> arguing that “no legal mechanism would be available and feasible to include the excluded crime sites on appeal.”<sup>52</sup> Moreover, they invoke Rule 21 of the Internal Rules to argue

<sup>48</sup> Immediate Appeal, para. 11. *See also* Reply to IENG Sary, paras. 11-12.

<sup>49</sup> Immediate Appeal, paras. 15-18. *See also* Reply to IENG Sary, paras. 14-15. The Civil Party Lead Co-Lawyers similarly assert that there exists a “present and real possibility that the trial in Case 002/01 will be the last trial at the ECCC”. *See* Civil Party Response, para. 6. *See also* Civil Party Notice of Request for Reconsideration, para. 6(c) (“The Lead Co-Lawyers and the Civil Party Lawyers are aware that this first trial could be the only one”); Civil Party Request for Reconsideration, paras. 1 (“In light of the advanced age of the [Co-]Accused and the perpetual problems of the Court in securing adequate funding, we believe there is a possibility that this trial could be the last. If this is the case[,] severance would represent a *de facto* discontinuation of proceedings for a large number of Civil Parties.”), 27.

<sup>50</sup> Immediate Appeal, paras. 12-13. *See also* Reply to IENG Sary, para. 13.

<sup>51</sup> Immediate Appeal, paras. 12-14. *See also* Reply to IENG Sary, para. 15.

<sup>52</sup> Immediate Appeal, para. 13. *See also* Immediate Appeal, para. 14.

that allowing the Immediate Appeal would safeguard the rights of victims without having any adverse impact on the rights of the parties.<sup>53</sup>

21. The Co-Accused respond that the Impugned Decision does not terminate any proceedings as the Trial Chamber has made clear that no charges in the Indictment are discontinued and that the second trial will commence soon after the conclusion of the evidence in Case 002/01.<sup>54</sup> They contend that the Co-Prosecutors' claim that future trials in Case 002 are intangibly remote is speculative, and that the age and health of the Co-Accused, as well as the practical issues relating to commencing Case 002/02, do not involve a termination of proceedings but only potential delays.<sup>55</sup> IENG Sary adds that the Co-Prosecutors' only option is to appeal following the issuance of the trial judgment,<sup>56</sup> a recourse which he maintains would adequately protect the Co-Prosecutors' and victims' interests,<sup>57</sup> whereas admitting and granting the Immediate Appeal would cause him prejudice.<sup>58</sup>

22. The Supreme Court Chamber recalls that the right of appeal provided for in Rule 104(4)(a) of the Internal Rules ensures that an avenue of appeal exists where the proceedings are terminated without arriving at a judgment and therefore without an opportunity to appeal against it.<sup>59</sup> 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.<sup>60</sup> In the context of the ECCC, which has only one Trial Chamber with only one trial on its docket, the severance of Case 002 into discrete trials creates the inevitable situation that proceedings in relation to charges falling outside the scope of Case 002/01 are, in effect, stayed. Such conclusion is not in dispute, and there is no suggestion that the stay of proceedings entailed by the Impugned Decision in relation to S-21 and District 12 is intended to be permanent. Rather, the issue at hand is whether there exists a sufficient prospect of resuming the proceedings in relation to charges excluded from the scope of Case 002/01 as to permit arriving at a judgment in the regular course.

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<sup>53</sup> Immediate Appeal, para. 19.

<sup>54</sup> IENG Sary Response, paras. 33, 37, 43; NUON Chea Response, paras. 3- 4; KHIEU Samphan Response, paras. 8-9, 11.

<sup>55</sup> IENG Sary Response, paras. 36, 38-39; NUON Chea Response, para. 5; KHIEU Samphan Response, paras. 14-17, 34.

<sup>56</sup> IENG Sary Response, paras. 39-41. *See also* KHIEU Samphan Response, paras. 10-12, 18-20.

<sup>57</sup> IENG Sary Response, paras. 41-43. *See also* KHIEU Samphan Response, paras. 17-18.

<sup>58</sup> IENG Sary Response, paras. 44-45.

<sup>59</sup> 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.

<sup>60</sup> Decision on Immediate Appeal against the Trial Chamber's Order to Release the Accused IENG Thirith, E138/1/7, 13 December 2011 ("Decision on IENG Thirith's Release"), para. 15.

23. The Trial Chamber has confirmed that “no allegations or charges in the Indictment are discontinued in consequence of the Severance Order”,<sup>61</sup> and that it remains its “intention [...] to conclude the hearing of evidence in Case 002/01 in 2013, and to commence Case 002/02 soon after the conclusion of evidence in Case 002/01”.<sup>62</sup> The Trial Chamber has not specified, however, whether S-21 and District 12 will form part of Case 002/02. In fact, the Trial Chamber has not provided any clear or specific information as to the number, scope, or duration of trials envisaged after Case 002/01.<sup>63</sup> Even if such information were provided, the question would remain as to whether arrival at a judgment on the merits in respect of the alleged crimes at S-21 and District 12 is effectively barred by virtue of their deferral to a future trial.

24. Based on the parties’ submissions, the Co-Prosecutors and the Civil Party Lead Co-Lawyers would answer the question in the affirmative, whereas the Co-Accused would argue that any answer to the question would be speculative. In the Supreme Court Chamber’s view, while some measure of speculation is always involved in the projection-making process, several inescapable realities exist in the case at hand that lend a measure of probability to the conclusion. Such realities include: the advanced age and declining health of the Co-Accused;<sup>64</sup> the Trial Chamber’s failure to provide a tangible plan or any information regarding subsequent cases to be tried in the course of Case 002;<sup>65</sup> the difficulties recently expressed by the Trial Chamber in meeting its workload demands;<sup>66</sup> and the fact that, in the context of the ECCC, judgments on the merits are not final until having passed through the appellate stage.<sup>67</sup> These factors, taken together, give good reason for the Co-Prosecutors’ pessimism about the future of Case 002. The Supreme Court Chamber notes that counsel for NUON Chea have previously expressed similar

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<sup>61</sup> Decision on Reconsideration, para. 9.

<sup>62</sup> 3 August 2012 Memorandum, para. 1.

<sup>63</sup> This is despite the Trial Chamber’s indication in its Severance Order that “further information regarding subsequent cases to be tried in the course of Case 002 will be provided to the parties and the public in due course.” See Severance Order, p. 4.

<sup>64</sup> At the time of writing, IENG Sary is aged 87 (born on 24 October 1925), NUON Chea is aged 86 (born on 7 July 1926), and KHIEU Samphan is aged 81 (born on 27 July 1931). See Closing Order, p. 7. As to their declining health, see, *inter alia*, Memorandum from Judge NIL Nonn, President of the Trial Chamber, entitled “Re-Appointment of Experts to Review the Health and Fitness of IENG Sary and NUON Chea during the week of 11 March 2013”, E256, 18 December 2012, para. 2 (“[NUON Chea and IENG Sary] both suffer several chronic physical ailments and regularly participate in proceedings from the holding cell”); T. (EN), 9 January 2013, E1/157.1, pp. 2-3 (finding that IENG Sary’s and NUON Chea’s respective health conditions render them incapable of participating in the proceedings from the courtroom); Memorandum from Judge NIL Nonn, President of the Trial Chamber, entitled “Adjournment of Proceedings”, E258, 16 January 2013 (adjournment of proceedings due to hospitalisation of NUON Chea and KHIEU Samphan); T. (EN), 21 January 2013, E1/161.1, p. 2 (noting the absence of IENG Sary, NUON Chea, and KHIEU Samphan from the courtroom due to their ongoing “health concerns”).

<sup>65</sup> See *supra*, para. 23 and fn. 63. See also *infra*, paras. 46-50.

<sup>66</sup> See T. (EN), 23 October 2012, E1/137.1, pp. 49-50. See also Decision on NUON Chea’s “Appeal Against Constructive Dismissal of Application for Immediate Action Pursuant to Rule 35”, E189/2/3, 26 November 2012, para. 5 and fn. 13.

<sup>67</sup> Cf. Rules 104, 110-111, 113 of the Internal Rules; Article 38 of the Constitution of the Kingdom of Cambodia, 21 September 2007; Articles 398, 405-406, 497 of the Code of Criminal Procedure of the Kingdom of Cambodia, 7 June 2007 (“CCP”).

views on this matter.<sup>68</sup> Even the Trial Chamber has made statements implying that Case 002/01 will be the only trial to ever reach judgment.<sup>69</sup>

25. In light of the above, the Supreme Court Chamber considers that, as the definitive decision on the mode of the severance of Case 002, the Impugned Decision results in a *de facto* stay of proceedings in relation to all charges placed outside the scope of Case 002/01, 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 Impugned Decision denying inclusion of S-21 and District 12 within the scope of Case 002/01 has the effect of terminating the proceedings in relation to those charges.

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

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<sup>68</sup> See, e.g., T. (EN), 22 October 2012, E1/136.1, p. 9 (“[Mr. IANUZZI for NUON Chea:] I think we should absolutely dispense once and for all with the notion that there’s going to be another trial in Case 002. Clearly, we’re stuck with Case 002/[ ]01. That is the trial we’re hearing now, and there will never be another one. I think everyone agrees with that.”); T. (EN), 19 October 2012, E1/135.1, p. 42 (“[Mr. IANUZZI for NUON Chea:] And we further understand [...] that the rationale for this is to lay a foundation, as it were, for future truncated trials [...] within Case 002 – at least, that’s the theory. And I just wanted to say, on that point, we register our full agreement with what Mr. CAYLEY said on that issue the last time he was in Court, that that will never, ever happen.”); T. (EN), 27 August 2012, E1/114.2, pp. 24-25 (“[Mr. PAUW for NUON Chea:] One last thing – and the Prosecution raised this issue last week at the earlier [Trial Management Meeting]. And basically, if I understood the Prosecution correctly, the Prosecution said: Let’s call a spade a spade; the chances of having a second trial before this Chamber are slim. We’re dealing with very elderly Accused, funds are drying up, and it’s not unlikely that there is not going to be a second case that’s going to end. We, therefore, think it’s important that all these issues that come up in this case are briefed thoroughly.”).

<sup>69</sup> See Decision on Reconsideration, para. 11 (“Given, as the Co-Prosecutors allege, that there is real concern as to whether the Accused will be physically and mentally able to participate in a lengthy trial, the Chamber considered these measures to be essential in order to ‘safeguard] the fundamental interest of victims in achieving meaningful and timely justice, and the right of all Accused in Case 002 to an expeditious trial’.”). See also Severance Order, para. 8.

#### IV. MERITS

27. As recalled above, on 8 October 2012, the Trial Chamber issued the Impugned Decision wherein it denied the Co-Prosecutors' request to include District 12 and S-21 within the scope of Case 002/01, but granted their request to include Tuol Po Chrey.<sup>70</sup>

28. The Co-Prosecutors submit that the Trial Chamber erred in law, fact, and the exercise of its discretion by refusing to include District 12 and S-21 within the scope of Case 002/01.<sup>71</sup> In particular, they contend that the Trial Chamber erred in rendering a decision in improper form and with inadequate content.<sup>72</sup> They aver that the Trial Chamber erred in failing to consider whether the charges within the scope of Case 002/01 are reasonably representative of the Indictment.<sup>73</sup> They further submit that the Trial Chamber erroneously relied on extraneous considerations and misconstrued factors that impact the length of the trial.<sup>74</sup> In addition, they argue that the Trial Chamber misunderstood the nexus between the current issues in Case 002/01 and the proposed additional crime sites.<sup>75</sup> The Co-Prosecutors therefore request that the Supreme Court Chamber hold that an extension of the scope of Case 002/01 so as to include S-21 and District 12 is in the interests of justice, and that it amend the Impugned Decision accordingly.<sup>76</sup>

29. NUON Chea and KHIEU Samphan respond that the Immediate Appeal is ill-founded and should be denied as such.<sup>77</sup> IENG Sary makes no specific submissions on the merits. The Civil Party Lead Co-Lawyers support the Immediate Appeal in its entirety and request that the relief sought by the Co-Prosecutors be granted.<sup>78</sup>

##### a. Form

30. With respect to the Impugned Decision's form, the Co-Prosecutors take issue with the fact that it was issued as a memorandum, arguing that its lack of formality creates uncertainty.<sup>79</sup> In this respect, the Supreme Court Chamber recalls:

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<sup>70</sup> See *supra*, para. 7, referring to Impugned Decision, paras. 2-3. The Trial Chamber specified that Tuol Po Chrey would be incorporated only "insofar as they [...] occurred immediately after the evacuation of Phnom Penh [...], but not otherwise extending to killings that occurred between 1976 and 1977." See Impugned Decision, para. 3.

<sup>71</sup> Immediate Appeal, paras. 1-3, 21-86.

<sup>72</sup> Immediate Appeal, paras. 3, 42-48.

<sup>73</sup> Immediate Appeal, paras. 3, 21-41. See also Reply to NUON Chea, paras. 5-6.

<sup>74</sup> Immediate Appeal, paras. 3, 49-68, 82-86. See also Reply to NUON Chea, paras. 7-15.

<sup>75</sup> Immediate Appeal, paras. 3, 69-81. See also Reply to NUON Chea, paras. 16-26.

<sup>76</sup> Immediate Appeal, paras. 3, 87. See also Reply to NUON Chea, para. 27; Reply to KHIEU Samphan, para. 11.

<sup>77</sup> NUON Chea Response, paras. 6-36; KHIEU Samphan Response, paras. 25-56.

<sup>78</sup> Civil Party Response, paras. 1-11.

<sup>79</sup> Immediate Appeal, paras. 45-46.

[A] court's decision must display *indicia* of an authoritative judicial act. In this respect, it is necessary for a judicial decision to dispose of a legal matter before it in a definite manner. As such, a judicial decision should contain an operative part ("enacting clause" or "disposition") which resolves the substantive and/or procedural issue by creating, altering, dissolving or confirming a law-based relation concerning the parties.<sup>80</sup>

The Supreme Court Chamber notes that the Impugned Decision disposed of the Co-Prosecutors' request to include District 12, S-21, and Tuol Po Chrey in the scope of Case 002/01 in a definitive manner, granting the request only with respect to Tuol Po Chrey. The Impugned Decision does therefore possess *indicia* of an authoritative judicial act, despite lacking solemn form. The Supreme Court Chamber points out that, unless the law would necessarily require a specific form or designation of a judicial act, practices departing from judicial formalism and symbolism do not render the acts void; such acts are rather reviewed in the aspect of fairness, in terms of sufficient clarity as to their existence, content and procedural consequences. In this respect, the Supreme Court Chamber notes that the Trial Chamber has previously indicated that it "will in its discretion issue decisions in memorandum format where their subject-matter pertains largely to trial management".<sup>81</sup> Thus, while it would indeed be preferable for the Trial Chamber to render all of its judicial decisions – be they substantive or procedural – in a formal manner, the Supreme Court Chamber does not consider that the lack of formality in this particular case creates a level of uncertainty amounting to a discernible error in the Trial Chamber's discretion causing the Co-Prosecutors any prejudice.

#### **b. Content**

31. As to the Impugned Decision's content, the Co-Prosecutors essentially argue that, in excluding District 12 and S-21, the Trial Chamber failed to consider whether the scope of Case 002/01 would be representative of the Indictment, and that the factors that the Trial Chamber did rely upon were extraneous, misconstrued, or misplaced.<sup>82</sup>

32. In deciding to exclude District 12 and S-21 from the scope of Case 002/01, the Trial Chamber explained:

The reasons for this are, firstly, that incorporation of these elements (whether due to the number of witnesses sought by the parties, anticipated difficulties in limiting the scope of these proposed extensions, or likely Defence objections to them) would risk a substantial prolongation of the trial in Case 002/01. The Chamber also remains unconvinced that

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<sup>80</sup> Decision on NUON Chea's Appeal against the Trial Chamber's Decision on Rule 35 Application for Summary Action, E176/2/1/4, 14 September 2012 ("Rule 35 Decision"), para. 25 (internal reference omitted).

<sup>81</sup> Memorandum from Judge NIL Nonn, President of the Trial Chamber, entitled "Trial Chamber's disposition of Lead Co-Lawyers' Submission for purpose of reconsideration and Correction of Memorandum E62/3/10/4" (E62/3/10/4/1) and Motion E117", E117/2, 23 September 2011, p. 3.

<sup>82</sup> See *supra*, para. 28.



these additional crime sites are closely connected to the existing factual allegations in Case 002/01 or that their inclusion fits within the logical sequence of the trial in Case 002 as described in the Severance Order (E124). Finally, the Trial Chamber is conscious that in ensuring an expeditious trial, it has had to allow for delays brought about by issues such as the lengthy process required to assess and then review IENG Thirith's fitness to stand trial. The current hospitalization of the Accused IENG Sary, and consequent trial management challenges, also ensures that the Chamber does not consider significant expansion of the scope of trial in Case 002/01 to be a prudent exercise of its trial management discretion.<sup>83</sup>

33. The Supreme Court Chamber considers that the Trial Chamber's delineation of the terms of severance raises a more preliminary concern. Considerations of efficiency and fairness lend support to the general principle, expressed in the laws applicable to the ECCC as well as in international criminal jurisdictions, that charges concerning similar events against several accused should preferably be tried in joint proceedings.<sup>84</sup> Severance of a confirmed indictment is not foreseen under Cambodian law, and the *ad hoc* international criminal tribunals have been reluctant to grant severance requests.<sup>85</sup> Where severance has been deemed necessary, it has characteristically involved separating an accused person from joint proceedings.<sup>86</sup> As such, decisions on severance constitute exceptions to the general preference for joint trials.

<sup>83</sup> Impugned Decision, para. 2.

<sup>84</sup> See Rule 79(2) of the Internal Rules ("When the Chamber is seised of a number of related [i]ndictments, it may issue an order consolidating all such [i]ndictments."); Article 299 of the CCP ("When the court receives several procedures of many connected facts, it may order to consolidate all procedures"); Rule 48 of the ICTY Rules ("Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried"); Rule 48 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda ("ICTR Rules"); Rule 48*bis* of the ICTR Rules ("Persons who are separately indicted, accused of the same of different crimes committed in the course of the same transaction, may be tried together, with leave granted by a Trial Chamber"); *Prosecutor v. Jadranko PRLIĆ et al.*, Case No. IT-04-74-PT, Decision on Defence's Motions for Separate Trials and Severance of Counts, 1 July 2005 ("Prlić Decision"), para. 23 ("The Chamber deems that it is in the interests of justice to favour joint trials."); *Prosecutor v. Théoneste BAGOSORA et al.*, Case No. ICTR-98-41-T, Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses, 9 September 2003 ("Bagosora Decision"), para. 21. See also Rule 49 of the ICTR and ICTY Rules ("Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.").

<sup>85</sup> See, e.g., *Prosecutor v. Pauline NYIRAMASUHUKO and Arsène Shalom NTAHOBALI*, Case o. ICTR-08-42-T/ICTR-97-21-T, Decision on Nyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings, 7 April 2006; *Bagosora* Decision; *Prosecutor v. Duško SIKIRICA et al.*, Case No. IT-95-8-PT Decision on Kolundzija Defense Motion for Severance of Counts and/or Bifurcation of Trial, 2 August 2000; *Prosecutor v. Radoslav BRĐANIN and Momir TALIĆ*, Case No. IT-99-36-T, Decision on Motions by Momir Talić for a Separate Trial and for Leave to File a Reply, 9 March 2000; *Prosecutor v. Dario KORDIĆ and Mario ČERKEZ*, Case No. IT-95-14/2-PT, Decision on Accused Mario Čerkez's Application for a Separate Trial, 7 December 1998.

<sup>86</sup> See, e.g., *Aloys NTABAKUZE v. The Prosecutor*, Case No. ICTR-98-41A-A, Judgement, 8 May 2012, para. 7; *Prosecutor v. Ratko MLADIĆ*, Case No. IT-09-92-PT, Decision on Consolidated Prosecution Motion to Sever the Indictment, to Conduct Separate Trials, and to Amend the Indictment, 13 October 2011 ("Mladić Decision"); *Prlić* Decision; *Prosecutor v. Pavle STRUGAR and Vladimir KOVAČEVIĆ*, Case No. IT-01-04-PT, Decision on the Prosecutor's Motion for Separate Trial and Order to Schedule a Pre-Trial Conference and the Start of the Trial against Pavle Strugar, 26 November 2003; *Prosecutor v. Radoslav BRĐANIN and Momir TALIĆ*, Case No. IT-99-36-T, Decision on Prosecution's Oral Request for Separation of Trials, 20 September 2002; Rule 82(B) of the ICTY Rules ("The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.").

34. As recalled above, the Trial Chamber issued the Severance Order pursuant to Rule 89*ter* of the Internal Rules wherein it separated the proceedings in Case 002 into discrete trials.<sup>87</sup> Rule 89*ter* of the Internal Rules provides:

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.

35. The language of Rule 89*ter* of the Internal Rules readily announces that a decision to sever proceedings is not purely discretionary in that it must be justified by the “interest of justice”, but offers no guidance as to what circumstances would satisfy the requirement. In the Supreme Court Chamber’s view, the “interest of justice” to sever must be read to denote a condition where accused and/or charges tried separately better serve the objectives of the criminal proceedings and principles on which they are premised. So understood, the “interest of justice” to sever will lie in a variety of factors, to be determined on a case-by-case basis, upon consideration of which the Trial Chamber may decide to sever a case. However, notwithstanding the breadth of discretion vested in the Trial Chamber in deciding on the severance, the “interest of justice” needs to be demonstrated with adequate reasoning which points to concrete and relevant circumstances and explains their common effect on the severed case as a whole.

36. In the Supreme Court Chamber’s view, the Trial Chamber’s determination that factors related to expeditiousness and the logical sequence of Case 002/01 were appropriate to consider in reaching the Impugned Decision does not evince unreasonableness at first appearance. As to the contention that the Trial Chamber erred in failing to consider representativeness of the Indictment, the fact that the Trial Chamber did not explicitly mention this factor does not necessarily mean that it did not take it into account. The Trial Chamber is not required to articulate every step of its reasoning for each finding it makes.<sup>88</sup> Nevertheless, in light of the range and importance of the overall issues at play, the Impugned Decision does evince a *prima facie* paucity of reasoning and consideration of other conceivably relevant factors.

37. Further reasoning may, however, be found in the Trial Chamber’s previous decisions regarding the severance of Case 002. As previously noted, the Supreme Court Chamber considers that the Impugned Decision is intrinsically linked to the Severance Order and Decision on Reconsideration and forms an episode in a year-long decision-making process that was marked

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<sup>87</sup> See *supra*, para. 4.

<sup>88</sup> See, e.g., *Dominique NTAWUKULILYAYO v. The Prosecutor*, Case No. ICTR-05-82-A, Judgement, 14 December 2011, paras. 45, 135, 152, fn. 403, and references cited therein.

by multiple pronouncements on the same matter in the same factual and legal circumstances.<sup>89</sup> A merit-based review of the Trial Chamber's decision to exclude S-21 and District 12 from the scope of Case 002/01 therefore requires examination of, *inter alia*, the Severance Order and Decision on Reconsideration, particularly given that the scope of Case 002/01 was not finalized until 11 days after the issuance of the Impugned Decision.<sup>90</sup> In this way, the Severance Order, Decision on Reconsideration, and Impugned Decision, along with all related memoranda, constitute one comprehensive decision regarding the severance of Case 002 and the scope of Case 002/01 ("Severance of Case 002").<sup>91</sup>

38. Although they agree with the Severance Order in principle, the Co-Prosecutors objected to not having been heard on the terms of the Severance Order prior to its issuance, and to the form and substance, or lack of clarity in respect thereof, that the severance entailed.<sup>92</sup> Arguing that the terms of the Severance Order disregarded their interests, the Co-Prosecutors sought its reconsideration, requesting primarily that the Trial Chamber revise the scope of Case 002/01 to be more representative of the Indictment.<sup>93</sup> In rejecting the Request for Reconsideration, the Trial Chamber described Rule 89*ter* of the Internal Rules as conferring upon it a broad discretionary trial management competence to sever proceedings *proprio motu* that is without right of appeal.<sup>94</sup> The Trial Chamber further indicated that to require as a rule that it seek the views of the Co-Prosecutors and consider reasonable representativeness of the Indictment before taking a decision on severance would be "ill-suited to the ECCC, where proceedings are [not adversarial and where indictments are initiated and amended by the prosecution, but instead] inquisitorial and wh[ere]

<sup>89</sup> See *supra*, para. 17.

<sup>90</sup> See *supra*, para. 17 and fn. 46..

<sup>91</sup> See *supra*, para. 17.

<sup>92</sup> Notice of Request for Reconsideration, paras. 2-5; Request for Reconsideration, paras. 1-6, 16, 24-45. See also Civil Party Notice of Request for Reconsideration, paras. 2-3, 5-6; Civil Party Request for Reconsideration, paras. 1-2, 4-15, 19-48; Co-Prosecutors' Request for Clarification of the Scope of the First Trial, E124/9, 4 November 2011, paras. 1-15; Urgent Request on the Scope of Trial One and the Need for a Reasoned Decision Following the Civil Parties Request for Reconsideration of the Severance Order, E124/10, dated 17 November 2011 and filed on 22 November 2011 ("Civil Party Request for Clarification and Reasoned Decision"), paras. 1-13; Request for Expansion, paras. 1-33; [NUON Chea] Response to Co-Prosecutors' Request for Reconsideration of the Severance Order, E124/5, 11 October 2011, paras. 4-5 ("[W]hatever its decision on the Request [for Reconsideration], the Defence [for NUON Chea] can only hope the Trial Chamber will make it reasonably soon. At some point (presumably), [NUON Chea] needs to know the precise size and scope of the case against him. Sadly, after four long years, this somehow remains beyond the extraordinary capabilities of this Tribunal. [...] In light of NUON Chea's right to an expeditious trial, the Defence objects to an oral hearing on this issue and eagerly (not to say wearily) looks forward to reading something resembling a final indictment in the not too distant future." (Internal reference omitted)).

<sup>93</sup> Request for Reconsideration, paras. 1-3, 16-45. See also Civil Party Request for Reconsideration, paras. 1, 6-48.

<sup>94</sup> Decision on Reconsideration, para. 5. See also Memorandum from Judge NIL Nonn, President of the Trial Chamber, entitled "Notice of Trial Chamber's disposition of remaining pre-trial motions (E20, E132, E134, E135, E124/8, E124/9, E124/10, E136 and E139) and further guidance to the Civil Party Lead Co-Lawyers", E145, 29 November 2011 ("29 November 2011 Memorandum"), p.1.

indictments are judicially controlled.”<sup>95</sup> Moreover, the Trial Chamber stated that “as no allegations or charges in the Indictment are discontinued in consequence of the Severance Order, there is no need for the first trial to be reasonably representative of the totality of charges in the Indictment.”<sup>96</sup>

39. With respect to the right of appeal, the Co-Prosecutors submit that the deference owed to trial management discretionary decisions is not absolute and does not foreclose appellate review,<sup>97</sup> an argument with which NUON Chea agrees.<sup>98</sup> The Supreme Court Chamber recalls that any decision of the Trial Chamber – whether substantive or procedural – which falls within the scope of one or more of the four categories under Rule 104(4) of the Internal Rules, is subject to immediate appeal, and may be overturned where it contains, *inter alia*, a discernible error in the exercise of the Trial Chamber’s discretion resulting in prejudice to the appellant.<sup>99</sup>

40. With respect to the right to be heard, the Supreme Court Chamber notes with concern that the Severance Order was issued without having sought the views of the parties. While a plain reading of Rule 89*ter* of the Internal Rules does suggest that the Trial Chamber enjoys a certain breadth of discretion to decide on its own motion that a given case should be severed and in what order the cases as separated should be tried, it does not necessarily suggest a similarly broad discretion to determine what form the cases as separated should take, especially without hearing the parties on the matter first. The Supreme Court Chamber considers such discretion to be tempered particularly in cases as large and complex as Case 002, where the mode of severance inevitably has greater and more significant impact on all interested parties. To consider the discretion conferred by Rule 89*ter* of the Internal Rules as excluding any necessity to hear the parties’ views on the terms of severance, especially in a case of such magnitude as Case 002,

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<sup>95</sup> Decision on Reconsideration, para. 4. The Trial Chamber’s reasoning in this regard was in answer to the Co-Prosecutors’ submission in their Request for Reconsideration that the “interest of justice” requirement at Rule 89*ter* of the Internal Rules is not defined, and therefore requires a look at international practice for guidance on the issue. *See* Request for Reconsideration, para. 17. The Co-Prosecutors thereby relied considerably on Rule 73*bis*(D) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (“ICTY Rules”) to support their assertion that they have a right to be heard before severance decisions are taken and that cases as severed must be reasonably representative of the Indictment. *See* Request for Reconsideration, paras. 17-23, 29-32. Rule 73*bis* of the ICTY Rules provides, in relevant part: “After having heard the Prosecutor, the Trial Chamber, in the interest of a fair and expeditious trial, may invite the Prosecutor to reduce the number of counts charged in the indictment and may fix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes, are reasonably representative of the crimes charged.” (Emphasis added)).

<sup>96</sup> Decision on Reconsideration, para. 9.

<sup>97</sup> Immediate Appeal, paras. 24-30.

<sup>98</sup> NUON Chea Response, para. 6.

<sup>99</sup> *See supra*, Section II (Standards of Appellate Review).

amounts to qualifying such discretion as unfettered and goes against the tenets of interpretation decreed by Rule 21(1) of the Internal Rules.<sup>100</sup>

41. The Supreme Court Chamber is also alarmed by the paucity of reasoning in the Severance Order. In severing Case 002 and outlining the anticipated scope of Case 002/01, the Trial Chamber reasoned only that it “has determined separation of proceedings to be in the interests of justice”,<sup>101</sup> and that “[s]eparation of proceedings will enable the Chamber to issue a verdict following a shortened trial, safeguarding the fundamental interest of victims in achieving meaningful and timely justice, and the right of all [Co-]Accused to an expeditious trial.”<sup>102</sup> Some clarification was provided in the Decision on Reconsideration on the Trial Chamber’s motivation for issuing the Severance Order.<sup>103</sup> The Supreme Court Chamber nonetheless finds that this clarification is limited to restating general postulates and does not demonstrate how the severance advances the interest of justice, nor does it satisfy the right to receive a reasoned decision.<sup>104</sup>

42. Moreover, the Supreme Court Chamber finds no support for the Trial Chamber’s assertion that the ECCC is *purely* an “inquisitorial [system] wh[ere] indictments are judicially controlled”.<sup>105</sup> Such a statement fails to appreciate the *sui generis* mixed jurisdictional nature of the ECCC and ignores provisions explicitly referring to the adversarial nature of ECCC proceedings and to the Co-Prosecutors’ crucial role and responsibility in creating ECCC indictments and proving the charges therein.<sup>106</sup> Even if the ECCC could be said to operate under

<sup>100</sup> Rule 21(1) of the Internal Rules provides, *inter alia*, that “[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement.”

<sup>101</sup> Severance Order, para. 5.

<sup>102</sup> Severance Order, para. 8.

<sup>103</sup> See Decision on Reconsideration, para. 10.

<sup>104</sup> See Rule 35 Decision, para. 25.

<sup>105</sup> Decision on Reconsideration, para. 4. In the context of the ECCC, indictments are judicially controlled to the extent that the Co-Investigating Judges “conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case”, and “are not bound by the Co-Prosecutors’ submissions”. See Rule 67(1) of the Internal Rules. See also Articles 246-247 of the CCP. The Judges of the Pre-Trial Chamber also have a degree of control over indictments when seized of appeals against the Closing Order See Rule 69(1) of the Internal Rules. See also Article 126 of the CCP. Upon the conclusion of the respective roles of the Co-Investigating Judges and the Pre-Trial Chamber, the Trial Chamber is then “seised” of the indictment for the preparation of trial. See Rule 79 of the Internal Rules.

<sup>106</sup> See, e.g., Rule 21(1)(a) of the Internal Rules (“ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication”); Rule 87(1) of the Internal Rules (“The onus is on the Co-Prosecutors to prove the guilt of the accused.”); Article 16 of the Law on the Establishment of the ECCC, with inclusion of amendments as promulgated on 27 October 2004 (“ECCC Law”) (“[a]ll indictments in the [ECCC] shall be the responsibility of [...] [the] Co-Prosecutors, who shall work together to prepare indictments against the Suspects in the [ECCC].”). See also Article 4 of the CCP (“Prosecutors initiate criminal proceedings and request the application of the law by investigating and trial judges.”); Article 33 new of the ECCC Law (“The [ECCC] trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force”).

a strictly inquisitorial system, the Supreme Court Chamber finds no basis for the Trial Chamber's implication that this inherently renders it unnecessary to seek the Co-Prosecutors' (or any of the parties') views on the severance of a case or to consider whether the cases as severed can be reasonably representative of the Indictment. The need to respect the right to be heard in criminal proceedings and the consideration of the possibility to sever a criminal case such that the cases as severed are reasonably representative of an indictment, particularly where there is real concern about having more than one case arrive at a judgment on the merits, is dictated by common sense and the interests of meaningful justice, and conforms with comparable international legal standards.<sup>107</sup>

43. In the same vein, the Trial Chamber's added justification for rejecting the notion that Case 002/01 should be more representative of the Indictment, namely that "no allegations or charges in the Indictment are discontinued in consequence of the Severance Order",<sup>108</sup> is equally unreasonable in the light of its expressed reasons for ordering severance in the first place. In particular, the Supreme Court Chamber considers such justification to be irreconcilable with the Trial Chamber's statement within the same decision that "[g]iven, as the Co-Prosecutors allege, that there is real concern as to whether the [Co-]Accused will be physically and mentally able to participate in a lengthy trial, the Chamber considered these measures to be essential in order to '[safeguard] the fundamental interest of victims in achieving meaningful and timely justice, and the right of all [Co-]Accused in Case 002 to an expeditious trial'."<sup>109</sup> If anything, the Trial Chamber's doubts about the Co-Accused's abilities to participate in a lengthy trial militates in *favour* of exploring, at the earliest instance, possible ways of shaping the scope of Case 002/01 that could maximize representation of the totality of the charges against the Co-Accused, and thereby optimize the meaningfulness of the justice to be rendered, in the shortest amount of time.

44. For these reasons, the Supreme Court Chamber finds that the Trial Chamber committed an error of law in interpreting Rule 89*ter* of the Internal Rules as conferring upon it the discretion to sever Case 002 without having to provide adequate reasons demonstrating the interest of justice served and without having to seek the parties' views on the terms thereof. The Supreme Court Chamber accordingly finds that the Trial Chamber committed a discernible error in the exercise of its discretion in issuing the Severance Order without having invited the parties' submissions on the terms thereof, and in issuing the Decision on Reconsideration without having considered how to render the scope of Case 002/01 reasonably representative of the Indictment.

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<sup>107</sup> Cf. Rule 73*bis*(D) of the ICTY Rules, *quoted supra*, fn. 95.

<sup>108</sup> Decision on Reconsideration, para. 9.

<sup>109</sup> Decision on Reconsideration, para. 11, *referring to* Severance Order, para. 8.

In violating their right to a reasoned opinion and their right to be heard, and in limiting the scope of Case 002/01 in a way that unduly disregards reasonable representativeness of the Indictment, the Trial Chamber thereby caused prejudice to the Co-Prosecutors.<sup>110</sup>

45. The Supreme Court Chamber considers such prejudice to have been partially remedied when, upon being seized of the Request for Expansion, the Trial Chamber invited the parties to make submissions on the risks and benefits, as well as the impact on their respective rights and the interests they represent, that the proposed expansion entailed.<sup>111</sup> By then, however, nearly a year of hearings on the substance under the terms of the Severance Order had already passed,<sup>112</sup> effectively rendering the scope of Case 002/01 as shaped thereby a *fait accompli*. Moreover, the Impugned Decision makes no mention of whether the Trial Chamber changed its views about whether the scope of Case 002/01 should be reasonably representative of the Indictment, a request that the Co-Prosecutors reiterated in the Request for Expansion,<sup>113</sup> when it decided to include Tuol Po Chrey but exclude District 12 and S-21. Rather, the Impugned Decision continues to rely heavily on considerations of expeditiousness alone, with the only added reasoning that the killings at Tuol Po Chrey “appear to be a logical extension of the existing allegations in Case 002/01”,<sup>114</sup> whereas, in the Trial Chamber’s view, the killings at District 12 and S-21 do not.<sup>115</sup> As a consequence, it can only be inferred that the Trial Chamber remained

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<sup>110</sup> Although the Civil Party Lead Co-Lawyers are not appellants in the present instance, the Supreme Court Chamber notes a similar, if not aggravated, violation of their right to be heard. On 6 October 2011, the Civil Party Lead Co-Lawyers gave notice that they, too, intended to request reconsideration of the Severance Order. *See* Civil Party Notice of Request for Reconsideration. The Civil Party Lead Co-Lawyers filed their request on 18 October 2011 at 13h49. *See* Civil Party Request for Reconsideration, first page. The Decision on Reconsideration was filed three hours later, at 16h35. *See* Decision on Reconsideration, first page. In the Decision on Reconsideration, the Trial Chamber acknowledged receipt of the Civil Party Notice of Request for Reconsideration (*see* Decision on Reconsideration, para. 1), but did not address their particular arguments. Following this, the Civil Party Lead Co-Lawyers requested that the Trial Chamber issue a reasoned decision on the Civil Party Request for Reconsideration. *See* Civil Party Request for Clarification and Reasoned Decision. On 29 November 2011, the Trial Chamber indicated that “[n]otwithstanding the [Civil Party Notice of Request for Reconsideration], the Trial Chamber in its [Decision on Reconsideration] clarified that it ruled on [the Co-Prosecutors’ Request for Reconsideration] expeditiously, in order to safeguard its ability to commence the trial of the substance in Case 002 in 2011 [...]. It follows that separate decisions [to the Civil Party Request for Reconsideration and the Civil Party Request for Clarification and Decision] are not contemplated, as these motions are in substance repetitive of issues on which the Trial Chamber has already ruled [in the Decision on Reconsideration]. Further motions seeking reconsideration of the Severance [Order] – whether styled as requests for ‘clarification’, responses or otherwise – will also not receive a response from the Trial Chamber and may be considered a deliberate attempt to delay proceedings.” *See* 29 November 2011 Memorandum, pp. 1-2. The Supreme Court Chamber notes, however, that the Civil Party Request for Reconsideration contains several important concerns that pertain to the specific interests which the Civil Party Lead Co-Lawyers represent, and which were not raised in the Co-Prosecutors’ Request for Reconsideration. *See, e.g.,* Civil Party Request for Reconsideration, paras. 7-21, 32, 35-42, 44; Civil Party Request for Clarification and Reasoned Decision, paras. 6-11. These concerns remain unresolved to date.

<sup>111</sup> 3 August 2012 Memorandum, paras. 13-15.

<sup>112</sup> Opening statements began on 21 November 2011. *See* T. (EN), 21 November 2011, E1/13.1 (Trial Day 1).

<sup>113</sup> Request for Expansion, paras. 5, 15-20.

<sup>114</sup> Impugned Decision, para. 3.

<sup>115</sup> Impugned Decision, para. 2.

guided in the Impugned Decision by undisclosed criteria other than logical relations among the particular charges.

46. It is also noteworthy that the Trial Chamber's invitation for submissions on the scope of Case 002/01, and the resultant Impugned Decision denying expansion in large part, came approximately one year after the issuance of the Severance Order. In the meantime, the Trial Chamber kept the limits of the scope of Case 002/01 in a state of uncertainty,<sup>116</sup> and no plan was ever put into place regarding the number or scope of the remaining cases to be tried in Case 002.<sup>117</sup> The latter situation remains true today, despite the Trial Chamber's indication in the Severance Order that "further information regarding subsequent cases to be tried in the course of Case 002 will be provided to the parties and the public in due course."<sup>118</sup>

47. The ECCC is under an affirmative obligation to ensure that proceedings are conducted within a reasonable time.<sup>119</sup> However, the Trial Chamber's continued failure to create a tangible plan for the future of remaining trials in Case 002 has resulted in confusion for the parties and has effectively "buried" the remaining charges in the Indictment. While the Trial Chamber has announced its intent to commence subsequent cases shortly after the conclusion of evidence in Case 002/01 in 2013,<sup>120</sup> and that subsequent proceedings could commence prior to the conclusion of any appeals in Case 002/01,<sup>121</sup> several practical concerns raised by the Co-Prosecutors<sup>122</sup> and the Civil Party Lead Co-Lawyers<sup>123</sup> that may prevent the adjudication of future cases within a reasonable time period remain unaddressed. The Supreme Court Chamber therefore considers that prejudice also arises from the Trial Chamber's failure to articulate any plan for the adjudication of future trials in Case 002.

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<sup>116</sup> See *supra*, paras. 17, 37 and fn. 46.

<sup>117</sup> See *supra*, paras. 23-24 and fn. 63.

<sup>118</sup> Severance Order, p. 4.

<sup>119</sup> See Rule 21(4) of the Internal Rules ("Proceedings before the ECCC shall be brought to a conclusion within a reasonable time.").

<sup>120</sup> 3 August 2012 Memorandum, para. 1.

<sup>121</sup> Decision on Reconsideration, paras 7-8.

<sup>122</sup> See Immediate Appeal, para. 18. See also Request for Reconsideration, paras. 26-28.

<sup>123</sup> See Civil Party Request for Reconsideration, paras. 25-32.



## V. CONCLUSION

48. For the reasons stated above, the Supreme Court Chamber finds that the Trial Chamber committed an error of law in interpreting the confines of its discretion under Rule 89*ter* of the Internal Rules to preclude the necessity to demonstrate by way of adequate reasoning the interest of justice in severing Case 002, as well as the necessity to hear the parties in Case 002 on the terms of its severance. The Trial Chamber's issuance of the Severance Order and the Decision on Reconsideration on the basis of its erroneous interpretation of Rule 89*ter* of the Internal Rules has resulted 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 its discretion which have caused prejudice. The Trial Chamber's failure to create a plan regarding the handling of the remaining cases to be tried in Case 002 has also caused prejudice.

49. The Supreme Court Chamber recognizes the scale and complexity of Case 002, as well as the deteriorating health conditions of the Co-Accused, which likely prompted the Trial Chamber to sever the proceedings into more expeditious and manageable trials. Indeed, economy of justice may be served by proceeding to judgment on certain selected issues prior to embarking on the adjudication of others, and this interest may be justified by legal as well as organizational considerations. These, however, have not been sufficiently explained in respect of Case 002 as a whole. In this way, the cumulative effect of the Trial Chamber's errors in shaping the severance of Case 002, and thereby the scope of Case 002/01, occasions the invalidity of the Severance of Case 002, which comprises the Severance Order, Decision on Reconsideration, and Impugned Decision, along with all related memoranda.<sup>124</sup> This, in turn, renders the grounds on which the Impugned Decision stands too tenuous for it to be upheld. The Supreme Court Chamber accordingly finds that the Impugned Decision must be annulled. The question of amending the Impugned Decision so as to include District 12 and S-21 within the scope of Case 002/01 is thereby moot.

50. The present decision is without prejudice to the Trial Chamber's reassessment of severing Case 002 pursuant to Rule 89*ter* of the Internal Rules. Should the Trial Chamber continue to consider the interests of justice to require severance of Case 002, 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. 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

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<sup>124</sup> See *supra*, paras. 17, 37.

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).<sup>125</sup>

51. It must also be considered at this stage that one trial panel alone may be unable to fulfill the ECCC's obligation to conclude proceedings on the entirety of the charges in the Indictment within a reasonable time. As such, in the event of a renewed severance of Case 002, the Supreme Court Chamber considers that the ECCC should explore the establishment of another panel within the Trial Chamber to support the timely adjudication of the remainder of Case 002.<sup>126</sup> The composition of a second trial panel would safeguard against any potential concerns about actual or appearance of bias of judges from the first trial adjudicating the second trial.<sup>127</sup> This second trial panel could also immediately begin to hear subsequent proceedings while the Trial Chamber is occupied with the drafting of the judgment in the first trial and ensure that the parties do not remain idle during this period. Given the advanced age and declining health of the Co-Accused, as well the gravity of the alleged crimes remaining in the Indictment, it is imperative that the ECCC utilize every available day to ensure a final determination of the remaining charges as expeditiously as possible.

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<sup>125</sup> Cf. *Mladić* Decision, para. 30.

<sup>126</sup> Cf. *Parizov v. The Former Yugoslav Republic of Macedonia*, ECHR Application no. 14258/03, Judgment, 7 February 2008, para. 59 ("the Court recalls that it is for the Contracting States to organise their legal systems in such a way that their courts can guarantee everyone's right to obtain a final decision on disputes [...] within a reasonable time"); *Markoski v. The Former Yugoslav Republic of Macedonia*, ECHR Application no. 22928/03, Judgment, 2 November 2006, para. 39 ("The Court also recalls that a chronic overload cannot justify an excessive length of proceedings"); *Kostovska v. The Former Yugoslav Republic of Macedonia*, ECHR Application no. 44353/02, Judgment, 15 June 2006, para. 41; *Dumanovski v. The Former Yugoslav Republic of Macedonia*, ECHR Application no. 13898/02, Judgment, 8 December 2005, para. 45 ("As the Court has consistently held in its case-law [...], the workload in the national courts cannot be considered as a factor that can excuse the protracted length of the proceedings.").

<sup>127</sup> See *Mladić* Decision, para. 35.

**VI. DISPOSITION**

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

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

**DECLARES** the invalidity of the Severance of Case 002; and

**ANNULS** the Impugned Decision.

**Phnom Penh, 8 February 2013**

**President of the Supreme Court Chamber**



**KONG Srim**