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ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា **សាធារណៈ / Public** Kingdom of Cambodia
 Extraordinary Chambers in the Courts of Cambodia Nation Religion King
 Chambres Extraordinaires au sein des Tribunaux Cambodgiens Royaume du Cambodge
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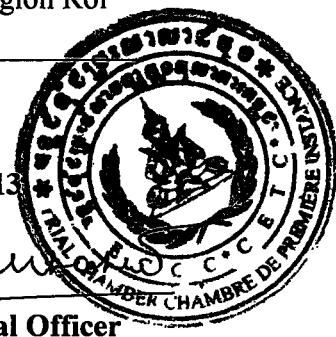
MEMORANDUM – TRIAL CHAMBER

TO: All Parties, Case 002 **Date:** 12 February 2013

FROM: Nil Nonn, President, Trial Chamber

CC: All Judges of the Trial Chamber; Trial Chamber Senior Legal Officer

SUBJECT: Directions to the parties in consequence of the Supreme Court Chamber’s Decision on Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision concerning the Scope of Case 002/01 (E163/5/1/13)



1. On 8 February 2013, the Supreme Court Chamber (“SCC”) rendered its Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision concerning the Scope of Case 002/01 (E163/5/1/13), which annulled the Trial Chamber’s severance of the trial in Case 002 (“SCC Decision”).¹ The SCC found the appeal admissible on grounds that the Trial Chamber’s Severance Order was in effect a termination of proceedings. Proceedings in relation to the remaining allegations in the Indictment were considered by the SCC to be effectively precluded by virtue of their deferral to a future trial, as it is probable that subsequent trials in Case 002/01 will not occur due to the advanced age and declining health of the Accused (SCC Decision, paragraphs 23-24). The Trial Chamber is nonetheless criticized for not having outlined a precise plan for the adjudication of these future trials (SCC Decision, paragraphs 24, 46, 47 and 50). It was further found to have erred in its interpretation of the scope of its discretion to order severance pursuant to Internal Rule 89^{ter}, for failing to hear the parties prior to the issuance of its Severance Order and for having given inadequate consideration to the need to ensure that the charges retained in Case 002/01 are sufficiently representative. Finally, the SCC appears to recommend the establishment of a second Trial Chamber in relation to future trials in Case 002 (SCC Decision, paragraph 51).

2. The immediate consequence of the SCC Decision is that Case 002 is no longer confined in scope and the Trial Chamber cannot presently proceed to a verdict in this case until all factual allegations and charges contained in the Case 002 Closing Order are adjudicated. The SCC Decision nonetheless provides the following indication:

¹ The effect of the SCC Decision extends to the Trial Chamber’s Severance Order (E124 of 22 September 2011), Decision on Co-Prosecutors’ Request for Reconsideration of the Terms of the Trial Chamber’s Severance Order (E124/7 of 18 October 2011), Memorandum on Notification of Decision on Co-Prosecutors’ Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163/5 of 8 October 2012), as well as “all related memoranda” (SCC Decision, para. 17).

Should the Trial Chamber continue to consider the interests of justice to require severance in 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 for the adjudication of the entirety of 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 [...] 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) (SCC Decision, paragraph 50 (emphasis in original)).

3. To enable the Chamber to deal with the current uncertainty surrounding the envisaged scope of proceedings in Case 002, to minimize delay to the ongoing trial in Case 002/01, and otherwise to comply with the SCC's directions, the Trial Chamber schedules a hearing on Thursday 14 February 2013 and Friday 15 February 2013.² The parties are requested at this hearing specifically to address the following issues:

- i. [Co-Prosecutors and Lead Co-Lawyers] The Trial Chamber's Severance Order and related decisions reflect the concern that the entirety of the charges in the Case 002 Closing Order are unlikely to be able to be tried within the Accused's likely lifespan or before they become unfit to stand trial. What are your views on these concerns?
- ii. [Co-Prosecutors and Lead Co-Lawyers] The Trial Chamber's Severance Order and related decisions were expressly motivated by a concern to preserve its ability to render *any* timely verdict in Case 002. As a general matter, would you prefer the Chamber to attempt to try a broader array of charges and factual allegations in Case 002 at the risk of no verdict being ultimately obtained, or do you consider it preferable to proceed instead in relation to a more limited array of charges and factual allegations, thereby increasing the likelihood that a verdict can be rendered?
- iii. [Co-Prosecutors and Lead Co-Lawyers] At the time of the SCC Decision, the Trial Chamber was nearing the conclusion of Case 002/01. It estimates that relatively few additional courtroom days in the presence of all three Accused were required in order to conclude the hearing of evidence in that first trial. Since the lodging of the Co-Prosecutors' appeal, and as foreseen by the medical experts periodically reviewing the fitness of all Accused, the Chamber has experienced increasing delay and difficulty in obtaining the presence of all three Accused at any given time, due to their physical frailty. In the light of these changed circumstances, and difficulties of implementing an alternative course at this late stage, do you still oppose the Trial Chamber's definition of the scope of its first trial as expressed in the Severance Order and related decisions?
- iv. [Co-Prosecutors and Lead Co-Lawyers] If you maintain your request to expand the scope of Case 002/01, is this request limited to the addition of factual allegations related to S-21 and District 12, or do you consider the SCC's direction to ensure reasonable representativity to require a still broader range of factual allegations and charges? Inclusion of S-21 and District 12 would encompass only a limited geographical area, encapsulate only a minor part of the overall victimization in Case 002 and compel the Chamber to re-hear allegations in relation to the only crime site to have been adjudicated before the ECCC to date. The Trial Chamber limited Case 002/01 principally to forced

² SCC Decision, para. 51: "[I]t is imperative that the ECCC utilize every available day to ensure a final determination of the remaining charges as expeditiously as possible."

movement on grounds that this phenomenon affected virtually all individuals living in Cambodia during the Democratic Kampuchea regime. Please comment, in relation to the SCC Decision's identified requirement of representativity.

- v. *[All parties]* Expert Elizabeth BECKER is currently scheduled to testify before the Trial Chamber during the week commencing 18 February 2013. All parties and the expert have prepared for this testimony on the assumption that its scope should be limited to the contours of Case 002/01. It is impracticable at this stage to require the expert and parties to prepare for this testimony on an entirely different basis. The Trial Chamber would therefore propose to proceed to hear Elizabeth BECKER and all other individuals imminently scheduled to appear before the Chamber on the basis of the scope of the trial as defined in the Severance Order and related decisions. The parties are invited to comment on this proposal and the impact generally of the SCC Decision in relation to all witnesses, experts and Civil Parties who may be heard before the Trial Chamber prior to the Chamber's issuance of a revised decision on the scope of trial in Case 002/01.
- vi. *[All parties]* In relation to any extension of the scope of Case 002/01 still sought, please indicate how many documents, witnesses, experts and Civil Parties (including recall of individuals already heard) would be required in support of or in rebuttal to these requests. When would be the earliest date upon which you could be prepared to tender and if required, present these additional documents in court?
- vii. *[All parties]* The Trial Chamber indicated its intention to proceed to a hearing of evidence in Case 002/02 as soon as possible after the conclusion of Case 002/01. As all factual allegations in relation to each potential sub-trial in Case 002 form part of one consolidated Indictment, might the Trial Chamber proceed with the hearing of the evidence in Case 002/02 after the conclusion of the hearing of evidence in Case 002/01 (following a judicial recess sufficient to allow preparation by the parties for the next trial segment and in parallel with the drafting of the Case 002/01 partial verdict?)
- viii. *[All parties]* The Trial Chamber indicated in the Severance Order that all remaining allegations in Case 002 were not discontinued in consequence of it but would form the subject of future proceedings should circumstances permit. What prejudice has resulted to the parties from the lack of a concrete timetable for these later trials, given that its implementation depends wholly on unknown contingencies (such as the continued fitness to stand trial of all Accused, the availability of donor funds to support future trials and the hypothesis that any subsequent trials may instead be heard by a different Trial Chamber)?
- ix. *[All Defence teams]* What impact does annulment of the severance of Case 002 at this stage of proceedings have on the right of the Accused to a fair and expeditious trial? What measures, if any, would you consider necessary in order to avoid or remedy any prejudice to the Accused in consequence of it?

4. The hearing on Thursday 14 February 2013 will hear submissions by the Co-Prosecutors and the Lead Co-Lawyers on the above issues, and any other related issue considered relevant, to which the Defence teams may briefly respond. Friday 15 February 2013 will be allocated to submissions by all Defence teams, to which the Co-Prosecutors and Lead Co-Lawyers will be permitted a brief right of reply. This hearing may be continued, if required, over the following week should the health of the Accused not permit the hearing of expert Elizabeth BECKER during the week commencing 18 February 2013, as currently planned.

5. The Trial Chamber will render a fully-reasoned decision regarding the scope of Case 002/01 as soon as possible after this hearing, taking into account both the submissions of the parties and the principles enshrined in the SCC Decision.