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..... KONG Srim

ព្រះរាជាណាចក្រកម្ពុជា
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Kingdom of Cambodia
Nation Religion King
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Nation Religion Roi

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

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(២៦)

Case File/Dossier N° 002/19-09-2007-ECCC-TC/SC(26)

Before:

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

Date: 26 June 2013
Language(s): Khmer/English
Classification: PUBLIC

DECISION ON CO-PROSECUTORS' REQUEST FOR CLARIFICATION

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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 a motion filed on 6 June 2013 by the Co-Prosecutors requesting that the Supreme Court Chamber provide guidance as to its power to order the Trial Chamber to re-open evidentiary hearings after their closure (“Request”).¹

2. On 26 April 2013, the Trial Chamber issued its “Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013”² (“Second Decision on Severance”), in which it re-severed Case 002 into discrete trials and limited the scope of the first trial to a number of factual allegations and charges (“Case 002/01”) following the Supreme Court Chamber’s annulment of a previous severance decision by the Trial Chamber. On 10 and 27 May 2013, the Co-Prosecutors and NUON Chea appealed the Second Decision on Severance (“Co-Prosecutors Immediate Appeal” and “NUON Chea Immediate Appeal”, respectively; together, “Immediate Appeals”).³ In the Immediate Appeals, the Co-Prosecutors request an amendment of the Second Decision on Severance with the expansion of the scope of Case 002/01 such that it includes the S-21 security centre,⁴ whereas NUON Chea requests the annulment of the Second Decision on Severance with prejudice to future severance orders, or, in the alternative, with the expansion of the scope of Case 002/01 such that it includes charges of genocide and those concerning crimes allegedly committed at cooperatives and working sites.⁵

3. On 31 May 2013, the Trial Chamber announced that the trial in Case 002/01 is entering its final stage and that “[i]n order to safeguard the timely conclusion of the Case 002/01 verdict and in accordance with Internal Rule 104(4), the Chamber will not defer the close of evidentiary proceedings in Case 002/01 pending resolution of the Co-Prosecutors’ appeal of the second severance decision (E284), unless this is so ordered by the Supreme Court Chamber”⁶ (“Trial Chamber’s Memorandum”).

¹ Co-Prosecutors’ Request for Clarification of the Supreme Courts (*sic*) Chamber’s Power to Re-Open Evidentiary Proceedings at Any Point Prior to the Trial Chamber’s Judgment in Case 002/01, E284/2/1/1, 6 June 2013. No responses have been filed to the Request.

² E284.

³ Co-Prosecutors’ Immediate Appeal of Second Decision on Severance of Case 002, E284/2/1, 10 May 2013; Immediate Appeal against Trial Chamber’s Second Decision on Severance and Response to Co-Prosecutors’ Second Severance Appeal, E284/4/1, 27 May 2013.

⁴ Co-Prosecutors Immediate Appeal, para. 84.

⁵ NUON Chea Immediate Appeal, para. 84.

⁶ Memorandum by Judge NIL Nonn, President of the Trial Chamber, entitled “Announcement of remaining hearings prior to the close of evidentiary proceedings in Case 002/01 and scheduling of final Trial Management Meeting for 13 June 2013”, E288, confidential version filed on 31 May 2013 and public redacted version filed on 5 June 2013, para. 10.

4. In the Request, the Co-Prosecutors petition the Supreme Court Chamber to confirm that, should the Case 002/01 evidentiary hearings conclude before the Supreme Court Chamber has issued its decision(s) on the Immediate Appeals, “[it] has the power to order the Trial Chamber to re-open the evidentiary hearings if [it] decides to expand the scope of the trial”.⁷ The Co-Prosecutors further request that the Supreme Court Chamber confirm that “such a re-opening [...] could be ordered at any time prior to the Trial Chamber’s final judgment in Case 002/01”.⁸

5. At the outset, the Supreme Court Chamber notes that the Co-Prosecutors request it to provide clarification as to a legal issue pertaining to its powers. No explicit provision in the ECCC legal compendium expresses the Supreme Court Chamber’s competence to provide such clarification.⁹ The Supreme Court Chamber recalls, however, that “similar processes for the clarification or determination of legal issues are not uncommon at the international level [and that,] [o]n this basis, the Supreme Court Chamber considers that, where the interests of justice so require, it may grant a request for legal guidance”.¹⁰ Requests for clarification or legal guidance may emanate from another judicial body or from a party to proceedings.¹¹ The Supreme Court Chamber will therefore consider whether it is in the interests of justice to provide the Co-Prosecutors with the clarification which they seek.

6. By announcing that the closure of evidentiary hearings in Case 002/01 will not be deferred pending delivery of the decision on the Immediate Appeals, without considering the

⁷ Request, para. 6.

⁸ Request, para. 6.

⁹ The Supreme Court Chamber notes that the Co-Prosecutors do not request authentic interpretation of a judicial decision, which the Supreme Court Chamber would be competent to furnish pursuant to Article 606(1) of the Code of Criminal Procedure of the Kingdom of Cambodia (“CPC”). This Article provides in relevant part that “[a]ny ambiguity in the interpretation of a judicial decision shall be referred to the court which made that decision”.

¹⁰ Decision on Requests by the Trial Chamber and the Defence for IENG Thirith for Guidance and Clarification, E138/1/1 0/1/5/8/2, 31 May 2013 (“Decision on IENG Thirith Clarification Request”), para. 12.

¹¹ See Decision on IENG Thirith Clarification Request, para. 12, referring to Rules 68(G) and 176bis(A) of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon (“STL”); Rule 72 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (“SCSL”); *The Prosecutor v. Thomas Lubanga Dyilo*, Clarification, 14 May 2007, Case No. ICC-01/04-01/06-904 (OA 8) and, in the same case, Appeals Chamber’s Clarification, 19 October 2006, Case No. ICC-01/04-01/06-590 (OA 4); *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2, Decision on Defence Motion to Clarify, 15 January 1999; *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Decision on Motion by Prosecution for Clarification or Alternative Relief, 25 January 2002; *The Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84, Decision on Motion for Clarification of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings and for Extension of Time, 22 November 2005. Common law practice also provides for appeals ‘by way of case stated’, which is a statement of facts prepared by one court for the opinion of another on a point of law. The process of appeal takes place pursuant to a request made by a lower court at the behest of the parties. The process has been used on a number of occasions before English and Welsh courts. See, e.g., *Chambers v. DPP* [2012] EWHC 2157; *DPP v. Bayer* [2004] 1 Cr. App. Rep. 493. Similar processes are also found in the Republic of Ireland (see Courts (Supplemental Provisions) Act 1961, s. 52), New Zealand (Summary Proceedings Act 1957, s. 104; *Radhi v. Police* [2013] NZHC 163), and Australia (see Federal Court of Australia Act 1976, s. 26). In addition, national courts in the European Union are able to request clarification on points of EU law from the European Court of Justice. See Article 267 of the Treaty on the Functioning of the European Union.

possible prejudice that closure could have on the course of the trial, the Trial Chamber may be seen to jeopardize several legal interests: the effective and meaningful exercise of the right to appeal against the Second Decision on Severance¹², the accused's right to be informed of the charges and to have time and facilities to prepare a defence,¹³ and the economy of proceedings. As such, there is a concern about ensuring legal certainty to all the parties and ensuring that the proceedings in Case 002 are as expeditious and efficient as possible.¹⁴ The Supreme Court Chamber therefore considers that in the present instance it is in the interests of justice to provide the Co-Prosecutors with the clarification which they seek.

7. The ECCC legal compendium reflects a logical – and classical – sequence of events in the conduct of a trial, namely: (i) the parties present evidence to be heard during the trial proceedings;¹⁵ (ii) at the conclusion of the evidentiary hearings, the parties present their closing submissions;¹⁶ and, (iii) at the conclusion of the closing submissions, the trial judges enter into deliberations in order to reach their verdict.¹⁷ During this last stage, the parties may not present any additional request or argument.¹⁸ A similar approach is followed at the international level.¹⁹

¹² See Decision on Co-Prosecutors' Request for Urgent Order to Trial Chamber to Issue Reasoned Decision on Severance of Case 002, E163/5/1/13/3, 8 May 2013, para. 5 (“Even if the evidence in Case 002/01 were to conclude before the time limit were to expire for the issuance of a decision on an eventual immediate appeal, any possible prejudice which may arise out of any possible errors remain susceptible to appellate scrutiny and intervention, as necessary or appropriate to the circumstances”). See also European Court of Human Rights (“ECtHR”), *Airey v. Ireland*, Application no. 6289/73, Judgment, 9 October 1979, para. 24 (“The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”).

¹³ See, *inter alia*, Article 14(3) of the International Covenant on Civil and Political Rights (“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence”). See also, *to the same effect*, Article 35^{new} of the Law on the Establishment of the ECCC.

¹⁴ See, *inter alia*, Rule 21(4) of the Internal Rules and, *more specifically*, the concerns raised by the Trial Chamber in the Second Decision on Severance at paras. 126-134. See also Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, E163/5/1/13, 8 February 2013, para. 51.

¹⁵ Art. 334 of the CPC (“Until the end of the trial hearing, the accused, the civil party, and civil defendants may make written statements and submit all documents and evidence that they think will be conducive to ascertain the truth. [...]”).

¹⁶ Art. 335 of the CPC (“At the conclusion of the hearing, the presiding judge invites the following people to give their closing statements one after another: - The civil party, the civil defendants and the accused can make brief statements; - the lawyer of the civil party presents his closing arguments; - the Royal Prosecutor presents his closing arguments; - the lawyer of the civil defendant and then the lawyer of the accused present their closing arguments. [...]”).

¹⁷ Art. 337 of the CPC (“The court shall retreat to deliberate in a deliberation room to reach its verdict. [...]”).

¹⁸ Art. 337 of the CPC (“The court shall retreat to deliberate in a deliberation room to reach its verdict. No further request may be submitted to the court; no further argument may be raised. [...]”).

¹⁹ The practice of a number of international tribunals is to close the hearing after both parties have completed the presentation of their respective cases. Once the proceedings are closed, the Trial Chamber deliberates in private and does not accept new evidence during the deliberation stage. See Rule 87 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia; Rule 87 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda; Rule 147 of the Rules of Procedure and Evidence of the STL; Rules 141 and 142 of the Rules of Procedure and Evidence of the International Criminal Court (“ICC”); and Rule 87 of the Rules of Procedure and Evidence of the SCSL.

8. Rule 96(2) of the Internal Rules explicitly provides that the Trial Chamber may reopen the proceedings during the deliberation stage. The same applies to proceedings before the Supreme Court Chamber.²⁰ The justification for this discretion is two-fold. In the procedural aspect, a court is not bound by its own case management decisions and may therefore reconsider them as long as doing so does not run against the interests of justice. In the material aspect, a court should reopen proceedings whenever it finds that matters relevant to the outcome of deliberations so require. The possibility to reopen evidentiary proceedings, including during the deliberation stage, has also been confirmed by the *ad hoc* international criminal tribunals.²¹

9. The reopening of the evidentiary hearings would obviously be indispensable should severance be annulled or the scope of a case expand as a result of an appellate decision. Whereas a trial court decision not to suspend the proceedings *as such* pending resolution of the an immediate appeal concerning the scope of trial is not *per se* unreasonable,²² what would need to be considered is the appropriateness of the parties having to make their closing submissions in a situation where the scope of the factual allegations and charges is not yet definitively settled. Notwithstanding an option to reopen the evidentiary hearings, the Supreme Court Chamber considers, as a general matter, that the defence should not be compelled to present its final arguments before definitively knowing the scope of trial²³; moreover, it would be premature in terms of procedural strategy and economy of proceedings to impose it on the other parties.

²⁰ Rule 104*bis* of the Internal Rules provides that “[i]n the absence of any specific provision, the rules that apply to the Trial Chamber shall, *mutatis mutandis*, also apply to the Supreme Court Chamber.”

²¹ *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case No. ICTR-99-46-A, Judgement, 7 July 2006, para. 55 (“In the present case, the Appeals Chamber considers that, once the Trial Chamber decided to reconsider its pre-trial decisions relating to the specificity of the Indictments at the stage of deliberations, it should have interrupted the deliberation process and reopened the hearings.”). *See also* expressing the same idea but not directly on point: *The Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T, Decision Granting Župljanin Motion to Reopen Defence Case, 3 April 2012, paras. 5-6 (“The Defence may seek to introduce fresh evidence by reopening its case. [...] [A] Chamber must exercise its discretion and determine whether the evidence should be admitted.”); *The Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-AR73.6, Decision on Ivan Čermak and Mladen Markač Interlocutory Appeals against Trial Chamber’s Decision to Reopen the Prosecution Case, 1 July 2010, para. 5 (“It is well established in the jurisprudence of the Tribunal that matters related to the management of the trial proceedings fall within the discretion of the Trial Chamber. The Trial Chamber’s decision to allow the reopening of the Prosecution’s case-in-chief is such a discretionary decision to which the Appeals Chamber must accord deference.” (Internal references omitted)); *The Prosecutor v. Zejnir Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Decision on the Prosecution’s Alternative Request to Reopen the Prosecution’s Case, 19 August 1998, para. 27 (“Great caution must be exercised by the Trial Chamber lest injustice be done to the accused, and it is therefore only in exceptional circumstances where the justice of the case so demands that the Trial Chamber will exercise its discretion to allow the Prosecution to adduce new evidence after the parties to a criminal trial have closed their case.”), *quoted with approval in The Prosecutor v. Zejnir Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 288.

²² Pursuant to Rule 104(*in fine*) of the Internal Rules, “[u]nless otherwise provided in the [Internal] R[ule]s or decided by the Trial Chamber, an immediate appeal does not stay the proceedings before the Trial Chamber.”

²³ *see*, e.g., Stefan Trechsel, *Human Rights in Criminal Proceedings*, Oxford, 2005, p. 195 (“[O]nce the information has been communicated, the charge cannot be modified unless there is a new communication and a sufficient period

10. This being said, the Supreme Court Chamber considers that, at this stage, these issues remain hypothetical. Practically speaking, the Trial Chamber's projections²⁴ suggest that the Supreme Court Chamber's decision on the Immediate Appeals is likely to be delivered before Case 002/01 would reach the deliberation stage.²⁵ Given the unsettled trial schedule,²⁶ and given the fact the Trial Chamber's Memorandum does not necessarily imply that the Trial Chamber will call for closing submissions immediately after the conclusion of taking evidence pertinent to the scope of the charges currently selected by it. Thus, the discussed prejudice can be avoided by proper trial management, *i.e.*, by waiting for the result of the Immediate Appeals before inviting the parties to make their closing submissions.

11. A more relevant question transpiring from the Co-Prosecutors' request is whether, should it become apparent that the execution of an impugned Trial Chamber's decision under appellate scrutiny could cause prejudice to the parties, the Supreme Court Chamber may order an interim measure such as suspension of the effect of the impugned decision. In this regard, it is noted that the ECCC legal compendium does not explicitly authorise the Supreme Court Chamber to suspend an interlocutory decision against which an appeal has been filed. In turn, the CPC, which does not specifically envisage interlocutory appeals similar to those foreseen in the Internal Rules,²⁷ addresses the effects of appeals on trial proceedings only insofar as the execution of the judgment is concerned, and provides for automatic suspension.²⁸ Although the CPC, by analogy, lends support to the view that the Supreme Court Chamber may suspend the execution of a

of time to allow the defence to adapt to the new situation. This principle is also known as the 'principle of immutability'). *See also, inter alia*: ECtHR, *Pélissier and Sassy v. France*, Application no. 25944/94, Judgement, 25 March 1999, para. 52 ("The Court considers that in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.").

²⁴ *See* Trial Chamber's Memorandum (which suggested, at the time of filing the Request, a close of evidentiary hearings towards the end of June 2013, followed by a one-month time limit for all parties to submit their closing briefs, and the scheduling of a hearing for the presentation of closing statements one month later).

²⁵ Rule 108(4)*bis* of the Internal Rules provides for a three-month deadline for the Supreme Court Chamber to issue its decision on the Immediate Appeals, with the possibility to extend by an additional month "in exceptional circumstances".

²⁶ The schedule has recently been updated, indicating that the evidentiary hearing will continue at least in July, as the Trial Chamber has already allocated approximately 14 hearing days for documentation hearings and questioning of the accused, starting from 24 June, and the Trial Chamber has yet to decide on the parties' request to call additional witnesses. *See* Memorandum by Judge NIL Nonn, President of the Trial Chamber, entitled "Schedule for the final document and other hearings in Case 002/01, for the questioning of the Accused and response to motions E263 and E288/1", E288/1/1, dated 17 June 2013 and notified on 21 June 2013.

²⁷ The CPC only envisages interlocutory appeals against a decision which "terminates proceedings". *See* Art. 385 of the CPC.

²⁸ *See* Art. 398 of the CPC ("the execution of the judgment shall be suspended until the time limit for appeal has expired"). A similar situation is envisaged with regards to requests for cassation to the Supreme Court. *See* Arts. 421 and 435 of the CPC. The CPC also provides for the suspension of trial proceedings where an "interlocutory question" pertaining to an "objection" raised by a party shall be resolved by another court that has exclusive jurisdiction over the issue at stake. *See* Arts. 342-345 of the CPC.

decision under appeal,²⁹ the Supreme Court Chamber finds it more instructive to seek guidance in the procedural rules established at the international level, where the Internal Rules governing the appellate regime of the ECCC, and immediate appeals in particular, find their origin.³⁰

12. The rules governing procedure before international or internationalized criminal tribunals often explicitly give appellate courts the power to suspend the effects of a decision under appeal.³¹ In addition, international and internationalized tribunals have found that, in instances where their statutory provisions do not expressly or by necessary implication contemplate their power to pronounce on a matter,³² they possess an inherent jurisdiction “to determine incidental issues which arise as a direct consequence of the procedures of which [they are] seized by reason of the matter falling under [their] primary jurisdiction”.³³ The inherent jurisdiction is described as being “ancillary or incidental to the primary jurisdiction and is rendered necessary by the imperative need to ensure a good and fair administration of justice”.³⁴ As such, “[t]his inherent jurisdiction arises as from the moment the matter over which the Tribunal has primary jurisdiction is brought before an organ of the Tribunal”.³⁵ Inherent jurisdiction has been used *inter alia* to order interim measures.³⁶ This approach has already been applied in the jurisprudence of the ECCC insofar as the Pre-Trial Chamber has used its inherent powers to suspend the effects of a decision issued by the Co-Investigating Judges pending resolution of the appeal proceedings, to ensure that the right of appeal does not become meaningless.³⁷ The Supreme Court Chamber therefore considers that it would be in line with the procedural rules

²⁹ See Arts. 398, 435 and 342-345 of the CPC, quoted above. See also Art. 571(4) of the French Code of Criminal Procedure, which provides for the suspension of trial or appeals proceedings pending determination of a request for cassation by the Court of Cassation.

³⁰ See Art. 12(1) of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea; Art. 33~~new~~(1) of the Law on the Establishment of the ECCC; Rule 2 of the Internal Rules.

³¹ At the ICC and the STL, an appeal does not have suspensive effect unless so ordered by the *Appeals Chamber* (see Article 82(3) of the Statute of the ICC; Rule 126(F) of the Rules of Procedure and Evidence of the STL). At the SCSL, interlocutory appeals against decisions rendered prior to the initial appearance of the accused do not stay the proceedings before the Trial Chamber unless the *Trial Chamber or the Appeals Chamber* so orders (see Rule 72(H) of the Rules of Procedure and Evidence of the SCSL). Interlocutory appeals on ruling issued after the initial appearance are allowed only in exceptional circumstances and do not have suspensive effect unless so ordered by the Trial Chamber (see Rule 73 (A) and (B) of the Rules of Procedure and Evidence of the SCSL).

³² STL, Decision on Appeal of Pre-Trial Judge’s Order on Jurisdiction and Standing, Case No. CH/AC/2010/02, Appeals Chamber, 10 November 2010 (“STL Appeals Chamber Decision”), paras. 46 and 48.

³³ STL Appeals Chamber Decision, para. 45.

³⁴ STL Appeals Chamber Decision, para. 45.

³⁵ STL Appeals Chamber Decision, para. 45.

³⁶ STL Appeals Chamber Decision, para. 46, referring to *Prosecutor v. Brima et al*, Decision on Defence Appeal Motion Pursuant to Rule 77(J) on both the Imposition of Interim Measures and an Order Pursuant to Rule 77(C)(ii), SCSL-04-16-AR77, 23 June 2005, para. 9; ECtHR, *Mamakutlov and Askarov v. Turkey*, Applications nos 46827/99 and 46951/99, Judgment, 4 February 2005, paras 123-124 and *Veerman* case, Order of 28 October 1957, in Decisions of the Arbitral Commission on Property, Rights and Interests in Germany, Vol. I (Koblenz, 1958), p. 120.

³⁷ Order Suspending the Enforcement of the “Order on International Co-Prosecutor’s Public Statement regarding Case File 003”, D14/1/2, 13 June 2011.

established at the international level, and not contrary to the CPC, to use its inherent power to suspend the execution of the Second Decision on Severance if eventually necessary to ensure the good and fair administration of justice.

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

GRANTS the Request; and

PROVIDES the legal clarifications set out above.

Phnom Penh, 26 June 2013

President of the Supreme Court Chamber

