



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

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

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

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Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

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**DECISION ON KHIEU SAMPHAN REQUEST TO POSTPONE COMMENCEMENT OF CASE 002/02
UNTIL A FINAL JUDGEMENT IS HANDED DOWN IN CASE 002/01**

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1. INTRODUCTION

1. The Trial Chamber is seised of a request by the KHIEU Samphan Defence to postpone the commencement of proceedings in Case 002/02 until after the Supreme Court Chamber has finally ruled on all appeals relating to Case 002/01 and, in particular, established the relevant modes of responsibility and precise scope of Case 002/01.¹

2. SUBMISSIONS

2. The Accused KHIEU Samphan submits that in light of the severance of Case 002 and the Trial Chamber's announcements that Case 002/01 will form the 'foundation' of future trials, the principles of *res judicata* and judicial certainty require that future proceedings cannot commence until the Supreme Court Chamber issues its judgement on any eventual appeal in Case 002/01. Absent the completion of any appeal proceedings in Case 002/01, the Trial Chamber's findings in a judgement in Case 002/01 cannot form a foundation for the future phases of Case 002 as they cannot be considered as reflecting an incontestable truth binding on the parties by virtue of the principle of *res judicata*.² Commencing the proceedings in Case 002/02 before the judgement and all related appeals in Case 002/01 are final would be contrary to the interests of judicial economy, insofar as proceedings in Case 002/02 could be conducted on the basis of legal findings which may subsequently be considered erroneous by the Supreme Court Chamber,³ and would prejudice the rights of the Accused KHIEU Samphan to effectively exercise his right of appeal in Case 002/01 and, by corollary, to benefit from necessary preparation time for his defence in Case 002/02.⁴

3. In response, the Co-Prosecutors submit that the principle of *res judicata* is of limited application and would not extend to obliging the Trial Chamber to apply to Case 002/02 the

¹ *Conclusions de la Défense de M. KHIEU Samphân sur la nécessité d'attendre un jugement définitif dans le procès 002/01 avant de commencer le procès 002/02*, E301/5/5, 5 February 2014 ("Request"), paras 31-33 (submitting that it must be clarified whether the Accused can be found liable as members of a joint criminal enterprise based on the implementation of the five policies as this would have an impact on the conduct of proceedings in a second case), 34, 40 (submitting that the rationale of the Severance Order, namely to provide through a first trial a foundation for a more detailed examination of the remaining charges and factual allegations against the Accused in later trials, cannot be achieved as long as the first case is not finally adjudicated), 55-59 (submitting that the issue of the exact scope of Case 002/01 is still unclear and can only be resolved by appealing various Trial Chamber decisions that can be filed only with the appeal against the verdict). See also T. 11 December 2013 (Trial Management Meeting), pp. 98-99, 104, 107; T. 12 December 2013 (Trial Management Meeting), pp. 71-72, 85, 97-98; T. 11 February 2014 (Adversarial Hearing), pp. 29-33.

² Request, paras 26-41, 52-54; see also T. 11 February 2014 (Trial Management Meeting), pp. 29-30, 35.

³ Request, paras 38-39; see also T. 11 December 2013 (Trial Management Meeting), pp. 98-99; T. 12 December 2013 (Trial Management Meeting), pp. 68, 70.

⁴ Request, paras 61-62; see also T. 12 December 2013 (Trial Management Meeting), p. 104.

factual findings of the Supreme Court in any appeal in Case 002/01.⁵ In particular, although the Cambodian Code of Criminal Procedure (“CCP”) recognises the principle of *res judicata*, it does not envisage its application to a lower court addressing facts of the case in which the same accused have been tried in a higher court for different but related crimes.⁶ Further, international practice has not applied *res judicata* to a second trial with the same accused for different crimes but related facts.⁷ Additionally, domestic legal systems which commonly sever counts dealing with separate charges against the same accused do not require a final appeal judgement in the first proceeding before being able to continue with further trials.⁸

4. Finally, the Co-Prosecutors submit that the request should be denied insofar as it would delay the judicial process by at least one and a half years and thus contravene the direction of the Supreme Court Chamber to commence proceedings in Case 002/02 as soon as possible.⁹ Judicial economy would best be served by allowing Case 002/02 to commence as soon as possible such that it runs in parallel with any appeal proceedings in Case 002/01.¹⁰

5. The Lead Co-Lawyers for the Civil Parties submit that the request of the KHIEU Samphan Defence has no legal basis as neither the Internal Rules nor the principle of *res judicata* require the Trial Chamber to stay proceedings in Case 002/02 pending a final judgement in Case 002/01. Further, a stay would not serve the interests of either judicial economy or the Accused and the Civil Parties.¹¹

6. The NUON Chea Defence, citing concerns for the health of the Accused and the desire of the Accused NUON Chea to commence Case 002/02 at the earliest opportunity, oppose the request.¹²

⁵ T. 11 February 2014 (Adversarial Hearing), pp. 10-11.

⁶ T. 11 February 2014 (Adversarial Hearing), p. 11.

⁷ T. 11 February 2014 (Adversarial Hearing), pp. 11-12.

⁸ T. 11 February 2014 (Adversarial Hearing), p. 14.

⁹ T. 11 February 2014 (Adversarial Hearing), pp. 8-9, 14-15; *see also* T. 12 December 2013 (Trial Management Meeting), pp. 74-75.

¹⁰ T. 11 February 2014 (Adversarial Hearing), pp. 9, 15. Anticipating that the handing down of any appeal judgement in Case 002/01 may coincide with the close of the trial hearing in Case 002/02, the Co-Prosecutors submit that the Defence would have the opportunity to challenge any impugned findings from Case 002/01 before the Trial Chamber in Case 002/02 at the close of that trial: T. 11 February 2014 (Adversarial Hearing), p. 13.

¹¹ T. 11 February 2014 (Adversarial Hearing), pp. 17-19; *see also* T. 12 December 2013 (Trial Management Meeting), pp. 77-78.

¹² T. 11 February 2014 (Adversarial Hearing), pp. 21-23.

3. FINDINGS

3.1. Res judicata and Legal Certainty

7. The Accused KHIEU Samphan submits that the principle of *res judicata* is relevant to a consideration of whether the Trial Chamber may proceed with Case 002/02 before Case 002/01 has been finalised on appeal. This submission is misconceived.

8. The Trial Chamber has previously held that the principle of *res judicata* applies only where a first case in respect of the same parties and facts results in a final judicial decision.¹³ Under the ECCC legal framework, judgements on the merits are not final until the appellate stage has concluded.¹⁴ Accordingly, until the judgement in Case 002/01 becomes final, *res judicata* does not apply. This being so, it cannot serve as a basis for delaying the start of proceedings in Case 002/02 until Case 002/01 is finally adjudicated. As clarified later in this decision, nor can the argument that judicial economy would be better served if the Chamber waits until the judgement becomes final be linked to the principle of *res judicata*.

9. The Accused KHIEU Samphan separately submits that the principle of legal certainty mandates that the Case 002/01 be finalised on appeal before Case 002/02 may begin. While the exact arguments made in support of this submission are not clearly discernible, they appear to assert an uncertainty as to the scope of Case 002/01 in the absence of final decisions by the Supreme Court Chamber on issues such as the Chamber's treatment of the DK policies and the modes of liability upon which it may find the Accused responsible in Case 002/01, and on possible appeals against decisions relevant to the admissibility and presentation of evidence.¹⁵ To the extent that the Accused KHIEU Samphan may be advancing an argument based on judicial economy, this is addressed below. Otherwise, the Trial Chamber considers that these prospective issues do not constitute a valid legal basis to delay the start of Case

¹³ TC, Decision on IENG Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), E51/15, 3 November 2011, para. 27. The principle of *res judicata* is recognised in the CCP, Article 12 of which stipulates that "[i]n applying the principle of *res judicata*, any person who has been finally acquitted by a court judgement cannot be prosecuted once again for the same act, even if such act is subject to different legal qualification". See also *Prosecutor v. Delalić et al.* ("*Celebici*"), ICTY Trial Chamber, IT-96-21-T, Judgement, 16 November 1998, para. 228 ("The principle of *res judicata* only applies *inter partes* in a case where a matter has already been judicially determined within that case itself. [...] The doctrine of *res judicata* is limited, in criminal cases, to the question of whether, when the previous trial of a particular individual is followed by another of the same individual, a specific matter has already been fully litigated.").

¹⁴ SCC, 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. 24.

¹⁵ Request, paras 31-33, 55-60; T. 11 February 2014 (Adversarial Hearing), pp. 30-31, 33, 38-39.

002/02 given that fair trial rights and the right to an expeditious trial must also be weighed. This argument is accordingly dismissed.

3.2. Fair trial rights and expeditiousness

10. Under Article 33 new of the ECCC Law, the Court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force. To this end, the Supreme Court Chamber has on several occasions stressed the importance of proceeding with the hearings in Case 002/02 as soon as possible. In particular, on 23 July 2013 the Supreme Court Chamber directed that evidentiary hearings in Case 002/02 must commence as soon as possible after the end of closing submissions in Case 002/01.¹⁶ On 22 August 2013, the Supreme Court Chamber again stressed the need for the expeditious hearing of Case 002/02, stating that it expected concrete results, and repeated its prior direction that evidentiary hearings in Case 002/02 must commence as soon as possible after the end of closing submissions in Case 002/01.¹⁷ Finally, on 25 November 2013, the Supreme Court Chamber reiterated the ECCC's obligation to conclude proceedings on the entirety of the charges in the Indictment within a reasonable time, stating "that it is imperative that the ECCC utilize every available day to ensure a final determination of the remaining charges as expeditiously as possible",¹⁸ and referring "to the pressing need for handling the remaining charges in Case 002."¹⁹ The KHIEU Samphan Defence team dismisses the foregoing directions as being so unfair to the Accused as to be unintended by the Supreme Court Chamber.²⁰

11. Based on the duration of appeal proceedings in Case 001 which concerned only one accused, the Co-Prosecutors estimate that the proposed postponement in Case 002 may

¹⁶ SCC, Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002 – Summary of Reasons, E284/4/7, 23 July 2013, paras 11, 13; *see also* SCC, Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002, E284/4/8, 25 November 2013, para. 72.

¹⁷ SCC, Decision on Immediate Appeal against the Trial Chamber's Decision on KHIEU Samphan's Application for Immediate Release, E275/2/3, 22 August 2013, paras 37, 51.

¹⁸ SCC, Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002, E284/4/8, 25 November 2013, para. 72. *See also* SCC, 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.

¹⁹ SCC, Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002, E284/4/8, 25 November 2013, para. 74. Although the Supreme Court Chamber recommended the establishment of a second panel of judges to proceed with Case 002/01, the Trial Chamber ruled that such creation would be less expeditious than proceeding with the current bench, and it was thus not in the interests of justice: TC, President's Memorandum on the Proposal to Appoint a Second Panel of the Trial Chamber to Try the Remaining Charges in Case 002, E301/4, 20 December 2013.

²⁰ T. 11 February 2014 (Adversarial Hearing), pp. 37-39.

amount to at least one and a half years.²¹ This is more than double that of the time anticipated by the Trial Chamber to write its judgement in Case 002/01, which the Supreme Court Chamber already recognised as a risk to the Accused's right to expeditious proceedings.²² Notwithstanding the apparent readiness of the Accused KHIEU Samphan to waive his right to an expeditious trial, however, the Trial Chamber is required to balance the interests of all parties.²³

12. As noted above, the KHIEU Samphan Defence claims that prejudice would arise from not knowing how the Trial Chamber will address the chapeau requirements for crimes against humanity, the alleged joint criminal enterprise and the scope of Case 002/01.²⁴ As submitted by the Co-Prosecutors, the KHIEU Samphan Defence fail to particularise the prejudice they claim they will face in proceeding with Case 002/02 absent a final judgement by the Supreme Court Chamber in Case 002/01. In this instance, the Trial Chamber agrees with the Co-Prosecutors that there is no particular prejudice caused to the Accused given that all the parties to Case 002/02 will be similarly situated.²⁵

13. Insofar as the KHIEU Samphan Defence claims that their right to prepare an effective appeal in Case 002/01 or an effective defence in Case 002/02 will be prejudiced by reason of simultaneously preparing for both proceedings, the Chamber again notes that all parties will be similarly situated. The Chamber also recalls that all parties have had access to the Case 002 case-file since the investigation stage and have already proceeded to trial on the basis of the entirety of the case-file. As such, they cannot claim a lack of sufficient time for preparing future proceedings.

14. Further, the KHIEU Samphan Defence submits that judicial economy is best served by only proceeding with Case 002/02 once the legal findings from Case 002/01 are final and no longer subject to being overturned on appeal. To the contrary, the Trial Chamber considers that proceeding with Case 002/02 before any eventual judgement on appeal in Case 002/01 would safeguard the interests of both Accused, principally their rights to receive an expeditious trial and to achieve finality as soon as possible. It is reasonable to estimate that

²¹ T. 11 February 2014 (Adversarial Hearing), pp. 8-9, 14 (even up to two years).

²² SCC, Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002, E284/4/8, 25 November 2013, paras 46, 74.

²³ *Prosecutor v. Kvočka et al.*, ICTY Appeals Chamber, IT-98-30/1-AR73.5, Decision on Interlocutory Appeal by the Accused Zoran Žigić Against the Decision of Trial Chamber I dated 5 December 2000, 25 May 2001, paras 20-21.

²⁴ Request, paras 31-33, 57.

²⁵ T. 11 February 2014 (Adversarial Hearing), p. 13.

the Supreme Court Chamber would hand down judgement in Case 002/01 before any trial in Case 002/02 would conclude. Accordingly, the parties will have the opportunity at that time to make submissions before the Trial Chamber as to any findings that the Supreme Court Chamber may make that are of relevance to Case 002/02. Further, the parties maintain their rights of appeal to the Supreme Court Chamber in accordance with Internal Rule 104.

15. The Chamber considers that commencing the proceeding in Case 002/02 will also safeguard the fundamental interest of the Civil Parties and victims in achieving meaningful and timely justice.

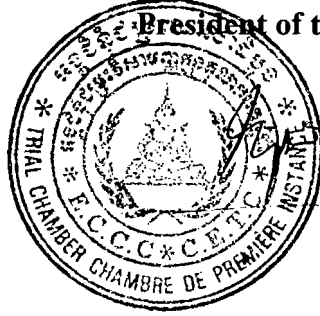
16. Accordingly, the KHIEU Samphan Defence has not established any valid reason which would warrant that the Trial Chamber delay the commencement of Case 002/02 until after the Supreme Court Chamber has finally ruled on all appeals relating to Case 002/01.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

DENIES the Request of the KHIEU Samphan Defence to delay the commencement of Case 002/02 until after the Supreme Court Chamber has finally ruled on all appeals relating to Case 002/01.

Phnom Penh, 21 March 2014

President of the Trial Chamber



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Nil Nonn