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ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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Nation Religion King  
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Nation Religion Roi

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

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber  
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007-ECCC/TC

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**Before:** Judge NIL Nonn, President  
Judge Silvia CARTWRIGHT  
Judge YA Sokhan  
Judge Jean-Marc LAVERGNE  
Judge YOU Ottara

**Date:** 4 April 2014  
**Original language(s):** Khmer/English/French  
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**DECISION ON ADDITIONAL SEVERANCE OF CASE 002 AND SCOPE OF CASE 002/02**

**Co-Prosecutors**  
CHEA Leang  
Nicholas KOUMJIAN

**Accused**  
NUON Chea  
KHIEU Samphan

**Civil Party Lead Co-Lawyers**  
PICH Ang  
Elisabeth SIMONNEAU FORT

**Lawyers for the Defence**  
SON Arun  
Victor KOPPE  
KONG Sam Onn  
Arthur VERCKEN  
Anta GUISSÉ

## 1. INTRODUCTION

1. The Trial Chamber is seized of the parties' submissions on the scope of Case 002/02 and their requests to sever the proceedings concerning the remaining charges in Case 002, filed on 31 January 2014 pursuant to the Chamber's request.<sup>1</sup> An oral hearing on this matter was convened on 11 February 2014.<sup>2</sup>

## 2. PROCEDURAL HISTORY

2. On 22 September 2011, the Chamber issued an order severing the proceedings in Case 002 into two or more cases. The Chamber decided that the first part of Case 002, later termed "Case 002/01", should comprise:

- (a) Factual allegations described in the Indictment as population movement phases 1 and 2;
- (b) Crimes against humanity including murder, extermination, persecution on political grounds, forced transfer and enforced disappearances (insofar as they pertain to the movement of population phases 1 and 2).<sup>3</sup>

3. On 27 January 2012, the Office of the Co-Prosecutors ("Co-Prosecutors") requested that the Trial Chamber include additional crime sites within Case 002/01.<sup>4</sup> On 8 October 2012, the Trial Chamber decided to expand the scope of the trial to include executions of former Khmer

<sup>1</sup> Trial Chamber Workplan for Case 002/02 and Schedule for Upcoming Filings, E301/5, 24 December 2013; Co-Prosecutors' Submission Regarding the Scope of Case 002/02 and Trial Schedule with Annex A, E301/2, 5 December 2013 ("OCP Submission on Scope"); Co-Prosecutors' Submission Regarding the Scope of Case 002/02, E301/5/1, 31 January 2014; Civil Parties' Submission on the Scope of Case 002/02, E301/5/3, 31 January 2014 ("Civil Parties' Submission"); NUON Chea's Response to Trial Chamber's Request for Submissions Concerning the Scope of Case 002/02, E301/5/4, 31 January 2014 ("NUON Chea Response"); *Conclusions de la Défense de M. KHIEU Samphan relatives à la portée du procès 002/02*, E301/5/2, 31 January 2014 ("KHIEU Samphan's Response").

<sup>2</sup> Adversarial hearing prior to commencement of evidentiary hearing in Case 002/02 (11 February 2014) (TC), E301/9, 7 February 2014.

<sup>3</sup> Severance Order Pursuant to Internal Rule 89ter, E124, 22 September 2011, para. 5; Annex: List of Paragraphs and Portions of the Closing Order Relevant to Case 002/01, Amended Further to the Trial Chamber's Decision on IENG Thirith's Fitness to Stand Trial (E138) and the Trial Chamber's Decision on Co-Prosecutors' Request to Include Additional Crime Sites Within the Scope of Trial in Case 002/01 (E163), E124/7.3, 8 October 2012. *See also* List of Paragraphs and Portions of the Closing Order Relevant to Trial One in Case 002, amended further to the Trial Chamber's Decision on IENG Thirith's Fitness to Stand Trial (E138), E124/7.2, 30 November 2011.

<sup>4</sup> Co-Prosecutors' Request to Include Additional Crimes Sites Within the Scope of Trial in Case 002/1, E163, 27 January 2012. On 3 and 13 February 2012, the IENG Sary Defence and the KHIEU Samphan Defence teams responded to the Co-Prosecutor's Request (E163/1 and 163/4). On 8 February 2012, the Co-Prosecutors sought leave to reply to IENG Sary. On 10 February 2012, the IENG Sary Defence filed a motion to strike Co-Prosecutors' leave to reply to IENG Sary's response regarding additional crime sites within the scope of trial in Case 002/01. The scope of Case 002/01 was again discussed during a Trial Management Meeting held on 17 August 2012.

Republic soldiers and officials at Tuol Po Chrey, but declined to incorporate executions of evacuees at sites in Kampong Tralach Leu District or the S-21 security centre and related execution site Choeung Ek.<sup>5</sup> On 7 November 2012 the Co-Prosecutors appealed the Trial Chamber's decision, requesting it be amended to include the factual allegations denied in Case 002/01.<sup>6</sup> On 8 February 2013, the Supreme Court Chamber annulled the entire severance decision, finding that the original severance of Case 002 in September 2011 and related subsequent decisions lacked clarity and reasoning. The Supreme Court Chamber found that the Trial Chamber had severed Case 002 and defined the scope of Case 002/01 without having given the parties sufficient opportunity to be heard, and ordered it to reconsider the issue after considering submissions of the parties.<sup>7</sup>

4. The Trial Chamber issued an oral second decision on severance on 29 March 2013 with reasons following on 26 April 2013.<sup>8</sup> Having heard the parties on the issue, the Trial Chamber decided that it remained in the interests of justice to sever the proceedings and confined the scope of the first trial in Case 002 to forced movement of population phases one and two and executions committed at Tuol Po Chrey. The Chamber considered this to represent a proportionate balance between the factors identified by the Supreme Court Chamber as well as to be necessary to safeguard its ability to reach any timely verdict in Case 002. The Chamber further considered that the addition of S-21 to the scope of Case 002/01 would not significantly advance the objective of reasonable representativeness of this first trial, and that further expansion of the scope of Case 002/01 would entail a risk to the Chamber's ability to render a timely verdict.<sup>9</sup>

5. On 10 and 27 May 2013 respectively, the Co-Prosecutors and NUON Chea appealed the Trial Chamber's second decision on severance. The Co-Prosecutors requested an expansion of the scope of Case 002/01 to include the S-21 security centre, while NUON Chea requested the decision be annulled in full, or, in the alternative, that the scope of Case 002/01 be expanded

<sup>5</sup> Notification of Decision on Co-Prosecutors' Request to Include Additional Crime Sites Within the Scope of Trial in Case 002/01 (E163) and deadline for submission of applicable law portion of Closing Briefs (TC), E163/5, 8 October 2012, paras 1-3.

<sup>6</sup> Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 with Annex I and Confidential Annex II, E163/5/1/1, 7 November 2012, para. 3.

<sup>7</sup> Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01 (SCC), E163/5/1/13, 8 February 2013, paras 48-50 ("SCC Decision on Severance").

<sup>8</sup> Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, E284, 26 April 2013.

<sup>9</sup> Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, E284, 26 April 2013, paras 122, 141, 147.

to include genocide and alleged crimes at cooperatives and worksites.<sup>10</sup> On 31 May 2013, the Trial Chamber announced that it would not defer the close of evidentiary proceedings in Case 002/01 pending resolution of the appeal of the second severance decision, unless that was so ordered by the Supreme Court Chamber.<sup>11</sup> On 23 July 2013, the Supreme Court Chamber issued a summary of its decision on the appeals against the second decision on severance. While denying the appeals on the merits, it ordered that the evidentiary hearings in Case 002/02 should commence as soon as possible after closing submissions in Case 002/01, and that Case 002/02, should include at a minimum the charges related to S-21, a worksite, a cooperative, and genocide.<sup>12</sup> The full reasons for this decision were issued on 25 November 2013,<sup>13</sup> after the conclusion of the hearing on the substance of Case 002/01, but before the Trial Management Meeting scheduled to consider issues relating to Case 002/02 began on 11 December 2013.<sup>14</sup>

6. On 24 December 2013, the Trial Chamber issued a memorandum that outlined a workplan for Case 002/02 and invited parties' written submissions on the scope of Case 002/02.<sup>15</sup>

### **3. SUBMISSIONS**

7. The Co-Prosecutors submit that in view of the SCC Second Decision on Severance, particularly the criteria of reasonable representativeness and the listed minimum charges and crime sites,<sup>16</sup> Case 002/02 should include at a minimum: the S-21 Security Centre (including Choeng Ek);<sup>17</sup> Genocide of the Vietnamese; Genocide of the Cham (and the related religious persecution and the allegations relating to the late 1975 'break-up' of the Cham); the 1<sup>st</sup>

<sup>10</sup> 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.

<sup>11</sup> 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 (TC), E288, 31 May 2013, para. 10.

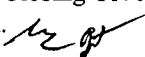
<sup>12</sup> Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002: Summary of Reasons (SCC), E284/4/7, 23 July 2013, paras 11-13.

<sup>13</sup> Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002 ("SCC Second Decision on Severance"), E284/4/8, 25 November 2013, paras 28-76.

<sup>14</sup> Scheduling of Trial Management Meeting in Case 002/02 (TC), E301, 8 November 2013; Scheduling of and Agenda for Trial Management Meeting in Case 002/02 (11-13 December 2013) (TC), E301/3, 5 December 2013.

<sup>15</sup> Trial Chamber Workplan for Case 002/02 and Schedule for Upcoming Filings (TC), E301/5, 24 December 2013, para. 5; Case 002/02 - Trial Chamber Workplan (detailed), E301/5.1, 24 December 2013.

<sup>16</sup> OCP Submission on Scope, para. 9, citing SCC Second Decision on Severance, para. 76.

<sup>17</sup> The Trial Chamber notes that the OCP Submission on Scope explicitly includes Choeng Ek (para. 10) and excludes Prey Sar (para. 27). Under the OCP proposal, the paragraphs of the Closing Order relevant to S-21 include 415-475, which encompass the paragraphs pertaining to Choeng Ek. 

January Dam Worksite (including Forced Marriage); and the Tram Kok Cooperatives (including the Kraing Ta Chan Security Centre and crimes relating to the Treatment of Buddhists and Forced Marriage) (“OCP Proposal”).<sup>18</sup> They further submit that the trial would be made more representative of the Closing Order with the inclusion of three additional crime sites: the Kampong Chhnang Airport Construction Site; the Au Kanseng Security Centre; and the Phnom Kraol Security Centre (“Expanded OCP Proposal”).<sup>19</sup>

8. The Civil Party Lead Co-Lawyers seek to ensure that the interests of Civil Parties and their experiences as victims are adequately represented in the factual allegations and legal characterization of the facts adjudicated in Case 002/02.<sup>20</sup> The Lead Co-Lawyers request an additional severance of Case 002 to prevent a prolonged wait for a judgement on the remaining charges (other than those already tried in Case 002/01).<sup>21</sup> They agree with the Expanded OCP Proposal and further seek, as a matter of first priority, to expand the charges of forced marriage (including rape) to a nationwide scope.<sup>22</sup> As a second priority, they seek to add the Trapeang Thma Dam worksite, North Zone Security Centre, Koh Kyang Security Centre, and forced movement of population phase three (including the related purges of the East Zone), and to extend the charges relating to the treatment of Buddhists to a nationwide scale.<sup>23</sup> The Lead Co-Lawyers submit that this request reflects the nature, scale, and geographical and temporal scope of the alleged crimes/sites, and that the proposed crimes/sites closely relate to fundamental themes of the overall case.<sup>24</sup> The Lead Co-Lawyers submit that severance would be the best method of balancing the competing legitimate interests of pursuing accountability of the Accused for a broad spectrum of crimes and acknowledging harms suffered, with the expeditious issuance of a second judgement, keeping in mind the advanced ages of most Civil Parties.<sup>25</sup>

9. The NUON Chea Defence submits that the Accused’s principal interest in the determination of the scope of Case 002/02 is his ability to adduce exculpatory evidence in

<sup>18</sup> OCP Submission on Scope, paras 10, 12-14.

<sup>19</sup> OCP Submission on Scope, para. 16. In their submission, the Co-Prosecutors list the Closing Order paragraphs which correspond with the crimes and sites. *See e.g.*, OCP Submission on Scope, para. 18; The proposed scope would include the Closing Order paragraphs from the Joint Criminal Enterprise (JCE) and Role of Accused sections relating to Cooperatives and Worksites, Security Centres and Execution Sites, Treatment of the Cham, Vietnamese and Buddhists, the Regulation of Marriage, and Armed Conflict.

<sup>20</sup> Civil Parties’ Submission, para. 2.

<sup>21</sup> T. 11 February 2014, p. 61.

<sup>22</sup> Civil Parties’ Submission, paras 10-14.

<sup>23</sup> Civil Parties’ Submission, paras 1, 15-32.

<sup>24</sup> Civil Parties’ Submission, paras 2, 11-12, 16, 18-19, 21-23, 25-27, 29-31.

<sup>25</sup> T. 11 February 2014, pp. 60-62.

support of his defence.<sup>26</sup> It takes no substantive position on the severance or proper scope of Case 002/02.<sup>27</sup> Rather, it submits that relevant evidence must not be excluded merely because it does not link directly to a crime site within the scope of the trial. It further submits that evidence on subjects outside the Closing Order, for example, regarding the total number of deaths during the Democratic Kampuchea period and factional conflict within the Communist Party of Kampuchea should be treated with more leniency than it was during the Case 002/01 trial.<sup>28</sup>

10. In the event the Trial Chamber were to decide to limit the introduction of evidence to the crime sites directly at issue, the NUON Chea Defence requests that the Chamber include the following crime sites within the scope of Case 002/02: Trapeang Thma Dam worksite; either Wat Kirirum or Wat Tlork security centre; the alleged policy of internal purges; and forced movement of population phase three.<sup>29</sup> It alleges that these facts are necessary to the defence put forward by the Accused.<sup>30</sup> The NUON Chea Defence does not object to the Lead Co-Lawyers' request to include allegations concerning the Treatment of Buddhists and Forced Marriage on a nationwide basis.<sup>31</sup> It opposes however the inclusion of S-21 Security Centre, as not being representative of the Closing Order "in any respect."<sup>32</sup> Should the Chamber decide to include S-21, the NUON Chea Defence may seek disqualification of those judges who adjudicated Case 001 and Case 002/01 as, it submits, those judges would be unable to adjudicate Case 002/02 impartially.<sup>33</sup>

11. The KHIEU Samphan Defence opposes a severance of the remaining charges, submitting that any severance would run counter to KHIEU Samphan's right to be judged without undue delay because severed trials inevitably last longer than a single trial.<sup>34</sup> It submits that the trial must not be severed but should reflect the totality of events, considering that the Co-Prosecutors accuse KHIEU Samphan of a systemic JCE and base their argument on the totality of events that allegedly took place in Cambodia between 1975 and 1979.<sup>35</sup> The

<sup>26</sup> NUON Chea Response, para. 3.

<sup>27</sup> T. 11 February 2014, p. 41

<sup>28</sup> NUON Chea Response, para. 4.

<sup>29</sup> NUON Chea Response, paras 6-7.; T. 11 February 2014, p. 43-44.

<sup>30</sup> NUON Chea Response, para. 7.

<sup>31</sup> T. 11 February 2014, p. 44.

<sup>32</sup> T. 11 February 2014, p. 50; NUON Chea Response, para. 8.

<sup>33</sup> T. 11 February 2014, pp. 44-50. As the Supreme Court Chamber included S-21 without evaluating its representativeness, the NUON Chea Defence suggests the Trial Chamber may properly exclude S-21 from the scope of Case 002/02. *See* T. 11 February 2014, pp. 50-51.

<sup>34</sup> KHIEU Samphan Response, paras 3-6; T. 11 February 2014, p. 52.

<sup>35</sup> KHIEU Samphan Response, paras 19-20.

KHIEU Samphan Defence further submits that another severance, and the consequent possibilities of either dropping the remaining charges or conducting a third trial, would mean that the precise facts the Accused would face could remain unknown to him for several years.<sup>36</sup> It notes that the criteria of representativeness will only be relevant if the Accused is too old, about to die, or ill.<sup>37</sup> Finally, the KHIEU Samphan Defence submits that the delays that will be caused by the severance-related procedural decisions and the consequent risk of the Accused dying before a judgement is rendered, support its proposal to hear the remainder of the charges in a single trial.<sup>38</sup>

12. In response to the NUON Chea Defence submission on possible bias, the Co-Prosecutors submit that the mere fact that judges hear cases with related facts does not disqualify them from hearing a subsequent trial that involves the same factual scenario.<sup>39</sup> In response to the NUON Chea Defence request that the Chamber be more lenient in admitting evidence outside the scope of the Closing Order, the Lead Co-Lawyers submit that this would contravene ECCC Internal Rule 87.<sup>40</sup> They also submit that S-21 must be included in the scope of Case 002/02, in accordance with the Supreme Court Chamber's decision of 23 July 2013.<sup>41</sup>

#### **4. APPLICABLE LAW**

13. When the interest of justice so requires, the Chamber may at any stage order the separation of proceedings concerning part of the charges contained in the Closing Order.<sup>42</sup> The Supreme Court Chamber has held that prior to issuing a decision on severance the parties must be invited to make submissions and the parties' interests must be balanced against all relevant factors.<sup>43</sup> In determining whether to sever a trial, the Chamber must evaluate different legitimate interests rooted in human rights and principles of efficiency.<sup>44</sup> Important factors in this analysis include the potential prejudice to the Accused's rights, the efficiency and manageability of the proceedings, the desire to avoid inconsistencies between separate trials, and the potential burden on witnesses.<sup>45</sup> Another factor that may be considered is whether

<sup>36</sup> KHIEU Samphan Response, para. 25.

<sup>37</sup> T. 11 February 2014, p. 57.

<sup>38</sup> KHIEU Samphan Response, para. 29.

<sup>39</sup> T. 11 February 2014, pp. 67-68.

<sup>40</sup> T. 11 February 2014, pp. 62-63.

<sup>41</sup> T. 11 February 2014, p. 63.

<sup>42</sup> Internal Rule 89*ter*.

<sup>43</sup> SCC Decision on Severance, para. 50.

<sup>44</sup> Second SCC Decision on Severance, paras 37, 43.

<sup>45</sup> Second SCC Decision on Severance, para. 38.

severance is necessary to ensure at least a portion of the charges are adjudicated within the lifespan of frail Accused.<sup>46</sup>

14. Where the Chamber, having considered all relevant interests, decides to sever a case into two or more manageable phases, it must define the scope of the trial, balancing the requirements that the trial be fair and expeditious as well as “reasonably representative” of the entire Closing Order.<sup>47</sup> The Supreme Court Chamber has suggested that the following factors may warrant consideration when limiting the scope of a trial: (i) the crimes charged in the Closing Order; (ii) the classification and nature of the crimes; (iii) the places where the crimes are alleged to have been committed; (iv) the scale of the crimes; (v) the victims of the crimes charged; (vi) the time period of the crimes charged; and (vii) the fundamental nature of the case.<sup>48</sup>

## **5. FINDINGS**

15. As a preliminary matter, the Trial Chamber notes the NUON Chea Defence submission, outlined above, regarding the possibility that it may seek the disqualification of Trial Chamber judges in certain circumstances. This issue remains theoretical and the Chamber will only address it once seised of an application for disqualification.<sup>49</sup>

### **5.1. Decision on Severance**

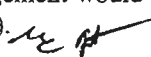
16. In light of the above, the Trial Chamber must first decide whether to sever part of the remaining charges in Case 002 based on all relevant factors. The parties take varying views on an additional severance of Case 002. While the Co-Prosecutors and Civil Parties support an additional severance of the proceedings, the KHIEU Samphan Defence opposes any severance. The NUON Chea Defence takes no position for or against, instead requesting that certain additional crime sites be included in the event of severance.

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<sup>46</sup> Second SCC Decision on Severance, para. 51.

<sup>47</sup> Second SCC Decision on Severance, para. 64.

<sup>48</sup> Second SCC Decision on Severance, para. 64.

<sup>49</sup> T. 11 February 2014 pp. 44-50 (NUON Chea Defence noting it is perhaps premature, but nonetheless citing indications that the Case 001 judgement and potential findings in the Case 002/01 judgement would render the Trial Chamber partial and biased with regard to charges concerning S-21 in Case 002/02). 



17. The Supreme Court Chamber has indicated that the *minimum* charges and crime sites to be included in Case 002/02 are S-21, a worksite, a cooperative, and genocide.<sup>50</sup> However, it has not predetermined whether severance of the remaining proceedings in Case 002 is necessary after the completion of Case 002/01. The Chamber must therefore examine all relevant factors to determine whether an additional severance is merited by the prevailing circumstances.

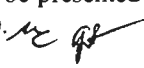
### 5.1.1. *Rights of the Accused*

18. The severance of the proceedings concerning the remaining charges in Case 002 must be viewed, *inter alia*, in light of the effect it may have on the rights of the Accused, including their right to be tried without undue delay and their ability to participate in the preparation of their defence for subsequent trials.<sup>51</sup> The Trial Chamber considers that the KHIEU Samphan Defence contention that severing the remainder of the trial would result in a lengthier process than continuing with a single unsevered trial, thereby resulting in undue delay, is misconceived. The trial of Case 002 is an unavoidably lengthy endeavour considering the number of facts set forth in the 772-page Closing Order. The KHIEU Samphan Defence has however failed to advance any convincing reasons which demonstrate that severing the remainder of the trial at this time would result in a lengthier process than continuing with a single unsevered trial.

19. As a preliminary matter, the KHIEU Samphan Defence mischaracterizes the Second SCC Decision on Severance in arguing that a severed trial would inevitably last longer than a single trial.<sup>52</sup> In that decision, the Supreme Court Chamber examined the *ad hoc* tribunals' jurisprudence concerning the severance of trials, including *Milošević* and *Mladić*, in order to ascertain factors that merit consideration in determining whether the severance of a trial

<sup>50</sup> Second SCC Decision on Severance, para. 70.

<sup>51</sup> Second SCC Decision on Severance, paras 38, 42; The SCC also notes that, "Rather exceptionally, a decision against joinder of multiple accused" was triggered by the consideration of a potential or real possibility not only of a conflict of defence strategy but also the possibility of mutual recriminations between the accused." Neither defence in Case 002 has raised this possibility here.

<sup>52</sup> KHIEU Samphan Response, para. 6 "*La Cour Suprême a précisé que «les préjudices potentiels aux droits des accusés ont principalement été examinés au regard du droit de ces derniers à être jugé sans délai excessif», les juges considérant notamment que «deux procès successifs [...] dureraient inévitablement plus longtemps qu'un procès unique.»*" (emphasis added). See also, T. 11 February 2014, p. 58 (citing the Second SCC Decision on Severance, para. 39, for the proposition that the Chamber must repeat in Case 002/02 evidence regarding the roles and authority of the Accused.) In fact, the SCC noted in that paragraph that "the presentation of evidence, may result in duplication considering that certain evidence, for example with regard to the position and powers of the accused, would likely need to be presented and considered in each trial." See Second SCC Decision on Severance, para. 39 (emphasis added). 

would unfairly prejudice the rights of the Accused.<sup>53</sup> The Supreme Court Chamber did not state that the severance of Case 002 would inevitably lead to longer proceedings or that this would create undue delay. It took no position on whether two separate trials would take longer than a single unsevered trial or, in the event that it would, how this factor should be weighed against other relevant factors.<sup>54</sup>

20. Furthermore, upon an examination of the specific factual circumstances in the *Milošević* and *Mladić* cases, it is not clear that the ICTY Chambers' respective concerns regarding the rights of the Accused are applicable to a possible severance of Case 002. In the *Milošević* case, the ICTY Appeals Chamber reversed a Trial Chamber decision to sever the trial, noting in particular that proceedings would take longer if separated into two successive trials.<sup>55</sup> The Appeals Chamber considered that two successive trials would be particularly onerous to Milošević as he was representing himself. Case 002 is clearly distinguishable by the fact that both Accused are represented by Defence teams.

21. The ICTY Trial Chamber in *Mladić* also considered that the severance and conduct of two trials could prejudice the Accused as it might overburden him to be involved in pre-trial matters in one case while simultaneously participating in the judgement or appeal stage of another.<sup>56</sup> It considered that the need to coordinate between two Defence teams, each representing the accused during the relevant proceedings, would also complicate the Accused's ability to participate in the preparation of his defence.<sup>57</sup> With respect to Case 002, the Chamber notes that judicial investigation is concluded and many pre-trial matters have already been completed, including the resolution of the majority of preliminary objections,<sup>58</sup> and the filing of initial lists of witnesses for the entirety of Case 002.<sup>59</sup> In addition, both

<sup>53</sup> Second SCC Decision on Severance, paras 37-40.

<sup>54</sup> Second SCC Decision on Severance, paras 38, 51, 52.

<sup>55</sup> *Prosecutor v. Milošević*, Case No. IT-99-37-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 27.

<sup>56</sup> *Prosecutor v. 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, para. 31.

<sup>57</sup> *Mladić* Decision, para. 31.

<sup>58</sup> See e.g., Decision on NUON Chea's Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules, E51/14, 8 August 2011; Decision on NUON Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92), E116, 9 September 2011; Decision on the Applicability of Joint Criminal Enterprise, E100/6, 12 September 2011; Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), E122, 22 September 2011; Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, E95/8, 26 October 2011; Trial Chamber Response to NUON Chea's Request to Temporarily Stay the Proceedings in Case 002 (E131/2), E131/2/1, 2 November 2011; Decision on IENG Sary's Rule 89 Preliminary Objections (*Ne Bis In Idem* and Amnesty and Pardon), E51/15, 3 November 2011.

<sup>59</sup> See e.g., Co-Prosecutors' Rule 80 Expert, Witness and Civil Party Lists, Including Confidential Annexes 1, 2, 3, 3A, 4 and 5, E9/4, 28 January 2011; Civil Party Lead Co-Lawyers' Rule 80 Witness, Expert and Civil Party

Accused in Case 002 are represented by a single defence team and therefore the Accused need not coordinate between two distinct teams of lawyers.

22. The Chamber does not consider that a severance of the remaining proceedings would create undue delay by requiring a postponement of a second trial to give the Accused adequate time to prepare his case.<sup>60</sup> Before the ECCC, unlike at the ICTY, Defence counsel are involved in the proceedings from the investigative phase. KHIEU Samphan and NUON Chea have enjoyed court-appointed representation since the latter part of 2007<sup>61</sup> and each Defence team has had sufficient time and resources to prepare its respective case against the charges in the entire Closing Order.<sup>62</sup> Delay of subsequent proceedings is not contemplated considering the imperative need to ensure that proceedings are conducted within a reasonable time, to ensure a final determination of the remaining charges, and to start Case 002/02 as soon as possible.<sup>63</sup>

23. The argument that severance of trials would necessarily create undue delay is not borne out by the experience of Case 002. As noted by the Chamber from the outset of the trial, Case 002/01 will serve as a foundation for a more detailed examination of the remaining charges and factual allegations against the Accused in later trials.<sup>64</sup> By relying on this foundation, Case 002/02 will be streamlined and ensure its expeditious completion. For example, consideration of the admissibility of evidence in Case 002/01 was a time and resource intensive process.<sup>65</sup> The Trial Chamber has clarified that evidence already put before the

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Lists, Including Confidential Annexes 1, 2a, 2b, 3a, 3b, and 4, E9/4/3, 14 February 2011; NUON Chea List of Proposed Witnesses, Experts, and Civil Parties, E9/4/4, 15 February 2011; KHIEU Samphan Proposed List of Witnesses and Experts, E9/4/6, 21 February 2011.

<sup>60</sup> Cf. *Mladić* Decision, para. 32.

<sup>61</sup> Assignment of Say Bory and Jacques Verges as KHIEU Samphan's Lawyer by DSS, A116, 8 January 2008 (noting initial notification of provisional appointment of counsel on 16 November 2007); Assignment of SON Arun and Victor KOPPE as NUON Chea's Lawyer by DSS, A119, 9 January 2008 (noting provisional appointment of counsel SON Arun since 19 September 2007 and of Michiel PESTMAN and Victor KOPPE from 16 October 2007); Permanent Assignment of SON Arun and Michiel PESTMAN as NUON Chea's Lawyer by DSS, A143, 4 February 2008.

<sup>62</sup> See also Trial Chamber's Disposition of Requests for Extension of Deadlines (E9/7 and E9/4/9), E9/7/1, 28 February 2011; Decision on Requests for Extension of Time to File Lists of Documents and Exhibits, E9/16/4, 29 March 2011.

<sup>63</sup> Second SCC Decision on Severance, para. 72; See also, Decision on KHIEU Samphan Request to Postpone Commencement of Case 002/02 until a Final Judgement is Handed Down in Case 002/01, E301/5/5/1, 21 March 2014, paras 10-11, 14-15; Trial Chamber Workplan for Case 002/02 and Schedule for Upcoming Filings (TC), E301/5, 24 December 2013; Adversarial hearing prior to commencement of evidentiary hearing in Case 002/02 (11 February 2014) (TC), E301/9, 7 February 2014.

<sup>64</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, para. 10; Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, E284, 26 April 2013, para. 15.

<sup>65</sup> Examples of the many decisions taken by the Trial Chamber on evidence admissibility issues during the proceedings in Case 002/01 include: Response to Issues Raised by Parties in Advance of Trial and Scheduling of

Chamber in Case 002/01 will be maintained in Case 002/02.<sup>66</sup> This will establish certain efficiencies as the amount of court time and resources necessary to repeat such procedures will therefore be limited in each subsequent trial phase. Furthermore, certain witnesses relevant to the totality of Case 002 were heard in Case 002/01. While the Trial Chamber will make an assessment on a case by case basis, this will reduce the need for certain witnesses to be recalled during subsequent phases of Case 002. The Trial Chamber accordingly finds that the KHIEU Samphan Defence has not demonstrated that a severed trial or a series of severed trials would inevitably create undue delay, especially when considering the advantage of obtaining a verdict on at least some of the charges in the Closing Order within the lifetime of the Accused, the Civil Parties, and victims.<sup>67</sup>

24. Although the KHIEU Samphan Defence initially agreed to the severance of charges in Case 002, it now asserts that KHIEU Samphan is prejudiced by a lack of foreseeability in Case 002/01 regarding the charges that are at issue and that such prejudice would persist in subsequent phases if the remaining charges were severed.<sup>68</sup> On this point, the Chamber notes the Supreme Court Chamber's conclusion that concerns of judicial predictability and certainty in relation to Case 002 as a whole were unfounded in relation to the severance in Case 002/01 after confirmation by the Supreme Court Chamber.<sup>69</sup> The Trial Chamber considers the present circumstances to be analogous. If severance is contemplated, then the identification of the relevant paragraphs in the Closing Order will provide notice to the Accused of the scope of the subsequent trial or trials. The Trial Chamber notes that the parties have now had ample opportunity to examine the evidence on the Case File and to raise objections pursuant to the Internal Rules. The Trial Chamber considers that issuance of a severance decision clearly defining the scope of the next stage of the trial serves to inform the Accused of the charges against them and permit them to participate in the preparation of their defence. The Trial

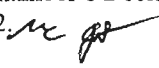
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Informal Meeting with Senior Legal Officer on 18 November 2011 (TC), E141, 17 November 2011, p. 5; Scheduling of Oral Hearing on Documents (16-19 January 2012) (TC), E159, 11 January 2012; Scheduling of Oral Hearing on Documents (13-16 February 2012) (TC), E170, 9 February 2012; Updated Memorandum for Next Document Hearing (12-19 March 2012) (TC), E172/5, 2 March 2012; Decision on Objections to Documents Proposed to be Put Before the Chamber on the Co-Prosecutors' Annexes A1-A5 and to Documents Cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01, E185, 9 April 2012; Decision Concerning New Documents and Other Related Issues, E190, 30 April 2012.

<sup>66</sup> Clarification Regarding the Use of Evidence and the Procedure for Recall of Witnesses, Civil Parties and Experts from Case 002/01 in Case 002/02 (TC), E302/5, 7 February 2014, para. 7.

<sup>67</sup> Second SCC Decision on Severance, para. 51.

<sup>68</sup> Urgent Request by the Defence Team of Mr. KHIEU Samphan for an Immediate Stay of Proceedings, E275/2/1/1, 1 August 2013, paras 42, 52.; T. 11 February 2014, p. 33.

<sup>69</sup> Decision on Immediate Appeal against the Trial Chamber's Decision on KHIEU Samphan's Application for Immediate Release, E275/2/3, 22 August 2013, para. 52. 

Chamber finds accordingly that the rights of the Accused would not be negatively impacted by lack of foreseeability or any other concerns in the event of severance.

25. Having considered possible impacts to the Accused's rights, the Chamber now examines factors related to case management.

### *5.1.2. Efficiency and manageability of the proceedings*

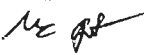
26. The Co-Prosecutors seek an additional severance, the scope of which would include 96 OCP witnesses, experts and civil parties and would, in their estimation, require an additional two to three years to complete (including one year to eighteen months of evidentiary hearings) in accordance with the Expanded OCP Proposal.<sup>70</sup> The Co-Prosecutors indicate that this would include all of the *charges* in the Case 002 Closing Order, although not all of the *facts* within the Closing Order.<sup>71</sup> Nonetheless, such a severance would constitute a significant reduction in the number of witnesses required to be heard at trial and result in a more manageable proceeding. For example, the Co-Prosecutors' initial list of witnesses filed in 2011 for the entirety of Case 002 put forward 295 witnesses, civil parties and experts to be heard in Case 002.<sup>72</sup> Of those, 58 testified in Case 002/01. Therefore, at least 237 individuals from the Co-Prosecutors' initial list remain to testify. Proceedings involving 96 OCP witnesses, experts and civil parties would clearly be more manageable than if all 237 were to be heard, particularly given that all other parties will also seek to have their own witnesses testify. In 2011 the NUON Chea Defence put forward 545 witnesses, experts and civil parties to testify in Case 002.<sup>73</sup> The KHIEU Samphan Defence and Civil Parties also put forward lengthy witness, expert and civil party lists.<sup>74</sup> Certain of these witnesses, experts, and civil parties might ultimately be unavailable or their appearance at trial considered irrelevant. In addition, the parties might rescind requests to hear certain individuals in order to save time

<sup>70</sup> T. 11 February 2014, p. 73; OCP Submission on Scope, para. 20; Co-Prosecutors' Proposed Case 002/02 Trial Plan (with Confidential Annex A), E301/2/1, 10 December 2013, para. 2; Annex A: Co-Prosecutors' Trial Plan and Tentative Witness List for Case 002/02, E301/2/1.1, 10 December 2013. The Trial Chamber notes that the Co-Prosecutors initially asserted during the TMM that a trial conducted in accordance with the Co-Prosecutors' proposed scope would take 12-18 months to complete, but later conceded that a 2-3 year estimate is more accurate: T. 11 December 2013, pp. 56-58.

<sup>71</sup> Co-Prosecutors' Proposed Case 002/02 Trial Plan (with Confidential Annex A), E301/2/1, 10 December 2013; Annex A: Charges and Criminal Events Alleged in Case 002 Indictment, E301/2.1, 10 December 2013.

<sup>72</sup> Annex 1: Proposed Order of Witness Appearance at Trial: Combined Expert, Witness and Civil Party List, E9/4.1, 28 January 2011.

<sup>73</sup> NOUN Chea List of Proposed Witnesses, Experts, and Civil Parties, E9/4/4, 15 February 2011.

<sup>74</sup> KHIEU Samphan Proposed List of Witnesses and Experts, E9/4/6, 21 February 2011; Civil Party Lead Co-Lawyers' Rule 80 Witness, Expert and Civil Party Lists, Including Confidential Annexes 1, 2a, 2b, 3a, 3b, and 4, E9/4/3, 14 February 2011. 

and avoid repetitiveness. Nonetheless, the trial of Case 002 would involve significantly more witnesses, civil parties, and experts than the Expanded OCP Proposal.

27. Another measure of the size of the remaining portion of Case 002 after the first severance is the number of Closing Order paragraphs that remain to be addressed. The Case 002 Closing Order is composed of 1624 paragraphs, 477 of which were included within Case 002/01.<sup>75</sup> Without further severance, Case 002/02 would need to address at least an additional 1147 paragraphs of the Closing Order. A trial involving such a broad collection of geographic areas and crime sites, in addition to the extraordinary number of proposed witnesses, experts, and civil parties, would be exceedingly difficult to manage efficiently and expeditiously. The persistent concerns related to the health of the Accused are also a major factor to be considered by the Chamber before embarking upon such a lengthy trial.<sup>76</sup>

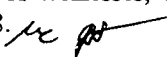
28. The Lead Co-Lawyers have noted the Civil Party concern to have a judgement rendered as soon as possible because many Civil Parties, who are of an advanced age and in deteriorating health, have an interest in seeing justice done within their lifetimes.<sup>77</sup> The Chamber finds that an additional severance of Case 002, which will reduce the wait for a judgement on certain charges, will serve this aim, while balancing the rights of the Accused. The Chamber has considered the potential burden that may be placed on witnesses, civil parties and experts who are called to testify in Case 002/02 and then recalled in subsequent proceedings in the event the remaining charges are severed. Although dependent upon the precise delimitation of the scope of subsequent proceedings, the Chamber considers that the number of individuals who might be recalled after appearing in Case 002/02 will be limited.<sup>78</sup> As recently indicated by the Chamber, the Internal Rules already establish a legal framework for the recall of witnesses, civil parties and experts.<sup>79</sup> They will function as a safeguard against irrelevant or repetitious evidence and will restrict the potential burden on these

<sup>75</sup> Annex: List of Paragraphs and Portions of the Closing Order Relevant to Case 002/01, Amended Further to the Trial Chamber's Decision on IENG Thirith's Fitness to Stand Trial (E138) and the Trial Chamber's Decision on Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163), E124/7.3, 8 October 2012.

<sup>76</sup> The Trial Chamber is currently assessing the health status of the Accused persons. *See* Decision on Accuseds' Fitness to Stand Trial and Order Assigning Experts, E301/10, 17 February 2014.

<sup>77</sup> T. 11 February 2014, p. 61.

<sup>78</sup> For example, only three of the Co-Prosecutors proposed ninety-six witnesses for Case 002/02 would be recalled from Case 002/01: Co-Prosecutors' Proposed Case 002/02 Trial Plan (with Confidential Annex A), E301/2/1, 10 December 2013, Annex A: Co-Prosecutors' Trial Plan and Tentative Witness List for Case 002/02, E301/2/1.1, 10 December 2013..

<sup>79</sup> Clarification Regarding the Use of Evidence and the Procedure for Recall of Witnesses, Civil Parties and Experts from Case 002/01 in Case 002/01 (TC), E302/5, 7 February 2014, para. 8. 

individuals. The Chamber finds that any potential burden on witnesses caused by a further severance will be limited and, accordingly, should not stand in the way of such severance.

29. The Trial Chamber has considered the need to avoid inconsistencies between separate trials. As the Trial Chamber will apply the same legal framework and the same evidentiary and procedural rules in each phase of Case 002 proceedings, the Chamber finds that any risk of inconsistencies between separate phases will be minimal and do not constitute an impediment to severance.

30. For the above-stated reasons, the Chamber considers that an additional severance of Case 002 is in the interests of judicial efficiency and does not impede unduly upon the rights of the Accused.

## **5.2. Decision on Scope of Case 002/02**

31. With respect to Case 002, the Supreme Court Chamber has ordered that Case 002/02 “shall comprise at a minimum the charges related to S-21, a worksite, a cooperative, and genocide.”<sup>80</sup> It has held that severing Case 002 in such a fashion “meets not only the parties’ respective positions on how to render the scope of Case 002/01 reasonably representative” of the Closing Order, but also satisfies the factors warranting consideration in deciding how to reduce the charges.<sup>81</sup> Having established that severance is warranted, the Chamber must now determine which worksite(s) and cooperative(s) should be included in Case 002/02 and also consider whether charges additional to those identified by the Supreme Court Chamber should be included in Case 002/02.

32. The Expanded OCP Proposal adheres to the Supreme Court Chamber’s order while, as outlined above in Section 5.1.2, at the same time retaining a manageable scope. Furthermore, the Chamber considers that the addition of several charges and crime sites to the OCP Expanded Proposal would have the advantage of satisfying some of the concerns raised by the NUON Chea Defence and the Civil Parties while allowing for the completion of the trial in a reasonable period of time. Accordingly, the Trial Chamber decides that the scope of Case 002/02 shall comprise the crime sites and charges put forward in the Expanded OCP Proposal, as well those outlined below.

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<sup>80</sup> Second SCC Decision on Severance, para. 76.

<sup>81</sup> Second SCC Decision on Severance, para. 70.



33. The OCP Expanded Proposal already includes the charges of forced marriage and rape (paras 842-861 of the Closing Order). The Lead Co-Lawyers request the geographic expansion of the rape and forced marriage charges to include such crimes committed nationwide and are unopposed in this request by the NUON Chea Defence.<sup>82</sup> This addition would require hearing one witness or civil party from each zone (seven in total) and one expert.<sup>83</sup> As this is the Consolidated Group of Civil Parties' first priority and granting this single addition would lead to only a modest extension of the scope of Case 002/02, the Chamber considers this to be a reasonable request and decides to include forced marriage and rape on a nationwide basis in Case 002/02.

34. The NUON Chea Defence seeks to include additional crime sites and charges that are closely linked to its ability to mount a defence, particularly crime sites in the Eastern Zone and Northwest Zone.<sup>84</sup> One of the crime sites requested by the NUON Chea Defence is the Trapeang Thma Dam Worksite. This crime site is also proposed by the Lead Co-Lawyers because "it provides geographic representivity for the Northwest Zone" and "the severity of crimes [...] are very high".<sup>85</sup> The Chamber considers it is also in the interests of justice to include this crime site within the scope of Case 002/02.

35. The NUON Chea Defence also seeks to include the charges of internal purges (paras 192-203 of the Closing Order) to the scope of Case 002/02 (likewise sought by the Lead Co-Lawyers). Considering that the NUON Chea Defence team identifies the inclusion of these charges as "most important" to the Accused's interests and that granting this request would not unduly lengthen the estimated trial time, the Chamber also grants the request to include these charges within the scope of Case 002/02. As discussed further below, internal purges are closely related to allegations of forced movement of population and their inclusion is, consequently, reflective of broader themes of the Closing Order.

36. The Lead Co-Lawyers seek to add the North Zone Security Centre and the Koh Kyang Security Centre. The NUON Chea Defence seeks the addition of the Wat Kirirum or Wat Tlork Security Centres. The Supreme Court Chamber's order does not require the inclusion of these sites since the Expanded OCP Proposal already includes S-21, a worksite, a cooperative

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<sup>82</sup> T. 11 February 2014, p. 44.

<sup>83</sup> Civil Parties' Submission, para. 13.

<sup>84</sup> T. 11 February 2014, p. 43.

<sup>85</sup> Civil Parties' Submission, para. 19.




and the charges of genocide.<sup>86</sup> The Chamber is faced with the difficult task of balancing the interests to an efficient and expeditious proceeding while at the same time taking into consideration the stated interests of the parties. That said, the Chamber is convinced that the inclusion of these additional sites in the scope of Case 002/02 risks undermining the efficiency and manageability gained by choosing to sever Case 002 in the first place without any measureable gain to the interests sought to be obtained by the parties. For these reasons, the Chamber declines to include these additional crime sites or charges in the scope of Case 002/02.

37. The Lead Co-Lawyers also seek to include forced movement of population phase three within the scope of Case 002/02. The NUON Chea Defence agrees with this request. The Trial Chamber notes that forced movement of population was dealt with extensively in Case 002/01. Phase three will be addressed to a certain extent in Case 002/02 through the inclusion of S-21 and internal purges, which are closely related to this particular phase of population transfer. As allegations of population transfer have already been thematically reflected in Case 002, the Trial Chamber decides not to include forced movement of population phase three in Case 002/02.

38. The Expanded OCP Proposal encompasses the treatment of Buddhists through the inclusion of the Tram Kok Cooperatives site (with crimes against humanity charged in relation to that site including the religious persecution of Buddhists), as well as the general allegations in the Closing Order relating to treatment of Buddhists. The Lead Co-Lawyers request, as a matter of second priority, that the treatment of Buddhists be included in Case 002/02 on a nationwide basis. The Trial Chamber finds that the inclusion of general allegations concerning the treatment of Buddhists and the Tram Kok Cooperative as one example crime site reasonably reflects the scale and nature of the alleged acts while maximising the efficient hearing of this topic. Accordingly, the Chamber adopts the OCP Expanded Proposal on this point and declines to extend the treatment of Buddhists to a nationwide scope.

39. The Trial Chamber notes the Co-Prosecutors' estimation that hearing the trial of the charges in the OCP's Expanded Proposal would require two to three years to complete. The Trial Chamber's addition of further crime sites would not add significantly to this estimate.

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<sup>86</sup> In addition, the Chamber has already chosen to include an additional two additional worksites (Trapeang Thma Dam and Kampong Chhnang Airport) as well as two additional Security Centres (Au Kanseng Security Centre and Phnom Kroal Security Centre). Finally, the Chamber has included the charges of internal purges. 

While the Trial Chamber is unable to give a precise estimate of the time the proceedings would take following an additional severance, the Chamber considers that it is possible to deal with the crimes outlined above within a reasonable time.

40. As to the NUON Chea proposal regarding the latitude granted to counsel in adducing evidence at trial, the Chamber reiterates that Internal Rule 87 sets forth the framework for the admissibility of evidence at trial and shall continue to be respected.<sup>87</sup>

### **5.3. Closing Order Paragraphs**

41. The Parties submit that certain sections and paragraphs of the Closing Order relating to crimes sites, policies, background and context should be included within the scope of Case 002/02, including some paragraphs and sections already included within the scope of Case 002/01.<sup>88</sup> The Chamber sets forth explanations below on the inclusion of certain sections and paragraphs of the Closing Order relating to crimes sites, policies, background and context in Case 002/02 formed part of Case 002/01 and attaches an annex inclusive of all relevant paragraphs of the Closing Order.

42. In Case 002/01, the Chamber heard evidence concerning the historical background; administrative, communication and military structures; joint criminal enterprise policies; and the roles and character of the Accused.<sup>89</sup> The resulting evidentiary record serves as a foundation for the trial of the remaining charges in Case 002.<sup>90</sup> However, certain of these matters may not have been fully examined in Case 002/01 due to its limited scope and may also be relevant in the context of Case 002/02.<sup>91</sup> Thus these sections of the Closing Order are

<sup>87</sup> Clarification Regarding the Use of Evidence and the Procedure for Recall of Witnesses, Civil Parties and Experts from Case 002/01 in Case 002/02 (TC), E302/5, 7 February 2014, para. 8.

<sup>88</sup> OCP Submission on Scope, paras 10-18, 21; Co-Prosecutors' Submission Regarding the Scope of Case 002/02, E301/5/1, 31 January 2014, para. 2; Civil Parties' Submission, 31 January 2014, paras 8-37; NUON Chea Response, para. 7.

<sup>89</sup> Annex: List of Paragraphs and Portions of the Closing Order Relevant to Case 002/01, Amended Further to the Trial Chamber's Decision on IENG Thirith's Fitness to Stand Trial (E138) and the Trial Chamber's Decision on Co-Prosecutors' Request to Include Additional Crime Sites Within the Scope of Trial in Case 002/01 (E163), E124/7.3, 8 October 2012.

<sup>90</sup> Clarification Regarding the Use of Evidence and the Procedure for Recall of Witnesses, Civil Parties and Experts from Case 002/01 in Case 002/01 (TC), E302/5, 7 February 2014, paras 5, 7.

<sup>91</sup> Clarification Regarding the Use of Evidence and the Procedure for Recall of Witnesses, Civil Parties and Experts from Case 002/01 in Case 002/01 (TC), E302/5, 7 February 2014, para. 8; *see also* 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, para. 11 (noting that it would mainly give detailed factual consideration in the first trial to those charges expressly included within the scope of Case 002/01); Response to Issues Raised by Parties in Advance of Trial and Scheduling of Informal Meeting with Senior Legal Officer on 18 November 2011 (TC), E141, 17 November 2011, p. 2.

expressly included within the scope of Case 002/02 insofar as they contain factual allegations relevant to the factual allegations in this case and not previously or fully examined.

43. In particular, the Chamber notes that movement of the Cham minority forms the basis of religious persecution charges, as well as a means of implementing policies concerning movement of population (phase two) and treatment of targeted groups.<sup>92</sup> The Chamber excluded the charges based on the policy concerning the treatment of the Cham, including charges of religious persecution, from the scope of Case 002/01.<sup>93</sup> However, treatment of the Cham and charges of religious persecution, including in the course of population movement (phase two), have been included within the scope of Case 002/02. The Chamber has therefore also included within the scope of Case 002/02 the movement of population policy only insofar as the Closing Order alleges that it was implemented through movement of the Cham minority.

44. Finally, the Chamber included within the scope of Case 002/01 the implementation of a policy to target former Khmer Republic officials through executions at Tuol Po Chrey.<sup>94</sup> The scope of Case 002/02 includes, *inter alia*, the Tram Kok Cooperatives, 1<sup>st</sup> January Dam Worksite, S-21 Security Centre, and Kraing Ta Chan Security Centre. Factual allegations relevant to each of these crime sites are relevant to the policy of targeting of former Khmer Republic officials.<sup>95</sup> Political persecution against former Khmer Republic officials is also charged in relation to each of these four crime sites.<sup>96</sup> The Chamber has therefore included within the scope of Case 002/02 the policy concerning targeting of former Khmer Republic officials, limited to implementation at the Tram Kok Cooperatives, 1<sup>st</sup> January Dam Worksite, S-21 Security Centre, and Kraing Ta Chan Security Centre.

<sup>92</sup> Closing Order, paras 266, 268, 281, 901, 1420, 1468.

<sup>93</sup> Annex: List of Paragraphs and Portions of the Closing Order Relevant to Case 002/01, Amended Further to the Trial Chamber's Decision on IENG Thirith's Fitness to Stand Trial (E138) and the Trial Chamber's Decision on Co-Prosecutors' Request to Include Additional Crime Sites Within the Scope of Trial in Case 002/01 (E163), E124/7.3, 8 October 2012.

<sup>94</sup> Annex: List of Paragraphs and Portions of the Closing Order Relevant to Case 002/01, Amended Further to the Trial Chamber's Decision on IENG Thirith's Fitness to Stand Trial (E138) and the Trial Chamber's Decision on Co-Prosecutors' Request to Include Additional Crime Sites Within the Scope of Trial in Case 002/01 (E163), E124/7.3, 8 October 2012; 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, para. 11; Response to Issues Raised by Parties in Advance of Trial and Scheduling of Informal Meeting with Senior Legal Officer on 18 November 2011 (TC), E141, 17 November 2011, p. 2.

<sup>95</sup> The Closing Order alleges that there was a pattern of targeting former Khmer Republic officials. Factual allegations relevant to this pattern are included within the sections of the Closing Order concerning Tram Kok Cooperatives (Closing Order, para. 319), 1<sup>st</sup> January Dam Worksite (Closing Order, para. 366), S-21 Security Centre (Closing Order, para. 432), Kraing Ta Chan Security Centre (paras 498, 500).

<sup>96</sup> Closing Order, para. 1416-1418.

#### **5.4. Status of Remaining Charges**

45. The severance outlined above excludes certain facts, charges and crime sites from the scope of Case 002/02. The Supreme Court Chamber has noted that the possibility of withdrawing certain charges is not foreclosed by the ECCC legal framework.<sup>97</sup> In this regard, the Trial Chamber notes the NUON Chea Defence's concern that "the decision to withdraw or dismiss charges has no clear precedent in domestic or international procedure".<sup>98</sup> However, as the Trial Chamber has not been seised of a request by the Co-Prosecutors to withdraw charges from the Closing Order<sup>99</sup>, the Trial Chamber need not address this issue at the current stage of proceedings.

#### **5.5. Subsequent procedures in Case 002/02**

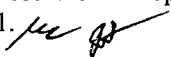
46. Having set forth the scope of Case 002/02, the parties are now invited to file a witness, expert and civil party list, as well as a document list. In this regard, a separate order will be issued by the Trial Chamber.<sup>100</sup> Thereafter, as indicated in its workplan for Case 002/02 issued in December 2013, the Trial Chamber will schedule an Initial Hearing for Case 002/02. The Chamber continues to consider other relevant matters necessary to resolve prior to the start of Case 002/02 evidentiary proceedings. As soon as the witness, expert and civil party lists are filed, the Trial Chamber will consider the prioritization of topics in Case 002/02.

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<sup>97</sup> Second SCC Decision on Severance, paras 61-62.

<sup>98</sup> NUON Chea Response, para. 12.

<sup>99</sup> The Co-Prosecutors do not seek to withdraw any of the facts from the Closing Order, instead proposing "to limit the evidence presented to prove each of the charges by excluding certain events and crime sites from the [Case 002/02] trial." See OCP Submission on Scope, para. 26.

<sup>100</sup> The Chamber notes the Co-Prosecutors have filed an initial list of witnesses, experts and civil parties for Case 002/02 based on their Expanded OCP Proposal. However, the Co-Prosecutors then indicated that, "their review and assessment of necessary witness testimony is ongoing, and a definitive witness list will be filed after the scope of Case 002/02 is determined and dates established by the Chamber for the filing of witness and document lists by all parties." Co-Prosecutors' Proposed Case 002/02 Trial Plan (with Confidential Annex A), E301/2/1, 10 December 2013, para. 1. 

**FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:**

**GRANTS** the Co-Prosecutors' and Lead Co-Lawyers' requests and **SEVERES** the proceedings in this case pursuant to Internal Rule 89*ter*;

**GRANTS** the Co-Prosecutors' and Lead Co-Lawyers' requests in part and **DECIDES**, pursuant to the Supreme Court Chamber order of 25 November 2013, that the scope of Case 002/02 crime base shall comprise the portions of the Closing Order pertaining to S-21 Security Centre, 1<sup>st</sup> January Dam Worksite, Tram Kok Cooperative, and genocide (Vietnamese and Cham peoples);

**GRANTS** the Co-Prosecutors', Lead Co-Lawyers', and NUON Chea Defence requests in part and **DECIDES** to include within the scope of Case 002/02 crime base, Kraing Ta Chan Security Centre, Kampong Chhnang Airport Construction site, Au Kanseng Security Centre, Phnom Kraol Security Centre, Trapeang Thma Dam Worksite and the charges of Forced Marriage and Rape (nationwide) and Internal Purges.

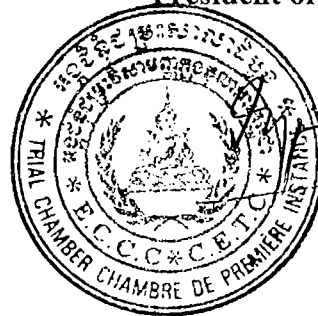
**REJECTS** the Lead Co-Lawyers' requests to include within the scope of Case 002/02 North Zone Security Centre, the Koh Kyang Security Centre, and forced movement of population phase three and to expand the charges related to the treatment of Buddhists to a nationwide geographic scope.

**REJECTS** the NUON Chea Defence requests to include within the scope of Case 002/02 forced movement of population phase three and Wat Kirirum or Wat Tlork Security Centre;

**FINDS** the disposition of the remaining charges in Case 002/02 does not arise at this time and will be addressed in due course.

**ATTACHES** Annex A containing a list of paragraphs and portions of the Closing Order relevant to Case 002/02, which forms part of this decision. *pe 4*

Phnom Penh, 4 April 2014  
President of the Trial Chamber



*[Handwritten signature]*  
Nil Non: