BEFORE THE SUPREME COURT CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC

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Mr KHIEU Samphan's Immediate Appeal Against the Decision Issued in the Form of an Email sent from Ms LAMB on 21 February 2013

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Before:

The Supreme Court Chamber
Judge KONG Srim
Judge Agnieszka KLONOWIECKA-MILART
Judge SOM Sereyvuth
Judge Chandra Nihal JAYASINGHE
Judge MONG Monichariya
Judge YA Narin
Judge Florence Ndepele MUMBA

The Co-Prosecutors
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All Defence Teams

MAY IT PLEASE THE SUPREME COURT CHAMBER

1. On 8 February 2013, the Supreme Court Chamber ("the Supreme Court") invalidated the severance of case 002 and found numerous prejudices caused to the parties. [1]

2. On 18, 20 and 21 February 2013, the Trial Chamber ("the Chamber") held hearings on the consequences of the Supreme Court Decision, addressing a series of questions to the parties.[2]

3. On 21 February 2013, in reply to one of these questions[3], all defence teams requested that the Chamber hear no expert or witness pending issuance of a new decision on the scope of the trial.[4]

4. On the same day, three hours after the adjournment of that hearing, the Senior Legal Officer informed the parties by email that the Chamber had decided that experts Philip SHORT and Elisabeth BECKER would provide their testimonies as of 4 March 2013; prior, therefore, to the issuance of a new decision on the scope of the trial ("the Impugned Decision")[5].

5. Pursuant to Rules 21 and 104(4) of the Internal Rules ("the Rules"), Mr KHIEU Samphan's Defence ("the Appellant") hereby appeals against the email which, it asserts,

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[1] Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, Supreme Court Chamber, 8 February 2013, **E163/5/1/13** ("Supreme Court Chamber Decision invalidating the severance"). [*The Defence worked on a draft and unofficial French translation of this decision, courtesy of the Interpretation and Translation Unit*].

[2] Directions to the parties in consequence of the Supreme Court Chamber's Decision on Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision concerning the Scope of Case 002/01 (E163/5/1/13), Memorandum from the Trial Chamber, 12 February 2013, **E163/5/1/13/1** (First memo on the severance hearings); Supplementary questions to the parties following hearing of 18 February 2013 in consequence of the Supreme Court Chamber's Decision concerning the Scope of Case 002/01 (E163/5/1/13), **E264**, Memorandum from the Trial Chamber, 19 February 2013, ("Second memo on the severance hearings"); Transcript of Hearing ("T.") of 18 February 2013, **E1/171.1** ; T. of 20 February 2013, DRAFT ; T. of 21 February 2013, DRAFT. [*Draft French translations of the two above-mentioned memos were provided to the Defence courtesy of the Interpretation and Translation Unit*].

[3] Second memo on the severance hearings, para. 3 iii) and iv).

[4] T. of 21 February 2013, DRAFT, p. 38 L. 9-22 p. 42 L. 19-20, p. 44 L. 11-13 and p. 45 L. 5-14, p. 52 L. 20-25 and p. 53 L. 1-10, (FRE).

[5] Email entitled "*Directions to the parties following hearing on severance*", sent by Ms Susan LAMB to the parties on 21 February 2013 at 3:14 pm ("Impugned Decision"), attached hereto.

constitutes a decision. Considering the importance and the urgency of the issues raised therein, the Supreme Court must make a determination before 4 March 2013, or suspend the substantive hearings until it issues its decision. The Impugned Decision must be annulled because the errors committed by the Chamber invalidate it and result in potentially irreparable prejudice to the Appellant.

I. FORM OF THE DECISION

6. According to the jurisprudence of the Supreme Court, "*[a] court's decision must display indicia of an authoritative judicial act. In this respect it is necessary for a judicial decision to dispose of a legal matter before it in a definite manner. As such, a judicial decision should contain an operative part ("enacting clause" or "disposition") which resolves the substantive and/or procedural issue by creating, altering, dissolving or confirming a law-based relation concerning the parties*".[6]

7. The email of the Chamber's Senior Legal Officer dated 21 February 2013 contains a clear and specific ruling on the request of the Defence teams to not hear any witnesses or experts until a new decision on the scope of the trial is rendered. The email grants the Defence request in respect of witnesses, but dismisses their request in respect of experts SHORT and BECKER.

8. As such, the email bears the indicia of an authoritative judicial act, despite its lacking solemn form. Accordingly, its validity must be reviewed "*in the aspect of fairness, in terms of sufficient clarity as to [its] existence, content and procedural consequences*".[7]

II. ADMISSIBILITY OF THE APPEAL AND THE REQUIREMENT FOR AN IMMEDIATE DECISION OR SUSPENSION OF THE PROCEEDINGS

9. Appeal of the Impugned Decision is admissible under both Internal Rules 21 and 104(4)

[6] Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012, **E176/2/1/4**, ("Rule 35 Supreme Court Chamber Decision"), para. 25; Supreme Court Chamber Decision Invalidating the Severance, para. 30.
[7] Supreme Court Chamber Decision Invalidating the Severance, para. 30. (Emphasis added).

of the Rules.

1) Internal Rule 21

10. According to the ECCC Appeal Judges, "*the overriding consideration in all proceedings before the ECCC is the fairness of the proceedings, as provided in Internal Rule 21(1)(a)*". In such a context, they ruled that where the facts and circumstances of an appeal so require, they are competent to consider grounds raised by the Appellants that are not explicitly listed under the Rules.[8]

11. Whilst finding that there is no general entitlement to immediate appeal[9], the appeal judges have, on an exceptional basis, reviewed appeals by applying a liberal interpretation of the right to appeal foreseen under Internal Rule 21.[10]

12. In such instances, the judges consider if, "*on balance*" whether the "*seriousness and egregiousness of the issues of fairness raised [...] and their impact on the proceedings warrant [...] admitting the appeal*".[11] They further seek to determine if, "*on balance*" it is the importance of expediting proceedings or concern for fairness which is paramount. In the latter case, the fact that the grounds of appeal were raised prior to the issuance of the indictment "*was of essence in finding that the grounds were admissible.*"[12]

13. The facts and circumstances of the present appeal require a broader interpretation of the right of appeal based on Internal Rule 21, and warrant the exceptional and immediate intervention of the Supreme Court.

14. As a matter of fact, the seriousness of the concerns regarding fairness and their impact on

[8] Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, Pre-Trial Chamber, 15 February 2011, **D427/2/15,** ("Pre-Trial Chamber Decision on Appeals against the CO"), para. 71.
[9] Decision on IENG Sary's Appeal Against Trial Chamber's Decision on Ieng Sary's Rule 89 Preliminary Objections (*NE BIS IN IDEM AND AMNESTY AND PARDON*), Supreme Court Chamber, 20 March 2012, **E51/15/1/2**, page 3; Pre-Trial Chamber Decision on Appeals against the CO, para 73.
[10] Pre-Trial Chamber Decision on Appeals against the CO, para 72 ; *Decision on IENG Sary's Appeal Against the Trial Chamber's Decision on Its Senior Legal Officer's Ex Parte Communications*, Supreme Court Chamber, 25 April 2012, **E154/1/1/4**, para. 15.
[11] Pre-Trial Chamber Decision on Appeals against the CO, para. 73.
[12] Pre-Trial Chamber Decision on Appeals against the CO, para. 73 and 75.

the on-going trial justified the Supreme Court's decision to annul the Chamber's severance order.

15. However, it appears that even prior to rendering a new severance order, the Chamber has committed the same prejudicial errors. If the Supreme Court does not intervene immediately, the resulting prejudices may prove irreparable.

16. If the present appeal is admissible under Internal Rule 21, it is also admissible under Internal Rule 104(4) of the Rules.

2) Internal Rule 104(4) of the Rules

17. According to Internal Rule 104(4)(d) of the Rules, "*decisions on interference with the administration of justice under Rule 35(6)"* are subject to immediate appeal.

18. Internal Rule 35 provides "*by way of illustration*", examples of conduct that qualify as interference with the administration of justice, but without defining proscribed conduct exhaustively.[13]

19. According to this same rule, "*any person who knowingly and wilfully interferes with the administration of justice*"[14] may be sanctioned, and when the Chambers have reasons to believe that a person may have committed such an act, they may "*rule immediately*".

20. In the view of the Supreme Court, "*neither an error of fact or law nor an abuse of discretion on the part of the Trial Chamber can, by itself, constitute a knowing and wilful interference with the administration of justice within the meaning of Rule 35*".[15]

21. In the view of the Appellant, in this precise and very particular case, the errors committed knowingly and wilfully by the Chamber at this stage of the proceedings in disregard for the Supreme Court's orders enjoining the Chamber to respect fairness and legal certainty,

[13] Rule 35 Supreme Court Chamber Decision, para. 33.
[14] Emphasis added.
[15] Decision on IENG Sary's Appeal Against Trial Chamber's Order Requiring His Presence in Court, Supreme Court Chamber, 13 January 2012, **E130/4/3**, p. 2 (emphasis added).

constitutes interference with the administration of justice, warranting an immediate ruling by the Supreme Court.

22. Moreover, the Appeal Judges had already decreed that the notion of interference as set out in Internal Rule 35 of the Rules is to be read broadly and that there is a functional link between Rules 21 and 35 of the Internal Rules.[16] The Supreme Court recently held that in a case of the magnitude of Case No. 002, to consider the Chamber's discretionary power as unrestricted is to disregard the tenets of interpretation laid down in Internal Rule 21(1).[17]

23. This prohibition is "*an effort to frustrate the mandate and functioning of the Court*",[18] "*where the conduct undermines the Court's legitimacy with the parties and the general public*".[19] Yet more clear and explicit is the following statement by the Supreme Court:

> "*Rule 35 is primarily designed for the application of punitive measures with the objective of deterrence. The Supreme Court Chamber considers, however, that Rule 35 also serves the overarching goal of ensuring an effective and fair trial. In this respect, the duty of the court is not just to punish the interference with the administration of justice, but also to stop on-going interference and prevent its potential occurrence. These duties are particularly valid in the face of interference that endangers a fundamental right, such as the right to a fair trial. It is therefore reasonable to construe,* a majori ad minus, *that the ECCC may resort to the procedures under Rule 35 to apply not only the* sensu stricto, *punitive measures (sanctions) but also undertake other corrective responses that are non-punitive in nature and do not require the finding of culpability (intent) in order to safeguard the right to a fair trial*".[20]

24. The conclusion of their interpretation of this rule shows a clear consideration of all of the recognized fundamental rights of the Accused.[21]

25. In the present case, the Chamber's action, and more particularly its allowing for Expert-

[16] Rule 35 Supreme Court Chamber Decision, para. 33, referring to Decision on Appeal Against the Order on Nuon Chea's Second Request for Investigation (Rule 35), Pre-Trial Chamber, 2 November 2010, **D384/5/2**.
[17] Supreme Court Chamber Decision Invalidating the Severance, para. 40.
[18] Rule 35 Supreme Court Chamber Decision, para. 34.
[19] *Ibidem*, para. 35.
[20] *Ibid.*, para. 45 (emphasis added).
[21] Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, **E50/3/1/4**, para. 30.

Witnesses to be heard when the scope of the trial has yet to be defined, undermines its legitimacy in the eyes of the parties and the public at large. Such conduct continues to run counter to the expeditiousness and fairness of the proceedings and jeopardizes the fundamental right of the Appellant to a fair trial. In order to safeguard this right, the Supreme Court is duty-bound to undertake corrective measures.

26. To this effect, the Supreme Court must declare this appeal admissible and immediately annul the Impugned Decision.

III. ERRORS COMMITTED BY THE TRIAL CHAMBER

27. By issuing the Impugned Decision, the Chamber committed an error of law that invalidates the decision. Moreover, the decision is vitiated by a number of discernible errors in the exercise of the Trial Chamber's discretion that result in potentially irreparable prejudice to the Appellant.

1) Error in Law

28. The Supreme Court held that when the Chamber severed proceedings, it committed errors which invalidated the Severance Order.[22] However, the Supreme Court allowed the Chamber to rectify its errors and even proposed a manner in which to proceed in the event of a new severance.[23]

29. The errors of the Trial Chamber singled out by the Supreme Court Chamber were all in the areas of fairness and judicial certainty. The Supreme Court therefore dispensed advice with a view to ensure that fairness and judicial certainty were effectively guaranteed in the event of a further severance.[24]

30. If the Supreme Court proceeded in such a manner, it was in recognition of the "*range and*

[22] Supreme Court Chamber Decision Invalidating the Severance, para. 49 (emphasis added).
[23] Supreme Court Chamber Decision Invalidating the Severance, para. 50.
[24] *Ibid.*, para. 17, 23, 24, 33, 35, 36, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49 and 50.

importance of the overall issues at play," [25] and "*in a case of such magnitude as Case 002*", "*the mode of severance inevitably has greater and more significant impact on all interested parties*".[26]

31. Based on the Supreme Court Decision, the Chamber has the choice either to continue the on-going trial without severing the case, or to order a new severance in accordance with the requirements of the Supreme Court.

32. Under the second scenario, in light of the breadth, importance and impact of the issues at play for all parties, and the recognition of the numerous prejudices occasioned by the first mode of severance, it is clear that the substantive hearings must be suspended until a new severance is issued.

33. Yet, when the Chamber issued its Decision, now under appeal, it appears that the Chamber had already decided upon its choice of a new severance. In fact, the Chamber's intentions were made very evident at the hearings on the consequences of the Supreme Court Decision. Indeed, the questions addressed to the parties were all geared towards severance.[27] Moreover, the President closed the hearing—during which two Defence teams argued that the proceedings not be severed—by announcing that the Chamber would issue its decision "*in due course with regard to the scope of Case 002 to be heard in the first stage*"[28].

34. Be that as it may, rather than suspend the substantive hearings pending its new decision on severance, the Chamber decided to proceed immediately with the testimony of experts SHORT and BECKER. The Chamber even announced that other *"interim"* directions may follow.[29]

35. Subsequently, by issuing the Impugned Decision in such a context (and by announcing

[25] *Ibid.*, para. 36.
[26] *Ibid.*, para. 40.
[27] First memo on the severance hearings; Second memo on the severance hearings.
[28] T. of 21 February 2013, DRAFT, p. 66 L. 24-25 – p. 67 L.1 (emphasis added).
[29] Impugned Decision, last sentence: "*Other interim directions to the parties may follow in due course*".

other similar decisions), the Chamber has clearly committed an error of law that invalidates the appealed decision, another feat to add to its list of accomplishments. Moreover, the appealed decision is vitiated by discernible errors in the exercise of discretion that are prejudicial to the Appellant and other parties. It therefore must also be annulled on that ground.

2) Prejudicial and discernible errors in the exercise of the Trial Chamber's discretion

36. In the Impugned Decision, the Chamber commits the first error by holding that the continuation of substantive hearings ("*in the interim*") pending a new decision of severance causes no prejudice to the parties.

37. Indeed, this "intermediary phase" only restores the prejudices previously pinpointed by the Supreme Court, and guarantees for fairness and judicial certainty remain neither effective nor ensured.

38. The Chamber commits a second error by holding that the continuation of the substantive hearings with the testimonies of experts SHORT and BECKER can proceed immediately without resulting in any prejudice to the parties.

39. In the impugned email, the Senior Legal Officer informs the parties that:

> "*Consistent with the Chamber's previous directions, both experts may be questioned on the entirety of Case 002 on areas within the knowledge of the experts, and the parties are encouraged to focus their questions on areas relevant to the facts at issue in Case 002/01. The Trial Chamber will not otherwise hear the testimony of other individuals whose testimony had been imminent prior to the SCC Decision*"[30].

40. It is noteworthy that the only points of consistency in the Chamber's approach are its contradictory attitude and the incomprehensible nature of its decisions.

41. The Chamber in fact contradicts itself with regard to the scale and scope of these expert testimonies. On 25 May, the Chamber informed the parties that it would hear these

[30] Impugned Decision, first bullet point.

witnesses, "*on all issues on which they are able to testify within the scope of the Case 002 Closing Order*". Philip Short would be taking the stand for 6 days, whereas Elisabeth Becker would testify for 5 days. Their appearances were scheduled for October 2012.[31]

42. On 8 January 2013, after the postponement of the hearing of these two experts due to the health condition of Mr IENG Sary and the ensuing delays in the proceedings, the Chamber had decided to "*reduce the length of testimony from that originally announced*" to 4 days each, and include one day of examination by the Chamber. At the same time, it had, "*encourage[d] the parties to limit questioning only to those topics relevant to Case 002/01*".[32]

43. In reality, curtailing the number of testimony days, along with an "encouragement" to remain within the confines of the first trial alone was tantamount to forcing the parties to limit their questions to the scope of the first trial.

44. In further confirmation of the Chamber's stance, on 18 January 2013, it had dismissed the NUON Chea Defence's request to put before the Chamber new documents in view of the questioning of Philip SHORT and Elizabeth BECKER on the ground that, "*the Chamber [was] unconvinced of the relevance or necessity to admit any of these documents*", and moreover, "*genocide is not part of the charges in the current case*".[33]

45. However, these documents would in fact be relevant if it is true that the experts may be heard "*on all issues on which they are able to testify within the scope of Case 002*".[34]

46. On 21 February 2013, in the Impugned Decision, the Chamber continues to ignore the fact that it has obliged the parties to prepare for the witness testimonies according to the scope

[31] Updated information regarding scheduling of proposed experts, Memorandum from the Trial Chamber, 25 May 2012, **E172/24**.
[32] Consolidated schedule of witnesses and experts for early 2013, Memorandum from the Trial Chamber, 8 January 2013, **E236/4** (Emphasis added).
[33] Response to Internal Rule 87(4) Requests to Place New Documents on the Case File concerning the Testimony of Witnesses François PONCHAUD and Sydney SCHANBERG (E243) and Experts Philip SHORT (E266, 226/1 and 230) and Elizabeth BECKER (E232 and E232/1), **E260**, para. 4 and 8.
[34] Updated information regarding scheduling of proposed experts, Memorandum from the Trial Chamber, 25 May 2012, **E172/24**.

of the first trial. It also denies the prejudicial consequences of deferring these testimonies to an unknown point in the proceedings.

47. The contours of the first trial have been invalidated. A new trial has been announced, but its contours are neither defined nor justified, any more than those of possible future trials. The excessive number of unanswered questions and the degree of uncertainty and unknowns makes it impossible for the parties to prepare for the testimonies.

48. How is preparation of questions possible, when the relevance is not defined? How is it possible to be certain that once the relevance of questions is defined, there will be a possibility to ask them? Which parts of the testimonies will be considered relevant by the judges and how will they be used in the event of multiple trials?[35] How is it possible to advise one's client on case strategy?

49. The decision to hear these experts in such circumstances is, therefore, not justified.

50. Even if the decision was based on the "[*likelihood] that the Chamber will lose the ability"* to hear the these witnesses "*at all*" if they were not heard on the currently scheduled dates,[36] this justification is at odds with the same decision denying early testimonies of very elderly witnesses who could be heard on the entirety of trial 002. [37] In fact, there is greater probability that all other opportunities to hear these very elderly witnesses would no longer possible, because in contrast to experts SHORT and BECKER, these witnesses are of a very advanced aged and may very soon be wholly incapable of testifying.

51. This justification is also at odds with the restriction to limit the testimony of these experts to the first trial given that its contours are now invalidated.

52. In summary, the Appellant is left in the dark and it is impossible for him to prepare his

[35] Concern shared by the Mr IENG Sary's Defence, addressed to the Trial Chamber through a letter sent to Ms Susan LAMB on 22 February 2013, entitled "*Request for clarification and guidance concerning the use of testimony that may extend beyond the scope of the trial*", attached hereto.
[36] Second memo on severance hearings, para. 3 iii).
[37] T. of 21 February 2013, DRAFT, p. 23 L. 18-20 (FRE); Impugned Decision, first bullet point.

defence in the absence of a short, medium and long term view, and without any judicial certainty. The only element of which he is certain is that he will be placed before a *fait accompli* if the experts appear in the current circumstances. The prejudices he is suffering will be irreparable if he is not given an opportunity, one way or another, to examine these witnesses again in the future.

53. As such, the Impugned Decision is vitiated by discernible errors in the exercise of the Trial Chamber's discretion that result in serious prejudices to the Appellant. It must be annulled.

54. **WHEREFORE**, The Supreme Court Chamber is requested to:

- RULE IMMEDIATELY or SUSPEND the substantive hearings pending issuance of its decision;
- DECLARE the present appeal admissible;
- ANNUL the Impugned Decision.

	Mr KONG Sam Onn	Phnom Penh	[*Signed*]
	Ms Anta GUISSÉ	Paris	[*Signed*]
	Mr Arthur VERCKEN	Paris	[*Signed*]
	Mr Jacques VERGÈS	Paris	[*Signed*]
Date	Name	Place	Signature