

**BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

Case No: 002/19-09-2007-ECCC/SC **Party Filing:** Co-Prosecutors

Filed to: Supreme Court Chamber **Original Language:** English

Date of document: 16 May 2014



CLASSIFICATION

**Classification of the document
suggested by the filing party:** Public

Classification by Supreme Court Chamber: សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

**CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN'S IMMEDIATE APPEAL
AGAINST THE TRIAL CHAMBER'S DECISION ON THE ADDITIONAL
SEVERANCE OF CASE 002 AND THE SCOPE OF TRIAL IN CASE 002/02**

Filed by:

Co-Prosecutors
CHEA Leang
Nicholas KOUMJIAN

Distribute to:

Supreme Court Chamber
Judge KONG Srim, President
Judge C. N. JAYASIINGHE
Judge SOM Sereyvuth
Judge A. KLONOWIECKA-MILART
Judge MONG Monichariya
Judge Florence MUMBA
Judge YA Narin

Accused
Khieu SAMPHAN

Lawyers for the Defence
KONG Sam Onn
Anta GUISSÉ
Arthur
VERCKEN

Civil Party Lead Co-Lawyers
PICH Ang
Elisabeth SIMONNEAU FORT

I. INTRODUCTION

1. On 5 May 2014, the Defence for Khieu Samphan (the “Defence”) filed an immediate appeal (“Appeal”)¹ of the decision of the Trial Chamber to re-sever Case 002 and set the scope of Case 002/02 (“Impugned Decision”).² The Appeal was notified to the Co-Prosecutors on 6 May 2014.³ The Co-Prosecutors are responding to the Appeal in Khmer and English within the time limit prescribed by Article 8.3 of the applicable Practice Direction.⁴ For the reasons set out below, the Co-Prosecutors respectfully request the Supreme Court Chamber (“Chamber”) to hold the Appeal inadmissible; or, in the alternative, to dismiss the Appeal on the merits.

II. ADMISSIBILITY

2. The Defence purports to rely upon Internal Rule (“Rule”) 104(4)(a) as the sole ground for admissibility of this Appeal,⁵ on the basis that “the Impugned Decision has the *de facto* effect of suspending all charges outside the scope of Case 002/02”⁶ without a “sufficiently tangible prospect of resumption leading to judgment on the merits in the current circumstances.”⁷ In support of their arguments on admissibility, the Defence asserts that by merely referring to the possibility of “withdrawing certain charges”⁸ in the absence of a “tangible plan”⁹ for addressing those charges, the Impugned Decision necessarily discloses the same error that has twice satisfied the admissibility requirements for appellate review by this Chamber.¹⁰
3. The Co-Prosecutors submit that the Appeal is demonstrably inadmissible for three reasons:

¹ E301/9/1/1/1 Appel immédiat de la Défense de M. Khieu Samphan interjeté contre la Décision portant nouvelle disjonction des poursuites et fixant l’étendue du procès 002/02, 5 May 2014 (“Appeal”).

² E301/9/1 Decision on Additional Severance of Case 002 and Scope of Case 002/02, 4 April 2014 (“Impugned Decision”).

³ E301/9/1/1 Appeal Register, Khieu Samphan’s Immediate Appeal Against the Trial Chamber’s Decision on Additional Severance of Case 002 and Scope of Case 002/02, 6 May 2014.

⁴ Practice Direction ECCC/2007/1/Rev.8, 7 March 2012.

⁵ E301/9/1/1/1 Appeal, *supra* note 1 at paras. 7-14.

⁶ E301/9/1/1/1 *Ibid.* at para. 9 [provisional translation of the original French: “...la Décision contestée a *de facto* pour effet de suspendre toutes les poursuites placées en dehors de la portée du procès qu’elle delimite.”]

⁷ E301/9/1/1/1 *Ibid.* [provisional translation of the original French: “...qui, dans les circonstances actuelles, n’est pas accompagnée d’une perspective suffisamment tangible de reprise susceptible d’aboutir à une jugement au fond.”]

⁸ E301/9/1/1/1 *Ibid.* at para. 10 [provisional translation of the original French: “...retirer certaines accusations...”].

⁹ E301/9/1/1/1 *Ibid.* at para. 11 [provisional translation of the original French: “...plan tangible...”].

¹⁰ E301/9/1/1/1 *Ibid.*

- a. First, the Impugned Decision does not amount to an effective termination (or *de facto* stay) of proceedings in relation to any charges;
- b. Second, a proper assessment of the “current circumstances” now affords a sufficiently tangible prospect of “resumption” of trial on all remaining charges in Case 002, within the meaning of the term in the applicable law; and
- c. Third to admit the Appeal on the basis of an expanded reading of Rule 104(4)(a) would be contrary to the general principle of law *allegans contraria non est audiendus*, in view of the Defence’s wholly inconsistent prior submissions on the issue of admissibility.

A. LAW

4. In a consistent line of jurisprudence, this Chamber has interpreted Rule 104(4)(a) to permit appeals against “decisions to stay the proceedings that do not carry a tangible promise of resumption, thereby barring arrival at a judgment on the merits.”¹¹ The Chamber clarified the application of this test in November 2013, requiring a two-step assessment of: (a) whether the Impugned Decision “results in a *de facto* stay of proceedings in relation to all charges placed outside the scope” of trial; and, if so (b) whether “such stay...carr[ies] a sufficiently tangible promise of resumption as to permit arriving at a judgment on the merits.”¹² In assessing the tangibility of the promise of resumption, the Chamber had regard to a detailed list of “present circumstances.”¹³
5. The Chamber has also emphasised that the Trial Chamber bears the duty to “dispose of matters pending before it so that the proceedings in a criminal charge are decided on the merits or dismissed,”¹⁴ but that this obligation to “*vider sa saisine*” must be understood as including “a decision on closure that does not pronounce on criminal responsibility.”¹⁵ The jurisprudence of this Chamber indicates a legitimate basis for extinction of charges by means of judicially-sanctioned withdrawal in the interests of

¹¹ **E138/1/7** Decision on Immediate Appeal against the Trial Chamber’s Order to Release the Accused Ieng Thirith, 13 December 2011 at para. 15; **E163/5/1/13** Decision on Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision concerning the Scope of Case 002/01, 8 February 2013 at para. 22 (“First Severance Appeal Decision”).

¹² **E284/4/8** Decision on Immediate Appeals against Trial Chamber’s Second Decision on Severance of Case 002, 25 November 2013 at para. 26 (“Second Severance Appeal Decision”).

¹³ **E284/4/8** *Ibid.* at para. 26; see also paras. 22-25.

¹⁴ **E284/4/8** *Ibid.* at para. 62.

¹⁵ **E284/4/8** *Ibid.* at fn. 176.

justice.¹⁶ As will be indicated below, in any event, the Impugned Decision does not extinguish any *charge*.

6. It is also a longstanding general principle of law that a party cannot benefit from advancing arguments inconsistent with that party's prior submissions (*allegans contraria non est audiendus*).¹⁷ This principle finds direct expression across civil law and common law systems,¹⁸ as well as before international criminal tribunals¹⁹ and the International Court of Justice, in a judgment specifically binding upon the Kingdom of Cambodia.²⁰ The Co-Prosecutors do not suggest that the common law species of *judicial* or *issue estoppel*²¹ is directly applicable before the ECCC,²² but rather submit that the underlying general principle *allegans contraria* is part of the applicable law and fully compatible with the Cambodian legal system.

B. ARGUMENT

7. The Defence readily concedes the fact-specific nature of the Rule 104(4)(a) assessment by referring to "*the current circumstances*" in its submissions on admissibility.²³ The

¹⁶ E284/4/8 Second Severance Appeal Decision, at paras. 61-62.

¹⁷ See e.g. *Cairncross v Lorimer* (1860) 3 Macq 827, recognising the doctrine of "personal bar" in Scots law as part of "the laws of all civilized nations".

¹⁸ See e.g. *Boizard (Liselotte) v Commission of the European Communities* [1982] 1 CMLR 157, per Advocate General Warner at 171: "It seems to me that, if one considers, for instance, the Danish law as to 'stiltiende afkald', the English law as to estoppel, the German law as to 'Rechtsverwirkung', the Italian law as to 'legittimo affidamento' and the Scots law as to personal bar, as well as the French law as to 'renonciation implicite', there emerges a general principle...".

¹⁹ See e.g. *Prosecutor v Bizimungu*, Case No. ICTR-99-50-T, Decision on Defence Motion to Reconsider Order of 2 June 2008 Denying Admission of Church and School Records (ICTR Trial Chamber II), 23 July 2008 at paras. 9ff (applying the common law doctrine of issue estoppel); *Prosecutor v Édouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Strike Allegation of Conspiracy with Juvenal Kajelijeli on the Basis of Collateral Estoppel, 16 July 2008 (considering the common law doctrine of collateral estoppel but finding it inapplicable on the facts).

²⁰ *Temple of Preah Vihear (Cambodia v Thailand) (Merits)* [1962] ICJ Rep 6, 39 (Separate Opinion of Judge Alfaro); see also *North Sea Continental Shelf (Denmark v Federal Republic of Germany; Netherlands v Federal Republic of Germany)* [1969] ICJ Rep 4, 120 (Separate Opinion of Judge Ammoun).

²¹ Also known as the *doctrine of preclusion of inconsistent positions*, the purpose of judicial estoppel is to "to protect the integrity of the judicial process"; see *New Hampshire v Maine*, 352 U.S. 742, 749 (2001) (quoting *Edwards v Aetna Life Ins. Co.*, 690 F.2d 595, 598 (1982) (Supreme Court of the United States of America)). See also *In re Kane*, 628 F.3d 631, 638-340 (3d Cir. 2010) (United States Federal Court of Appeals for the Third Circuit, finding that the appellee's change in position was neither irreconcilably inconsistent with previous disclosures nor made in a bad faith attempt to "play fast and loose with the courts"); see also Kimberly J. Winbush, *Judicial Estoppel in Criminal Prosecution*, 121 A.L.R. 5th 551.

²² See e.g. E96/6 Co-Prosecutors' Reply to the Responses regarding Admission of Witness Statements before the Trial Chamber, 10 August 2011 at para. 27, where the Co-Prosecutors submitted that "concept of estoppel is unknown in Cambodian law, or the civil law tradition more broadly".

²³ E301/9/1/1/1 Appeal, *supra* note 1 at para. 13 [provisional translation from the original French: "les circonstances actuelles"].

Defence also concedes that the previous jurisprudence of the Chamber, and specifically the Second Severance Appeal Decision is the “applicable law” in the instant case.²⁴

8. The Co-Prosecutors submit that the application of Rule 104(4)(a) to bar the Appeal is consistent with the very specific and limited purpose for which Parties are afforded recourse to immediate appeal under this provision. This purpose is “to ensure that an avenue of appeal exists where the proceedings are terminated without arriving at a judgment and therefore without an opportunity to appeal against it.”²⁵ The Appeal does not meet this requirement. First, the Impugned Decision ensures that *all* remaining legal “charges” are included in the next trial.²⁶ In their proposal of crime sites to be included in Case 002/02, the Co-Prosecutors indicated that they “do not propose to drop any “count” from the Indictment but rather, in the interests of an expeditious and representative trial, to limit the evidence presented to prove each of the charges by excluding certain events and crime sites from the trial.”²⁷ In the Impugned Decision, the Trial Chamber upheld this proposal, finding that the approach “adheres to the Supreme Court Chamber’s order while...at the same time retaining a manageable scope.”²⁸ It also included in Case 002/02 additional crime sites proposed by the Nuon Chea Defence and the Civil Party Lead Co-Lawyers.²⁹
9. Second, the Defence is on notice that proceedings in relation to the unadjudicated crime sites or criminal events may, in the future, be terminated or discontinued.³⁰ This approach is in the interests of justice because it is unlikely that judgments can be rendered on all crime sites and criminal events included in the Closing Order within the lifetime of the Accused and many of the victims. It also has the consequence of *reducing* the number of specific criminal allegations which Khieu Samphan must confront, which can only be in his interests. These facts, taken together, significantly minimise the risk of unavailability of appeal on merits, and remove any potential for harm to the interests of the Accused.

²⁴ E301/9/1/1/1 Appeal, *supra* note 1 at para. 15 [“...la Chambre n’a pas respecté le droit applicable tel qu’annoncé par la Cour Suprême”].

²⁵ E284/4/8 Second Severance Appeal Decision, *supra* note 12 at para. 22.

²⁶ See E301/2 Co-Prosecutors’ Submission Regarding the Scope of Case 002/02 and Trial Schedule with Annex A, 5 December 2013, at paras 11, 19.

²⁷ *Ibid.*, at para 26; see also para 28: “Case 002/02 will deal with all the remaining criminal charges in the Closing Order that were not covered in Case 002/01 by selecting representative crime sites for each charge.”

²⁸ E301/9/1 Impugned Decision, *supra* note 1, at para 32.

²⁹ E301/9/1 Impugned Decision, *supra* note 1, at paras 33-35

³⁰ E301/9/1 Impugned Decision, *supra* note 1, at para 45.

10. The Impugned Decision therefore does not operate as a *de facto* stay of proceedings in relation to any criminal charge. It is only the number of crime sites and criminal events that is being reduced, in the legitimate and essential interest, recognised by this Chamber, of arriving at a judgment within a reasonable period of time. The Impugned Decision is thus distinguishable from the Trial Chamber's first severance decision which resulted in this Chamber's finding that a "*de facto* stay of proceedings"³¹ had arisen and that the Co-Prosecutors' appeal of that decision should be admitted under Rule 104(4)(a).³² For these reasons, the Co-Prosecutors submit that the first step in the admissibility assessment must fail, as no *de facto* stay is in place with regard to any charges contained in the Closing Order.
11. Furthermore, the "current circumstances" also differ from the previous severance transaction, for three other reasons bearing on the inadmissibility of the Appeal:
- a. First, the applicable law relevant to the termination of proceedings has been developed by virtue of the Chamber's holding on the principle of prosecutorial legalism before the ECCC, and the possibility of withdrawal of charges / crime sites in the interests of justice. This is a possibility not countenanced by the Trial Chamber or the Parties in the prior severance litigation,³³
 - b. Second, the applicable law relevant to the implications of "promise of resumption" of charges has been clarified by virtue of the Chamber's finding that the duty of the Trial Chamber to "dispose of matters pending before it" includes decisions on closure of proceedings that *do not* pronounce on criminal responsibility, i.e. that the judgement on the merits must be understood as shorthand for definitive disposal of the charges;³⁴
 - c. Third, the Impugned Decision itself anticipates a direct request to withdraw charges by the Co-Prosecutors to the Trial Chamber.³⁵

For these reasons, the Co-Prosecutors submit that the second step in the admissibility assessment must also fail, as the present circumstances disclose a sufficient promise of "resumption" and judgment on all charges. There is every indication on the present

³¹ E284/4/8 Second Severance Appeal Decision, *supra* note 12 at para. 12.

³² E163/5/1/13 First Severance Appeal Decision, *supra* note 11 at paras. 20-26.

³³ E284/4/8 Second Severance Appeal Decision, *supra* note 12 at paras. 61-62.

³⁴ E284/4/8 *Ibid.* at fn. 176.

³⁵ E301/9/1 Impugned Decision, *supra* note 1 at para. 45 and fn. 99.

facts that the Trial Chamber will dispose of the remaining charges in due course. This conclusion is bolstered by the recent findings, made following expert assessments, that each of the Accused are in reasonably good health and fit to stand trial.³⁶

12. Finally, the Co-Prosecutors submit that the irreconcilable inconsistencies in the prior and present legal positions of the Defence make it unfair to give them the benefit of any extension in the interpretation of Rule 104(4)(a). The *non audiendus* principle operates here to bar the Defence from benefitting from expansion of the current interpretation of Rule 104(4)(a), having previously objected to the admissibility of the Co-Prosecutors' first severance appeal on the express basis that "[the first severance decision] is not a *stay*" and does not have the effect of barring a judgment on the merits [but] relates to management of the present trial."³⁷ Indeed, the Defence went so far as to assert that admitting a Rule 104(4)(a) appeal in that instance would "overly extend the ambit" of the Rule.³⁸ The Defence having advanced one position to oppose the Co-Prosecutors, the Chamber should not hear – *non audiendus* – arguments that support an irreconcilably inconsistent position.

III. MERITS

13. Under Rule 104(1) and (2), the applicable standard of review before the Chamber, for factual, legal and discretionary errors alike, is premised on a showing of prejudice or harm to the appellant warranting the exercise of either the Chamber's quashing or corrective jurisdiction.³⁹
14. In essence, the Appeal rests upon the assertion that the Impugned Decision discloses the same error of law that resulted in the annulment or substitution of earlier severance decisions: the absence of a "tangible plan concerning the trials that will follow the trial whose scope is set by means of severance."⁴⁰

³⁶ E301/11 Decision on Fitness of the Accused Nuon Chea to Stand Trial, 25 April 2014; E301/12 Decision on Fitness of the Accused Khieu Samphan to Stand Trial, 25 April 2014.

³⁷ E163/5/1/9 Response to the Co-Prosecutors' Immediate Appeal of Decision on Scope of Trial in Case 002/01, 31 November 2012 at para. 9.

³⁸ E163/5/1/9 *Ibid.* at para. 10.

³⁹ E284/4/8 Second Severance Appeal Decision, *supra* note 12 at para. 70; compare E163/5/1/13 First Severance Appeal Decision, *supra* note 11 at para. 50.

⁴⁰ E301/9/1/1/1 Appeal, *supra* note 1 at paras. 11, 21-23.

15. The Defence defers to the prior jurisprudence of this Chamber as part and parcel of the “applicable law.”⁴¹ Yet, it appears to fundamentally misunderstand or misapply the reasoning of this Chamber in *both*:
- a. the First Severance Appeal Decision – which required the Trial Chamber, based on its “organic familiarity with Case 002” *either* to apply the principle of reasonable representativeness *or* formulate a tangible plan,⁴² depending on the rationale underlying severance – *and*
 - b. the Second Severance Decision, by which this Chamber exercised its corrective jurisdiction to order that an “irreducible minimum” set of charges be brought within the scope of trial in Case 002/02, in line with the applicable international legal standard of reasonable representativeness.⁴³
16. At this stage of proceedings, there is no legal uncertainty that Khieu Samphan is being tried on all remaining legal charges of Case 002 through a minimum set of reasonably representative crime sites and criminal events contained in the Closing Order. This approach is entirely consistent with the legal principles enunciated by this Chamber.
17. In attacking the Impugned Decision for applying incorrect legal standards⁴⁴ and for paucity of reasoning,⁴⁵ the Defence treats its content in isolation from the multiple decisions of the Trial Chamber and this Chamber to which the Impugned Decision expressly refers.⁴⁶ The Co-Prosecutors submit that the Appeal cannot satisfy the standard of review in terms of the law the Impugned Decision applies or the reasoning it adopts.
18. The Appeal is also concerned with numerous vague complaints about: supposed factual inaccuracies in the Impugned Decision relating to delays occasioned by re-severance;⁴⁷ the Trial Chamber’s assessment of experience from trial proceedings in Case 002/01;⁴⁸

⁴¹ E301/9/1/1/1 Appeal, *supra* note 1 at para. 15 [“...la Chambre n’a pas respecté le droit applicable tel qu’annoncé par la Cour Suprême”].

⁴² E163/5/1/13 First Severance Appeal Decision, *supra* note 11 at para. 50.

⁴³ E284/4/8 Second Severance Appeal Decision, *supra* note 12 at para. 70

⁴⁴ E301/9/1/1/1 Appeal, *supra* note 1 at paras. 15-19, 20.

⁴⁵ E301/9/1/1/1 *Ibid.* at para. 11 [provisional translation of the original French: “...la Chambre avait commis l’erreur de ne pas fournir de “plan tangible” concernant les procès devant suivre le procès délimité par la disjonction”; see also paras. 21, 23.

⁴⁶ E301/9/1 Impugned Decision, *supra* note 1 at paras. 2-6, 13-17, 30-31 and 45.


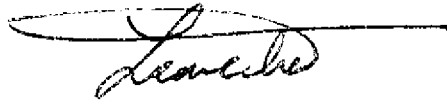

⁴⁷ E301/9/1/1/1 Appeal, *supra* note 1 at paras. 37-48.

⁴⁸ E301/9/1/1/1 *Ibid.* at paras. 49-53.

the extent of attention given to length of proceedings;⁴⁹ and the consideration of inconvenience to witnesses.⁵⁰ Taking these points of the Appeal together, in the interests of brevity, the Co-Prosecutors submit that the Impugned Decision falls within the trial management discretion of the Trial Chamber, to which this Chamber has held that a degree of deference is owed on appellate review.⁵¹ Other aspects of the Appeal also manifestly fall short of the standard of review as factually frivolous, insufficiently substantiated or out of time, including: objections to the Trial Chamber's treatment of prior Defence submissions;⁵² the litigious nature of the protracted severance transaction;⁵³ the incorrect assertion that the Trial Chamber underestimated the need to recall witnesses, experts and civil parties in Case 002/02;⁵⁴ and the impracticality of restricting the scope of trial testimony of certain witnesses during the course of Case 002/01.⁵⁵

19. For these reasons, the Co-Prosecutors respectfully request the Chamber to:
- a. declare the Appeal inadmissible; or, in the alternative,
 - b. dismiss the Appeal on the merits.

Respectfully submitted,

Date	Name	Place	Signature
16 May 2014	CHEA Leang Co-Prosecutor	Phnom Penh 	
	Nicholas KOUMJIAN Co-Prosecutor		

⁴⁹ E301/9/1/1/1 *Ibid.* at paras. 54-60.

⁵⁰ E301/9/1/1/1 *Ibid.* at paras. 61-65.

⁵¹ E163/5/1/13 First Severance Appeal Decision, *supra* note 11 at para. 50

⁵² E301/9/1/1/1 Appeal, *supra* note 1 at para. 37.

⁵³ E301/9/1/1/1 *Ibid.* at para. 52.

⁵⁴ E301/9/1/1/1 *Ibid.* at para. 62; the Impugned Decision characterises the number as “limited”; the Co-Prosecutors’ list specifies three individuals to be recalled from Case 002/01 out of a total number of 127 proposed witnesses, experts and Civil Parties.

⁵⁵ E301/9/1/1/1 *Ibid.* at para. 65.