

**BEFORE THE TRIAL CHAMBER****EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** Mr KHIEU Samphân**Filed to:** Trial Chamber**Original Language:** French**Date of Document:** 31 January 2014**CLASSIFICATION****Classification of the Document Suggested by the Filing Party:** Public**Classification by the Trial Chamber:****Classification Status:****Records Officer's Name:****Signature:**

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**Mr Khieu Samphân's Submissions Regarding the Scope of Case 002/02**

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**Filed by:****Lawyers for Mr KHIEU Samphan**KONG Sam Onn  
Anta GUISSÉ  
Arthur VERCKEN**Assisted by:**SENG Socheata  
Marie CAPOTORTO  
Soumeya MEDJEBEUR  
OUCH Sreypath**Before:****The Trial Chamber**Judge NIL Nonn  
Judge Silvia CARTWRIGHT  
Judge YOU Ottara  
Judge Jean-Marc LAVERGNE  
Judge YA Sokhan**The Co-Prosecutors**CHEA Leang  
Nicholas KOUMJIAN**All Civil Party Lawyers****NUON Chea's Defence**

**MAY IT PLEASE THE TRIAL CHAMBER**

1. On 24 December 2013, the Trial Chamber (“the Chamber”) issued its workplan for the second trial in Case 002 (002/02).<sup>1</sup> In the plan, it enjoined the parties to file their written submissions regarding the scope of Case 002/02<sup>2</sup> by 31 January 2014, and announced that “[t]hereafter, the Chamber would schedule the following”, which included “an opportunity for the parties to file written, or make oral submissions on the fate of facts/charges not included in case 002/02”.<sup>3</sup>

2. Mr KHIEU Samphân’s Defence (“the Defence”) objects to a further severance of the facts still to be adjudicated in Case 002. It also contests the approach taken by the Chamber which flouts the fundamental principles of legal predictability and certainty.

**I. Rejection of a new severance**

3. A new severance of Case 002 would once again violate Mr KHIEU Samphân’s right to be tried without undue delay and his right to a fair trial.

4. Even though it validated the last severance order issued by the Trial Chamber, the Supreme Court Chamber (“the Supreme Court”) described the problems caused by the fragmentation of the case at some length.

5. The Supreme Court noted that decisions on severance “involve balancing different legitimate interests by comparing the benefits and disadvantages of holding a single trial on all charges contained in an indictment as opposed to those of holding multiple trials on these same charges”.<sup>4</sup> It also noted that the factors that have been “taken into consideration include, *inter alia*, the potential prejudice to the accused’s rights, the efficiency and manageability of the proceedings,

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<sup>1</sup> Trial Chamber Workplan for Case 002/02 and Schedule for Upcoming Filings, Memorandum, 24 December 2013, E301/5 (“Workplan E301/5”).

<sup>2</sup> Workplan E301/5, para. 5.

<sup>3</sup> Workplan E301/5, para. 8.

<sup>4</sup> Decision on Immediate Appeals Against Trial Chamber’s Second Decision on Severance of Case 002, the Supreme Court Chamber, 25 November 2013, E284/4/8 (“Decision on Appeals Against the Severance E284/4/8”), para. 37.

the desire to avoid inconsistencies between separate trials, and the potential burden on witnesses.”<sup>5</sup>

6. The Supreme Court noted that “[p]otential prejudice to the rights of accused persons has been considered principally in relation to the right to be tried without undue delay”, considering, *inter alia*, that “two successive trials [...] would inevitably take even longer than a single trial.”<sup>6</sup>

7. Mr KHIEU Samphân did not object to the first severance order issued by the Chamber because, at the time, he thought that his right to be tried without undue delay and his right to a fair trial would be respected.

8. Yet that has not been the case.

9. On the contrary, the delays and procedural and legal problems that arose in the first trial (002/01) were so serious that the Defence had to request an immediate stay of proceedings.<sup>7</sup>

10. The lack of a clear definition of the scope of the first trial (002/01), the absence of a legal framework that clearly governs the presentation of evidence and the utter lack of transparency in the choice of the factual evidence which could be considered in the characterization of one type of criminal responsibility and of crimes against humanity have already given rise to procedural discussions and led to violations of Mr KHIEU Samphân’s rights. The numerous requests for clarification made by the various parties have not yet been clearly addressed.<sup>8</sup>

11. The arguments for requesting an immediate stay of proceedings thus remain valid.

12. This context lent itself to repeated immoderation from a Prosecution bench bent on expanding the scope of the trial *ad infinitum*. For example, at the close of Case 002/01, the Co-

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<sup>5</sup> Decision on Appeals Against the Severance **E284/4/8**, para. 38.

<sup>6</sup> Decision on Appeals Against the Severance **E284/4/8**, para. 38.

<sup>7</sup> Urgent Request by the Defence Team of Mr KHIEU Samphân for an Immediate Stay of Proceedings, 1 August 2013, **E275/2/1/1**.

<sup>8</sup> See, for example, the last two requests for clarification, filed after the close of the trial on the merits, during the drafting of closing briefs: Co-Prosecutors’ Request for Clarification of Findings Regarding the Joint Criminal Enterprise Alleged in Case 002/01, 7 August 2013, **E284/5**; Urgent Request [by Mr KHIEU Samphân’s Defence] for clarification of the Trial Chamber Decision of 15 August 2013 concerning objections to the admissibility of written statements and deferral of the timeline for filing final briefs, 2 September 2013, **E299/1**.

Prosecutors—with oral support from the Civil Parties—outdid themselves in presumptuousness by pleading the existence of systematic JCE (which involves the participation of an accused in a system of maltreatments, in a detention camp or centre) whose common criminal purpose would have been to enslave the whole of Cambodia and eliminate the real or supposed enemies of the CPK. However, the cooperatives and security centres were expressly excluded from the scope of Case 002/01!

13. Again, the Prosecution recently proposed that the Chamber bypass its severance order and the procedural rules in force by deciding that evidence admitted in Case 002/01 would be automatically available and placed before the Chamber in Case 002/02.<sup>9</sup>

14. For these reasons, the Defence today requests the Chamber to stop the severance of the case and try the accused on the basis of all the remaining charges. This solution is not perfect but it is the least imperfect of the solutions open to the Chamber. It does not suit the Defence but, as things stand, it is the only request that it can make in all decency since it is the only means of limiting the new violations of the rights of the accused to those that have already been committed and which cannot be remedied by anything short of an acquittal pure and simple.

15. Unfortunately, the Defence notes that the Chamber is preparing to make the same mistakes as in the past, by once again neglecting the principles of legal predictability and certainty.

## **II. Rejection of legal unpredictability and uncertainty**

16. A reading of the Chamber's workplan for Case 002/02 shows that it is preparing to order a new severance. The Chamber has requested the parties to file their written submissions regarding the scope of Case 002/02, announcing that thereafter, it would give the parties an opportunity to make their submissions regarding the facts referred to in the Closing Order which are "not included in case 002/02". The Chamber's intentions are therefore very clear: there will be a new severance and possibly a third trial.

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<sup>9</sup> Co-Prosecutors' Submission Regarding the Use of Evidence and Procedure for Recall of Witnesses from Case 002/01 in Case 002/02, 15 January 2014, **E302**; Response by the Defence for Mr KHIEU Samphân to the "Co-Prosecutors' Submission Regarding the Use of Evidence and Procedure for Recall of Witnesses from Case 002/01 in Case 002/01", 27 January 2014, **E302/1**.

17. This approach runs counter to the fundamental principles of legal predictability and certainty and has already been criticized by the Supreme Court.<sup>10</sup> The Defence is adamant: these principles must be respected. Failure to do so invalidates and discredits any judicial process, regardless of the number of victims and the gravity of the offences.

18. Beyond this firm and inalienable point of principle, the Defence is of the view that it is not its duty to choose *à la carte* from amongst the facts set out in the Closing Order, as if it were a kind of menu. The pointlessness of any such exercise is evidenced by the fact that Mr KHIEU Samphân is moving the Chamber to acquit him on all the charges alleged in the Closing Order.

19. Yet, what is certain is that with the Prosecution pleading systemic JCE and relying on the entire Closing Order to characterize the chapeau elements, severance was not and is not feasible. The Prosecution's stand has stymied and will continue to stymie all the trials, regardless of their number. Since, as of the very first trial, the Prosecution has premised its case on all the events that they claim occurred in Cambodia between 1975 and 1979, it is precisely a single trial involving all of those alleged events that should have been held. That is no longer possible. An acquittal is therefore the only solution.

20. And if, all that notwithstanding, the Chamber were to decide to defy logic and proceed to find the accused guilty, all avenues of appeal would be immediately pursued to have its decision reversed.

21. The same applies to a possible stay of proceedings regarding facts that may not be selected for Case 002/02. The Defence objects to the dropping of any of the charges since the Prosecution, emboldened and inspired by the Chamber's various suggestions and errors, has already incorporated in its case all of the facts alleged in the Closing Order. Accordingly, by accepting

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<sup>10</sup> Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 8 February 2013, **E163/5/1/13**, paras. 47, 48, 50; Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002 Summary of Reasons, 23 July 2013, **E284/4/7**, paras. 8-10; Decision on Immediate Appeal Against the Trial Chamber's Decision on KHIEU Samphân's Application for Immediate Release, 22 August 2013, **E275/2/3**, para. 48; Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002 **E284/4/8**, paras. 68 and 69. See also: Decision on Co-Prosecutors' Request for Clarification, 26 June 2013, **E284/2/1/2**, para. 6.

that certain charges be dropped, Mr KHIEU Samphân would *ipso facto* be waiving his right to defend himself against the charges already brought against him. That is clearly unacceptable.

22. Regarding the prospect of dropping some charges, it is now obvious that the risk of committing further errors is very high. In any case, the Chamber and the Prosecution have given a strong impression that they agree to again violate the basic right of any accused to be informed of the charges against them and to be afforded the time and resources they need to prepare their defence.<sup>11</sup>

23. That is precisely what happened at the Trial Management Meeting held by the Chamber in December 2013. At that meeting, Judge LAVERGNE, after underscoring the complexity of the issue and the need for an “in-depth” discussion of the subject, suggested that the discussion should be held “at a later stage” saying that: “perhaps the immediate priority is to decide on the scope of the trial and to make a decision on any possible severance.”<sup>12</sup>

24. The Co-Prosecutors’ response to that suggestion was not surprising:

“Well, we absolutely agree. The trial can proceed once we know the scope of the trial [...]”<sup>13</sup>

25. This stand taken by a member of the Chamber and the Co-Prosecutors’ response amply demonstrate that the issue of the facts not included in Case 002/02 could become yet another reason to violate the basic rights of the accused. In fact, if the Chamber ordered a new severance defining Case 002/02 and reserved its right to decide at a later stage either to drop charges or to open a third trial, that would mean that Mr KHIEU Samphân would continue to be kept in the dark for several more years as regards the specific charges against him.

26. Is it really necessary to recall that the Supreme Court recently ruled that “it is the duty of the Trial Chamber to dispose of matters pending before it so that the proceedings into a criminal charge are decided on the merits or dismissed”?<sup>14</sup> Probably not.

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<sup>11</sup> The Supreme Court Chamber reminded the Chamber of the importance of these rights in: *Decision on Co-Prosecutors’ Request for Clarification*, 26 June 2013, **E284/2/1/2**, para. 6 and Footnote 13.

<sup>12</sup> Transcript (“T”) of hearing of 12 December 2013, **E1/238.2**, p. 60, L. 14-23, at approx. [11.13.20].

<sup>13</sup> T. 12 December 2013, **E1/238.2**, p. 60 L. 25 to p. 61 L. 1, at approx. [11.13.20].

27. The truth is that if all the facts that were not adjudicated in Case 002/01 are not determined in Case 002/02, the Prosecution would be free to request the opening of a third trial provided that at least one of the accused is still fit to stand trial and the ECCC is still funded.

28. Accordingly, the only option open to the Trial Chamber is to adjudicate all the remaining facts, bearing in mind that, barring a judgement of acquittal in Case 002/01, this solution would not remedy the immense prejudice suffered by the accused on account of the first severance and the Prosecution's refusal to comply with the rules stemming from the severance.

29. In conclusion, the Defence requests the Chamber to henceforth reject the hypocritical assertion that it is extremely urgent to pass judgement on account of the advanced age or health status of the accused. In fact, in view of the delays in proceedings before the Supreme Court, it is very likely that: 1) either the accused will die without hearing the final judgement, or 2) the solution proposed today by the Defence is in reality the lesser of two evils and the most expeditious.

30. **FOR THESE REASONS**, Mr KHIEU Samphân's Defence requests the Chamber to:

- RULE that Case 002/02 will include all the allegations in the Closing Order which were not considered in Case 002/01.

	KONG Sam Onn	Phnom Penh	[Signed]
	Anta GUISSÉ	Paris	[Signed]
	Arthur VERCKEN	Paris	[Signed]

<sup>14</sup> Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002 E284/4/8, para. 62 and Footnote 172.