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

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

អង្គជំនុំជម្រះតុលាការកំពូល
Supreme Court Chamber
Chambre de la Cour suprême

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Case File/Dossier N°. 002/19-09-2007-ECCC-TC/SC(28)

Before: **Judge KONG Srim, President**
Judge Chandra Nihal JAYASINGHE
Judge Agnieszka KLONOWIECKA-MILART
Judge MONG Monichariya
Judge Florence Ndepele Mwachande MUMBA
Judge SOM Sereyvuth
Judge YA Narin

Date: **25 November 2013**
Language(s): **Khmer/English**
Classification: **PUBLIC**

DECISION ON IMMEDIATE APPEALS AGAINST TRIAL CHAMBER'S SECOND DECISION ON SEVERANCE OF CASE 002

Co-Prosecutors
CHEA Leang
Nicholas KOUMJIAN

Accused
KHIEU Samphân
NUON Chea

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

Co-Lawyers for NUON Chea
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KONG Sam Onn
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Arthur VERCKEN

1. **THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 ("Supreme Court Chamber" and "ECCC", respectively) is seized of the "Co-Prosecutors' Immediate Appeal of Second Decision on Severance of Case 002" filed on 10 May 2013 ("Co-Prosecutors' Appeal"),[1] and of the "Immediate Appeal against Trial Chamber's Second Decision on Severance and Response to Co-Prosecutors' Second Severance Appeal" filed by NUON Chea on 27 May 2013 ("NUON Chea's Appeal" and "NUON Chea's Response", respectively).[2]

I. INTRODUCTION

2. The Co-Prosecutors' Appeal and NUON Chea's Appeal (together, "Appeals") concern a decision of the Trial Chamber, issued orally on 29 March 2013 with reasons in writing filed on 26 April 2013, to sever the proceedings in the present case ("Case 002") into discrete trials ("Second Severance of Case 002") and to confine the scope of the first trial ("Case 002/01") to a limited set of charges.[3] The Impugned Decision follows a decision of the Supreme Court Chamber issued on 8 February 2013 declaring the invalidity of the Trial Chamber's previous similar severance of Case 002 ("First Severance of Case 002" and "SCC Decision", respectively).[4]

a. Background

3. On 16 September 2010, the Co-Investigating Judges issued the Closing Order in Case 002, indicting NUON Chea and KHIEU Samphân (together, "Co-Accused") of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 12 August 1949, and violations of the Cambodian Penal Code of 1956, and establishing the factual allegations for the Trial Chamber to determine ("Indictment").[5] Following a series of appeals, the Pre-Trial Chamber

[1] E284/2/1.
[2] E284/4/1.
[3] T. (EN), 29 March 2013, E1/176.1, pp. 1-4; Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, E284, 26 April 2013 ("Impugned Decision").
[4] Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, E163/5/1/13, 8 February 2013.
[5] Closing Order, D427, dated 15 September 2010 and filed on 16 September 2010 ("Closing Order"). IENG Thirith and IENG Sary were also indicted jointly with the Co-Accused. The charges against IENG Thirith have since been severed and the proceedings against her indefinitely stayed in light of her having been found unfit to stand trial. *See* Decision on Reassessment of Accused IENG Thirith's Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011, E138/1/10, 13 September 2012; Decision on IENG Thirith's Fitness to Stand Trial, E138, 17 November 2011. The proceedings against IENG Sary have since been terminated pursuant to his death on 14 March 2013. *See* Termination of the Proceedings against the Accused IENG Sary, E270/1, 14 March 2013. *See also Post Mortem* Dismissal of IENG Sary's Immediate Appeals, E238/9/1/5, 22 March 2013.

confirmed the Indictment, subject to some amendments.[6] Pursuant to Rules 79 and 80*bis* of the Internal Rules,[7] the Trial Chamber was thereby seized of the Indictment and held an initial hearing from 27 to 30 June 2011.[8] At the Initial Hearing, the Trial Chamber announced the order in which it intended to proceed with the hearing of the substance in Case 002.[9]

4. On 22 September 2011, acting pursuant to Rule 89*ter* of the Internal Rules, the Trial Chamber severed the proceedings in Case 002 for the first time into discrete trials, each comprising finite portions of the Indictment, and each of which would, in turn, conclude with a verdict and sentence in the event of a conviction ("First Severance Order").[10] With respect to the first trial, the Trial Chamber specified that its scope would be limited to: the history and structure of Democratic Kampuchea; the roles of the Co-Accused prior to and during the regime of Democratic Kampuchea; when their roles were assigned, what their responsibilities were, and the extent of their authority; the lines of communication; the movement of the population from Phnom Penh in 1975 ("Phase 1"); the movement of the population from the Central (Old North), Southwest, West and East Zones from September 1975 to 1977 ("Phase 2"); and, five types of crimes against humanity (murder, extermination, persecution (except on religious grounds), forced transfer and forced disappearances), but only insofar as they pertain to Phase 1 and Phase 2.[11] The Trial Chamber also indicated that:

> No co-operatives, worksites, security centres, execution sites or facts relevant to the third phase of population movements will be examined during the first trial. Further, all allegations of, *inter alia*, genocide, persecution on religious grounds as a crime against humanity and Grave Breaches of the Geneva Conventions of 1949 have also been deferred to later phases of the proceedings in Case 002.[12]

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[6] *See* Decision on IENG Sary's Appeal Against the Closing Order, D427/1/30, 11 April 2011; Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order, D427/2/15 *and* D427/3/15, 15 February 2011; Decision on IENG Sary's Appeal Against the Closing Order: Reasons for Continuation of Provisional Detention, D427/1/27, 24 January 2011; Decision on IENG Thirith's and NUON Chea's Appeals Against the Closing Order: Reasons for Continuation of Provisional Detention, D427/2/13 *and* D427/3/13, 21 January 2011; Decision on KHIEU Samphân's Appeal Against the Closing Order, D427/4/15, 21 January 2011; Decision on IENG Sary's Appeal Against the Closing Order's Extension of his Provisional Detention, D427/5/10, 21 January 2011; Decision on IENG Sary's Appeal Against the Closing Order, D427/1/26, 13 January 2011; Decision on IENG Thirith's and NUON Chea's Appeals Against the Closing Order, D427/2/12, 13 January 2011; Decision on KHIEU Samphân's Appeal Against the Closing Order, D427/4/14, 13 January 2011; Decision on IENG Sary's Appeal Against the Closing Order's Extension of his Provisional Detention, D427/5/9, 13 January 2011.
[7] Internal Rules of the ECCC, Revision 8, 3 August 2011 ("Internal Rules").
[8] *See* T. (EN), 27 June 2011, E1/4.1, T. (EN), 28 June 2011, E1/5.1, T. (EN), 29 June 2011, E1/6.1, *and* T. (EN), 30 June 2011, E1/7.1 (together, "Initial Hearing").
[9] *See* T. (EN), 27 June 2011, E1/4.1, pp. 7-8.
[10] Severance Order pursuant to Internal Rule 89*ter*, E124, 22 September 2011.
[11] First Severance Order, paras. 1, 5.
[12] First Severance Order, para. 7.

5. On 3 October 2011, the Co-Prosecutors objected to not having been invited to make submissions on the substance of the First Severance Order prior to its issuance,[13] and accordingly requested that the Trial Chamber reconsider and revise the First Severance Order such that the scope of the first trial include Phase 1 but exclude Phase 2, and add the following nine crime sites: the District 12 and Tuol Po Chrey execution sites; the S-21 security centre, including the purges of cadres from the New North, Central (Old North) and East Zones sent to S-21, but excluding the Prey Sar worksite; the North Zone, Kraing Ta Chan, and Au Kanseng security centres; the Kampong Chhnang Airport construction site; and, the Tram Kok cooperatives.[14] The Co-Prosecutors argued that the First Severance Order was not in the interests of justice because the charges selected for the first trial, which they contended would likely be the only trial in Case 002,[15] were not representative of the Co-Accused's criminal conduct as alleged in the Indictment,[16] would not promote an accurate historical record,[17] and would diminish the legacy of the ECCC in advancing national reconciliation.[18] On 18 October 2011, the Trial Chamber rejected the Request for Reconsideration in its entirety.[19]

6. On 27 January 2012, the Co-Prosecutors requested that the Trial Chamber expand the scope of the first trial by adding three of the nine previously requested crime sites, namely the District 12 execution sites ("District 12"),[20] the Tuol Po Chrey execution site ("Tuol Po Chrey"),[21] and the S-21 security centre (together with the related Choeung Ek execution site), including the purges of cadres from the New North, Central (Old North) and East Zones sent to S-21, but excluding the Prey Sar worksite ("S-21").[22] On 3 August 2012, the Trial Chamber indicated it may be willing to expand the scope of the first trial in the manner proposed by the

[13] Co-Prosecutors' Request for Reconsideration of "Severance Order pursuant to Internal Rule 89*ter*", E124/2, 3 October 2011 ("Request for Reconsideration"), paras. 2, 7, 14-16, 20-23. *See also* Co-Prosecutors' Notice of Request for Reconsideration of the Terms of "Severance Order pursuant to Internal Rule 89*ter*", E124/1, 23 September 2011 ("Notice of Request for Reconsideration"), para. 4(b). The Civil Party Lead Co-Lawyers also objected to not having been heard on the terms of the First Severance Order and similarly sought reconsideration thereof. *See* Lead Co-Lawyers and Civil Party Lawyers Request for Reconsideration of the Terms of the Severance Order E124, E124/8, 18 October 2011 ("Civil Party Request for Reconsideration"). *See also* Lead Co-Lawyers Notice of Request for Reconsideration of the Terms of "Severance Order pursuant to Internal Rule 89*ter*", E124/4, 6 October 2011 ("Civil Party Notice of Request for Reconsideration").

[14] Request for Reconsideration, paras. 1, 36, 42-43. The Co-Prosecutors also requested, in the alternative, that the Trial Chamber "hear the parties, either in writing or orally, on alternate formats of severance in Case 002". *See* Request for Reconsideration, para. 45(2). *See also* Request for Reconsideration, para. 1.

[15] Request for Reconsideration, paras. 3, 15, 24-27, 29-30, 36.

[16] Request for Reconsideration, paras. 3, 18-19, 21-24, 29-32, 36, 44. *See also* Notice of Request for Reconsideration, para. 4(a).

[17] Request for Reconsideration, paras. 3, 32-34. *See also* Notice of Request for Reconsideration, para. 4(a).

[18] Request for Reconsideration, paras. 3, 32, 34. *See also* Notice of Request for Reconsideration, para. 4(a).

[19] 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 ("Decision on Reconsideration").

[20] Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/1, E163, 27 January 2012 ("Request for Expansion"), paras. 4(a), 33(a), *referring to* Closing Order, paras. 691, 693-697.

[21] Request for Expansion, paras. 4(b), 33(b), *referring to* Closing Order, paras. 698-711.

[22] Request for Expansion, paras. 4(c), 33(c), *referring to* Closing Order, paras. 192-204, 415-475.

Co-Prosecutors and invited the parties to make submissions on the matter at the next trial management meeting,[23] which took place on 17 August 2012.[24]

7. On 8 October 2012, the Trial Chamber denied the Request for Expansion with respect to District 12 and S-21,[25] but granted the requested incorporation of Tuol Po Chrey, "insofar as they [...] occurred immediately after the evacuation of Phnom Penh [...], but not otherwise extending to killings that occurred between 1976 and 1977."[26] On 7 November 2013, the Co-Prosecutors appealed the Decision on Expansion, requesting the Supreme Court Chamber to include District 12 and S-21 within the scope of the first trial ("Co-Prosecutors' First Severance Appeal").[27]

8. On 8 February 2013, the Supreme Court Chamber found that the Trial Chamber committed an error of law in interpreting the confines of its discretion under Rule 89*ter* of the Internal Rules to preclude the necessity to demonstrate by way of adequate reasoning the interest of justice in severing Case 002, as well as the necessity to hear the parties in Case 002 on the terms of its severance.[28] It considered that the Trial Chamber's erroneous interpretation of Rule 89*ter* of the Internal Rules had resulted in a violation of the parties' right to a reasoned opinion and their right to be heard, as well as errors in the exercise of the Trial Chamber's discretion which caused prejudice.[29] The Supreme Court Chamber further determined that, despite an indication in the First Severance Order that "further information regarding subsequent cases to be tried in the course of Case 002 will be provided to the parties and the public in due course",[30] the Trial Chamber had not provided any clear or specific information as to the number, scope, or duration of trials envisaged after the first trial,[31] and that such failure to create a plan regarding the handling of the remaining charges to be tried in Case 002 had also caused prejudice.[32] The Supreme Court Chamber decided that the cumulative effect of the errors committed by the Trial Chamber occasioned the invalidity of the First Severance of Case 002, which comprised the First

[23] Memorandum from Judge NIL Nonn, President of the Trial Chamber, entitled "Scheduling of Trial Management Meeting to enable planning of the remaining trial phases in Case 002/01 and implementation of further measures designed to promote trial efficiency", E218, 3 August 2012 ("3 August 2012 Memorandum"), paras. 13-15. *See also* Memorandum from Judge NIL Nonn, President of the Trial Chamber, entitled "Co-Prosecutors' proposed extension of scope of trial in Case 002/01 (E163)", E218.1, 3 August 2012 ("Annex to 3 August 2012 Memorandum").
[24] T. (EN), 17 August 2012, E1/114.1 ("17 August 2012 Trial Management Meeting").
[25] Memorandum from Judge NIL Nonn, President of the Trial Chamber, entitled "Notification of Decision on Co-Prosecutors' Request to Include Additional Crimes Sites within the Scope of Trial in Case 002/01 (E163) and deadline for submission of applicable law portion of Closing Briefs", E163/5, 8 October 2012 ("Decision on Expansion"), para. 2.
[26] Decision on Expansion, para. 3.
[27] 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.
[28] SCC Decision, para. 48.
[29] SCC Decision, para. 48.
[30] First Severance Order, p. 4.
[31] SCC Decision, para. 23.
[32] SCC Decision, para. 48.

Severance Order, the Decision on Reconsideration, and the Decision on Expansion, along with all related memoranda.[33] The Supreme Court Chamber specified that the SCC Decision was without prejudice to the Trial Chamber's reassessment of severing Case 002, but that "it must first invite the parties' submissions on the terms thereof, and only after *all* parties' respective interests are balanced against *all* relevant factors may a severance of Case 002 be soundly undertaken".[34] The Trial Chamber thereafter immediately scheduled a hearing and provided a list of nine detailed and specific issues related to the potential re-severance of Case 002 for the parties to address,[35] which they did on 18 and 20 February 2013.[36] Following the submissions heard on 18 February 2013, the Trial Chamber issued another memorandum on 19 February 2013 requesting supplementary information related to the possible scope of a potential first trial,[37] which the parties provided during a further hearing on 21 February 2013.[38]

9. On 29 March 2013, the Trial Chamber announced in court that it decided to re-sever Case 002 pursuant to Rule 89*ter* of the Internal Rules, and that the scope of Case 002/01 would be confined to the charges related to Phase 1, Phase 2, and Tuol Po Chrey.[39] The Trial Chamber provided its written reasons in the Impugned Decision on 26 April 2013.

b. The Appeals

10. On 10 and 27 May 2013, the Co-Prosecutors and NUON Chea filed their respective Appeals, submitting that they are admissible and that the Impugned Decision contains errors of law, fact, and in the exercise of the Trial Chamber's discretion.[40] The Co-Prosecutors accordingly request the Supreme Court Chamber to amend the Impugned Decision so as to include S-21 within the scope of Case 002/01,[41] whereas NUON Chea requests the annulment of the Impugned Decision with prejudice to future severance orders, or, in the alternative, with the expansion of

[33] SCC Decision, para. 49.
[34] SCC Decision, para. 50 (emphasis in original).
[35] Memorandum by Judge NIL Nonn, President of the Trial Chamber, entitled "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)", E163/5/1/13/1, dated 12 February 2013 and filed on 14 February 2013.
[36] T. (EN), 18 February 2013, E1/171.1; T. (EN), 20 February 2013, E1/172.1.
[37] Memorandum by Judge NIL Nonn, President of the Trial Chamber, entitled "Supplementary questions to the parties following hearing of 18 February 2013 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)", E264, 19 February 2013.
[38] T. (EN), 21 February 2013, E1/173.1.
[39] T. (EN), 29 March 2013, E1/176.1, p. 4.
[40] Co-Prosecutors' Appeal, paras. 3, 15-79; NUON Chea's Appeal, 7-83.
[41] Co-Prosecutors' Appeal, para. 84.

the scope of Case 002/01 such that it includes charges of genocide and those concerning crimes allegedly committed at cooperatives and working sites.[42]

11. NUON Chea's Response to the Co-Prosecutors' Appeal was filed on 27 May 2013 in consolidation with NUON Chea's Appeal,[43] to which he subsequently filed an addendum on 31 May 2013.[44] The Co-Prosecutors similarly responded and replied to NUON Chea's Appeal and Response in consolidated form on 17 June 2013.[45] NUON Chea filed his reply to the Co-Prosecutors' Response on 24 June 2013,[46] and an addendum thereto on 3 July 2013,[47] to which the Co-Prosecutors responded on 15 July 2013.[48] Neither KHIEU Samphân nor the Civil Party Lead Co-Lawyers has offered any submissions.

c. The Addenda

12. NUON Chea requests that the Supreme Court Chamber admit both his addenda, and consider them in conjunction with his appeal.[49] The Co-Prosecutors request that the Supreme Court Chamber dismiss the Addendum to NUON Chea's Reply as "premature, unripe, not relevant and without merit".[50] The ECCC legal framework does not specifically provide for the filing of addenda or other additional submissions beyond motions or appeals, responses, and replies. However, the Supreme Court Chamber notes that processes for the admission of additional submissions are not uncommon at the international level, provided that leave for the admission of such materials is sought before or alongside the filing thereof.[51] In addition, Rule 39(4)(b) of the Internal Rules provides that Chambers may recognise the validity of any action

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[42] NUON Chea's Appeal, para. 84.
[43] *See supra*, para. 1.
[44] Addendum to Immediate Appeal against Trial Chamber's Second Decision on Severance, E284/4/2, 31 May 2013 ("Addendum to NUON Chea's Appeal").
[45] Co-Prosecutors' Combined Response to NUON Chea's Appeal of the Second Decision on Severance and Reply to his Response to the Co-Prosecutors' Appeal, E284/4/3, 17 June 2013 ("Co-Prosecutors' Response" and "Co-Prosecutors' Reply", interchangeably).
[46] Reply to Co-Prosecutors' Response to NUON Chea's Immediate Appeal against the Severance of Case 002, E284/4/4, 24 June 2013 ("NUON Chea's Reply").
[47] Addendum to Reply to OCP Response to NUON Chea's Immediate Appeal against Trial Chamber's Second Decision on Severance, E284/4/5, 3 July 2013 ("Addendum to NUON Chea's Reply").
[48] Co-Prosecutors' Response to NUON Chea's "Addendum to Reply to OCP Response to NUON Chea's Immediate Appeal Against the Trial Chamber's Second Decision on Severance", E284/4/6, 15 July 2013 ("Co-Prosecutors' Response to the Addendum to NUON Chea's Reply").
[49] Addendum to NUON Chea's Appeal, para. 7; Addendum to NUON Chea's Reply, para. 25.
[50] Co-Prosecutors' Response to the Addendum to NUON Chea's Reply, para. 3. *See also* para. 15.
[51] *See, inter alia*, Rule 113 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("SCSL" and "SCSL Rules", respectively) ("(A) An Appellant may file submissions in reply within five days after the filing of the Respondent's submissions. (B) No further submissions may be filed except with leave of the Appeals Chamber"). *See also* Rule 72(G) ("Where the Trial Chamber refers a motion to the Appeals Chamber pursuant to Sub-Rules (E) or (F) above [namely Preliminary Motions], any party wishing to file additional written submissions must seek leave from the Appeals Chamber which will impose time limits for further submissions, responses and replies if leave is granted").

executed after the expiration of a time limit prescribed in the Internal Rules on such terms, if any, as they see fit.

13. On this basis, and in light of the importance of the issues at stake in the present Appeals, the Supreme Court Chamber considers that it is in the interest of justice to admit the Addendum to NUON Chea's Appeal, the Addendum to NUON Chea's Reply, and the Co-Prosecutors' Response to the Addendum to NUON Chea's Reply. The Supreme Court Chamber will therefore consider the submissions made therein. The parties are reminded that leave should be sought from the relevant Chamber when filing any future addenda and responses or replies thereto.

d. Oral Arguments

14. Rule 109(1) of the Internal Rules provides that immediate appeals may be decided on the basis of written submissions only. Having considered the ample written submissions of the parties, the Supreme Court Chamber does not deem it necessary to hear oral arguments in this case, and hereby renders its decision.

II. STANDARDS OF APPELLATE REVIEW

15. Pursuant to Rule 104(4) of the Internal Rules, only the following decisions of the Trial Chamber are subject to immediate appeal: (a) decisions which have the effect of terminating the proceedings; (b) decisions on detention and bail under Rule 82 of the Internal Rules; (c) decisions on protective measures under Rule 29(4)(c) of the Internal Rules; and, (d) decisions on interference with the administration of justice under Rule 35(6) of the Internal Rules. Other decisions may only be appealed at the same time as an appeal against the judgment on the merits.

16. Pursuant to Rules 104(1) and 105(4) of the Internal Rules, the Supreme Court Chamber shall decide immediate appeals on the following grounds: (a) an error on a question of law invalidating the decision; (b) an error of fact which has occasioned a miscarriage of justice; or, (c) a discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the appellant.

III. ADMISSIBILITY

17. The Co-Prosecutors and NUON Chea submit that their respective Appeals are timely pursuant to Rule 107(1) of the Internal Rules, and admissible pursuant to Rules 104(4)(a) and 104(1) of the Internal Rules.[52]

a. Timeliness

18. Rule 107(1) of the Internal Rules provides that immediate appeals shall be filed within 30 days of the date of an impugned Trial Chamber decision or its notification. Rule 39(3) of the Internal Rules provides that a time limit that expires on a Saturday, Sunday or Cambodian public holiday shall automatically be extended to the subsequent working day. The Impugned Decision was filed and notified on 26 April 2013. The Co-Prosecutors' Appeal was filed 14 days later on Friday, 10 May 2013, and NUON Chea's Appeal was filed 31 days later, on Monday, 27 May 2013. The timeliness of the filing of the Appeals is not in dispute.

19. The Appeals are therefore timely under Rules 39(3) and 107(1) of the Internal Rules.

b. Rule 104(4)(a) of the Internal Rules

20. The Co-Prosecutors submit that the Impugned Decision effectively terminates the prosecution of the Co-Accused for the most serious charges in the Indictment, including the arrest, detention, torture and execution of hundreds of thousands of Cambodians at the network of security centres across Democratic Kampuchea.[53] They contend that the decision to exclude S-21 from the scope of Case 002/01 results in "an effective stay of proceedings in relation to the charges associated with the S-21 crime site, the resolution of which in a judgment on the merits is intangibly remote".[54] NUON Chea concurs with the Co-Prosecutors, but points out that the Impugned Decision excludes not only S-21 from the ongoing proceedings, but also the balance of the Closing Order.[55] The Co-Prosecutors do not contest the admissibility of NUON Chea's Appeal.[56]

21. The Supreme Court Chamber recalls that the right of appeal provided for in Rule 104(4)(a) of the Internal Rules ensures that an avenue of appeal exists where the proceedings are terminated without arriving at a judgment and therefore without an opportunity to appeal against

[52] Co-Prosecutors' Appeal, paras. 1, 3, 15-19; NUON Chea's Appeal, para. 8.
[53] Co-Prosecutors' Appeal, para. 1(a).
[54] Co-Prosecutors' Appeal, para. 19. *See also* Co-Prosecutors' Appeal, paras. 16-18.
[55] NUON Chea's Appeal, para. 8.
[56] Co-Prosecutors' Response, paras. 2, 5.

it.[57] The Supreme Court Chamber has interpreted Rule 104(4)(a) of the Internal Rules to include decisions to stay the proceedings that do not carry a tangible promise of resumption, thereby barring arrival at a judgment on the merits.[58]

22. In examining the Trial Chamber's First Severance of Case 002, the Supreme Court Chamber found that the Decision on Expansion denying inclusion of S-21 and District 12 within the scope of the first trial had the effect of terminating the proceedings in relation to those charges,[59] and that the Co-Prosecutors' First Severance Appeal was therefore admissible under Rule 104(4)(a) of the Internal Rules.[60] The Supreme Court Chamber's basis for so concluding was that, as the definitive decision on the mode of the First Severance of Case 002, the Decision on Expansion resulted in a *de facto* stay of proceedings in relation to all charges placed outside the scope of the first trial, and that, under the circumstances prevailing at the time, such stay did not carry a sufficiently tangible promise of resumption as to permit arriving at a judgment on the merits.[61]

23. The circumstances prevailing at the time of the SCC Decision included: the advanced age and declining health of the Co-Accused; the Trial Chamber's failure to provide a tangible plan or any information regarding subsequent cases to be tried in the course of Case 002; the difficulties expressed by the Trial Chamber in meeting its workload demands; the fact that, in the context of the ECCC, judgments on the merits are not final until having passed through the appellate stage; and, the views of the parties and of the Trial Chamber that the first trial would be the only trial to ever reach judgment.[62]

24. With respect to the Trial Chamber's failure to provide a tangible plan or any information regarding subsequent cases to be tried after the first trial, the Supreme Court Chamber notes that the Trial Chamber has now annexed what it describes as "a tentative outline for future trials in Case 002"[63] to the Impugned Decision.[64] However, the Trial Chamber specified that it "doubts that projections for future trials can meaningfully constitute a plan".[65] The Trial Chamber also abstained from resolving the issue as to how any subsequent trials might be conducted, and

[57] SCC Decision, para. 22, *referring to* Decision on IENG Sary's Appeal against Trial Chamber's Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes against Humanity, E95/8/1/4, 19 March 2012, para. 9.
[58] SCC Decision, para. 22, *referring to* Decision on Immediate Appeal against the Trial Chamber's Order to Release the Accused IENG Thirith, E138/1/7, 13 December 2011, para. 15.
[59] SCC Decision, para. 25.
[60] SCC Decision, para. 26.
[61] SCC Decision, para. 25.
[62] SCC Decision, para. 24.
[63] Impugned Decision, para. 153.
[64] Impugned Decision, pp. 71-74.
[65] Impugned Decision, para. 153.

particularly when a potential second trial in Case 002 ("Case 002/02") could commence.[66] Instead, the Trial Chamber proposed to "hold[] a Trial Management Meeting later in the year, when the issue can be revisited anew in the light of circumstances then prevailing".[67] As such, the Supreme Court Chamber finds that the Trial Chamber has once again failed to provide a tangible plan regarding subsequent cases to be tried after Case 002/01.

25. Other circumstances prevailing at the time of the SCC Decision also remain applicable at the present time. In deciding to re-sever Case 002, the Trial Chamber reiterated that its primary consideration was to maintain the ability to render "any verdict" in Case 002,[68] pointing out the fact of IENG Sary's recent death.[69] As an additional factor, the Trial Chamber invoked the uncertainty regarding the duration and continuity of financial support to the ECCC.[70] The Trial Chamber further declared that no further extensions to the scope of Case 002/01 shall be entertained.[71]

26. In light of the above, the Supreme Court Chamber considers that the Impugned Decision results in a *de facto* stay of proceedings in relation to all charges placed outside the scope of Case 002/01, and that, under the present circumstances, such stay does not carry a sufficiently tangible promise of resumption as to permit arriving at a judgment on the merits. The Supreme Court Chamber accordingly finds that the Second Severance of Case 002 and the decision to confine the scope of Case 002/01 to the charges related to Phase 1, Phase 2, and Tuol Po Chrey has the effect of terminating the proceedings in relation to the balance of the remaining charges in the Closing Order.

27. The Appeals are therefore admissible under Rule 104(4)(a) of the Internal Rules.

IV. MERITS

28. As recalled above, on 26 April 2013, the Trial Chamber issued the Impugned Decision wherein it ordered the Second Severance of Case 002 in the same manner as before, that is, it confined the scope of Case 002/01 to include only the charges relating to Phase 1, Phase 2, and Tuol Po Chrey.[72]

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[66] Impugned Decision, paras. 154-155.
[67] Impugned Decision, para. 155.
[68] Impugned Decision, paras. 8, 135, 161.
[69] Impugned Decision, paras. 4, 28, 47, 129, 132, 135, 161.
[70] Impugned Decision, paras. 145-146, 153, 155, 161.
[71] Impugned Decision, p. 70.
[72] *See supra*, paras. 2, 4-9. *See also* Impugned Decision, paras. 4, 85-161, p. 70.

29. The Co-Prosecutors submit that the Trial Chamber erred in failing to apply the legal standards for severance mandated by the Supreme Court Chamber.[73] They contend that the Trial Chamber erred in concluding that the existing scope of Case 002/01 was sufficiently representative of the Indictment without the addition of S-21,[74] and in concluding that the addition of S-21 would unreasonably delay the trial.[75] They further argue that the Trial Chamber erred in proposing a series of future trials, given the age and health of the Co-Accused.[76] The Co-Prosecutors accordingly request the Supreme Court Chamber to amend the Impugned Decision so as to include S-21 within the scope of Case 002/01.[77]

30. NUON Chea submits that the Trial Chamber erred in deciding to sever Case 002 anew,[78] and in failing to include charges relating to genocide and cooperatives and worksites in Case 002/01.[79] He accordingly requests the Supreme Court Chamber to annul the Impugned Decision with prejudice to future severance orders, or, in the alternative, to expand of the scope of Case 002/01 such that it includes charges of genocide and those concerning crimes allegedly committed at cooperatives and worksites.[80]

a. Alleged Impropriety of Ordering the Second Severance of Case 002

31. In the Impugned Decision, the Trial Chamber addressed, as a preliminary matter, "whether renewed severance is appropriate at this late stage of trial".[81] The Trial Chamber stated that "[w]hen severance of proceedings was first undertaken [...] prior to the commencement of trial, this was considered by the Trial Chamber as necessary in the interests of justice in order to safeguard its ability to render any timely verdict in Case 002".[82] The Trial Chamber considered that "the constraints that made severance necessary in September 2011 (namely the advanced age and increasing physical frailty of the Case 002 Co-Accused, and the unlikelihood that all allegations in the Case 002 Closing Order could be heard during the lifespan of the [Co-]Accused or while they remained fit to be tried) remain unchanged and indeed, have been accentuated by developments since the Trial Chamber's initial severance of Case 002".[83] For these reasons, the

[73] Co-Prosecutors' Appeal, paras. 20-27.
[74] Co-Prosecutors' Appeal, paras. 28-50.
[75] Co-Prosecutors' Appeal, paras. 51-75.
[76] Co-Prosecutors' Appeal, paras. 76-79.
[77] Co-Prosecutors' Appeal, para. 84.
[78] NUON Chea's Appeal, paras. 9-27.
[79] NUON Chea's Appeal, paras. 28-55.
[80] NUON Chea's Appeal, para. 84.
[81] Impugned Decision, para. 85.
[82] Impugned Decision, para. 86.
[83] Impugned Decision, para. 87.

Trial Chamber decided that "renewed severance of the Case 002 Closing Order is still required in the interests of justice".[84]

32. NUON Chea submits that the Trial Chamber erred in deciding to sever Case 002 anew because it gave no consideration to the Co-Accused's submissions on the issue,[85] and it did not articulate a plan sufficient to resolve the legal and practical impediments to holding sequential trials at the ECCC.[86] In particular, he contends that, before ordering severance of joined charges, the Trial Chamber was required to consider the potential prejudice to the accused's rights, the potential burden on witnesses, and "other factors relevant to the interests of justice, particularly the relative manageability for the Chamber and the parties of a single trial versus separate trials".[87] He further avers that severance is inconsistent with his right to a fair trial because the experience during the First Severance of Case 002 has demonstrated that the allegations in the Closing Order are too related to permit meaningful separation into discrete trials.[88] He argues that the effort to do so has caused him prejudice, most seriously by hindering his ability to confront the evidence against him and to mount a full and effective defence by eliminating a holistic perspective of Case 002.[89] He adds that renewed severance is inappropriate because the First Severance of Case 002 has rendered the first trial unmanageable,[90] and because the Trial Chamber would be unable to act impartially in Case 002/02 after issuing a judgment in Case 002/01.[91] He contends that these errors require the annulment of the Impugned Decision.[92]

33. The Co-Prosecutors respond that NUON Chea is barred from arguing the impropriety of the principle of severance, because since severance was first ordered in September 2011, he has advanced a position that is exactly opposite to his position now, and it is a general principle of law that a party cannot succeed in advancing arguments inconsistent with that party's prior submissions.[93] The Co-Prosecutors further contend that the Second Severance of Case 002 is, in principle, fully compatible with NUON Chea's fair trial rights, and that he fails to meaningfully support his argument that severance in fact violates them.[94]

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[84] Impugned Decision, para. 90.
[85] NUON Chea's Appeal, paras. 9, 22-24.
[86] NUON Chea's Appeal, para. 9.
[87] NUON Chea's Appeal, para. 11.
[88] NUON Chea's Appeal, paras. 12-21; Addendum to NUON Chea's Reply, paras. 21-24.
[89] NUON Chea's Appeal, paras. 12-20; Addendum to NUON Chea's Reply, paras. 13-21, 23-24. *See also* NUON Chea's Reply, para. 5.
[90] NUON Chea's Appeal, paras. 12, 20.
[91] NUON Chea's Appeal, para. 21; Addendum to NUON Chea's Reply, para. 22.
[92] NUON Chea's Appeal, paras. 9, 25-27.
[93] Co-Prosecutors' Response, paras. 6-7.
[94] Co-Prosecutors' Response, paras. 8-16.

34. NUON Chea replies that views previously expressed in his defence on the issue of severance have no bearing on the determination of his present appeal, and that nothing therein is inconsistent with any of his prior positions.[95]

35. The severance of proceedings at the ECCC is foreseen under Rule 89*ter* of the Internal Rules as follows:

> When the interest of justice so requires, the Trial Chamber may at any stage order the separation of proceedings in relation to one or several accused and concerning part or the entirety of the charges contained in an [i]ndictment. The cases as separated shall be tried and adjudicated in such order as the Trial Chamber deems appropriate.

36. The Supreme Court Chamber recalls that, in declaring the invalidity of the First Severance of Case 002, it specified that the SCC Decision was without prejudice to the Trial Chamber's reassessment of severing Case 002, but that "it must first invite the parties' submissions on the terms thereof, and only after *all* parties' respective interests are balanced against *all* relevant factors may a severance of Case 002 be soundly undertaken".[96] Moreover, the Supreme Court Chamber provided specific guidance on the notion that severance must be required by the "interest of justice":

> The language of Rule 89*ter* of the Internal Rules readily announces that a decision to sever proceedings is not purely discretionary in that it must be justified by the "interest of justice", but offers no guidance as to what circumstances would satisfy the requirement. In the Supreme Court Chamber's view, the "interest of justice" to sever must be read to denote a condition where accused and/or charges tried separately better serve the objectives of the criminal proceedings and principles on which they are premised. So understood, the "interest of justice" to sever will lie in a variety of factors, to be determined on a case-by-case basis, upon consideration of which the Trial Chamber may decide to sever a case. However, notwithstanding the breadth of discretion vested in the Trial Chamber in deciding on the severance, the "interest of justice" needs to be demonstrated with adequate reasoning which points to concrete and relevant circumstances and explains their common effect on the severed case as a whole.[97]

37. To the extent that, despite this clarification, the Trial Chamber considered that the discretion granted to it by Rule 89*ter* of the Internal Rules remained unfettered or uncertain,[98] it should have sought guidance in the procedural rules established at the international level.[99]

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[95] NUON Chea's Reply, paras. 3-4.
[96] *See supra*, para. 8, *citing* SCC Decision, para. 50 (emphasis in original).
[97] SCC Decision, para. 35.
[98] *See* Impugned Decision, para. 125 (concluding "that the factors to be weighed are within its trial management discretion" on the purported basis that the SCC Decision does not provide "[a]n exhaustive list of 'all' or 'other conceivably relevant' factors that [it] may consider before proceeding to severance or in determining the scope of trial").
[99] Article 12(1) of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea ("ECCC Agreement"); Article 33*new* of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia

Indeed, whereas international criminal tribunals are generally bestowed with broad discretionary power to sever charges or separate multi-accused trials,[100] this exercise of discretion is tempered by normative use of criteria such as "interests of justice", "conflicts of interest", and "prejudice to the accused", even where such terms do not appear in their Statutes and Rules of Procedure.[101] As previously articulated by the Supreme Court Chamber, decisions on severance therefore 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.[102]

38. 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, the desire to avoid inconsistencies between separate trials, and the potential burden on witnesses.[103] Potential prejudice to the rights of accused persons has been considered principally in relation to the right to be tried without undue delay owing to circumstances particular to certain accused or "in relation to evidence relevant to certain crimes and not others in the joint trial".[104] In particular, it

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for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea ("ECCC Law"); Rule 2 of the Internal Rules.

[100] *See, e.g.*, Rules 48, 49, 72(A)(iii), and 82(B) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia ("ICTY" and "ICTY Rules", respectively), Rules 48, 48*bis*, 49, 72(A)(iii), and 82(B) of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda ("ICTR"), Rules 48, 49, 72(B)(iii), and 82(B) of the SCSL Rules, and, as regards separation of trials against multiple accused, Article 64(5) of the Rome Statute of the International Criminal Court and Rule 136 of the Rules of Procedure and Evidence of the International Criminal Court ("ICC Rules"). *See also* ICTY, *Prosecutor v. Ratko 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 ("*Mladić* Decision"), para. 22 ("the [Trial] Chamber has the authority to sever joined charges in an indictment and to conduct separate trials"); ICTY, *Prosecutor v. Slobodan MILOŠEVIĆ*, Case No. IT-99-37-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("*Milošević* Appeal Decision"), para. 26 ("if with the benefit of hindsight it becomes apparent to the Trial Chamber that the trial has developed in such a way as to become unmanageable [...] it will still be open to the Trial Chamber at that stage to order a severance of the charges").

[101] *See e.g.. Mladić* Decision, paras. 16, 28; Suzannah LINTON in Göran SLUITER, Håkan FRIMAN, Suzannah LINTON, Salvatore ZAPPALA, Sergey VASILIEV (eds.), *International Criminal Procedure: Rules and Principles*, 1st ed (Oxford: Oxford University Press, 2013) ("Sluiter et al. ICP Book"), p. 525.

[102] *See* SCC Decision, para. 50.

[103] *See, inter alia, Mladić* Decision, paras. 15, 25-26, 28-37; *Milošević* Appeal Decision, paras. 22, 24-30. *See also* ICTY, *Prosecutor v. Radoslav BRĐANIN and Momir TALIĆ*, Case No. IT-99-36-T, Decision on Prosecution's Oral Request for the Separation of Trials, 20 September 2002 ("*Talić* Decision"), paras. 26, 28; *Prosecutor v. Jadranko PRLIĆ et al.,* Case No. IT-04-74-PT, Decision on Defence's Motions for Separate Trials and Severance of Counts, 1 July 2005, para. 23; ICTR, *Prosecutor v. Théoneste BAGOSORA et al.*, Case No. ICTR-98-41-T, Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses, 9 September 2003, para. 22; *Prosecutor v. Théoneste BAGOSORA* (Case No. ICTR-96-7), *Gratien KABILIGI* (Case No. ICTR-97-34), *Aloys NTABAKUZE* (Case No. ICTR-97-30), *and Anatole NSENGIYUMVA* (Case No. ICTR-96-12), Decision on the Prosecutor's Motion for Joinder, 29 June 2000 ("*Bagosora* Joinder Decision"), para. 147; SCSL, *Prosecutor v. Issa Hassan SESAY* (Case No. SCSL-2003-05-PT), *Alex Tamba BRIMA* (Case No. SCSL-2003-06-PT), *Morris KALLON* (Case No. SCSL-2003-07-PT), *Augustine GBAO* (Case No. SCSL-2003-09-PT), *Brima Bazzy KAMARA* (Case No. SCSL-2003-10-PT), and *Santigie Borbor KANU* (Case No. SCSL-2003-10-PT), Decision and Order on Prosecution Motions for Joinder, 27 January 2004 ("*Sesay* Decision"), paras. 28, 42- 44.

[104] *Mladić* Decision, para. 25.

has been considered that severance of charges may affect the accused's ability to participate in the preparation of his defence for the second trial, as it would require the accused's simultaneous involvement in two cases.[105] Relevant, moreover, has been the risk of severance impairing the accused's right to be tried without undue delay in relation to charges adjudicated in the second trial,[106] considering that "two successive trials [...] would inevitably take even longer than a single trial."[107] 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]".[108]

39. Overall, concerns of efficiency of proceedings involve considering the relative manageability for the Chamber and the parties of a single trial *versus* multiple ones, and determining whether management concerns are ameliorated by holding separate trials.[109] Efficiency of holding multiple trials instead of one has been examined notably in terms of: (i) the presentation of evidence, which 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; (ii) the overall length of proceedings; (iii) arranging and coordinating the testimony of witnesses for the second trial after they have testified in the first; (iv) litigation of procedural issues that would need to be decided on twice; (v) possible loss of the benefits associated with a routine and manners of operating that have been established in the first trial and that may not be adopted by a second trial chamber, if subsequent trials are handled by different chambers; (vi) legal and managerial concerns if the same panel of judges are assigned to the first and second cases, including the possibility that partiality and appearance of partiality of the chamber may be raised as well as the pace of the second trial if the chamber is busy with drafting the judgment in the first case.[110] In addition to managerial concerns related to arranging

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[105] *Mladić* Decision, para. 31.
[106] *See Mladić* Decision, para. 32.
[107] *Milošević* Appeal Decision, para. 27.
[108] *Sesay* Decision, para. 41. *See also* ICTY, *Prosecutor v. Radoslav BRĐANIN and Momir TALIĆ*, Case No. IT-99-36-T, Decision on Motions by Momir Talić for a Separate Trial and for Leave to File a Reply, 9 March 2000, para. 29.
[109] *See, on severance of charges, Mladić* Decision, paras. 15, 28-36, *and Milošević* Appeal Decision, para. 26. *See also, on separation of trials of co-accused, Talić* Decision, para. 26 ("The jurisprudence of the Tribunal reflects the submission of the Prosecution that judicial economy and expediency of trials are two of the essential pre-conditions that ought to be borne in mind when the Trial Chamber considers a case under Rule 82(B)"); *Sesay* Decision, para. 28(f)(i) (stating that "factors to be taken into consideration in determining whether the interests of justice will be served by a joinder" include, *inter alia,* "the public interest in savings and expenses and time") and para. 42(a) and (f); ICTR *Prosecutor v. Clement KAYISHEMA* (Case No. ICTR-95-I-T), *Gérard NTAKIRUTIMANA* (Cases Nos. ICTR-96-10-T and ICTR-96-17-T), *and Obed RUZINDANA* (Case Nos. ICTR-95-1-T and ICTR-96-10-T), Decision on the Motion of the Prosecutor to Sever, to Join in a Superseding Indictment and to Amend the Superseding Indictment, 27 March 1997, pp. 4-5.
[110] *See Mladić* Decision, paras. 34-35; *Milošević* Appeal Decision, paras. 24-26. *See also, on the duplication of evidence, Milošević* Appeal Decision, para. 30; *Sesay* Decision, paras. 28(f)(iv), (g) and 42(d) (emphasizing "[t]he

for multiple testimonies by the same witnesses, a particular burden on witnesses themselves has been stressed in terms of the necessary protection and emotional distress and disruption to their personal lives.[111] Finally, a preference for joint trials has been expressed in order to minimize the possibility of inconsistencies in the treatment of evidence, sentencing, and the determination of other legal issues.[112] In the case of the International Criminal Court, there is an explicit preference for joint trials.[113]

40. The *ad hoc* international criminal tribunals have thus far found that the factors mentioned above favoured a single trial and refused to sever charges stemming from materially-related events.[114] Where severance has been ordered, it has only been in order to separate the trials of individual persons in multi-accused indictments,[115] based on the need to protect the right to be tried without undue delay where the circumstances relevant to one accused delayed the trial of others.[116] By the same token, concerns about the right to a fair and expeditious trial where specific prejudice to speedy proceedings has been identified prompted a refusal to join cases.[117]

41. This jurisprudence reflects a normative approach adopted in a number of national jurisdictions, both in common law, such as Canada, the United States of America, England and Wales, and civil law systems such as Italy, Germany and France, where trial courts have balanced the accused's right to a fair and expeditious trial against society's interest in seeing that

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need for a consistent and detailed presentation of evidence") *and, on the overall length of proceedings, Bagosora* Joinder Decision, para. 155.

[111] *See Mladić* Decision, paras. 28, 37 ("The calling of witnesses in multiple trials is a trial management concern, but is also a concern as to the witnesses themselves, particularly when the potential period of time between the first and the second calling could be extensive and the practical considerations of the disruption to witnesses' daily lives"); *Sesay* Decision, paras. 28(f)(iv) and 42(e) (emphasizing the need for "better protection of the victims' and witness' physical and mental safety by eliminating the need for them to make several journeys"). *See also Talić* Decision, para. 28 *and* ICTY *Prosecutor v. Jadranko PRLIĆ et al.,* Case No. IT-04-74-PT, Decision on Defence's Motions for Separate Trials and Severance of Counts, 1 July 2005, para. 23.

[112] *See Sesay* Decision, paras. 28(f)(ii)-(iii), 42(b)-(c), 44(h). *See also Bagosora* Joinder Decision, para. 143 ("It is also desirable, and in the interests of transparent justice, that the same verdict and the same treatment should be returned against all the persons jointly tried with respect to the offences committed in the same transaction. It is also to avoid the discrepancies and inconsistencies inevitable from the separate trial of joint offenders."), *quoting. Prosecutor v. Zejnil DELALIĆ et al.,* Case No. IT-96-21-T, Decision on the Motion by Defendant Delalic Requesting Procedures for Final Determination of the Charges Against Him, 1 July 1998, para. 35.

[113] *See* Rule 136 of the ICC Rules.

[114] *See Mladić* Decision *and Milošević* Appeal Decision.

[115] *See* SCC Decision, para. 33 *and* fn. 86.

[116] *See, e.g. Prosecutor v. Pavle STRUGAR and Vladimir KOVAČEVIĆ*, Case No. IT-01-04-PT, Decision on the Prosecutor's Motion for Separate Trial and Order to Schedule a Pre-Trial Conference and the Start of the Trial against Pavle Strugar, 26 November 2003; *Talić* Decision, para. 26.

[117] *See Sesay* Decision para. 46 (where the SCSL Trial Chamber refused to join proceedings against accused belonging to two different military factions in order to keep the proceedings focused and thus enhance the fairness and expeditiousness of the trial).

justice is done in a reasonably efficient and cost-effective manner, and the desirability of avoiding conflicting verdicts.[118]

42. Human rights jurisprudence has concerned itself with joinder and severance mainly in the aspect of the right to liberty and to an expeditious trial. Specifically, the European Court of

[118] **In Canada**, *see* Art. 591 of the Canadian Criminal Code; *R. v. Last*, [2009] 3 S.C.R. 146, para. 16 ("The interests of justice encompass the accused's right to be tried on the evidence admissible against him, as well as society's interest in seeing that justice is done in a reasonably efficient and cost-effective manner. The obvious risk when counts are tried together is that the evidence admissible on one count will influence the verdict on an unrelated count.") *and* para. 18 ("Factors courts rightly use include: the general prejudice to the accused; the legal and factual nexus between the counts; the complexity of the evidence; whether the accused intends to testify on one count but not another; the possibility of inconsistent verdicts; the desire to avoid a multiplicity of proceedings; the use of similar fact evidence at trial; the length of the trial having regard to the evidence to be called; the potential prejudice to the accused with respect to the right to be tried within a reasonable time; and the existence of antagonistic defences as between co-accused persons"). **In the United States**, *see* Rule 14(a) of the US Federal Rules of Criminal Procedure (which provides for the possibility to sever charges or order separate trials if joinder "appears to prejudice a defendant or the government"); *Zafiro v. United States*, 506 U.S. 534 ("Severance should be granted only if there is a serious risk that a joint trial would compromise a specific trial right of a properly joined defendant or prevent the jury from making a reliable judgment about guilt or innocence. The risk of prejudice will vary with the facts in each case, and the Rule leaves determination of the risk, and the tailoring of any necessary remedy, to the sound discretion of the district courts."); *Nichols and Gillespie v. State of Arkansas,* CA CR 99-354 (Court of Appeals of Arkansas) ("A trial court has discretion to grant or deny a severance, and the appellate court will not disturb the ruling absent an abuse of discretion; the joinder and severance rules are designed to promote an expeditious disposition of criminal cases while at the same time not prejudicing individual defendants"). **In England and Wales**, *see* Section 5(1) of the Indictments Act 1915 (stating that "[w]here, before trial, or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment"); *Ludlow v. Metropolitan Police Commissioner,* [1971] A.C. 29 ("The judge has no duty to direct separate trials under section 5(3) [of the Indictments Act 1915] unless in his opinion there is some special feature of the case which would make a joint trial of the several counts prejudicial or embarrassing to the accused and separate trials are required *in the interests of justice* [...]"). **In Germany**, a criminal case can be severed on grounds of expediency, s*ee* Sections 2 *and* 4 of the Law on Criminal Procedure. Expediency is meant in the broad sense that it is supposed to be more convenient for the future conduct of the trial. It lies within the discretion of the court to define the expediency of the severance. *See* Pfeiffer, Strafprozessordnung, Kommentar, C.H.BECK, 5th Ed. 2005, Art. 2, para. 4. The exercise of this discretion is subject to appeal pursuant to Art. 304 (1) Criminal Procedure Code (OLG Hamm, 3 Ws 386/01; OLG Frankfurt, StV 1983, para. 92. **In France**, severance of charges is permissible in the interests of justice, but only where the charges, whilst related, are not "indivisible". *See* Art. 286 of the Code of Criminal Procedure; Henri Angevin, *Jurisclasseur,* Fasc. 20 : Cour d'Assises – Procédure préparatoire aux sessions d'assises – Actes facultatifs ou exceptionnels, 1 mai 2007 (« Angevin »), para. 58 (« *la disjonction pouvait être ordonnée 'quand il s'agit de faits qui, bien que connexes, sont néanmoins distincts par le temps et les lieux et peuvent être débattus et jugés séparément'* ») *referring to* Cass. Crim., 8 August 1873, Bull. Crim. 1873, no. 224; Cass. Crim., 27 May 1964, Bull. Crim. 1964, no. 181; Cass. Crim., 8 October 1969, Bull. Crim. 1969, no. 244. S*ee also* Crim. Cass. 27 May 1964, Bull. Crim. 1964, no. 181. Separation of trials is typically ordered in multi-accused cases, where the proceedings against one accused delay the trial of others. *See* Angevin, para. 60. Severance of charges has been ordered where some of them were not ready to be adjudicated. *See* Crim. Cass. 3 May 1972, Bull. Crim. 1972, no. 150. **In Italy**, severance is favoured in order to ensure the swift disposition of all autonomous matters in an indictment. *See* Articles 17-19 of the Italian Code of Criminal Procedure. A judge must order separation, for instance: during the preliminary hearing, where it is possible to reach swiftly the decision for some accused, while it is necessary to carry out further investigation in relation to others; where proceedings against some accused, or in relation to certain charges, have been stayed; and, if evidentiary hearings in relation to some accused or some charges are concluded, while in relation to other accused or other charges there is a need to take further action. Apart from these statutorily indicated cases, the judge may sever proceedings where s/he considers such measure useful to speed up the course of the trial. However, this may be done only with the parties' consent. The general principle of severance does not apply, however, where the joint adjudication of the various factual elements referred to by the indictment as absolutely necessary to guarantee that the whole decision is correct and just; this situation occurs in particular where factual elements of multiple charges are mutually dependent and prejudicial. *See* Luigi Tramontano, Codice di procedura penale spiegato, Art. 18; La Tribuna, 2013.

Human Rights ("ECtHR") has found that national courts' decisions on severance did not, as such, cause unjustified delays or otherwise violate the right to fair trial; rather, the issue was whether the question of severance occasioned periods of inactivity on the part of investigative or judicial authorities.[119] In this respect, the Supreme Court Chamber recalls that "the continued detention of any accused person must relate to specific charges subject to criminal proceedings",[120] and that according to the jurisprudence of the ECtHR, "[the complexity of the case] may continue to justify the prolongation of the deprivation of liberty only where the competent authorities have demonstrated 'special diligence' in the conduct of proceedings".[121]

43. The following conclusions are warranted upon this review. First, notwithstanding a breadth of discretion vested in a trial court (including the Italian system which favours severance as soon as there is a charge ready for adjudication), a decision on severance of cases is not arbitrary but norm-based and involves balancing different interests rooted in human rights and principles of efficiency. Specific concerns of expeditious proceedings are generally not addressed by adjudicating materially-related charges through multiple trials. Consequently, the effects of severance are assessed in relation to the entirety of charges so reconfigured and not just a portion thereof.[122] As such, where severance is ordered, the status of the entirety of charges encompassed by the indictment is resolved and no criminal procedure that observes the right to a speedy trial and the principle of efficiency permits leaving any severed portion unattended. Rather, depending on factual circumstances and legal ramifications, the separated cases either proceed, or are suspended or dismissed. The Supreme Court Chamber will discuss this aspect of the present case in the following section.

44. The Trial Chamber determined the following factors to be "relevant to its decision on severance and the resultant scope of trial in Case 002/01, or to the Chamber's objective of ensuring a timely verdict in Case 002/01":[123]

> (1) the advanced age and physical frailty of the remaining Case 002 [Co-]Accused;
> (2) the public interest in achieving a verdict in relation to at least a portion of the Case 002 Closing Order;

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[119] *See, e.g.,* ECtHR *Kudła v. Poland*, Judgment, 26 October 2000, application no. 30210/96; *Neumeister v. Austria*, Judgment, 27 June 1968, application no. 1936/63.
[120] Decision on Immediate Appeal against the Trial Chamber's Decision on KHIEU Samphân's Application for Immediate Release, E275/2/3, 22 August 2013 ("SCC Detention Decision"), para. 48.
[121] SCC Detention Decision, para. 50, *referring to*, *inter alia*, ECtHR, *Kudła v. Poland*, Judgment, 26 October 2000, application no. 30210/96, para. 124; *Letellier v. France*, Judgment, 26 June 1991, application no. 12369/86, para. 35; *Idalov v. Russia*, Judgment, 22 May 2012, application no. 5826/03, paras. 124, 140.
[122] *See* SCC Decision, para. 35 ("notwithstanding the breadth of discretion vested in the Trial Chamber in deciding on the severance, the 'interest of justice' needs to be demonstrated with adequate reasoning which points to concrete and relevant circumstances and explains their common effect on the severed case as a whole").
[123] Impugned Decision, para. 125.

(3) judicial manageability of Case 002/01 in the light of the late stage of trial, including possible prejudice to the [Co-]Accused that may stem from further expansion of its scope;
(4) the uncertain impact upon the length of proceedings in Case 002/01 should S-21 be added to its scope; and,
(5) uncertainty regarding the duration of financial support to the ECCC.

45. In the Supreme Court Chamber's view, the Impugned Decision demonstrates that the Trial Chamber performed the requisite balancing exercise only to quite a limited extent. Factors (1), (2), (3) and (4) relate to the same goal of expeditiousness, such that the Trial Chamber considers the necessity of keeping the length of the proceedings in Case 002/01 to an absolute minimum to be paramount. Factor (3) makes no reference to the efficiency and manageability of the proceedings in relation to Case 002 as a whole, but rather only in relation to Case 002/01, in the face of the inability to calculate the time required to adjudicate any additional portion of the pending charges.

46. The potential prejudice to the rights of the Co-Accused is considered under the same factor (3), but also only through the lens of the inevitable extension of time required to conclude Case 002/01 should its scope be expanded. The Supreme Court Chamber considers that extending the duration of a trial in order to adjudicate pending charges does not *per se* constitute a delay in the sense contemplated by the right to a speedy trial. Not even the Defence perceives it as such.[124] Rather, the danger to a speedy trial arises from postponing Case 002/02 until after the Trial Chamber has adjudicated Case 002/01, an aspect not discussed by the Impugned Decision. Likewise, there is no discussion of the potential prejudice to the rights of the Co-Accused caused by real or perceived judicial bias in the subsequent trials should any conviction follow in Case 002/01.

47. A factor that is briefly discussed in the Impugned Decision concerns the potential prejudice to the Prosecution's case where severance could impede the Co-Prosecutors' ability to meet their burden of proof on those materially-related charges that are separated:

> [T]he Trial Chamber does not consider the scope of Case 002/01 as proposed by the Co-Prosecutors comprises a sort of 'irreducible minimum' of charges and factual allegations in terms of *Haradinaj*, reduction of which jeopardizes the Co-Prosecutors' ability to present evidence on the scope of the alleged widespread or systematic attack and joint criminal enterprise. From the outset, the Chamber has ruled that all parties may lead evidence in relation to the roles and responsibilities of all [Co-]Accused in relation to all policies of the DK era. There is nothing to prevent the Co-Prosecutors from making full use of the significant quantity of evidence already before the Chamber in relation to S-21,

[124] *See, e.g.*, NUON Chea's Appeal, para. 35.

> to the extent this is relevant to leadership or communications structures, or other overarching themes in Case 002/01.[125]

The Supreme Court Chamber notes that the Co-Prosecutors did not raise their ability to prove the case as severed in their present appeal, and accordingly deems itself ill-placed to *ex-officio* discuss the evidentiary condition of the case.

48. Factors that were not discussed at all are the potential burden on witnesses and the desire to avoid inconsistencies between separate trials. However, the fact that the Trial Chamber did not explicitly mention these factors in severing Case 002 anew does not necessarily mean that it did not take them into account. The Trial Chamber is not required to articulate every step of its reasoning for each finding that it makes,[126] as long as reasons given are sufficiently compelling.

49. Factor (5) is a newly introduced argument, invoking "the ECCC's persistent financial malaise", which implies that the Trial Chamber's decision to retain the original scope of the first trial is time-driven, namely by a desire to render a verdict before the ECCC potentially loses financial support.[127] For reasons that are more fully developed below, the Supreme Court Chamber considers the uncertain availability of donor funding to the ECCC to be an inappropriate and irrelevant factor to consider in the present judicial decision-making process before the ECCC.[128]

50. In conclusion, the Supreme Court Chamber observes that there has been a shift in the Trial Chamber's justification for severing Case 002 anew. Whereas the scale and complexity of Case 002 played a significant part in prompting the Trial Chamber to sever the proceedings into more expeditious, efficient, and manageable trials when it ordered the First Severance of Case 002,[129] at this point, the factors relied upon by the Trial Chamber in ordering the Second Severance of Case 002 indicate that it was motivated by the conviction that the entirety of the charges in the Closing Order cannot or will not be adjudicated in light of the advanced age and

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[125] Impugned Decision, para. 117 (internal references omitted).
[126] *See* SCC Decision, para. 36, *and references cited therein*.
[127] Impugned Decision, para. 146. *See also* Impugned Decision, para. 125(5).
[128] *See infra*, para. 75.
[129] *See* SCC Decision, para. 49. *See also* Decision on Reconsideration, paras. 8-9, *and in particular*, para. 10 ("The Trial Chamber in its Severance Order was [...] motivated by the following objectives: [t]o divide Case 002 into manageable parts that each take abbreviated time to determine; [t]o ensure that the first trial encompasses a thorough examination of the fundamental issues and allegations against all Accused; [t]o provide a foundation for a more detailed examination of the remaining charges and factual allegations against the Accused in later trials; [t]o follow as far as possible the chronology and/or logical sequence of the Closing Order (approximately 1975-1976); [t]o ensure as far as possible that the issues examined in the first trial provide a basis for the consideration of the mode of liability of joint criminal enterprise by including all Accused; and [t]o select those factual allegations that affect as many victims as possible.").

increasing physical frailty of the Co-Accused.[130] The Trial Chamber's repeated stated goal in deciding on renewed severance of Case 002 is the preservation of its ability to reach "any timely verdict".[131]

51. The Supreme Court Chamber considers that, once articulated, such a goal is not excluded by the notion of "interest of justice", including that it may prevail over other concerns. Within the confines of the interest of justice so identified, the Trial Chamber's discretion pursuant to Rule 89*ter* of the Internal Rules to order that a case be severed into discrete trials remains broad,[132] and the burden on an appellant to demonstrate an abuse in the exercise of this discretion resulting in prejudice to him or her is accordingly high. Evaluation of the elements relevant for the expeditiousness factor, in particular such as the health condition of the Co-Accused and the pace at which the Trial Chamber is capable of proceeding, inherently requires a great deal of discretion. Having already lost IENG Thirith and IENG Sary to dementia and death, respectively,[133] and faced with numerous disruptions of the trial due age-related and health concerns of the remaining Co-Accused,[134] the Trial Chamber's resort to severance of the Indictment in order to ensure that at least a portion thereof is adjudicated within the lifespan of the Co-Accused is not unreasonable.

52. The Supreme Court Chamber accordingly finds that the Trial Chamber's determination that renewed severance of Case 002 is required in the interest of justice does not warrant appellate intervention. With respect to NUON Chea's remaining arguments as to the alleged impediment to presenting the case for the Defence against a broader factual background, the Supreme Court Chamber notes that the Trial Chamber specifically found "nothing to prevent the Co-Prosecutors from making full use of the significant quantity of evidence already before the Chamber in relation to S-21, to the extent this is relevant to leadership or communications structures, or other overarching themes in Case 002/01".[135] NUON Chea accordingly enjoys a symmetrical possibility to adduce evidence.

53. For the foregoing reasons, NUON Chea's request that the Second Severance of Case 002 be annulled is denied.

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[130] Impugned Decision, paras. 86, 125(1).
[131] Impugned Decision, paras. 4, 41, 86, 122, 137, 149, 161, p. 70. *See also* Impugned Decision, para. 125(2).
[132] *See* SCC Decision, paras. 35, 40.
[133] *See supra*, fn. 5.
[134] Impugned Decision, paras. 128-132.
[135] Impugned Decision, para. 117.

b. Alleged Errors in the Mode of the Second Severance of Case 002

54. The Supreme Court Chamber recalls that, in declaring the invalidity of the First Severance of Case 002, it specified that the SCC Decision was without prejudice to the Trial Chamber's reassessment of severing Case 002, but that renewed severance must entail a tangible plan for the adjudication of the entirety of the charges in the Indictment and due consideration to reasonable representativeness of the Indictment within the smaller trials.[136] In the Impugned Decision, the Trial Chamber dismissed the notion of "representativeness of the Indictment" as "meaningless",[137] asserting that "all charges will be adjudicated unless an Accused becomes unfit to stand trial or proceedings are terminated by his death".[138] Applying however this criterion for the sake of argument, the Trial Chamber concluded that the addition of S-21 to the scope of the first trial was not "essential to any criterion of reasonable representativeness",[139] and considered that the addition of Tuol Po Chrey to the original scope of Case 002/01 satisfied the criterion "in all the relevant circumstances".[140] The Trial Chamber accordingly resumed the proceedings in Case 002/01 from the point it had reached when the SCC Decision was rendered,[141] declaring that it decided not to add any further charges "on grounds that it would otherwise confront insuperable challenges in undertaking a fair and equitable selection between numerous and equally-deserving candidates for inclusion".[142]

55. The Trial Chamber also declared that it "doubts that projections for future trials can meaningfully constitute a plan",[143] and abstained from resolving the issue as to how any subsequent trials might be conducted, and particularly when a potential second trial in Case 002 ("Case 002/02") could commence.[144] Instead, the Trial Chamber proposed to "hold[] a Trial Management Meeting later in the year, when the issue can be revisited anew in the light of circumstances then prevailing".[145] It further declared that "[t]here is no barrier to the later trial of the remaining Case 002 [Co-]Accused on all charges and factual allegations in the Case 002 Closing Order, should the Accused remain fit to be tried and donor funds be found in support of these future trials".[146]

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[136] SCC Decision, para. 50.
[137] Impugned Decision, para. 98.
[138] Impugned Decision, para. 98.
[139] Impugned Decision, para. 116. *See also* Impugned Decision, paras. 122, 147.
[140] Impugned Decision, para. 118.
[141] Impugned Decision, p. 70.
[142] Impugned Decision, para. 119.
[143] Impugned Decision, para. 153.
[144] Impugned Decision, paras. 154-155.
[145] Impugned Decision, para. 155.
[146] Impugned Decision, para. 155.

56. The Co-Prosecutors submit that the Trial Chamber failed to give due consideration to reasonable representativeness of the Indictment within Case 002/01, as mandated by the Supreme Court Chamber, and applied instead its own, erroneous, legal test.[147] They contend that the Trial Chamber further erred in "maintaining the fiction that the [Co-]Accused will be subject to a series of [future] trials",[148] and in "refus[ing] to accept and recognise that its decision effectively dismisse[s] the bulk of the Case 002 charges against the [Co-]Accused".[149] In addition, the Co-Prosecutors aver that the Trial Chamber dismissed the relevance of comparable international legal standards on severance, and thereby erred in fact and law by failing to properly consider several relevant circumstances and factors that should be weighed in assessing severance of charges.[150] The Co-Prosecutors submit that the Trial Chamber also dismissed the Supreme Court Chamber's guidance as to the direct applicability of the notion of reasonable representativeness of an indictment within the legal framework of the ECCC,[151] and erred in concluding that the addition of S-21 would unreasonably delay the trial.[152] They argue that the result is that the crimes included within the scope of Case 002/01 are not sufficiently representative of the Indictment, a situation that could be adequately remedied by the addition of S-21, which they contend is the most representative crime site charged in the Indictment.[153] The Co-Prosecutors submit that these errors of law and fact compel the inclusion of S-21 within the scope of Case 002/01 in order to avoid a miscarriage of justice.[154]

57. NUON Chea agrees that the Trial Chamber's formulation of the scope of Case 002/01 manifestly lacks reasonable representativeness of the Indictment, and that the Trial Chamber erroneously disregards the Supreme Court Chamber's guidance and instructions on renewed severance.[155] He refutes, however, the Co-Prosecutors' view that S-21 is uniquely representative of the Indictment, and accordingly supports the Trial Chamber's decision not to include it within the scope of Case 002/01.[156] He submits that the Trial Chamber should instead have included, at a minimum, charges relating to genocide, and a cross-section of those arising from cooperatives

[147] Co-Prosecutors' Appeal, paras. 20-23.
[148] Co-Prosecutors' Appeal, para. 24.
[149] Co-Prosecutors' Appeal, para. 27. *See also* Co-Prosecutors' Appeal, para. 24.
[150] Co-Prosecutors' Appeal, paras. 28-34, *referring to* Rule 73*bis*(D) of the ICTY Rules, as well as the jurisprudence thereof.
[151] Co-Prosecutors' Appeal, para. 25.
[152] Co-Prosecutors' Appeal, paras. 51-75. *See also* Co-Prosecutors' Response, paras. 27-30.
[153] Co-Prosecutors' Appeal, paras. 35-50. *See also* Co-Prosecutors' Response, paras. 17-26, 31.
[154] Co-Prosecutors' Appeal, para. 50.
[155] NUON Chea's Appeal, paras. 28-37.
[156] NUON Chea's Appeal, paras. 56-83.

and worksites, within the scope of Case 002/01 in order to render it reasonably representative of the full Case 002 Closing Order.[157] The Co-Prosecutors disagree.[158]

58. At the outset, the Supreme Court Chamber emphasizes that, when it declared the invalidity of the First Severance of Case 002 without prejudice to the Trial Chamber's reassessment thereof, it did so in lieu of exercising its corrective jurisdiction bearing in mind the deference that is owed to the Trial Chamber as the primary manager of Case 002 to appropriately implement the Supreme Court Chamber's guidelines.

59. One such guideline provided in the SCC Decision was that "the consideration of the possibility to sever a criminal case such that the cases as severed are reasonably representative of an indictment, particularly where there is real concern about having more than one case arrive at a judgment on the merits, is dictated by common sense and the interests of meaningful justice, and conforms with comparable international legal standards".[159] As an example, the Supreme Court Chamber referred to Rule 73*bis*(D) of the ICTY Rules,[160] which provides, in relevant part, that "[a]fter having heard the Prosecutor, the Trial Chamber, in the interest of a fair and expeditious trial, may invite the Prosecutor to reduce the number of counts charged in the indictment and may fix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes, are reasonably representative of the crimes charged".[161]

60. In dismissing the notion of "representativeness of the Indictment" as "meaningless",[162] the Trial Chamber refuted the comparability and relevance of Rule 73*bis*(D) of the ICTY Rules to the ECCC legal framework as follows:

> Under the ECCC legal framework, the indictment is the result of a judicial decision and is final when the Trial Chamber is seised with it. The Co-Prosecutors have no power to withdraw any part of the Indictment and nor can the Trial Chamber use a severance order to reduce or expand the crimes charged. The only purpose of severance at the trial stage is to modify the way in which all charges in the Indictment are to be adjudicated. Charges which would normally be adjudicated in a single trial are separated, to be heard in two or

[157] NUON Chea's Appeal, paras. 31, 38-55, 84. *See also* Addendum to NUON Chea's Appeal, paras. 1-6.
[158] Co-Prosecutors' Response, paras. 31-40.
[159] SCC Decision, para. 42, *referring to* Rule 73*bis*(D) of the ICTY Rules.
[160] *See* SCC Decision, fn. 107. *See also* SCC Decision, fn. 95.
[161] *See also* Rule 73*bis*(G) of the SCSL Rules ("In the interest of a fair and expeditious trial, the Trial Chamber, after hearing the parties, may at any time invite the Prosecutor to reduce the number of counts charged in the indictment. Furthermore, the Trial Chamber may determine a number of sites or incidents comprised in one or more of the charges made by the Prosecutor, which may reasonably be held to be representative of the crimes charged").
[162] Impugned Decision, para. 99.

> more trials, but otherwise remain unchanged. Legally, severance is exclusively a trial management tool and in the absence of a mechanism for the withdrawal of any charges in the Indictment, all charges will be adjudicated unless an Accused becomes unfit to stand trial or proceedings are terminated by his death.[163]

61. The Supreme Court Chamber recalls that, indeed, nothing in the rules of Cambodian criminal procedure applicable to the ECCC provides for the possibility of withdrawing or judicially terminating any charges in an indictment once they have been accepted for trial; this, as noted on a previous occasion, is the result of Cambodian procedure mirroring the French principle of legalism (mandatory prosecution).[164] However, as also previously noted by the Supreme Court Chamber, the applicability of the legalism principle to international criminal proceedings might be disputable.[165] At the international and hybrid criminal tribunals, mandatory prosecution is limited in favour of selective prosecution of persons from among "those most responsible",[166] with a focus on policies that balance the goals of criminal justice against limited

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[163] Impugned Decision, para. 98.

[164] *See* Decision on Immediate Appeal against the Trial Chamber's Order to Unconditionally Release the Accused IENG Thirith, E138/1/10/1/5/7, 14 December 2012 ("IENG Thirith Second SCC Decision"), paras. 37-38. On the application of the principle of legalism in France, *see* MERLE and VITU, *Traité de droit criminel*, T. II, 4th ed, Cujas, Paris 1989, paras. 278-279, 283 (explaining that in France, the prosecution has no discretion to discontinue or ask for the discontinuation of a criminal action once it has been initiated and criminal proceedings can only be terminated by the Court, for one of the reasons explicitly stated in the law), *quoted in* IENG Thirith Second SCC Decision, para. 37; RIBEYRED, *Jurisclasseur,* Fasc. 20: Action publique et action civile, 27 April 2011, paras. 52-53 *and* Paris Court of Appeal, 16 December 2012 (where the Court of Appeal found that the Trial Court had to decide on the charges irrespective of an oral request presented by the prosecution to abandon the case, based on Article 464 of the French Code of Criminal Procedure which states, in relevant part, that where it considers that the facts constitute a misdemeanor, the court imposes a penalty) *confirmed by* Crim. Cass., Case No. 12-80180, 30 January 2013. The application of this principle in Cambodian Law can be inferred from Articles 7, 8, and 247 of the Code of Criminal Procedure of the Kingdom of Cambodia ("CCPC") (which explicitly list the causes for extinction of a criminal action and state the obligation of the Investigating Judge to decide on all facts of which they are seized).

[165] IENG Thirith Second SCC Decision, para. 37.

[166] Strategy of case selection is among the most difficult issues of international criminal prosecution. Focusing on the gravest instances of international crimes was written into the Charter of the International Military Tribunal, Art. 1 ("there shall be established an International Military Tribunal [...] for the just and prompt trial and punishment of the major war criminals of the European Axis"). Although the ICTY and ICTR Statutes do not mention any minimum level of responsibility for those to be prosecuted, the Security Council called on both the ICTY and ICTR, "in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for the crimes [...]." *See* Security Council Resolution 1503, Res/RES/1503 (2003), 28 August 2003, Preamble, para. 7, *and* Resolution 1534, S/RES/1534 (2004), 31 March 2004, paras. 3, 5 ("The Security Council [...] [c]alls on each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503 (2003). The ICTY Rules have since been amended to state that "[t]he President shall refer the matter to the Bureau which shall determine whether the indictment, *prima facie*, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal". *See* Rule 28(A) of the ICTY Rules. Regarding the Special Court for Sierra Leone, Article 1 of its Statute provides that "[t]he Special Court shall [...] have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law [...], including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone." The determination of the Court's jurisdiction was subject to debate. *See* Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, para 29 ("In its resolution 1315 (2000), the Security Council recommended that the personal jurisdiction of the Special Court should extend to those 'who bear the greatest responsibility for the commission of the crimes', which is understood as an indication of a limitation on the number of accused by reference to their

resources.[167] A decision to withdraw charges has traditionally been an act of prosecutorial discretion and initiative, providing however that, regarding charges contained in a confirmed indictment, the approval of the Trial Chamber is first sought and gained.[168] In the ECCC legal framework, the objectives are "concerns to the international community as a whole" and "pursuit of justice and national reconciliation, stability, peace and security".[169] Accordingly, prosecution at the ECCC is also expressly limited to "senior leaders of Democratic Kampuchea and those who were most responsible",[170] and, as such, is policy-driven and necessarily requires an exercise of prosecutorial and judicial discretion.[171]

62. The adoption of these objectives as benchmarks begs the question whether the implicit consequence for the model of the applicable procedure would not also be an authorisation to withdraw the charges, in whole or in part, where it is so warranted by the interest of justice defined by those objectives. Considering that prosecutorial legalism does not directly derive from rights,[172] is not an international standard of justice,[173] and, in the Cambodian legal system, does

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command authority and the gravity and scale of the crime. I propose, however, that the more general term 'persons most responsible' should be used."). In a letter dated 12 January 2011 from the Secretary-General to the President of the Security Council (S/2001/40), the Secretary-General noted that the determination of the meaning of the term "persons who bear the greatest responsibility" in any given case falls initially to the prosecutor and ultimately to the Special Court itself and "is a guidance to the prosecutor in determining his or her prosecutorial strategy" (*see* paras. 2-3). At the International Criminal Court, the preamble of the Rome Statute states that the Court is for the most serious crimes of concern to the international community as a whole, and Article 17(1)(d) of the Statute provides for the inadmissibility of the case when it is not sufficiently grave to justify further action by the Court.

[167] *See* Robert Cryer, Prosecuting the Leaders: Promises, Politics and Practicalities, Göttingen Journal of International Law 1 (2009) 1 p. 49, 65; Margaret M. deGuzman and William A. Schabas in Sluiter et al. ICP Book, pp. 137-139, *and references cited therein*. With respect to the International Criminal Court, the Preparatory Committee for the Establishment of the Court observed that the limited resources of the Court should not be exhausted by taking up prosecution of cases which could easily and effectively be dealt with by national courts. *See* Proceedings of the Preparatory Committee During the Period of 25 March - 12 April 1996, A/AC.249/CRP.4, 4 April 1996, para. 3. In a *Paper on some policy issues before the Office of the Prosecutor* of the ICC, ICC-OTP 2003, the Prosecutor acknowledges that "The Court is an institution with limited resources" (*see* p. 3), and that, as a rule, "the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes" (*see* p. 7).

[168] *See* Article 61(9) of the Rome Statute, Rules 50-51 of the ICTY, ICTR and SCSL Rules, *and* Rule 72 of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon.

[169] Preamble of the ECCC Agreement.

[170] Article 1 of the ECCC Agreement *and* Article 1 of the ECCC Law.

[171] *See* Appeal Judgement in the case of *KAING Guek Eav alias Duch*, F28, 3 February 2012, paras. 61-80.

[172] In response to criticism of selective prosecution based in the principle of equality before the law, the jurisprudence of international criminal tribunals has held that the principle of equality would be violated by prosecutorial discretion only where there is evidence of an improper motive, such as discrimination, and that other similarly situated persons were not prosecuted. S*ee, e.g.,* ICTY, *Prosecutor v. Zejnil DELALIĆ et al.*, Case No. IT-96-21-A, Judgement, 21 February 2001, paras. 604-607; *Prosecutor v. Vojislav ŠEŠELJ*, Case No. IT-03-67-PT, Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment, 26 May 2004, para. 21; ICTR, *The Prosecutor v. Jean-Paul AKAYESU*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, para. 96.

[173] Common law systems principally embrace prosecutorial discretion but also in continental Europe the legalism principle is subject to gradual erosion. In addition to the outset of different forms of plea agreements, even systems that traditionally mandated the prosecution now part with the obligation to pursue the entirety of the charges where it is not required by the interest of justice. *See e.g.*, Section 153 of the German Code of Criminal Procedure. *See also* Section 154a of the German Code of Criminal Procedure, which provides: [OFFICIAL TRANSLATION] "If

not enjoy any privileged legal status,[174] a positive answer to this question is not foreclosed, as long as the matter is approached transparently, in consideration of the interests of justice and fair trial rights involved, with the agreement of both the Co-Prosecutors and the Trial Chamber. Given that the Cambodian procedure does not deal with this particular matter, guidance as to balancing the interests involved and procedure to ensure fairness and transparency may be sought in procedural rules established at the international level.[175] In any event 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.[176]

63. Turning back to the dispute around the representativeness criterion, the Supreme Court Chamber recalls that, concerned with the need to ensure timely justice in cases of large indictments,[177] the ICTY and the SCSL have amended their rules to allow their respective Trial Chambers to invite the Prosecutor to reduce, or order *proprio motu* the reduction of, the number of counts charged in an indictment or to fix a number of crime sites or incidents in respect of which evidence may be presented.[178] The Supreme Court Chamber considers that the claimed incongruity of the criteria for the reduction of charges by the ICTY and the present situation before the Trial Chamber is unfounded. The reduction of charges does not lead to termination thereof; as such, notwithstanding that its practical impact is to effectively remove certain alleged events from the indictment,[179] this intervention still formally remains a trial management tool.[180]

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individual severable parts of an offence or some of several violations of law committed as a result of the same offence are not particularly significant (1) for the penalty or measure of reform and prevention to be expected, or (2) in addition to a penalty or measure of reform and prevention which has been imposed with binding effect upon the accused for another offence or which he may expect to be imposed for another offence, prosecution may be limited to the other parts of the offence or the other violations of law. […] After the bill of indictment has been filed, the court, with the consent of the public prosecution office, may introduce this limitation at any stage of the proceedings. […] At any stage of the proceedings the court may reintroduce into the proceedings those parts of the offence or violations of law which were not considered […]." *See also* Article 14(2) of the Polish Code of Criminal Procedure, as amended on 2 September 2013, which allows the withdrawal of criminal charges at trial, albeit with the consent of the accused.

[174] The principle of legalism in Cambodia is not express but inferred from Articles 7 and 8 of the CCPC, which list exhaustively the reasons for the termination of a criminal action. *Compare e.g.,* with Italy, where the principle is established at Article 112 of the Italian Constitution, which states: [OFFICIAL TRANSLATION] "The public prosecutor has the obligation to institute criminal proceedings".

[175] *See* Article 12(1) of the ECCC Agreement *and* Article 33*new* of the ECCC Law. *See also* Rule 2 of the Internal Rules.

[176] In other words, the court must "vider sa saisine" (*see* Paris Court of Appeal, 16 December 2012, *referred to supra*, fn. 164) but this encompasses also such a decision on closure that does not pronounce on criminal responsibility.

[177] *See, e.g.,* Dominique Raab, "Evaluating the ICTY and its Completion Strategy: Efforts to Achieve Accountability for War Crimes and their Tribunals", 3 Journal of International Criminal Justice 82 (2005), pp. 82-84. *See also* SCSL, Eighth Annual Report of the President of the Special Court for Sierra Leone, May 2011; Report on the Special Court for Sierra Leone, Submitted by Independent Expert Antonio Cassese, 12 December 2006.

[178] *See* Rule 73*bis*(D) of the ICTY Rules *and* Rule 73*bis*(G) of the SCSL Rules.

[179] *See, e.g.*, ICTY, *Prosecutor v. Milan MILUTINOVIĆ et al.*, Case No. IT-05-87-T, Order Regarding Prosecution's Submission With Respect To Rule 73 *Bis* (D), 9 April 2009, paras. 4, 7-8. *See also Prosecutor v. Milan*

The use of such tool, as well, could be subject to consideration at the ECCC as "procedural rules established at the international level". However, even though the Trial Chamber is not inaccurate in stating that Rule 73*bis*(D) of the ICTY Rules does not apply before it in the present context, the acute possibility that a portion of the charges contained in the Indictment will never be tried for reasons beyond the control of the court and of the parties commands an exercise of prioritization of the charges to be adjudicated, with the impact on the case of the prosecution strikingly similar to cases where the charges are reduced pursuant to Rule 73*bis*(D) of the ICTY Rules. Accordingly, where the severance of an indictment, such as that provided under Rule 89*ter* of the Internal Rules, is motivated by the risk that the entirety of the charges therein will not be adjudicated, the principles governing the reduction of charges, such as the criterion of representativeness provided under Rule 73*bis*(D) of the ICTY Rules, become comparable and relevant.[181]

64. As decisions on the reduction of charges involve limiting the scope of a trial that has been previously defined and confirmed, the applicable rules specifically mandate a balancing exercise between "the interest of a fair and expeditious trial" and the need for a trial that is "reasonably representative" of the whole indictment.[182] The jurisprudence of the ICTY, which has applied Rule 73*bis*(D) of the ICTY Rules in a number of cases, is particularly instructive to help capture how the interests of justice may be served by limiting the charges to be adjudicated, and the selection criteria. In particular, the following factors may warrant consideration: (i) the crimes

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MILUTINOVIĆ et al., Case No. IT-05-87-T, Prosecution's Submission With Respect To Rule 73 *Bis* (D) Decision Of 11 July 2006, 12 March 2009.

[180] *See, e.g.*, ICTY, *Prosecutor v. Ratko MLADIĆ*, Case No. IT-09-92-PT, Decision pursuant to Rule 73 *bis* (D), 2 December 2011, para. 15; *Prosecutor v. Milan MILUTINOVIĆ et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009, para. 16 of Volume I *and* para. 1213 of Volume IV; *Prosecutor v. Radovan KARADŽIĆ*, Case No. IT-95-5/18-T, Decision on the Accused's Motion for Finding of *Non-Bis-In-Idem*, 16 November 2009, para. 14 ("The Trial Chamber agrees with the Accused that the charges in the Indictment in respect of which evidence will not be presented at trial pursuant to Rule 73 *bis* (D) have not simply disappeared, and notes that it will be for the Prosecution to either withdraw those charges, or indicate the manner in which it wishes to proceed against the Accused in relation to them, at the end of this trial"). *See also* Thirteenth Annual Report of the ICTY, 21 August 2006, UN Doc. A/61/271-S/2006/666, para. 10 ("Trial Chambers are also proactively expediting trials. Notably, Trial Chambers are using Rule 73 *bis* to oblige the Prosecution to focus its cases. [...] the judges adopted an amendment to Rule 73 *bis* to allow a Trial Chamber to invite and/or direct the prosecution to select those counts in the indictment on which to proceed. This amendment is necessary to ensure respect for an accused's right to a fair and expeditious trial and to prevent unduly lengthy periods of pretrial detention. The Prosecutor strongly opposed this amendment, even though focusing indictments is part of the trial management commonly used in national jurisdictions and does not impact on prosecutorial prerogatives.").

[181] *See* SCC Decision, para. 42.

[182] *See* Rule 73*bis*(D) of the ICTY Rules *and* Rule 73*bis*(G) of the SCSL Rules. *See also Prosecutor v. Milan MILUTINOVIĆ et al.*, Case No. IT-05-87-T, Decision on Application of Rule 73*Bis*, 11 July 2006 ("*Milutinović* Decision"), para. 6; *Prosecutor v. Vojislav ŠEŠELJ*, Case No. IT-03-67-PT, Decision on the Application of Rule 73*Bis*, 8 November 2006 ("*Šešelj* Decision"), para. 10 ("the fairness and expeditiousness of the trial and the requirement of reasonable representativeness [are] overarching principles that are to guide the Chamber's exercise of discretion").

charged in the indictment;[183] (ii) the classification and nature of the crimes;[184] (iii) the places where the crimes are alleged to have been committed;[185] (iv) the scale of the crimes;[186] (v) the victims of the crimes charged;[187] (vi) the time period of the crimes charged;[188] and, (vii) the fundamental nature of the case.[189] The overarching goal of the representativeness criterion is thus to select a minimum quantum of charges that would reasonably reflect the scale and nature of the totality of the alleged criminal acts and individual culpability. As such, underlying the criterion of representativeness is the assumption that the proceedings on the retained charges are capable

[183] While this factor has been articulated in Rule 73*bis*(D) of the ICTY Rules, it has not been explicitly discussed in the jurisprudence on reduction of charges.

[184] A plain reading of the expression used in Rule 73*bis*(D) of the ICTY Rules indicates that the legal characterisation of the crimes shall be taken into consideration, in order to ensure, as much as possible, that the crimes retained in the severed indictment reflect the category of crimes initially charged. As such, indictments before the ICTY have generally been reduced to limit the number of crimes site without affecting the crimes charged, or by consolidating charges so as to preserve "umbrella charges" such as persecution and inhumane acts to cover the variety of criminal activities encompassed in the original indictment counts. *See, e.g., Prosecutor v. Dragan NIKOLIĆ*, Case No. IT-94-2, Decision on Prosecutor's Motion for Leave to Amend the First Amended Indictment, 15 February 2002.

[185] Efforts shall be made to ensure that the severed indictment is geographically reflective of the crimes initially charged. This may be done by, *inter alia*, ensuring that the removed crime sites are "equally and proportionally distributed" among the regions where the crimes are alleged to have occurred. *See Prosecutor v. Jovica STANIŠIĆ and Franko SIMATOVIĆ*, Case IT-03-69-PT, Decision pursuant to Rule 73*bis*(D), 4 February 2008 ("*Stanišić* Decision"), para. 23. If a region can be identified as the *locus* of the case, the fact that some crimes were committed outside that region may be a reason to exclude them. *See Milutinović* Decision, para. 11. However, the elimination of an entire crime site in a country not otherwise represented in the proposed amended indictment was found not to fulfil the representativeness requirement, as such removal would result in the victims of crimes committed in certain areas not being represented in the case anymore. *See Prosecutor v. Momčilo PERIŠIĆ*, Case No. IT-04-81-PT, Decision on Application of Rule 73 *Bis* and Amendment of Indictment, 15 May 2007, para. 12. Finally, it has also been found that presentation of non-crime-base evidence in respect of a broader range of sites, relevant to prove, *inter alia*, the widespread and systematic attack against the population, can further contribute to guarantee that the broad geographical scope of the indictment is preserved, even if some crime sites are removed. *See Šešelj* Decision, para. 30 ("[t]he broad geographical scope of the Indictment will be retained given the scope of the crime sites in respect of which evidence will be presented").

[186] This factor suggests that consideration shall be given to the magnitude and regularity of the crimes, in order to ensure that the recurrence of the alleged criminal acts is, to some extent, reflected in the reduced indictment. The removal of crime sites or counts in a very large indictment would necessarily have less impact on the Prosecution's ability to demonstrate the recurrence of crimes than in a smaller indictment.

[187] The number of victims, their belonging to a specific group, and the severity of the prejudice caused thereto have all been deemed to be relevant when reducing charges. *See Šešelj* Decision, paras. 25, 31; *Prosecutor v. Ramush HARADINAJ et al.*, Case No. IT-04-84-PT, Decision pursuant to Rule 73*bis*(D), 22 February 2007, para. 11. ICTY Trial Chambers have sought to retain all ethnic and religious groups and "not to jeopardize the Prosecution's ability to prove the victimisation" of all targeted ethnic groups.

[188] ICTY Trial Chambers have sought to reflect the "key phases" in the commission of the crimes and the time period over which crimes were committed. *See Stanišić* Decision, para. 28. *See also, generally, Prosecutor v. Ante GOTOVINA, Ivan ČERMAK and Mladen MARKAČ*, Case No. IT-06-90-PT, Order pursuant to Rule 73*bis*(D) to Reduce the Indictment, 21 February 2007.

[189] In the *Milutinović* case, a Trial Chamber of the ICTY considered that it could not eliminate counts given the way the Prosecution's case was structured, but focused on eliminating "those crime sites or incidents that are clearly different from the fundamental nature or theme of the case, and ordering the Prosecution to lead evidence relating to the other sites or incidents that fall squarely within that nature or theme". *See Milutinović* Decision, paras. 7, 10. The Trial Chamber in *Šešelj* choose not to apply this factor and rather decided to put emphasis on the "reasonably representative[ness] of the crimes charged". *See Šešelj* Decision, para. 12.

of bringing about an institutional response that is as relevant to the broad goals of criminal justice as proceedings on the original charges would have been. [190]

65. In light of the above, the Trial Chamber cannot genuinely claim, on the one hand, that the declining health and physical frailty of the Co-Accused requires that Case 002 be severed so that at least one timely verdict within the lifespan of the Co-Accused may be reached while deciding, on the other hand, that the fact that no future charges or trials are legally discontinued renders it unnecessary, even meaningless, to ensure that the scope of what is being selected for trial and adjudication is reasonably representative of the Indictment. The Trial Chamber therefore erred in law and in the exercise of its discretion by dismissing the criterion of reasonable representativeness of the Indictment as inapplicable to the present situation.

66. The Supreme Court Chamber notes that the Trial Chamber appears to have nevertheless considered factors indicative of representativeness, albeit merely for the sake of argument.[191] In particular, the Trial Chamber found that even though the scale, nature, legal description, temporal span and geographical distribution of crimes included in the Indictment would not be represented by the scope of Case 002/01 as severed,[192] its mode of severance would "satisfy, *in all the relevant circumstances*, the criterion of reasonable representativeness of the Case 002 Closing Order"[193] given that "forced movement perhaps constitute[ed] the only theme in the Indictment to have involved or directly affected the entire Cambodian population",[194] and that "continued participation of all individuals previously admitted to Case 002 [would have] no adverse impact upon fair trial rights of the [...] Accused".[195]

67. There is no basis in the law applicable before ECCC, and in particular in the rules established at the international level, for so re-defining the criterion of representativeness. The peril to timely justice is a predicate condition for the reduction of charges and for the application

[190] The Supreme Court Chamber agrees that the terms used in Rule 73*bis*(D) of the ICTY Rules suggest that it involves examining if the "crimes retained in a severed Indictment [are] of similar severity and variety of those in the Closing Order as a whole". *See* Co-Prosecutors' Appeal, para. 30. This conforms with accepted principles of prosecutorial strategy, which involve taking into account the overall criminality of the accused in order to obtain an appropriate penalty, and focusing on the most serious offences. *See* SCSL, *Prosecutor v. Samuel Hinga NORMAN, Moinina FOFANA and Allieu KONDEWA*, Case No. SCSL-04-14-AR73, Decision on Amendment of the Consolidated Indictment, 18 May 2005, para. 82. The Supreme Court Chamber notes, however, that the goals of criminal justice are not limited to punishment and serve moreover the purpose of affirming accountability, affirming fair trial as means of thereof, establishing a true record of relevant facts, and providing relief for the victims.
[191] Impugned Decision, para. 100 ("Despite the difficulty in applying directly a provision imported from an institutional context and legal framework radically different from that of the ECCC, the Trial Chamber has endeavoured to identify the criterion of representativeness established by ICTY Rule 73*bis*(D) and to consider how it might assist in determining the representativeness of the scope of Case 002/01").
[192] *See* Impugned Decision, paras. 101-123.
[193] Impugned Decision, para. 118 (emphasis added).
[194] Impugned Decision, para. 112.
[195] Impugned Decision, para. 114.

of the representativeness criterion in the first place. Once such condition has been determined, the applicable test is the one described above and concerns of expediency and trial management can no longer come into play as factors justifying a further reduction of charges. Indeed, allowing such secondary qualifying would render the criterion of representativeness meaningless. For these reasons, the Trial Chamber's decision may only stand if, in accordance with the most reasonable interpretation, the phrase "in all the relevant circumstances" is read to mean that the peril to reaching "any timely verdict" prevails over the immediate implementation of the criterion of representativeness.

68. The Supreme Court Chamber concedes that concerns of effective management so understood may prevail over the postulate that the scope of Case 002/01 be representative of the Indictment. The fact that, despite having spent 14 months preparing for the trial in Case 002,[196] and then having kept the scope of Case 002/01 open for change for a year,[197] the Trial Chamber rigidly declined to adjust its original position in order to accommodate those of the parties and address any of the parties' concerns with the consequences of renewed severance for any future trials suggests that the Trial Chamber is unprepared to adjudicate within Case 002/01 any of the charges remaining in the Closing Order. As such, the Supreme Court Chamber considers that, in the present circumstances, to order an expansion of Case 002/01 and to require the Trial Chamber to reconfigure its schedule would inevitably result in unnecessary delays. The Co-Prosecutors' request to add S-21, and NUON Chea's request to add the genocide charges as well as a cooperative and a worksite, to the scope of Case 002/01 are accordingly denied.

69. The goal of reaching "*any* timely verdict" within the lifespan of the Co-Accused does not, however, relieve the Trial Chamber from the obligation to pursue a balance between the interest of a fair and expeditious trial and the need for a trial that is reasonably representative of the whole Closing Order in Case 002.[198] Failure to undertake to adequately represent the full case against the Co-Accused within their lifespan will inevitably result in a failure to reach an adequately meaningful verdict.[199] In this respect, the Supreme Court Chamber recalls that another guideline provided in the SCC Decision was the necessity for a tangible plan for the adjudication of the entirety of the charges in the Indictment, and not merely a portion thereof.[200] In abstaining from resolving the issue as to when Case 002/02 will commence and how proceedings as to any

[196] The Closing Order in Case 002 was filed on 16 September 2010, which is the date at which the Trial Chamber gained access to the case file of Case 002 in accordance with Rule 69(3) of the Internal Rules. The trial in Case 002 began on 21 November 2011. *See* T. (EN), November 2011, E1/13.1.
[197] *See* SCC Decision paras,17, 37,46
[198] *See supra*, para. 43.
[199] *See* SCC Decision, para. 43.
[200] SCC Decision, paras. 47-50.

remaining charges might be concluded,[201] the Impugned Decision appears to be abdicating the resolution of judiciable issues to external factors, such as physical condition of the Co-Accused or the financing of the ECCC, which perpetuates the state of uncertainty for the parties and effectively invites a *de facto* amnesty on unadjudicated charges.

70. The Supreme Court Chamber is therefore compelled to exercise its corrective jurisdiction in order to ensure that at least the irreducible minimum of the remaining charges in the Closing Order is adjudicated appropriately. The Supreme Court Chamber considers that the most appropriate course of action would be to instruct that those charges that should have been included within the scope of Case 002/01 will instead form the limited scope of Case 002/02, so that the combination of Cases 002/01 and 002/02 will be reasonably representative of the Indictment. Although the Co-Prosecutors and NUON Chea disagree on what charges should be included within the scope of Case 002/01 to render it more representative of the Indictment, their suggested inclusions do not suggest a dramatic expansion thereof. Disagreement is therefore not a ground for dismissing the parties' respective positions on the matter, but rather a reason to adopt them together. The question of how to render the scope of Case 002/01 reasonably representative of the Indictment is one that the Trial Chamber had the means to answer to the satisfaction of all the parties who had expressed views on the matter, namely by including, at minimum, S-21, as per the Co-Prosecutors' wishes, as well as including the genocide charges, a cooperative, and a worksite, as per NUON Chea's wishes.[202] Such inclusion meets not only the parties' respective positions on how to render the scope of Case 002/01 reasonably representative of the Indictment, but it also objectively satisfies the factors listed above which warrant being taken into consideration when deciding how to reduce the charges in an indictment while maintaining the criterion of reasonable representativeness.[203] In particular, the Closing Order indicts the Co-Accused of the following counts:

a. Genocide (by killing, of people who belonged to the Cham group and to the Vietnamese group);[204]

[201] Impugned Decision, para. 153 (expressing "doubts that projections for future trials can meaningfully constitute a plan"). *See also* Impugned Decision, paras. 154-155.
[202] The Supreme Court Chamber notes that, while the present decision inevitably binds and thereby impacts KHIEU Samphân, he had an opportunity to appeal the Impugned Decision and make submissions in this respect, but chose not to do so.
[203] *See supra*, para. 62, *referring to* (i) the crimes charged in the indictment; (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.
[204] Closing Order, paras. 1336-1349.

b. Crimes against Humanity (murder; extermination; enslavement; deportation; imprisonment; torture; persecution (on political, religious, or racial grounds); rape (in security centres and cooperatives, and in the context of forced marriages); other inhumane acts (through "attacks against human dignity", forced marriage, forced transfer, and enforced disappearances);[205] and,

c. Grave Breaches of the 1949 Geneva Conventions ("Grave Breaches") (wilful killing; torture; inhumane treatment; wilfully causing great suffering or serious injury to body or health; wilfully depriving a prisoner of war or a civilian the rights of fair and regular trial; unlawful deportation of a civilian; unlawful confinement of a civilian).[206]

71. The Supreme Court Chamber notes that the charges included in the scope of Case 002/01 – *i.e.* Phase 1, Phase 2, and Tuol Po Chrey – collectively relate only to the following limited set of the Crimes against Humanity alleged in the Closing Order: murder;[207] extermination;[208] political persecution;[209] religious persecution;[210] other inhumane acts through "attacks against human dignity";[211] and, other inhumane acts through forced transfer.[212] The counts of Genocide (by killing, of people who belonged to the Cham group and to the Vietnamese group), Crimes against Humanity (enslavement; deportation; imprisonment; torture; racial persecution; rape; other inhumane acts through forced marriage; other inhumane acts through enforced disappearances), and Grave Breaches (wilful killing; torture; inhumane treatment; wilfully causing great suffering or serious injury to body or health; wilfully depriving a prisoner of war or a civilian the rights of fair and regular trial; unlawful deportation of a civilian; unlawful confinement of a civilian) are therefore wholly omitted from the scope of Case 002/01. A review of the Closing Order shows that the full spectrum of counts indicted therein could have been reasonably represented by including – in addition to Phase 1, Phase 2, and Tuol Po Chrey – the genocide charges,[213] S-21,[214] the Prey Sar worksite,[215] and the Tram Kok cooperatives,[216] to the scope of Case 002/01.

[205] Closing Order, paras. 1350-1478.
[206] Closing Order, paras. 1479-1520.
[207] Closing Order, paras. 1373, 1375, 1377 (Tuol Po Chrey and Phase 1).
[208] Closing Order, paras. 1381, 1387, 1389 (Tuol Po Chrey, Phase 1, and Phase 2).
[209] Closing Order, paras. 1416-1418 (Tuol Po Chrey, Phase 1, and Phase 2).
[210] Closing Order, para. 1420 (Phase 2).
[211] Closing Order, para. 1436 (Phase 1 and Phase 2).
[212] Closing Order, para. 1448 (Phase 1 and Phase 2).
[213] Closing Order, paras. 1336-1349 (Genocide (by killing, of people who belonged to the Cham group and to the Vietnamese group).

72. Case 002/02 must commence as soon as possible after the end of closing submissions in Case 002/01. The Supreme Court Chamber recalls that the ECCC is under an affirmative obligation to ensure that proceedings are conducted within a reasonable time,[217] and that it is imperative that the ECCC utilize every available day to ensure a final determination of the remaining charges as expeditiously as possible.[218] Moreover, having found that the Impugned Decision results in a *de facto* stay of proceedings in relation to all charges placed outside the scope of Case 002/01,[219] the Supreme Court Chamber has expressed the view that the persistence of this situation may render the Co-Accused's continued detention in relation to those charges unjustified.[220] The Supreme Court Chamber notes that, on 8 November 2013, the Trial Chamber scheduled a trial management meeting to take place on 11 and 12 December 2013, committed to soliciting the parties' views on the course of proceedings concerning the remaining charges of Case 002.[221] The trial management meeting must, however, be promptly followed by an actual trial on those remaining charges that would render the combined scope of of Cases 002/01 and 002/02 reasonably representative of the Indictment.

73. The Supreme Court Chamber recalls its previous concern that "one trial panel alone may be unable to fulfill the ECCC's obligation to conclude proceedings on the entirety of the charges in the Indictment within a reasonable time",[222] and that, "in the event of a renewed severance of Case 002, [...] the ECCC should explore the establishment of another panel within the Trial

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[214] The inclusion of S-21 would incorporate the counts of Crimes against Humanity (enslavement (*see* Closing Order, para. 1391); imprisonment (*see* Closing Order, para. 1402); torture (*see* Closing Order, para. 1408); racial persecution (*see* Closing Order, paras. 1422, 1424); rape (*see* Closing Order, para. 1426)), and Grave Breaches (wilful killing (*see* Closing Order, paras. 1491-1493); torture (*see* Closing Order, paras. 1498-1500); inhumane treatment (*see* Closing Order, paras. 1501-1503); wilfully causing great suffering or serious injury to body or health (*see* Closing Order, paras. 1504-1506); wilfully depriving a prisoner of war or a civilian the rights of fair and regular trial (*see* Closing Order, paras. 1507-1510); unlawful deportation of a civilian (*see* Closing Order, paras. 1515-1517); unlawful confinement of a civilian (*see* Closing Order, paras. 1518-1519)).

[215] A description of the location, creation, functioning, interrogations, and security at the Prey Sar worksite – a worksite for S-21 – is provided at paragraphs 400 through 414 of the Closing Order. The inclusion of the Prey Sar worksite would incorporate the following Crimes against Humanity: enslavement (*see* Closing Order, para. 1391); imprisonment (*see* Closing Order, paras. 1402, 1405); and, torture (*see* Closing Order, para. 1408).

[216] A description of the location, establishment, functioning, security, and treatment of specific groups at the Tram Kok cooperatives is provided at paragraphs 302 through 322 of the Closing Order. The inclusion of the Tram Kok cooperatives would incorporate the following Crimes against Humanity: enslavement (*see* Closing Order, paras. 1391, 1393); deportation (*see* Closing Order, para. 1397); imprisonment (*see* Closing Order, paras. 1402, 1405); torture (*see* Closing Order, para. 1408); racial persecution (*see* Closing Order, para. 1422); rape (*see* Closing Order, paras. 1426, 1428); other inhumane acts through forced marriage (*see* Closing Order, para. 1442); other inhumane acts through enforced disappearances (*see* Closing Order, para. 1470).

[217] SCC Decision, para. 47, *referring to* Rule 21(4) of the Internal Rules.

[218] SCC Decision, para. 51.

[219] *See supra*, para. 26.

[220] *See* SCC Detention Decision, para. 49.

[221] Memorandum by Judge NIL Nonn, President of the Trial Chamber, entitled "Scheduling of Trial Management Meeting in Case 002/02", E301, 8 November 2013.

[222] SCC Decision, para. 51.

Chamber to support the timely adjudication of the remainder of Case 002."[223] The Supreme Court Chamber further stated that "[t]his second trial panel could also immediately begin to hear subsequent proceedings while the Trial Chamber is occupied with the drafting of the judgment in the first trial and ensure that the parties do not remain idle during this period."[224]

74. With the Trial Chamber's express projection of a timeline of at least eight months to issue its judgment in Case 002/01,[225] and in light of the considerations expressed above, the Supreme Court Chamber considers that the establishment of a second panel has now become imperative. The Supreme Court Chamber emphasizes that there is no obstacle against the convening of a second panel within the Trial Chamber where it is necessitated by the interests of justice. In accordance with the ECCC Agreement, "the President of a Chamber may, on a case-by-case basis, designate from the list of nominees submitted by the Secretary-General [of the United Nations], one or more alternate judges to be present at each stage of the proceedings, and to replace an international judge if that judge is unable to continue sitting".[226] The appointment of Cambodian judges, including reserve judges "as needed", is also provided for in the ECCC legal framework.[227] These provisions regulating the role of judges at the ECCC have been interpreted so as to ensure the best administration of justice when an increased caseload caused judges to be "unable to continue sitting" concurrently on all pending matters.[228] No legal impediments therefore exist in responding to the pressing need for handling the remaining charges in Case 002. Neither do any financial or administrative impediments exist in this respect, as confirmed by the Office of Administration of the ECCC in response to an order by the Supreme Court Chamber instructing it to explore the establishment of a second trial panel to hear and adjudicate Case 002/02.[229] It is thus the responsibility of the President of the Trial Chamber to avail himself of the existing possibilities.[230]

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[223] SCC Decision, para. 51.
[224] SCC Decision, para. 51.
[225] Impugned Decision, fn. 270.
[226] *See* Article 3(8) of the ECCC Agreement. *See also* Article 11*new* of the ECCC Law.
[227] *See* Article 11*new* of the ECCC Law.
[228] For example, in 2010 and 2011, due to a heavy workload in the Pre-Trial Chamber, the President called upon the (then) reserve international Judge Katinka LAHUIS to work full-time on pending appeals against the Closing Order at the time, and thus formed an additional panel of judges in order to deal with the appeals expeditiously and meet prescribed deadlines. *See* Memorandum by PRAK Kimsan, President of the Pre-Trial Chamber, entitled "Designation to be present at each stage of the proceedings in the appeals against the Closing Order", D427/1/30.1, dated 16 November 2010; Memorandum by PRAK Kimsan, President of the Pre-Trial Chamber, entitled "Appointment of Judge Katinka Lahuis to assist the Pre-Trial Chamber on a number of pending cases", D411/3/6.6, dated 28 April 2011.
[229] Memorandum by Tony KRANH, Acting Director of the Office of Administration, and Knut ROSANDHAUG, Deputy Director of the Office of Administration, entitled "Judicial order regarding establishment of a second trial panel", E284/4/7/1/2, dated 31 October 2013, para. 3 ("The Office of Administration has reviewed administrative and financial implications of an establishment of a second panel of judges within the Trial Chamber – and confirms

75. The Supreme Court Chamber considers the Trial Chamber's reliance on the ECCC's financial malaise to be irrelevant and inappropriate in the present decision-making process. While Judges are at all times certainly obligated to be mindful of the efficiency of proceedings, they must always act within the *sacrum* sphere of the law, the tenets of which cannot be overridden by the *profanum* of budgetary savings. As discussed above,[231] in international criminal proceedings financial policies may legitimately enter into equation and affect the scope of the charges in three ways: by legislative decisions shaping personal and subject-matter jurisdiction; by efficiency-driven prosecutorial decisions on which cases to prosecute; and, eventually, by efficiency-driven decisions on the withdrawal or reduction of charges, the latter however being necessarily predicated upon the criterion of reasonable representativeness of the indictment. Beyond such exceptions, trial judges cannot tailor their cognisance of pending matters to budgetary savings. The ECCC's funding crisis affects the judicial institution as a whole, and that crisis must be swiftly resolved – either by a firm and unwavering commitment by donor countries to provide their voluntary contributions or by a shift in the ECCC's funding process to the UN Regular Budget by way of assessed funds – in order to effectively complete the proceedings in Case 002 and the other matters properly before the court. If there is insufficient funding to guarantee a trial driven by law, all ECCC proceedings must be terminated and the court must close down. Barring this, proceedings must go on without individual decisions on matters of law and fact being unduly influenced by financial considerations.[232]

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its readiness to support any decision made by the Supreme Court Chamber or the Trial Chamber to duly complete the judicial processes in Case 002."), *responding to* Order Regarding the Establishment of a Second Trial Panel, E284/4/7/1, 23 July 2013.

[230] *See* Memorandum by Knut ROSANDHAUG, Deputy Director of the Office of Administration, regarding the establishment of a second trial panel, E284/4/7/1/1, dated 18 September 2013, p. 2.

[231] *See supra*, paras. 61-64.

[232] *See, e.g.,* European Court of Human Rights, *Salov v. Ukraine*, Judgment, 6 September 2005, application no. 65518/01, paras. 83, 86. *See also* Nuala Mole and Catharina Harby, *The right to a fair trial. A guide to the implementation of Article 6 of the European Convention on Human Rights* (Directorate General of Human Rights, Council of Europe: 2001), pp. 33-34 ("In the case of *Salov v. Ukraine*, which concerned criminal proceedings against the applicant, the Court examined the wider judicial and financial background to a decision allowing a prosecution protest and remittal of the applicant's case. When doing so the Court noted, *inter alia*, a decision by the Ukrainian Constitutional Court from 1999 which had found that the Cabinet of Ministers had acted unconstitutionally when drastically reducing the State budget for the judicial system – this was found to have exerted financial influence on the courts and infringed the citizens' right to judicial protection").

V. DISPOSITION

76. For the foregoing reasons, the Supreme Court Chamber:

ADMITS the Appeals under Rule 104(4)(a) of the Internal Rules;

DENIES the Appeals on the merits; and,

ORDERS that the evidentiary hearings in Case 002/02 shall commence as soon as possible after closing submissions in Case 002/01, and that Case 002/02 shall comprise at minimum the charges related to S-21, a worksite, a cooperative, and genocide.

Phnom Penh, 25 November 2013

President of the Supreme Court Chamber

KONG Srim