



**ព្រះរាជាណាចក្រកម្ពុជា  
ជាតិ សាសនា ព្រះមហាក្សត្រ**

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

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**អង្គជំនុំជម្រះសាលាដំបូង**  
Trial Chamber  
Chambre de première instance

**សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ**  
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**Before:** Judge NIL Nonn, President  
Judge Silvia CARTWRIGHT  
Judge YA Sokhan  
Judge Jean-Marc LAVERGNE  
Judge YOU Ottara

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**DECISION ON SEVERANCE OF CASE 002 FOLLOWING SUPREME COURT CHAMBER  
DECISION OF 8 FEBRUARY 2013**

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## 1. INTRODUCTION

1. On 8 February 2013, the Supreme Court Chamber (“SCC”) rendered its Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision concerning the Scope of Case 002/01.<sup>1</sup> In its Severance Order of 22 September 2011, the Trial Chamber had limited the scope of the first trial in Case 002 principally to forced evacuations, later extending it also to executions carried out at Toul Po Chrey, in the interests of achieving a timely verdict.<sup>2</sup> The SCC Decision annulled the Trial Chamber’s Severance Order and related decisions.<sup>3</sup> Although the SCC Decision envisaged the possibility of a fresh severance of Case 002, the immediate consequence of the SCC Decision was that Case 002 was no longer confined in scope and the Trial Chamber unable to proceed to any verdict until all factual allegations and charges contained in the Case 002 Closing Order are adjudicated.

2. In annulling the severance of Case 002, the SCC considered the Trial Chamber to have erred in its interpretation of the scope of its discretion to order severance pursuant to Internal Rule 89*ter*, in failing to hear the parties prior to the issuance of its Severance Order and for having given inadequate consideration to the need to ensure that the charges retained in Case 002/01 are sufficiently representative.<sup>4</sup> Finally, the SCC recommended the establishment of a second Trial Chamber in relation to future trials in Case 002.<sup>5</sup>

3. In order to minimize further delay to proceedings in Case 002, the Trial Chamber on 12 February 2013 scheduled hearings on the issue of severance, outlining a number of issues for the parties to address in the light of the SCC Decision.<sup>6</sup> Following these hearings on 18-21 February 2013, in-court examination on 25 March 2013 of the court-appointed medical

<sup>1</sup> 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 (“SCC Decision”).

<sup>2</sup> Severance Order pursuant to Internal Rule 89*ter*, E124, 22 September 2011 (“Severance Order”); Notification of Decision on Co-Prosecutors’ request to include additional crime sites within the scope of trial in Case 002/01 (E163), E163/5, 8 October 2012 (“Decision on Proposed Extension of Trial” or “Impugned Decision”).

<sup>3</sup> The effect of the SCC Decision extends to the Trial Chamber’s Severance Order, Decision on Co-Prosecutors’ Request for Reconsideration of the Terms of the Trial Chamber’s Severance Order, E124/7, 18 October 2011 (“Decision on Request for Reconsideration”), the Impugned Decision, as well as “all related memoranda” (SCC Decision, para. 17).

<sup>4</sup> SCC Decision, paras 40-41, 44 and 48.

<sup>5</sup> SCC Decision, paras 50 and 51.

<sup>6</sup> These hearings were originally scheduled for 14 and 15 February 2013, but were subsequently re-scheduled for 18 and 19 February 2013 (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, 12 February 2013; Postponement and further information concerning the modalities of the severance hearing and related matters, e-mail from Trial Chamber Senior Legal Officer to all parties, 12 February 2013).

experts who reassessed the fitness to stand trial of the Accused NUON Chea, and having weighed the factors identified in the SCC Decision, the Chamber issues its present decision.

4. For the reasons that follow, the Trial Chamber decides to confine the scope of the first trial in Case 002 (“Case 002/01”) to forced movement of population phases one and two and executions committed at Toul Po Chrey. The Trial Chamber considers this to represent a proportionate balance between the factors identified by the SCC Decision and necessary in order to safeguard its ability to reach any timely verdict in Case 002. On 14 March 2013, trial proceedings against the Accused IENG Sary were terminated following his death.<sup>7</sup>

## 2. PROCEDURAL HISTORY

### 2.1. The pre-trial phase in Case 002 before the Trial Chamber

#### 2.1.1. *Introduction*

5. On 14 January 2011, the Trial Chamber was seised of the 739-page Closing Order in Case 002 (“Indictment”), comprising a case of significant complexity and scope, which formally remitted the Accused NUON Chea, IENG Sary, KHIEU Samphan and IENG Thirith for trial. It encompassed diverse offences under international and Cambodian law, including genocide, crimes against humanity, grave breaches of the Geneva Conventions, and offences under Cambodian domestic law, allegedly committed between April 1975 and January 1979 at multiple crime sites throughout the territory of Democratic Kampuchea, including 11 security centres, six worksites and cooperatives and four execution sites. Between January and April 2011, the parties sought to call a cumulative total of 1054 witnesses, experts and Civil Parties to address the totality of the allegations in the Case 002 Closing Order, and proposed collectively to tender over 7600 documents and other material as evidence.<sup>8</sup>

<sup>7</sup> See Death Certificate of Accused IENG Sary, E270, 14 March 2013; Termination of Proceedings Against the Accused IENG Sary, E270/1, 14 March 2013.

<sup>8</sup> See e.g. Co-Prosecutors’ Rule 80 expert, witness and Civil Party lists, including confidential annexes 1, 2, 3, 3a, 4, and 5, E9/4, 28 January 2011; IENG Sary’s list of proposed experts and notification concerning his witness and Civil Party lists, E9/4/2, 14 February 2011; Civil Party Lead Co-Lawyers’ rule 80 witness, expert and Civil Party lists, including confidential annexes 1, 2a, 2b, 3a, 3b, and 4, E9/4/3, 14 February 2011; List of proposed witnesses, experts, and Civil Parties, E9/4/4, 15 February 2011 (NUON Chea Defence); IENG Thirith List of witnesses and expert, E9/4/5, 15 February 2011; Proposed list of witnesses and experts, E9/4/6, 21 February 2011 (KHIEU Samphan Defence); IENG Sary’s initial list of documents already on the case file and notice concerning his forthcoming initial list of new documents to put before the chamber at Trial, E9/22, 1 April 2011; IENG Sary’s second initial list of documents, E9/24, 8 April 2011; “IENG Sary’s third initial

6. At the time Case 002 was remitted for trial in January 2011, the Accused were aged between 78 and 85 years of age. In February 2011, the Defence teams of three Accused filed motions challenging their fitness to stand trial, in response to which the Trial Chamber identified and appointed medical experts and scheduled fitness hearings.<sup>9</sup> During a Trial Management Meeting and Initial Hearing on 5 April 2011 and 27 June 2011 respectively, the Chamber provided early indications of witnesses considered by the Chamber to be most relevant to hear in Case 002, as well as the likely sequencing of the trial in Case 002, but did not at that stage sever proceedings pursuant to Internal Rule 89ter.<sup>10</sup> Fitness hearings in relation to the three Accused alleging unfitness to stand trial were held in August 2011.<sup>11</sup>

### 2.1.2. *Severance of Proceedings by the Trial Chamber*

7. On 22 September 2011, the Trial Chamber issued its Severance Order pursuant to Internal Rule 89ter. The Severance Order separated proceedings in Case 002 into a number of discrete cases that incorporate particular factual allegations and legal issues and confined the scope of Case 002/01 principally to allegations concerning the forced movement of population.<sup>12</sup> Internal Rule 89ter, pursuant to which the Trial Chamber issued its Severance Order, provides:

**Rule 89ter. Severance**

(Adopted on 23 February 2011)

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

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list of documents, E9/25, 19 April 2011; Notice of joinder in IENG Sary's initial submissions regarding documents to be relied upon at trial and additional submissions regarding new documents, E9/26, 19 April 2011; IENG Thirith Motion to submit its list of documents, E9/27, 19 April 2011; List of Documents, E9/29, 19 April 2011 (KHIEU Samphan Defence); Co-Prosecutors' Rule 80 (3) Trial Document List, E9/31, 19 April 2011; Civil Party Lead Co-Lawyers' lists of documents and exhibit (annex 7 and 8), E9/32, 19 April 2011.

<sup>9</sup> See e.g. Urgent application for appointment of fitness expert, E30, 2 February 2011; Trial Chamber's Response to Urgent Request for Additional Time to File Reply to Co-Prosecutors' Response to NUON Chea's Urgent Application for Appointment of a Fitness Expert (E30/2), E30/2/1, 15 February 2011; Request for confidential reports regarding the physical and psychiatric health of all four Accused (Case 002), E31, 3 February 2011; Defence request for appointment of a NEUROPSYCHIATRIST to assess Madame IENG Thirith's fitness to stand Trial with attachment, Annexes and strictly confidential annex D containing privileged information, E52, 21 February 2011; Memorandum for Defence Teams for IENG Sary, IENG Thirith and NUON Chea, E62, 9 March 2011; Order Assigning Expert, E62/3, 4 April 2011; Order for Further Assessment of IENG Thirith, E62/3/3, 24 May 2011; Scheduling Order for Preliminary Hearing on Fitness to Stand Trial, E110, 12 August 2011; Order Appointing Experts, E111, 23 August 2011.

<sup>10</sup> Communication of Dates of the Trial Management Meeting (5 April 2011 and 6 April 2011), E9/5, 3 February 2011; Agenda for Trial Management Meeting, E9/5/1, 17 March 2011; Scheduling of Initial Hearing of Case 002, E86, 11 May 2011; Agenda for Initial Hearing from 27th to 30th June 2011, E86/1, 14 June 2011; see also Confidential Annex A: partial list of witnesses, experts and Civil Parties to be heard during the first trial in Case 002, E131/1.1, 25 October 2011; T., 27 June 2011 (Initial Hearing), p.17.

<sup>11</sup> See T., 29 August 2011; T., 30 August 2011; T., 31 August 2011.

<sup>12</sup> Severance Order, para. 2.

entirety of the charges contained in an Indictment. The cases as separated shall be tried and adjudicated in such order as the Trial Chamber deems appropriate.

8. The Trial Chamber determined separation of proceedings (in relation to part of the charges contained in the Indictment) to be in the interests of justice. It considered this might enable it to issue a multi-Accused verdict following a first trial based on a limited part of the Indictment, thereby “safeguarding the fundamental interest of victims in achieving meaningful and timely justice [*i.e.* the rendering of any verdict], as well as the right of all Accused in Case 002 to an expeditious trial”.<sup>13</sup> The Severance Order indicated that while the scope of the Case 002/01 crime base would be limited to factual allegations described in the Indictment as population movement phases one and two and associated crimes against humanity, the Case 002/01 verdict would outline the structure of Democratic Kampuchea (“DK”), the roles of each Accused both preceding and during the DK period, as well as policies of DK on the issues raised in the entire Indictment.<sup>14</sup>

9. In order to retain the flexibility to hear a greater proportion of the allegations in the Closing Order should the health of the Accused so permit, the Trial Chamber indicated that it may at any time decide to include additional portions of the Case 002 Closing Order in the first trial, subject to the right of the Defence to have the opportunity to prepare an effective defence and all parties to receive timely notice.<sup>15</sup> The scope of Case 002/01 was later expanded to incorporate killings carried out at Toul Po Chrey, following the Trial Chamber’s determination that addition of this segment was consistent with the logical and chronological structure of trial laid down in the Severance Order and unlikely to prolong proceedings significantly.<sup>16</sup>

10. In view of the provisions of Internal Rule 23(3), the Severance Order had no impact on the nature of Civil Party participation at trial, but it noted that the formulation of reparations claims made on their behalf by the Lead Co-Lawyers should take account of Internal Rule 23*quinqies*(1)(a).<sup>17</sup> In addition to making other consequential orders, the Chamber

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<sup>13</sup> Severance Order, paras 5 and 8.

<sup>14</sup> Severance Order, paras 1 and 5. Excluded from the scope of Case 002/01 were co-operatives, worksites, security centres, execution sites or facts relevant to the third phase of population movements, all of which were deferred to future trials. For the same reasons, allegations concerning rape and forced marriage are also unable to be accommodated within the scope of Case 002/01 (Severance Order, paras 7, 9).

<sup>15</sup> Severance Order, para. 6.

<sup>16</sup> Decision on Proposed Extension of Trial, para. 3.

<sup>17</sup> Severance Order, para. 8. Internal Rule 23*quinqies*(1) provides that “[i]f an Accused is convicted, the Chambers may award only collective and moral reparations to Civil Parties. Collective and moral reparations

concluded by indicating that no charges in the Indictment were discontinued as a result of the Severance Order and that further information regarding subsequent cases to be tried in Case 002 would be provided to the parties and the public in due course.<sup>18</sup> The Trial Chamber has always borne in mind that the ECCC's ability to hold such future trials depends on unknown contingencies, outside of the Chamber's control, such as the continued fitness of the Accused to be tried, and the continuity of donor support to the ECCC.

11. On 17 November 2011, the Trial Chamber declared the Accused IENG Thirith to be unfit to stand trial due to the impact of a progressive, dementing illness, most likely Alzheimer's disease. It ordered the severance of the charges against the Accused IENG Thirith from the Indictment and declared proceedings against her to be stayed.<sup>19</sup>

### 2.1.3. *The Co-Prosecutors' Requests for Reconsideration of the Severance Order*

12. On 3 October 2011, the Co-Prosecutors sought reconsideration of the Trial Chamber's Severance Order and an oral hearing, objecting to its issue prior to the Co-Prosecutors being heard, and seeking the inclusion of a more representative cross-section of the Indictment within the scope of Case 002/01.<sup>20</sup>

13. On 18 October 2011, the Trial Chamber rejected the Co-Prosecutors' First Request for Reconsideration, on grounds that they had placed "considerable reliance on Rule 73bis before the [ICTY], deriving from it a mandatory, universal obligation to seek the views of the Co-Prosecutors before decisions on severance are taken. Far from representing a

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for the purpose of these Rules are measures that ... a) acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted."

<sup>18</sup> Severance Order, para. 9 and Disposition.

<sup>19</sup> Decision on IENG Thirith's Fitness to Stand Trial, E138, 17 November 2011 (*reaffirmed in* Decision on Reassessment of the Accused IENG Thirith's Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011, E138/1/10, 19 September 2012). Following subsequent appeals filed by the Co-Prosecutors, the Trial Chamber remained seised of a variety of issues concerning the Accused IENG Thirith for more than one year after having first determined that she was unfit to be tried: *see e.g.* Immediate appeal against the Trial Chamber decision to order the release of Accused IENG Thirith, E138/1/1, 18 November 2011; Co-Prosecutors' request for stay of release of Accused IENG Thirith, E138/1/2, 18 November 2011 and (Supreme Court Chamber) Decision on Co-Prosecutors' Request for Stay of Release Order, E138/1/2/1, 19 November 2011; Issuance of Decision on Appeal against Trial Chamber's Decision to Release IENG Thirith (E138/1/1), E138/1/6, 5 December 2011 and Decision on Immediate Appeal against the Trial Chamber's Order to Release the Accused IENG Thirith, E138/1/7, 13 December 2011; *see also* Decision on Co-Prosecutors' Request for Stay of Release Order of IENG Thirith, E138/1/10/1/2/1, 16 September 2012 and 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 and Decision on the Implementation of the Supreme Court Chamber's 'Decision on Immediate Appeal against the Trial Chamber's Order to Unconditionally Release the Accused IENG Thirith (E138/1/10/1/5/8)', E138/1/10/1/5/8/1, 26 March 2013.

<sup>20</sup> Co-Prosecutors' Request for Reconsideration of Severance Order pursuant to Internal Rule 89ter, E124/2, 3 October 2011 ("First Request for Reconsideration"), para. 3.

universal minimum procedural standard, ICTY Rule 73*bis* is instead a specific measure adopted within an institutional setting that differs significantly from that of the [ECCC].”<sup>21</sup> In rejecting this request, the Trial Chamber noted that ICTY Rule 73*bis* evolved in the context of adversarial proceedings, where indictments are initiated and amended by the Prosecution. Before the ECCC, proceedings are inquisitorial and Indictments are issued instead by Co-Investigating Judges. The Trial Chamber further stressed that in practice, attempts by ICTY Trial Chambers to reduce the scope of indictments pursuant to Rule 73*bis* have seldom been uncontested by the Prosecution, and that hearings and related procedural steps pursuant to this Rule have inevitably delayed the commencement of trial in affected cases before the ICTY.<sup>22</sup> It concluded by noting that

[i]n the present context, the Trial Chamber has recently announced the commencement of the trial of the substance in Case 002 for late November 2011. In the exercise of its duty to ensure an expeditious trial, the Chamber has declined to reconsider this Order or to hold a hearing, which would ensure that the substantive trial could instead not open before 2012.<sup>23</sup>

14. The Trial Chamber also corrected a number of the Co-Prosecutors’ misconceptions regarding the effect of the Severance Order, noting that this Order is relevant only to the order and sequencing of the trials in Case 002. The order was designed to enable the Chamber to issue a first verdict limited to certain counts and factual allegations as soon as possible, without the need to await a conclusion of the whole trial in relation to all portions of the Indictment.<sup>24</sup> It also emphasised that the Severance Order did not discontinue any allegations or charges in the Indictment.<sup>25</sup>

15. The Trial Chamber further noted that the Severance Order was motivated by the following objectives:

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<sup>21</sup> Decision on Request for Reconsideration, para. 3; *see also* para. 5 (“the ECCC Plenary Session in February 2011 [thus] chose not to merely replicate ICTY Rule 73*bis* but instead enacted the present Rule 89*ter*. This rule was intended to grant the Trial Chamber, where the interests of justice so require, a discretionary trial management mechanism enabling it on its own motion to separate proceedings and to examine in different trials different parts of the Indictment. To safeguard the expeditiousness of proceedings, decisions taken pursuant to this rule are not subject to immediate appeal”).

<sup>22</sup> Decision on Request for Reconsideration, para. 4 (further noting that the ECCC, whose docket is limited and Accused elderly, is less able than the ICTY to absorb the impact of similar delays).

<sup>23</sup> Decision on Request for Reconsideration, para. 6.

<sup>24</sup> Decision on Request for Reconsideration, paras 7-8 (further refuting the Co-Prosecutors’ contention that commencement of subsequent proceedings in Case 002 could occur only substantially after the conclusion of the first trial and/or following determination of any appeals from that trial, noting that “the Chamber does not consider that any appeal of the first verdict prevents continuation of the subsequent trials in Case 002 in relation to the remaining counts and factual allegations in the Indictment”).

<sup>25</sup> Decision on Request for Reconsideration, para. 9.



- i. To divide Case 002 into manageable parts that each take an abbreviated time to determine;
- ii. To ensure that the first trial encompasses a thorough examination of the fundamental issues and allegations against all Accused;
- iii. To provide a foundation for a more detailed examination of the remaining charges and factual allegations against the Accused in later trials;
- iv. To follow as far as possible the chronology and/or logical sequence of the Closing Order (approximately 1975-1976);
- v. To 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
- vi. To select those factual allegations that affect as many victims as possible.<sup>26</sup>

16. The Trial Chamber in its Case 002/01 verdict would therefore

give consideration to the roles and responsibilities of the Accused in relation to all policies relevant to the entire Indictment, but will give detailed factual consideration in the first trial mainly to a feature of the Indictment which affected virtually all victims of the Democratic Kampuchea regime (namely population movement phases one and two). Given, as the Co-Prosecutors allege, that there is real concern as to whether the Accused will be physically and mentally able to participate in a lengthy trial, the Chamber considered these measures to be essential in order to “[safeguard] the fundamental interest of victims in achieving meaningful and timely justice, and the right of all Accused in Case 002 to an expeditious trial”.<sup>27</sup>

17. Finally, the Chamber repeated its assurance in the Severance Order that it did not exclude the possibility of adding additional charges or counts to the first trial in Case 002 should circumstances permit.<sup>28</sup> While finding no basis to reconsider the Severance Order at that stage, the Chamber also took note of the Co-Prosecutors’ indication of possible additional topics for inclusion in the first trial, indicating that it would be “guided by [the Co-Prosecutors’] views as to priority allegations for consideration during later phases of the trial”.<sup>29</sup>

## **2.2. The Trial Chamber’s treatment of the issue of severance over the course of trial**

18. The hearing of the substance against the Accused NUON Chea, IENG Sary and KHIEU Samphan commenced on 21 November 2011, 11 months after the Trial Chamber was seised of the Case 002 Closing Order. As of that date, proceedings against the Case 002

<sup>26</sup> Decision on Request for Reconsideration, para. 10.

<sup>27</sup> Decision on Request for Reconsideration, para. 11, *citing* Severance Order, para. 8.

<sup>28</sup> Decision on Request for Reconsideration, para. 12, reiterating that the Chamber “may at any time decide to include in the first trial additional portions of the Closing Order in Case 002, subject to the right of the Defence to be provided with opportunity to prepare an effective defence and all the parties to be provided with timely notice” (Severance Order, para. 6).

<sup>29</sup> Decision on Request for Reconsideration, para. 12.

Accused had been ongoing for almost four years. On 27 January 2012, the Co-Prosecutors again requested that the Trial Chamber expand the scope of Case 002/01 by adding three crime sites, namely the District 12 execution sites (“District 12”), the Tuol Po Chrey execution site (“Tuol Po Chrey”), 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”).<sup>30</sup> The Lead Co-Lawyers supported the request, but the IENG Sary and KHIEU Samphan Defence teams asked that the request be summarily dismissed without a hearing.<sup>31</sup>

19. Having heard the evidence of 19 individuals, and prior to hearing crime base evidence, the Chamber on 3 August 2012 indicated that it would hear submissions from the Co-Prosecutors and Lead Co-Lawyers regarding possible extension of the scope of trial in Case 002/01, in addition to providing an opportunity to the Defence teams to respond.<sup>32</sup>

#### 2.2.1. *Adversarial hearing regarding proposed extensions to the scope of trial*

20. On 17 August 2012, during a Trial Management Meeting (“TMM”) otherwise designed to discuss measures to streamline and expedite trial proceedings, the Trial Chamber revisited the issue of the scope of trial. Despite its concerns as to the relatively slow pace of trial to date, the Chamber in its Scheduling Order noted that “the Co-Prosecutors have repeatedly urged extension of the scope of charges to be addressed in Case 002/01 (most recently, E163 and *Cambodia Daily*, Wednesday 11 July 2012, pp. 1-2).”<sup>33</sup> It further noted that

[a]lthough the principal focus of the Chamber’s efforts to date has been to ensure greater streamlining and trial efficiency, the Chamber has nonetheless also devoted significant time and resources to assessing the impact of acceding to the Co-Prosecutors’ request to expand the scope of Case 002/01 in the manner proposed by [the Co-Prosecutors].<sup>34</sup>

<sup>30</sup> Co-Prosecutors’ Request to Include Additional Crimes Sites within the Scope of trial in case 002/1, E163, 27 January 2012 (“Second Request for Reconsideration”), paras 4 and 33.

<sup>31</sup> IENG Sary’s Response to the Co-Prosecutors’ Request to Include Additional Crime Sites Within the Scope of Trial in Case 002/01, E163/1, 3 February 2012; Response to Co-Prosecutors’ Request to Include Additional Crime Sites Within the Scope of the First Trial of Case 002, E163/4, 13 February 2012.

<sup>32</sup> See Confidential Annex A: partial list of witnesses, experts and Civil Parties to be heard during the first trial in Case 002, E131/1.1, 25 October 2011 (listing approximately 60 individuals identified by the Trial Chamber as likely to be heard on a priority basis in Case 002/01); Scheduling of Trial Management Meeting to enable planning of the remaining trial phases in Case 002/01 and implementation of future measures designed to promote trial efficiency, E218, 3 August 2012 (“TMM Scheduling Order”).

<sup>33</sup> TMM Scheduling Order, para. 13.

<sup>34</sup> TMM Scheduling Order, para. 13.

21. The Trial Chamber attached to its TMM Scheduling Order an Annex indicating a modest extension of trial the Chamber might contemplate in relation to executions in District 12 and at Toul Po Chrey.<sup>35</sup> The Chamber warned that acceding to even a relatively modest request for extension of the scope of Case 002/01 entailed resolution of a number of issues and inevitable prolongation of proceedings in Case 002/01.<sup>36</sup> In its Annex, the Chamber outlined a number of principal concerns, including:

- i. The impact of these proposed extensions on witness testimony and concern that expanding the trial may undercut the Trial Chamber's ongoing efforts to streamline proceedings by further reducing the number of individuals to be heard in Case 002/01;<sup>37</sup>
- ii. The Chamber's assessment that the hearing of an additional 23 Civil Parties and witnesses as sought by the Co-Prosecutors to address these proposed extensions would equate to a prolongation of proceedings by at least four to six months and concerns that much of this evidence might be unlikely to add significantly to the evidence already before the Chamber, repetitive or otherwise unnecessary to hear;<sup>38</sup>
- iii. Lack of clarity regarding the purpose of adding further allegations regarding S-21 in light of the testimony of KAING Guek Eav to date in Case 002/01 and the totality of crime base evidence regarding S-21 already before the Chamber;<sup>39</sup> and
- iv. Uncertainty regarding the scope of these proposed extensions, in particular concerning the full extent of the additional portions of the Closing Order that may need to be incorporated into Case 002/01 should the extensions proposed by the Co-Prosecutors be adopted, as well as the consequential impact of adding further Indictment paragraphs on the numbers of witnesses and documents to be considered at trial (including those sought by the other parties).<sup>40</sup>

22. The Trial Chamber nonetheless invited submissions from the parties on the following questions at the TMM<sup>41</sup>:

- *[Co-Prosecutors]* The impact that failure to grant the proposed extension may have on the Co-Prosecutors' ability to meet their burden of proof in Case 002/01;
- *[Co-Prosecutors and Lead Co-Lawyers]* Whether the envisaged benefits offered by the proposed extension outweighs the risks of prolongation of trial proceedings, particularly in view of the interests of victims of Khmer Rouge era crimes in reaching an early verdict; and
- *[All Defence teams]* Reasoned oral submissions regarding the time required by the Defence teams to adequately prepare their defence to the areas of the indictment sought to be added by the Co-Prosecutors (and thus the earliest date on which witnesses called in support of these proposed additions might be called before the Chamber).

<sup>35</sup> Annex entitled 'Co-Prosecutors' proposed extension of scope of trial in Case 002/01 (E163)', E218.1, 3 August 2012 ("Annex"), paras 3-4.

<sup>36</sup> TMM Scheduling Order, paras 13-14.

<sup>37</sup> Annex, para. 7

<sup>38</sup> Annex, paras 4, 8, 9 and 10.

<sup>39</sup> Annex, paras 11-12.

<sup>40</sup> Annex, paras 12-16.

<sup>41</sup> TMM Scheduling Order, para. 15; T., 17 August 2012.

23. Prior, during and subsequent to the TMM, the Co-Prosecutors requested the addition of the above three further crime sites to the scope of Case 002/01 on grounds that their inclusion would assist the Co-Prosecutors in demonstrating the criminal intent and purpose behind the forced movement of the population from the cities of Cambodia in April 1975, enable the Accused to be tried for some of the most serious crimes committed during the DK regime and ensure that the scope of Case 002/01 was more representative of all crimes in the Case 002 Closing Order.<sup>42</sup> The Defence indicated that they may seek an adjournment to enable the preparation of a defence should extension of the trial be contemplated, and requested to hear a substantial number of rebuttal witnesses in the event that S-21 was added to the scope of trial, but did not otherwise oppose the concept of severance.<sup>43</sup>

### 2.2.2. *Partial grant of Co-Prosecutors' request to expand the scope of Case 002/01*

24. On 8 October 2012, the Trial Chamber granted the Co-Prosecutors' request to incorporate killings at Toul Po Chrey within Case 002/01, insofar as these related to incidents occurring immediately after the evacuation of Phnom Penh.<sup>44</sup> The Trial Chamber considered the killings at Toul Po Chrey to be a logical extension of the existing allegations in Case 002/01, which might be incorporated following a relatively brief extension of trial. In support of this extension, the Chamber indicated that it intended to call only two additional witnesses, namely TCW-752 and TCW-389.<sup>45</sup>

25. Following careful consideration of all submissions of the parties made at the TMM and subsequently, the Chamber considered however that it was unable to entertain proposals to extend the scope of trial in Case 002/01 so as to include factual allegations concerning S-21 and District 12. The reasons for this were that incorporation of these elements would risk a substantial prolongation of the trial in Case 002/01, due either to the number of witnesses sought by the parties, anticipated difficulties in limiting the scope of

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<sup>42</sup> T., 17 August 2012, pp. 93-102; *see also* Second Request for Reconsideration and "Notice of Co-Prosecutors' position on key issues to be discussed at 17 August 2012 trial management meeting" (with confidential annex), E128/2, 15 August 2012.

<sup>43</sup> [List of] All Individuals Sought by the Parties to be Heard at Trial (as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer), E236, 2 October 2012 (indicating requests to hear the testimony of a cumulative total of 36 further individuals should S-21 be added to the scope of Case 002/01 (5 sought by the Co-Prosecutors and an additional 27 by the NUON Chea Defence) and a further six individuals should District 12 be added (sought by the Co-Prosecutors)).

<sup>44</sup> Decision on Proposed Extension of Trial, para. 3 (excluding from consideration killings at Toul Po Chrey that instead occurred between 1976 and 1977).

<sup>45</sup> Decision on Proposed Extension of Trial, para. 3 (further indicating that the Chamber would incorporate consideration of documents and other evidence relevant to this segment at a forthcoming document hearing and requesting the parties to commence immediate preparation for the testimony of these two witnesses).

these proposed extensions, or likely Defence objections to them. The Chamber was also unconvinced that these additional crime sites were closely connected to the existing factual allegations in Case 002/01 or that their inclusion fitted within the logical sequence of the trial in Case 002 as described in the Severance Order.<sup>46</sup> Most crucially, intervening trial management challenges stemming from the physical frailty of one or more Accused precluded the possibility of any further extensions to the scope of trial. The Chamber noted that it was

conscious that in ensuring an expeditious trial, it has had to allow for delays brought about by issues such as the lengthy process required to assess and then review IENG Thirith's fitness to stand trial. The current hospitalization of the Accused IENG Sary, and consequent trial management challenges, also ensures that the Chamber does not consider significant expansion of the scope of trial in Case 002/01 to be a prudent exercise of its trial management discretion.<sup>47</sup>

26. To provide legal certainty to the parties and to enable the Trial Chamber to proceed to the concluding phases of trial in Case 002/01, the Chamber shortly afterwards indicated that no further extensions of trial would be contemplated during Case 002/01.<sup>48</sup>

### **2.3. Increasing trial management challenges stemming from the health of the Accused**

27. On 7 September 2012, the Accused IENG Sary was hospitalized for a period of 61 days, returning to the ECCC Detention Facility on 7 November 2012. Although the Trial Chamber was able to proceed with the hearing of a limited number of individuals during this period due to the willingness of the Accused IENG Sary to waive his right to be present, this agreement was withdrawn upon the Chamber's determination that while the Accused was increasingly frail, he remained fit to be tried.<sup>49</sup> On 18 December 2012, reconsideration of the fitness to stand trial of the Accused NUON Chea and IENG Sary by the court-appointed medical experts was scheduled for mid-March 2013.<sup>50</sup>

<sup>46</sup> Decision on Proposed Extension of Trial, para. 2.

<sup>47</sup> Decision on Proposed Extension of Trial, para. 2.

<sup>48</sup> Forthcoming document hearings and response to Lead Co-Lawyers' memorandum concerning the Trial Chamber's request to identify Civil Party applications for use at trial (E208/4) and KHIEU Samphan Defence request to revise corroborative evidence lists (E223), E223/2, 19 October 2012, para. 3.

<sup>49</sup> Decision on Accused IENG Sary's Fitness to Stand Trial, E238/9, 26 November 2012. An appeal of this determination, and related decisions, remained pending before the Supreme Court Chamber at the date of the Accused's death. On 21 March 2013, the SCC dismissed all pending immediate appeals filed by IENG Sary on the merits: *Post Mortem* Dismissal of IENG Sary's Immediate Appeals, E238/9/1/5, 21 March 2013 (announcing that the SCC no longer had jurisdiction to decide on immediate appeals filed by IENG Sary following the termination of proceedings against him).

<sup>50</sup> Re-appointment of Experts to Review the Health and Fitness of IENG Sary and NUON Chea During the Week of 11 March 2013, E256, 18 December 2012; Consolidated Schedule of Witnesses and Experts for Early 2013, E236/4, 8 January 2013, para. 5.

28. Since resuming on 8 January 2013, the Trial Chamber has confronted increasing trial management challenges due to the increasing physical frailty and hospitalization of the Accused. The Trial Chamber had been able to utilize only seven courtroom days for the hearing of oral testimony in 2013 prior to the issue of the SCC Decision, due to the combined effect of the hospitalization of one or more Accused, and the absence of waivers enabling the Chamber to proceed in the interim. The Accused NUON Chea was admitted to the Khmer-Soviet Friendship Hospital on 13 January 2013, where he remained until 19 February 2013. KHIEU Samphan was also hospitalized between 16 and 25 January 2013. IENG Sary was re-admitted to the Khmer Soviet Friendship Hospital on 4 March 2013, where he remained until his death on 14 March 2013.

#### **2.4. Co-Prosecutors' Appeal of Trial Chamber Decision on the Scope of Case 002/01**

29. On 7 November 2012, the Co-Prosecutors appealed the Trial Chamber's decision partially granting its request to expand the scope of trial in Case 002/01, alleging that the Trial Chamber erred in failing to apply the correct legal standard for the severance of charges or to provide adequate reasons, incorrectly evaluating the risk of a substantial prolongation of the trial, and by suggesting the absence of a nexus between the existing crime sites in Case 002/01 and those sought to be added. It requested the SCC to declare the appeal admissible, to find the proposed extension of the scope of the trial to be in the interest of justice, and to amend the Impugned Decision so as to include S-21 and the executions in District 12 within the scope of the trial in Case 002/01.<sup>51</sup> The Civil Party Lead Co-Lawyers supported the Co-Prosecutors' appeal.<sup>52</sup>

30. In response, the Defence teams alleged that the appeal was inadmissible and should be rejected on its merits. They submitted that the appeal, which pertained to decisions taken over one year ago and prior to the start of trial, was time-barred and inadmissible under Rule 104(4).<sup>53</sup> Further, and while the Impugned Decision declined to add additional crime

<sup>51</sup> Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 with Annex 1 and Confidential Annex II, E163/5/1/1, 7 November 2012, paras 3, 21-86 and 87.

<sup>52</sup> Civil Party Lead Co-Lawyers' Support to the Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, E163/5/1/5, 21 November 2012, paras 6-7, 9-10 (contending that any extension of the scope of the trial would assist in achieving a more accurate historical record and extend the reach of justice, both of which will foster national reconciliation).

<sup>53</sup> IENG Sary's Response to the Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, E163/5/1/3, paras 21-49; NUON Chea's Response to Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, E163/5/1/4, 19 November 2012, paras 3-5; KHIEU Samphan's Response to the Co-Prosecutors' Immediate Appeal Concerning the Scope of Case 002/01, E163/5/1/9, 30 November 2012, para. 8.

sites to the scope of Case 002/01, it created no bar to arriving at a judgement on the merits and did not terminate proceedings. It simply determined the scope of the current trial and expressly did not discontinue any counts or allegations in the Indictment.<sup>54</sup> In any trial severed by the charges, there will be practical issues to resolve. However, uncertainty in relation to future trials does not indicate the effective termination of proceedings.<sup>55</sup> The Defence further submitted that the Trial Chamber did not err in law or in the exercise of its discretion by disregarding the requirement of reasonable representativeness as set out in ICTY Rule 73bis(D) when applying ECCC Internal Rule 89ter.<sup>56</sup> Nor did the Trial Chamber err in its assessment of the likelihood of substantial prolongation of trial proceedings that might stem from granting the extensions sought by the Co-Prosecutors, or the nexus between the current scope of trial and the proposed extensions.<sup>57</sup>

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<sup>54</sup> NUON Chea's Response to Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, E163/5/1/4, 19 November 2012, para. 5 ("at most, the Impugned Decision has the effect of postponing the decision whether or not to prosecute the facts surrounding S-21 and District 12 to a later date; that future decision will be based on a number of factors, for which a proper assessment can be done only at an unspecified time in the future"); IENG Sary's Response to the Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, E163/5/1/3, para. 35 (describing the Impugned Decision as a "forthright trial management decision, well within the Trial Chamber's discretion").

<sup>55</sup> IENG Sary's Response to the Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, E163/5/1/3, para. 38 (also noting that the possibility that an Accused could become unfit or die prior to judgement may be greater in some cases than in others, but it is incorrect to suggest at this stage that possible future unfitness or death of an Accused causes proceedings to be effectively terminated).

<sup>56</sup> NUON Chea's Response to Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, E163/5/1/4, 19 November 2012, paras 7-15, 12; KHIEU Samphan's Response to the Co-Prosecutors' Immediate Appeal Concerning the Scope of Case 002/01, E163/5/1/9, 30 November 2012, para. 43; IENG Sary's Response to the Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, E163/5/1/3, para. 5.

<sup>57</sup> NUON Chea's Response to Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, E163/5/1/4, 19 November 2012, paras 17 ("a reasonable reading of the [Impugned] Decision makes clear that the Trial Chamber [...] made a preliminary assessment of all the witnesses as proposed by the parties, and made a *prima facie* finding that the number of witnesses that would need to be heard ... in case the charges were to be extended would risk a substantial prolongation of the trial. The Trial Chamber was well within its right to conduct such an assessment") and 23 ("it can be deduced from the [Impugned] Decision that the Trial Chamber envisions that even when using the techniques and powers that it has used for its trial management so far, the risks for delays are substantial. This is a reasonable assumption [...] based on the facts before the Trial Chamber, and due substantial deference").

## 2.5. The Supreme Court Chamber Decision

31. In its Decision of 8 February 2013, the SCC considered the Severance Order and related decisions to amount in substance to a termination of proceedings.<sup>58</sup> The SCC held that in the specific ECCC context, “the severance of Case 002 into discrete trials creates the inevitable situation that proceedings in relation to charges falling outside the scope of Case 002/01 are, in effect, stayed” and the Co-Prosecutors’ appeal was declared admissible pursuant to Internal Rule 104(4).<sup>59</sup> It found that future trials in Case 002 are unlikely to occur, amongst other factors, due to the advanced age and declining health of the Accused.<sup>60</sup> The Trial Chamber was also criticized for failure to outline a precise plan for the adjudication of these future trials.<sup>61</sup>

32. Regarding the merits of the appeal, the SCC appeared to agree with the Trial Chamber that “considerations of efficiency and fairness lend support to the general principle [...] that charges concerning similar events against several accused should preferably be tried in joint proceedings”.<sup>62</sup> While 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’”, the SCC considered this rule to “[offer] no guidance as to what

<sup>58</sup> SCC Decision, paras 22-23 (finding that the “prospect of resuming the proceedings in relation to charges excluded from the scope of Case 002/01 as to permit arriving at a judgment in the regular course” is remote and thus “arrival at a judgment on the merits in respect of the alleged crimes at S-21 and District 12 is effectively barred by virtue of their deferral to a future trial”) and 25-26 (“as the definitive decision on the mode of the severance of Case 002 ... results in a *de facto* stay of proceedings in relation to all charges placed outside the scope of Case 002/01, [...] the Impugned Decision denying inclusion of S-21 and District 12 within the scope of Case 002/01 has the effect of terminating the proceedings in relation to those charges”).

<sup>59</sup> SCC Decision, para. 22 (noting that the ECCC has only one Trial Chamber and only one trial on its docket); *see also* para. 17 (acknowledging that the Impugned Decision followed a year-long decision-making process at trial regarding severance, but rejecting “any notion that prescribed time limits for the disposal of immediate appeals should have any impact on the timeliness, admissibility or merits thereof”).

<sup>60</sup> SCC Decision, para. 24 (“while some measure of speculation is always involved in the projection-making process, several inescapable realities exist in the case at hand [...] lend a measure of probability to the [Co-Prosecutors’ pessimism about the future of Case 002]. Such realities include: 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 recently expressed by the Trial Chamber in meeting its workload demands; and the fact that, in the context of the ECCC, judgments on the merits are not final until having passed through the appellate stage”).

<sup>61</sup> SCC Decision, paras 46 (“no plan was ever put into place regarding the number or scope of the remaining cases to be tried in Case 002 [...] despite the Trial Chamber’s indication in the 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’”) and 47 (“the Trial Chamber’s continued failure to create a tangible plan for the future of remaining trials in Case 002 has resulted in confusion for the parties and has effectively ‘buried’ the remaining charges in the Indictment. [...] The Supreme Court Chamber therefore considers that prejudice also arises from the Trial Chamber’s failure to articulate any plan for the adjudication of future trials in Case 002”).

<sup>62</sup> SCC Decision, paras 30 and 33 (finding severance, where deemed necessary, to characteristically involve separating an accused person from joint proceedings and as constituting an exception to the general preference for joint trials).



circumstances would satisfy the requirement.”<sup>63</sup> In the SCC’s view, the interest of justice to sever lies “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.”<sup>64</sup> It considered the Trial Chamber’s consideration of factors related to expeditiousness and the logical sequence of Case 002/01 not to “evince unreasonableness at first appearance”, but found the Impugned Decision to “evince a *prima facie* paucity [both] of reasoning and consideration of other conceivably relevant factors.”<sup>65</sup>

33. The SCC rejected the notion that Internal Rule 89*ter* confers upon the Trial Chamber a broad discretionary trial management competence to sever proceedings *proprio motu* without right of appeal. It also disagreed that a requirement to seek the views of the Co-Prosecutors and to consider the reasonable representativeness of the Indictment before taking a decision on severance were ill-suited to the specific procedural context of the ECCC.<sup>66</sup> The SCC further faulted the Chamber for “reason[ing] only [...] that [s]eparation of proceedings will enable the Chamber to issue a verdict following a shortened trial, safeguarding the fundamental interest of victims in achieving meaningful and timely justice, and the right of all [Co-]Accused to an expeditious trial”, finding that this explanation was “limited to restating general postulates and does not demonstrate how the severance advances the interest of justice.”<sup>67</sup>

34. The SCC questioned the premise that measures to shorten the trial are necessary in order to safeguard the fundamental interest of victims in achieving meaningful and timely justice, and the right of all Co-Accused in Case 002 to an expeditious trial, instead considering that

[i]f anything, the Trial Chamber’s doubts about the Co-Accused’s abilities to participate in a lengthy trial militates in *favour* of exploring, at the earliest instance, possible ways

<sup>63</sup> SCC Decision, paras 34-35.

<sup>64</sup> SCC Decision, para. 35.

<sup>65</sup> SCC Decision, paras 35-36 and 37 (nonetheless acknowledging that further reasoning is found in the Trial Chamber’s previous decisions regarding the severance of Case 002).

<sup>66</sup> SCC Decision, paras 38 (*citing* Decision on Reconsideration, para. 4, 40 (noting that while a plain reading of Rule 89*ter* of the Internal Rules “does suggest that the Trial Chamber enjoys a certain breadth of discretion to decide on its own motion that a given case should be severed and in what order the cases as separated should be tried, it does not necessarily suggest a similarly broad discretion to determine what form the cases as separated should take, especially without hearing the parties on the matter first”) and 42 (rejecting the Trial Chamber’s assertion that the ECCC is purely an inquisitorial system and finding “no basis for the Trial Chamber’s implication that this [...] renders it unnecessary to seek the Co-Prosecutors’ (or any of the parties’) views on the severance of a case or to consider whether the cases as severed can be reasonably representative of the Indictment”).

<sup>67</sup> SCC Decision, para. 41 (acknowledging that further clarification of the Trial Chamber’s motivation for issuing the Severance Order was provided in the Decision on Reconsideration).

of shaping the scope of Case 002/01 that could maximize representation of the totality of the charges against the Co-Accused, and thereby optimize the meaningfulness of the justice to be rendered, in the shortest amount of time.<sup>68</sup>

35. The SCC further noted that the Trial Chamber appears “to rely heavily on considerations of expeditiousness alone”, whilst also reminding the Trial Chamber of its “affirmative obligation to ensure that proceedings are conducted within a reasonable time”.<sup>69</sup>

36. The SCC considered the requirement of reasonable representativeness of an Indictment, particularly where there is real concern that only one case may arrive at a judgment on the merits, to be “dictated by common sense and the interests of meaningful justice, and conforms with comparable international legal standards”.<sup>70</sup> The SCC concluded that the Trial Chamber

committed an error of law in interpreting Rule 89*ter* of the Internal Rules as conferring upon it the discretion to sever Case 002 without having to provide adequate reasons demonstrating the interest of justice served and without having to seek the parties’ views on the terms thereof. The Supreme Court Chamber accordingly finds that the Trial Chamber committed a discernible error in the exercise of its discretion in issuing the Severance Order without having invited the parties’ submissions on the terms thereof, and in issuing the Decision on Reconsideration without having considered how to render the scope of Case 002/01 reasonably representative of the Indictment. In violating their right to a reasoned opinion and their right to be heard, and in limiting the scope of Case 002/01 in a way that unduly disregards reasonable representativeness of the Indictment, the Trial Chamber thereby caused prejudice to the Co-Prosecutors.<sup>71</sup>

37. The SCC further noted that the Trial Chamber should not have announced its intention to commence subsequent cases shortly after the conclusion of evidence in Case 002/01 without addressing several practical issues regarding the adjudication of future cases.<sup>72</sup> In a footnote, the SCC “notes a similar, if not aggravated, violation of the Civil Party Lead Co-Lawyers’ right to be heard” following the Trial Chamber’s acknowledgement of the Lead

<sup>68</sup> SCC Decision, para. 43 (emphasis in original).

<sup>69</sup> SCC Decision, paras 45 (further concluding, on the basis of the Trial Chamber’s consideration that the killings at Tuol Po Chrey were a logical extension of the existing allegations in Case 002/01 but the killings at District 12 and S-21 were not, that “it can only be inferred that the Trial Chamber remained guided in the Impugned Decision by undisclosed criteria other than logical relations among the particular charges”) and 47.

<sup>70</sup> SCC Decision, paras 42 and 43 (further considering that the Trial Chamber’s additional justification for rejecting the notion that Case 002/01 should be more representative of the Indictment, namely that “no allegations or charges in the Indictment are discontinued in consequence of the Severance Order”, is equally unreasonable in the light of its expressed reasons for ordering severance in the first place, namely, that there is real concern as to whether the Co-Accused will be physically and mentally able to participate in a lengthy trial).

<sup>71</sup> SCC Decision, para. 44 (considering such prejudice to have been partially remedied when the Trial Chamber invited the parties to make submissions on the risks and benefits of the Co-Prosecutors’ proposed expansion of trial at the TMM but finding that after nearly a year of hearings on the substance under the terms of the Severance Order, the scope of Case 002/01 was a *fait accompli*).

<sup>72</sup> SCC Decision, para. 47.

Co-Lawyers' request for reconsideration of the Severance Order within its Decision on Reconsideration but without specifically addressing their particular arguments.<sup>73</sup>

38. The SCC acknowledged that “the scale and complexity of Case 002, as well as the deteriorating health conditions of the Co-Accused [...] likely prompted the Trial Chamber to sever the proceedings into more expeditious and manageable trials” and that “economy of justice may be served by proceeding to judgment on certain selected issues prior to embarking on the adjudication of others, and this interest may be justified by legal as well as organizational considerations.”<sup>74</sup> However, the SCC considered these to have not been sufficiently explained in respect of Case 002 as a whole and therefore that

the cumulative effect of the Trial Chamber's errors in shaping the severance of Case 002, and thereby the scope of Case 002/01, occasions the invalidity of the Severance of Case 002, which comprises the Severance Order, Decision on Reconsideration, and Impugned Decision, along with all related memoranda. This, in turn, renders the grounds on which the Impugned Decision stands too tenuous for it to be upheld. The Supreme Court Chamber accordingly finds that the Impugned Decision must be annulled.<sup>75</sup>

39. Although finding “the question of amending the Impugned Decision so as to include District 12 and S-21 within the scope of Case 002/01 [to be] moot”, the SCC indicated that the “present decision is without prejudice to the Trial Chamber's reassessment of severing Case 002 pursuant to Rule 89*ter* of the Internal Rules.”<sup>76</sup> Should the Trial Chamber continue to consider the interests of justice to require severance of Case 002, it must

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. It is necessary that the Trial Chamber determine, based on its organic familiarity with Case 002, whether the gist of such severance is in judicial manageability, in which case there is necessity for a tangible plan for the adjudication of the entirety of the charges in the Indictment, and not merely a portion thereof. If, however, faced with the deteriorating health of the Co-Accused, the principal motivation is that justice is better served by concluding with a judgement, whether in a conviction or acquittal, of at least one smaller trial on some portion of the Indictment, then the Trial Chamber should state this clearly and give due consideration to reasonable representativeness of the Indictment within the smaller trial(s).<sup>77</sup>

40. Finally, the SCC concluded by noting that

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<sup>73</sup> SCC Decision, footnote 110 (noting the Trial Chamber's explanation that it ruled on the Co-Prosecutors' Request for Reconsideration expeditiously, in order to safeguard its ability to commence the Case 002 trial of the substance in 2011, and that it considered separate decisions on the Civil Party Request for Reconsideration and the Civil Party Request for Clarification and Decision to be unnecessary, considering instead that the Civil Party Request for Reconsideration “contain[ed] several important concerns that pertain to the specific interests which the Civil Party Lead Co-Lawyers represent [...] [which] remain unresolved to date”).

<sup>74</sup> SCC Decision, para. 49.

<sup>75</sup> SCC Decision, para. 49.

<sup>76</sup> SCC Decision, para. 50.

<sup>77</sup> SCC Decision, para. 50 (emphasis in original).

[i]t must also be considered at this stage 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. As such, in the event of a renewed severance of Case 002, the Supreme Court Chamber considers that the ECCC should explore the establishment of another panel within the Trial Chamber to support the timely adjudication of the remainder of Case 002. The composition of a second trial panel would safeguard against any potential concerns about actual or appearance of bias of judges from the first trial adjudicating the second trial. This 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. Given the advanced age and declining health of the Co-Accused, as well as the gravity of the alleged crimes remaining in the Indictment, it is imperative that the ECCC utilize every available day to ensure a final determination of the remaining charges as expeditiously as possible.<sup>78</sup>

## **2.6. Hearings before the Trial Chamber following the SCC Decision**

41. At the time the SCC Decision was issued, the Trial Chamber was within weeks of concluding the hearing of evidence in Case 002/01. To enable the Chamber to deal with the uncertainty surrounding the scope of proceedings in Case 002 in the aftermath of the SCC Decision, to minimize further delay to the on-going trial in Case 002/01, and otherwise to comply with the SCC's directions, the Trial Chamber on 12 February 2012 scheduled a hearing.<sup>79</sup> In advance of the Severance Hearing, which took place on 18, 20 and 21 February 2013, the parties were specifically requested to address the following issues:

- i. [*Co-Prosecutors and Lead Co-Lawyers*] The Trial Chamber's Severance Order and related decisions reflect the concern that the entirety of the charges in the Case 002 Closing Order are unlikely to be able to be tried within the Accused's likely lifespan or before they become unfit to stand trial. What are your views on these concerns?
- ii. [*Co-Prosecutors and Lead Co-Lawyers*] The Trial Chamber's Severance Order and related decisions were expressly motivated by a concern to preserve its ability to render *any* timely verdict in Case 002. As a general matter, would you prefer the Chamber to attempt to try a broader array of charges and factual allegations in Case 002 at the risk of no verdict being ultimately obtained, or do you consider it preferable to proceed instead in relation to a more limited array of charges and factual allegations, thereby increasing the likelihood that a verdict can be rendered?
- iii. [*Co-Prosecutors and Lead Co-Lawyers*] At the time of the SCC Decision, the Trial Chamber was nearing the conclusion of Case 002/01. It estimates that relatively few additional courtroom days in the presence of all three Accused were required in order to conclude the hearing of evidence in that first trial. Since the lodging of the Co-Prosecutors' appeal, and as foreseen by the medical experts periodically reviewing the fitness of all Accused, the Chamber has experienced increasing delay and difficulty in obtaining the presence of all three Accused at any given time, due to their physical frailty. In the light of these changed circumstances, and difficulties of implementing

<sup>78</sup> SCC Decision, para. 51.

<sup>79</sup> 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, 12 February 2013 ("Severance Hearing").

an alternative course at this late stage, do you still oppose the Trial Chamber's definition of the scope of its first trial as expressed in the Severance Order and related decisions?

- iv. [*Co-Prosecutors and Lead Co-Lawyers*] If you maintain your request to expand the scope of Case 002/01, is this request limited to the addition of factual allegations related to S-21 and District 12, or do you consider the SCC's direction to ensure reasonable representativity to require a still broader range of factual allegations and charges? Inclusion of S-21 and District 12 would encompass only a limited geographical area, encapsulate only a minor part of the overall victimization in Case 002 and compel the Chamber to re-hear allegations in relation to the only crime site to have been adjudicated before the ECCC to date. The Trial Chamber limited Case 002/01 principally to forced movement on grounds that this phenomenon affected virtually all individuals living in Cambodia during the Democratic Kampuchea regime. Please comment, in relation to the SCC Decision's identified requirement of representativity.
- v. [*All parties*] Expert Elizabeth BECKER is currently scheduled to testify before the Trial Chamber during the week commencing [25 February 2013]. All parties and the expert have prepared for this testimony on the assumption that its scope should be limited to the contours of Case 002/01. It is impracticable at this stage to require the expert and parties to prepare for this testimony on an entirely different basis. The Trial Chamber would therefore propose to proceed to hear Elizabeth BECKER and all other individuals imminently scheduled to appear before the Chamber on the basis of the scope of the trial as defined in the Severance Order and related decisions. The parties are invited to comment on this proposal and the impact generally of the SCC Decision in relation to all witnesses, experts and Civil Parties who may be heard before the Trial Chamber prior to the Chamber's issuance of a revised decision on the scope of trial in Case 002/01.
- vi. [*All parties*] In relation to any extension of the scope of Case 002/01 still sought, please indicate how many documents, witnesses, experts and Civil Parties (including recall of individuals already heard) would be required in support of or in rebuttal to these requests. When would be the earliest date upon which you could be prepared to tender and if required, present these additional documents in court?
- vii. [*All parties*] The Trial Chamber indicated its intention to proceed to a hearing of evidence in Case 002/02 as soon as possible after the conclusion of Case 002/01. As all factual allegations in relation to each potential sub-trial in Case 002 form part of one consolidated Indictment, might the Trial Chamber proceed with the hearing of the evidence in Case 002/02 after the conclusion of the hearing of evidence in Case 002/01 (following a judicial recess sufficient to allow preparation by the parties for the next trial segment and in parallel with the drafting of the Case 002/01 partial verdict?)
- viii. [*All parties*] The Trial Chamber indicated in the Severance Order that all remaining allegations in Case 002 were not discontinued in consequence of it but would form the subject of future proceedings should circumstances permit. What prejudice has resulted to the parties from the lack of a concrete timetable for these later trials, given that its implementation depends wholly on unknown contingencies (such as the continued fitness to stand trial of all Accused, the availability of donor funds to support future trials and the hypothesis that any subsequent trials may instead be heard by a different Trial Chamber)?
- ix. [*All Defence teams*] What impact does annulment of the severance of Case 002 at this stage of proceedings have on the right of the Accused to a fair and expeditious trial?

What measures, if any, would you consider necessary in order to avoid or remedy any prejudice to the Accused in consequence of it?<sup>80</sup>

42. In response to information received during the Severance Hearing, the Trial Chamber on 19 February 2013 requested the parties to provide further supplementary information to the Chamber during the continuation of this hearing on 21 February 2013. In particular, the Co-Prosecutors were requested to clarify what specific paragraphs of the Closing Order they consider would need to be added to the scope of trial in support of any extension sought beyond population movement phases one and two and Toul Po Chrey.<sup>81</sup>

43. As the Trial Chamber had already received numerous requests from the parties to adjourn proceedings or relax other trial deadlines following the SCC Decision, all parties were further invited to comment on the proposed trial schedule for the following weeks and the timing of the decision on severance in light of the following considerations:

- i. The health of the Accused has been considered by the Trial Chamber and endorsed by the Supreme Court Chamber as a determining factor for any decision on the scope of the trial. Medical experts are scheduled to be heard by the Chamber in mid-March 2013 and their expertise may affect the determination of the scope of proceedings.
- ii. A written decision on severance, with extensive reasoning as mandated by the Supreme Court Chamber will very likely not be available in two official ECCC languages for another 2-3 weeks.
- iii. The testimony of experts Philip SHORT has been scheduled for next week [in fact, week commencing 25 February 2013] and Elizabeth BECKER tentatively for the week after. Philip SHORT's availability is very limited, as is Elizabeth BECKER's, who has already been postponed twice. If these experts are not heard as currently scheduled, it is likely that the Chamber will lose the ability to hear them at all.
- iv. Should witnesses scheduled to testify prior to [the] severance decision be postponed, or alternatively, could they testify at least in relation to the scope of trial as understood by all parties prior to the annulment of the Severance Order and related decisions? Please comment in relation to the following individuals whose testimony is scheduled imminently: SHORT, BECKER, TCW-724, TCW-794, TCW-100 and TCW-110.<sup>82</sup>

<sup>80</sup> 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, 12 February 2013, para. 3.

<sup>81</sup> 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, para. 2 (noting that in their filing E163, the Co-Prosecutors indicated that certain paragraphs of the Case 002 Closing Order should be added to Case 002/01 in order to include S-21, whereas the Chamber's own analysis suggested that a number of additional paragraphs should be added in order to render coherent this proposed extension, that further indictment paragraphs may need to be added should Co-Prosecutors seek to add grave breaches charges in consequence of this proposed extension, and requesting the Co-Prosecutors to provide a definitive list of all Indictment paragraphs proposed for inclusion).

<sup>82</sup> 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

44. In order to obtain the most accurate assessment possible of the likely prolongation of proceedings that would stem from the grant of the Co-Prosecutors' request to include S-21, the parties were further requested to address the following issues:

- i. The Co-Prosecutors have calculated the time necessary to extend the scope of trial to S-21 to require no more than the hearing or rehearing of five individuals, namely KAING Guek Eav, TCCP-21, TCW-540, TCW-698 and TCW-232, entailing an additional 11 trial days. They also seek to put forward approximately 200 documents that would likely require an additional document hearing. Please confirm these projections, and in addition, clarify whether or not the Co-Prosecutors seek to include S-24 [...] within this proposed extension.
- ii. The premise that the proposed extension could be accomplished following only a limited number of hearing days depends on the ability of the Accused to participate in trial or their readiness to waive their right to be present. The Chamber notes that for the better part of the last 2 months, one or more of the Accused have been hospitalized. The trial was able to continue only because the Accused waived their rights to be present in relation to the hearing of a limited number of individuals. Could the Defence teams indicate whether their clients' willingness to waive their right to be present would continue in the event the Accused were unable to attend proceedings and the above individuals relevant to S-21 were called?
- iii. Could the Co-Prosecutors clarify whether the estimates of time required for the conclusion of a new S-21 trial segment depends on the admission of transcripts from Case 001? In the light of the criteria for the introduction of trial transcripts from other trials in the [...] Chamber's Decision E96/7, the Defence teams should address whether or not they would seek to contest the admission into evidence of Case 001 transcripts concerning S-21, to which the Co-Prosecutors and Lead Co-Lawyers may respond.<sup>83</sup>

45. On 21 February 2013, having heard the submissions of the parties on these issues, the Chamber provided advance courtesy notification to the parties of its intention to hear imminently-scheduled international experts and the following further directions:

- i. The Chamber shall proceed to hear experts Philip SHORT on the week commencing Monday 4 March 2013 and Elizabeth BECKER during the week commencing 11 March 2013, as previously scheduled. Consistent with the Chamber's previous directions, both experts may be questioned on the entirety of Case 002 on areas within the knowledge of the experts, and the parties are encouraged to focus their questions on areas relevant to the facts at issue in Case 002/01. The Trial Chamber will not otherwise hear the testimony of other individuals whose testimony had been imminent prior to the SCC Decision.
- ii. As the Chamber considers the evidence of the medical experts to be integral to its decision on severance, it shall issue a fully-reasoned decision on severance after the conclusion of the medical experts' testimony. The medical experts are currently scheduled to arrive in Phnom Penh in mid-March and to testify during the week

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Concerning the Scope of Case 002/01 (E163/5/1/13), E264, 19 February 2013 ("Supplementary Questions to the Parties"), para. 3.

<sup>83</sup> Supplementary Questions to the Parties, para. 4.

commencing 25 March 2013. Other interim directions to the parties may follow in due course.<sup>84</sup>

46. Following this notification, the KHIEU Samphan Defence indicated its intention to appeal the Trial Chamber's decision to hear the two international experts prior to the issue of its revised severance decision.<sup>85</sup> In light of further developments in the interim, the Trial Chamber issued the following additional directions to the parties on 5 March 2013:

- i. On 4 March 2013, the Trial Chamber was informed that the Accused IENG Sary was evacuated to the Khmer-Soviet Friendship Hospital without an indication as to when he will return to the ECCC Detention Facility. On the same date, the Chamber was advised that Khmer-English interpretation would not be provided by the Interpretation and Translation Unit until ECCC national staff are paid salaries for the months of December 2012, January 2013 and February 2013 (E1/174.1). The Chamber consequently cannot proceed with the testimony of experts Philip SHORT and Elizabeth BECKER. Their testimony is therefore postponed and further information regarding their rescheduling will follow in due course.
- ii. As already indicated, the Trial Chamber has decided not to hear additional fact witnesses prior to a new severance decision (E264/1). The Chamber's decision on severance in turn is linked to the evidence of the medical experts scheduled to testify during the week commencing 25 March 2013. Measures to bring forward the medical assessments of the Accused had previously been explored but are not feasible due to expert unavailability.
- iii. After the Chamber has issued its decision on severance and heard from the experts regarding the fitness to stand trial of the Accused IENG Sary and NUON Chea, the Chamber will issue further information regarding the trial schedule to the parties.<sup>86</sup>

47. On 14 March 2013, Trial Chamber proceedings against the Accused IENG Sary were terminated following the latter's death at the Khmer Soviet Friendship Hospital. On 18-19 March 2013, the court-appointed medical experts reassessed the fitness to stand trial of the Accused NUON Chea.<sup>87</sup> On 25 March 2013, the medical experts testified that the Accused NUON Chea remained fit to stand trial.<sup>88</sup> The Accused is, however, elderly, frail and suffering from a number of chronic conditions that render his physical health fragile and prognosis uncertain.<sup>89</sup>

<sup>84</sup> Email from Trial Chamber Senior Legal Officer to parties of 21 February 2012 entitled Directions to the parties following hearing on severance; of Experts Philip SHORT and Elizabeth BECKER and Postponement of Fact Witnesses until Decision on Severance, E264/1, 26 February 2013, paras 2 and 4.

<sup>85</sup> Appel immédiat de la Défense de M. KHIEU Samphân interjeté contre la décision rendue par voie de courriel de Mme LAMB le 21 février 2013 (advance courtesy copy lodged with Trial Chamber Senior Legal Officer and SCC Greffier on 26 February 2013 and subsequently filed as E264/1/2/1 on 29 March 2013).

<sup>86</sup> Postponement of Expert Testimony, E264/3, 6 March 2013, paras 1-3.

<sup>87</sup> Expert Medical Report – Mr. NUON Chea (Prepared in Response to Trial Chamber Request (E256)), E256/4, 20 March 2013 (“Expert Report of 20 March 2013”).

<sup>88</sup> T., 25 March 2013.

<sup>89</sup> Expert Report of 20 March 2013, paras 8 and 15 (noting a number of medical conditions contributing to the Accused's physical frailty and low levels of physical reserve); T., 25 March 2013, pp. 17, 25, 75-76.



### 3. SUBMISSIONS

#### 3.1. General position of the parties in relation to severance

##### 3.1.1. *Co-Prosecutors*

48. At the Severance Hearing, the Co-Prosecutors submitted that the SCC Decision does not invalidate the trial conducted to date, but is intended to correct the manner in which the severance of Case 002 was undertaken. Conceding that its immediate impact is to base proceedings on the entirety of the Case 002 Closing Order, the Co-Prosecutors seek a renewed severance of Case 002 to enable the hearing of evidence in this case “to conclude in 2013, followed by judicial determination thereafter”.<sup>90</sup>

49. While concurring with the objective of severance, the Co-Prosecutors disagree with the scope of the case that the Accused should confront in consequence of it. They seek the inclusion of S-21 within the scope of Case 002/01 in order to more fully reflect the implementation of the five policies of the joint criminal enterprise identified in the Closing Order, and to satisfy the “international standard” of representativeness of the totality of the crimes charged.<sup>91</sup>

50. In the Co-Prosecutors’ submission, the aftermath of the SCC Decision offers the Trial Chamber two disjunctive, equally-available alternatives:

- a) to decide that judicial manageability of a complex, multi-Accused case requires the division of Case 002 into a series of smaller trials, planned in advance; or
- b) to accept that the deteriorating health of the Co-Accused and the interest in reaching a final verdict in Case 002 require that a set of representative charges to be heard as part of a single, shortened, trial, considering the other charges to be regrettably and indefinitely stayed.<sup>92</sup>

##### 3.1.2. *Civil Party Lead Co-Lawyers*

51. While in ideal circumstances, the Civil Parties would prefer all facts in the Closing Order to be exhaustively examined, the Lead Co-Lawyers agree with the Co-Prosecutors that the trial of the Accused on the entirety of the charges in the Case 002 Closing Order is

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<sup>90</sup> T., 18 February 2013, pp. 15-16, 18-20 and 23.

<sup>91</sup> T., 18 February 2013, pp. 19-24, 32, 44-46 (referring to Rule 73bis(D) of the ICTY Rules of Procedure and Evidence and ICTY case law such as *Prosecutor v. Stanisić and Simatović*, Decision pursuant to 73bis(D) of the Rules of Procedure and Evidence, Case No. IT-03-69-PT, 4 February 2008).

<sup>92</sup> T., 18 February 2013, pp. 18-19 and 23-25 (concurring that it was “highly unlikely, intangibly remote, that [the] three Accused would be tried for all of the charges in Case 002”).

unlikely to occur within the Accused's lifespan or before they become unfit to stand trial.<sup>93</sup> As trial of the totality of the crimes and factual allegations in the Closing Order risks compromising what has been accomplished to date, a shorter trial that creates the possibility of a verdict is therefore preferable in the interests of justice and in the interests of the Civil Parties.<sup>94</sup> The Lead Co-Lawyers indicated that they would embrace any approach that is reasonable and which strikes a balance between the notion of representativeness and the necessity for the trial to conclude within a reasonable time.<sup>95</sup> They support the Co-Prosecutors' request to extend the scope of Case 002/01 by adding S-21, but disagree that the Trial Chamber need not outline a plan for the adjudication of the remaining charges and factual allegations should it opt for a single, representative trial.<sup>96</sup>

### 3.1.3. *NUON Chea Defence*

52. The NUON Chea Defence submit that although they initially supported the severance of Case 002, they now oppose it. In their submission, the only possible response to the annulment of the Severance Order, and which remedies the uncertainty this creates, is to proceed with the hearing of the entirety of the Case 002 Closing Order.<sup>97</sup> In view of the complexity of the Indictment and the advanced stage of the trial, extending the scope of Case 002/01 to the entire Closing Order is necessary in the interests of certainty, as well as to enable the Accused to present a coherent defence and the Trial Chamber to ascertain the truth.<sup>98</sup> The NUON Chea Defence further submit that should the Trial Chamber decide to opt for a renewed severance of Case 002, the requirement of reasonable representativeness would not be achieved simply by the inclusion of S-21.<sup>99</sup>

<sup>93</sup> T., 18 February 2013, pp. 27-28 and 30 (citing the advanced age and deteriorating health of both the remaining Accused and many Civil Parties and witnesses).

<sup>94</sup> T., 18 February 2013, pp. 28 and 33.

<sup>95</sup> T., 18 February 2013, pp. 34-35.

<sup>96</sup> T., 18 February 2013, pp. 40-41, 57-58 and 102-103 (submitting that while the Chamber may assess the risk that only one trial may ultimately occur and in its discretion, decide to sever proceedings, there is no legal possibility for it to conclude that there will only be one trial. There is therefore a need for the Trial Chamber to plan for future trials).

<sup>97</sup> T., 20 February 2013, pp. 2-5 (criticizing renewed severance as continuing a pattern of limited enquiry, aimed at reaching a finding of guilt based on only a fraction of the evidence: a partial approach that is inconsistent with the ability to present a defence and ascertaining the truth).

<sup>98</sup> T., 20 February 2013, p. 7.

<sup>99</sup> T., 20 February 2013, pp. 9-10, 12-14 (alleging that the addition of S-21 would result in neither a precisely circumscribed account of population movement nor a comprehensive account of the DK era as a whole).

#### 3.1.4. *IENG Sary Defence*

53. During the Severance Hearing, the IENG Sary Defence submit that while they supported the manner in which the Trial Chamber had originally severed Case 002/01, they also now prefer the trial of the entire Case 002 Closing Order in light of the annulment of that severance.<sup>100</sup> The IENG Sary Defence also agreed with the Lead Co-Lawyers that a plan is in all cases necessary for the adjudication of all portions of the Case 002 Closing Order.<sup>101</sup> Although the present Decision is issued after the termination of proceedings against the Accused IENG Sary, the Chamber has nevertheless, in the interests of justice, considered all submissions that remain pertinent to the issues in question.

#### 3.1.5. *KHIEU Samphan Defence*

54. The KHIEU Samphan Defence submit that the right of the Accused KHIEU Samphan to a fair trial without undue delay has been violated, exacerbated by the present uncertainty as to the scope of Case 002/01.<sup>102</sup> They emphasize that KHIEU Samphan is able to attend most hearings, whereas the health concerns of the other Accused have prevented hearings on a regular basis, delaying proceedings of Case 002/01 and violating KHIEU Samphan's right to a fair and expeditious trial.<sup>103</sup> The KHIEU Samphan Defence thus suggest the individual severance of KHIEU Samphan from the trial of his Co-Accused, and trial of KHIEU Samphan on the entirety of the Closing Order, as well as his provisional release.<sup>104</sup>

### **3.2. The notion of representativeness of Case 002/01**

#### 3.2.1. *Co-Prosecutors and Lead Co-Lawyers*

55. The Co-Prosecutors submit that in order to ensure the reasonable representativeness of Case 002/01 – a criterion that the SCC has interpreted in the light of ICTY precedents, and

<sup>100</sup> T., 20 February 2013, pp. 29, 49, 121 (noting prior SCC jurisprudence holding that under the ECCC legal framework, charges are not discontinued other than upon an Accused's death (Decision on Immediate Appeal against the Trial Chamber's Order to Unconditionally Release the Accused IENG Thirith, 14 December 2012, E138/1/10/1/5/7, para. 38) and further submitting that the indefinite suspension of charges is incompatible with an Accused's right to an expeditious trial) and 50-52, 56 (noting that the requirement of a concrete plan for subsequent trials may ensure that it is more expeditious for the Trial Chamber to proceed to try the entirety of the Closing Order).

<sup>101</sup> T., 20 February 2013, pp. 39, 52, 58, 123-124 (announcing that it would appeal if no plan is provided).

<sup>102</sup> T., 20 February 2013, pp. 65-68, 74-75, 78.

<sup>103</sup> T., 20 February 2013, pp. 61-64.

<sup>104</sup> T., 20 February 2013, pp. 75-76, 88-90; *see also* T., 25 March 2013, pp. 105-106, 117-119 (indicating that a provisional release application by the KHIEU Samphan Defence is under preparation) (subsequently filed as E275 on 1 April 2013).

in particular, ICTY Rule 73bis(D) – the appropriate balance in all circumstances is to include S-21 within the scope of this trial.<sup>105</sup> They contend that the inclusion of offences and factual allegations related to S-21 would ensure increased representativeness of the totality of offences contained in the Case 002 Closing Order by incorporating four additional crimes against humanity charges, in addition to four grave breaches of the Geneva Conventions.<sup>106</sup>

56. Although S-21 refers to a single location, its inclusion would nonetheless enhance geographical representativeness, as its victims were drawn from all zones and districts of Cambodia.<sup>107</sup> Incorporating S-21 within the scope of Case 002/01 would also increase the magnitude and severity of the crimes for which the Accused are tried.<sup>108</sup> In the Co-Prosecutors' submission, the inclusion of S-21 would further increase the number of victim groups represented at trial, resulting in justice for a wider cross-section of individuals.<sup>109</sup> It would also satisfy the requirement in the relevant ICTY case law that the charges as severed reflect the fundamental nature or theme of the case against the Accused, as well as extending the scope of trial to a greater portion of the time-period covered by the Indictment.<sup>110</sup>

57. The Co-Prosecutors submit, and the Civil Party Lead Co-Lawyers concur, that the addition of S-21 to the scope of Case 002/01 is itself sufficient to satisfy the requirement of representativeness identified in the SCC Decision, noting that the SCC Decision requires only that the charges included in the severed case be reasonably representative, not

<sup>105</sup> T., 18 February 2013, pp. 19-20 (noting that this involved a “difficult decision to not request the priority consideration of genocide and also war crimes charges in Case 002/01”).

<sup>106</sup> T., 18 February 2013, pp. 45-48 (referencing the crimes against humanity of enslavement, imprisonment, torture and other inhumane acts and the grave breaches of wilfully causing great suffering, wilfully depriving a prisoner of war to a fair trial, unlawful deportation of civilians and unlawful confinement of civilians).

<sup>107</sup> T., 18 February 2013, pp. 49-51.

<sup>108</sup> T., 18 February 2013, pp. 51-52 (submitting that Case 002 is principally about the untimely death and murder of 1.7 million people, that S-21 was the most important security centre in DK, and that S-21 “better represents the magnitude and severity of [Case 002] probably more than any other crime in the Closing Order”).

<sup>109</sup> T., 18 February 2013, pp. 52-54 (submitting that the victims of S-21 were deemed internal enemies by the CPK leadership and were drawn from across the entire country, included former soldiers and officials of the Khmer Republic and were related to purges conducted throughout DK).

<sup>110</sup> T., 18 February 2013, pp. 54, 55-57 (arguing that the Case 002 common purpose was to implement radical socialist revolution by achieving a great leap forward and eliminating internal and external enemies by whatever means possible, that “arrests, torture and murder at security centres is the nub of this case” and that S-21 represents “the heart of Case 002”) and 55 (noting that while representativeness of the time-frame of an Indictment is not a factor expressly recognized in ICTY Rule 73bis(D), S-21 remained in operation until 7 January 1979 and thus covers the entire duration of the Case 002 Closing Order (*citing Prosecutor v. Stanisic and Simatovic*, Decision Pursuant to Rule 73bis(D), 4 February 2008, para. 23)).

perfectly so.<sup>111</sup> In any case, current circumstances do not permit the possibility of including the entirety of the Indictment within the scope of Case 002/01.<sup>112</sup>

58. Finally, and on the basis of ICTY precedents, the Co-Prosecutors submit that the Chamber is not precluded from re-hearing allegations concerning S-21 in Case 002/01 merely because they formed the subject-matter of the first trial before the ECCC.<sup>113</sup>

### 3.2.2. *Defence teams*

59. The NUON Chea Defence submit that if the SCC Decision's injunction to include a properly representative sample of crime sites from the Case 002 Closing Order is taken seriously, the mere addition of S-21 to Case 002/01 would not satisfy this criterion.<sup>114</sup> In terms of the fundamental nature or theme of Case 002, the Co-Prosecutors' characterization of S-21 as the core of Case 002 is deficient in significant respects.<sup>115</sup> While agreeing that population movement is a good starting-point in terms of representativeness, the NUON Chea Defence submit that the essence of Case 002 – the gravest and most defining charge in the Indictment – is instead the alleged intent to destroy the Cambodian population; *i.e.* genocide. The addition of genocide to Case 002/01 would therefore constitute a unique and tangible contribution to the historical record, and a trial that excluded this offence can be neither representative nor serve the interests of justice.<sup>116</sup> They also submit that S-21 differed from other detention centres in the Closing Order in terms of its purpose, methodology and victim class.<sup>117</sup> The Co-Prosecutors' contention that S-21 was the most

<sup>111</sup> T., 18 February 2013, pp. 57, 58; T., 20 February 2013, p. 99.

<sup>112</sup> T., 18 February 2013, pp. 32, 44-45, 94, 99-100.

<sup>113</sup> T., 18 February 2013, pp. 42-43.

<sup>114</sup> T., 20 February 2013, pp. 8-10.

<sup>115</sup> T., 20 February 2013, pp. 10-11 (noting, in terms of the common purpose in the Case 002 Closing Order of implementing radical socialist revolution by achieving a great leap forward and eliminating internal and external enemies by whatever means possible, that S-21 is relevant only to the latter limb) and 12-13 (alleging that S-21 is unconnected to the core objectives of CPK and the revolution as such, and deals in only the most minor and incidental way with the targeting of groups).

<sup>116</sup> T., 20 February 2013, pp. 11-12.

<sup>117</sup> T., 20 February 2013, pp. 13-14, 118-119 (noting that other security centres included in Closing Order were located in a variety of geographical areas and detained people for any number of reasons, whereas S-21 was fundamentally a tool of internal CPK political purges. Further, and unusually, virtually every S-21 detainee is alleged to have been tortured and killed. Nor were S-21's victims drawn from all walks of life (noting, for example, the absence of Cham)).

important security centre and most connected to the centre therefore does not make it representative, but rather, unusual.<sup>118</sup>

60. According to the NUON Chea Defence, the Chamber may legitimately consider the fact that S-21 has already been adjudicated before the ECCC in determining whether or not to include it in Case 002/01.<sup>119</sup> Declining to incorporate S-21 within the scope of this case would have the further advantage of avoiding any question of impartiality in relation to the crimes occurring at S-21, given that the Trial Chamber has in a previous case entered convictions in relation to these same facts.<sup>120</sup>

61. The IENG Sary Defence agrees that the mere inclusion of S-21 is insufficient to satisfy the notion of representativeness. This goal can be satisfied only by the inclusion of the entire Case 002 Closing Order. Proceeding to trial on the entire Indictment also follows logically from the SCC's annulment of the Severance Order.<sup>121</sup> The IENG Sary Defence rejects the notion that the Chamber may simply try selected portions of the Closing Order and discard its obligation to try the remaining counts: an approach which would in any case be difficult to reconcile with other factors highlighted by the SCC, such as the advanced age of the Accused and the need for an expeditious trial.<sup>122</sup> Although ICTY Rule 73bis(D) contemplates the dismissal of charges within the specific ICTY procedural context, dispensing with charges is impermissible within the ECCC legal framework and therefore, a plan to hear all portions of the Indictment is required.<sup>123</sup>

62. The IENG Sary Defence further submit that there is no inherent reason to limit additions to the scope of Case 002/01 only to S-21, arguing that if the Co-Prosecutors are

<sup>118</sup> T., 20 February 2013, pp. 12-13 (characterizing S-21 as the "least representative crime site in the Closing Order" and as pertaining in substance to only one of five alleged policies of the DK era, namely the re-education of enemies).

<sup>119</sup> T., 20 February 2013, pp. 15. (noting that the issue is not whether S-21 can be tried again but whether it ought to be; *i.e.* whether, in the interests of justice, the only crime site to have resulted in satisfaction for victims to date should also be one of the few to be adjudicated in Case 002).

<sup>120</sup> T., 20 February 2013, pp. 15-16; *see also* T., 20 February 2013, p. 49 (noting that as the SCC points out the possibility of a conflict of interest, excluding S-21 would exclude any appearance of bias (IENG Sary Defence)).

<sup>121</sup> T., 20 February 2013, pp. 51-52, 56 (further submitting that inclusion of the entire Indictment may also lead to a more expeditious trial by eliminating ambiguity as to the scope of proceedings and by providing certainty to the Accused that there will be only one trial, and necessary to avoid the perception that the purpose of severance is to arrive at a conviction in the shortest possible time).

<sup>122</sup> T., 20 February 2013, pp. 28-29, 38, 40-41, 47-48, 53.

<sup>123</sup> T., 20 February 2013, pp. 28-30, 34-36.

prepared to risk the prolongation of trial in order to accommodate these allegations, there is no reason why the entire Closing Order should not be tried.<sup>124</sup>

63. The KHIEU Samphan Defence aver that the addition or otherwise of S-21 is of little moment, as they will shortly seek provisional release due to the lack of legal certainty created by the SCC Decision and denial of the Accused's right to an expeditious trial.<sup>125</sup> They also concur with the other Defence teams that the Severance Order has been annulled and is thus no longer valid. It follows that Case 002 should start anew. The KHIEU Samphan Defence opposes attempts either to correct errors made in the Severance Order or to proceed with a trial on the basis of randomly selected portions of the Closing Order.<sup>126</sup>

### **3.3. Time estimates for S-21 and other information sought by the Trial Chamber**

64. The Co-Prosecutors submit that should S-21 be added to the scope of Case 002/01, completion of this trial segment would not entail a significant prolongation of proceedings. They indicate that while much relevant evidence concerning S-21 has already been heard at trial, it would nonetheless be important to hear a small number of additional individuals able to describe the operation of S-21 to enable the Co-Prosecutors to meet their burden of proof. The Co-Prosecutors request the recall of KAING Guek Eav, plus the hearing of four additional witnesses and Civil Parties, namely TCCP-21, TCW-540, TCW-698 and TCW-232 and estimate that the hearing of this testimony would require approximately 11 courtroom days.<sup>127</sup>

65. Regarding document hearings in support of this proposed segment, the Co-Prosecutors indicated that most documents required by the Co-Prosecutors in connection with S-21 are already before the Chamber, and the Co-Prosecutors envisage tendering a further 200-250 additional documents.<sup>128</sup> In response to the Trial Chamber's request for clarification as to

<sup>124</sup> T., 20 February 2013, pp. 50-53 (describing the Co-Prosecutors' notion of a case that is more representative (*cf.* the SCC Decision's requirement of reasonable representativeness), as a "moving target").

<sup>125</sup> T., 20 February 2013, p. 76; *see also* Application for Mr KHIEU Samphan's Immediate Release on Bail, E275, 1 April 2013 ("KHIEU Samphan Provisional Release Application"), paras 13, 19.

<sup>126</sup> T., 20 February 2013, pp. 74-76, 77-78 (referring to the Co-Prosecutors' selection of incidents for inclusion as "cherry-picking").

<sup>127</sup> T., 18 February 2013, pp. 77, 80-81, 84 (comprising, in addition to KAING Guek Eav, a surviving detainee, a former S-21 interrogator, and two cadres, respectively); *see also* See also T., 18 February 2013, pp. 82, 87 (further submitting that a number of the 27 witnesses sought by the NUON Chea Defence (additional to the five sought by both the NUON Chea Defence and Co-Prosecutors) in support of this proposed trial segment need not be called and submitting that the Chamber may strictly curtail this list in the exercise of its trial management discretion).

<sup>128</sup> T., 18 February 2013, pp. 77-78; T., 21 February 2013, p. 28.

the total number of courtroom days required for consideration of all evidentiary issues relevant to S-21, the Co-Prosecutors submitted that the combined impact of the necessary document hearings and testimony would be approximately 14 courtroom days: an estimate which does not depend on the Co-Prosecutors' ability to admit transcripts from Case 001.<sup>129</sup>

66. The Civil Parties indicate that in the interests of justice, they would also seek to call a limited number of additional Civil Parties to testify on this proposed trial segment. The Lead Co-Lawyers submit that they would require approximately 14 days in order to identify further Civil Parties, witnesses or experts they would propose to hear in connection with S-21, for which an additional 3-5 courtroom days may be required. The Lead Co-Lawyers acknowledge that it may be difficult to precisely determine the length of time required in order to conclude the hearing of evidence in Case 002/01 and that this poses risks in terms of the fragile health of Accused: a matter weighed and considered by the Trial Chamber when earlier rejecting some of the Co-Prosecutors' requests for extension.<sup>130</sup>

67. The NUON Chea Defence dispute the Co-Prosecutors' assessment of the time required to complete an additional trial segment concerning S-21. They indicate that if S-21 were to be included within the scope of Case 002/01, a far more searching examination of what occurred there would be required. It follows that significantly more evidence than that proposed by the Co-Prosecutors would need to be heard.<sup>131</sup> The NUON Chea Defence recall that it had, at the August 2012 Trial Management Meeting and subsequently, indicated 27 witnesses additional to those sought by the Co-Prosecutors that they would seek to call should S-21 be added to the scope of Case 002/01, although they concede that

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<sup>129</sup> T., 18 February 2013, pp. 78-81 (noting, however, that pursuant to the Trial Chamber's Decision E96/7, the modalities for the admission of trial transcripts which do not relate to the acts and conduct of Accused or which are cumulative of other testimony, are well-understood. Despite the possibility of admitting trial transcripts from Case 001, the Co-Prosecutors note that a small number of individuals should nonetheless be heard orally in order to ensure that any transcripts so admitted can be said to be cumulative of other evidence); *see further* T., 21 February 2013, pp. 28-29; *see also* T., 21 February 2013, pp. 7-9 (confirming that in the event S-21 was added to the scope of Case 002/01, the following Closing Order paragraphs would also need to be added: 150-155, 178-204, 415-475, 916-974, 1048-1089, 1172-1190, 1480-1484 and 1487-1488, 1491-1493, 1498-1510, 1515-1520 but contending that addition of these paragraphs would not have a significant impact on the number of witnesses and evidence needed to be heard by Chamber beyond than that already planned or proposed, on grounds that much of the evidence required to adjudicate these issues is already before the Chamber).

<sup>130</sup> T., 18 February 2013, p. 88.

<sup>131</sup> T., 20 February 2013, pp. 21-23 (noting that KAING Guek Eav substantially admitted his responsibility in relation to crimes occurring at S-21, and thus that no real debate as to what occurred there took place during Case 001, and indicating an intention to lead evidence challenging the credibility of KAING Guek Eav).



this list might be able to be reduced.<sup>132</sup> Should the Trial Chamber decide to include the events at S-21 within Case 002/01, the NUON Chea Defence submit that additional time would be needed for preparation, as well as for the recall of certain witnesses that have already testified in Case 002/01, casting doubt on the Co-Prosecutors' time-estimates.<sup>133</sup> Regarding whether they would object to the admission into evidence of trial transcripts from Case 001 concerning S-21, the NUON Chea Defence indicated that much would depend on which evidence was sought to be admitted in this manner, noting that it was aware of the principles governing the admission of written statements and transcripts outlined in Decision E96/7.<sup>134</sup>

68. The IENG Sary Defence also contest the Co-Prosecutors' assessment of the impact of including S-21 on trial timelines, noting that the projections given are inherently malleable, and easy to manipulate or misinterpret.<sup>135</sup> Given the SCC's characterization of the ECCC legal framework as at least partially adversarial, the IENG Sary Defence declined at this stage to identify witnesses it would seek to call should S-21 be incorporated within the scope of Case 002/01, and also indicated that they would continue to oppose attempts to admit transcripts from Case 001 into the present trial.<sup>136</sup>

69. The KHIEU Samphan Defence observed that the Co-Prosecutors had initially requested 33 additional hearing days for this segment, now reduced to 11, but with some doubt as to whether this included Civil Party participation and other elements.<sup>137</sup> It therefore concluded that estimates of the likely prolongation of trial that would follow from a grant of this proposed extension are a highly inexact science.<sup>138</sup>

70. The IENG Sary Defence further noted that these uncertainties regarding the projected length of an additional S-21 trial segment were all properly weighed by the Trial Chamber

<sup>132</sup> T., 21 February 2013, pp. 38-39 (maintaining the position that S-21 should not be part of an extension of the scope of Case 002/01 but if it was included, undertaking to come up with a revised list soon after the issue of the decision to this effect).

<sup>133</sup> T., 21 February 2013, pp. 38-39 (further noting that as all parties have to date questioned witnesses on the assumption that they did not have to defend against certain portions of the Closing Order, this may require the recall of a limited number of witnesses who have already testified).

<sup>134</sup> T., 21 February 2013, p. 39.

<sup>135</sup> T., 21 February 2013, pp. 46-47 (submitting that the Chamber may be on perilous ground if relying on this 11 day projection and that "11 days may end up being 11 actual weeks"); *see also* T., 21 February 2013, p. 53 (KHIEU Samphan Defence) and T., 21 February 2013, pp. 11 and 66 (indicating that the Co-Prosecutors' projections may presuppose that the Trial Chamber will ultimately agree to admit transcripts in lieu of some oral testimony, which is not a foregone conclusion (NUON Chea Defence)).

<sup>136</sup> T., 20 February 2013, pp. 48, 60, 66.

<sup>137</sup> T., 20 February 2013, pp. 73-74; T., 21 February 2013, p. 33.

<sup>138</sup> T., 20 February 2013, p. 74.

when first rejecting the Co-Prosecutors' proposed extension of the scope of trial in relation to S-21 and District 12.<sup>139</sup>

71. Finally, the Defence teams indicated that the Accused would not waive their right to be present during the testimony of witnesses called in support of an S-21 trial segment should their health prevent their attendance in court or the holding cells.<sup>140</sup>

### **3.4. Possibility of continuing proceedings in the interim**

#### ***3.4.1. Impact of pending Decision on NUON Chea's Fitness to Stand Trial***

72. At the Severance Hearing, the Co-Prosecutors and NUON Chea Defence considered the findings of the medical experts on NUON Chea's trial fitness not to be determinative of the present decision on severance, on grounds that the medical experts will testify as to whether or not the Accused are currently fit to stand trial, but are unlikely to be able to indicate for how long the Accused might remain fit.<sup>141</sup> Nor did the Co-Prosecutors consider that a hypothetical finding by the medical experts that the Accused were able to sit only half-days to have a bearing on this decision. While conceding that the length of trial was a legitimate concern for the Trial Chamber, the Co-Prosecutors indicate that is true of any remaining trial segment. The possibility that the case may be unable to conclude is ever-present but the Trial Chamber must nonetheless comply with the SCC directives regarding greater representativeness.<sup>142</sup> By contrast, the IENG Sary Defence agreed with the Trial Chamber and SCC that the testimony of the medical experts is integral to its determination of the scope of trial.<sup>143</sup>

73. At the conclusion of the testimony of the medical experts on 25 March 2013, following their reassessment of the Accused NUON Chea's fitness to stand trial, the Trial Chamber permitted the parties an opportunity to address this issue anew.<sup>144</sup> The Co-Prosecutors maintained their original request for a single trial that incorporated the S-21

<sup>139</sup> T., 20 February 2013, pp. 73-74, 82 (noting that this rejection "was the result of at least a month's consultation with parties specifically on the issue of which individuals were sought by the parties in consequence of proposed extensions to the scope of trial"); *see also* T., 21 February 2013, pp. 46-49 (noting that the projections given by the Co-Prosecutors "may not for the first time have struck the Chamber as overly-optimistic" (IENG Sary Defence)).

<sup>140</sup> T., 21 February 2013, pp. 38 (NUON Chea Defence), 48 (KHIEU Samphan Defence) and 53 (IENG Sary Defence).

<sup>141</sup> T., 21 February 2013, pp. 19-20, 37-38.

<sup>142</sup> T., 21 February 2013, pp. 19-20, 23-24, 26-27.

<sup>143</sup> T., 21 February 2013, p. 40.

<sup>144</sup> T., 25 March 2013 ("25 March 2013 hearing").

detention facility within its scope.<sup>145</sup> The Lead Co-Lawyers also maintained their support for the Co-Prosecutors' request.<sup>146</sup> While advertent to the Accused NUON Chea's uncertain medical prognosis, including the possibility that he may not survive longer than six months, the Lead Co-Lawyers submit nonetheless that this should not dictate time limits, in view of the uncertainty of this prognosis, and the interests of having a trial process that embodies greater representativeness.<sup>147</sup> The Defence teams made no renewed submissions on severance in the light of the experts' conclusions on NUON Chea's fitness to stand trial, although the KHIEU Samphan Defence affirmed its intention to shortly seek the provisional release of the Accused KHIEU Samphan.<sup>148</sup>

#### 3.4.2. *Impact of pending Severance Decision*

74. All Defence teams opposed the continuance of proceedings prior to the issue of the present decision, requesting in the interests of certainty that the hearing of witnesses and experts be postponed until the Trial Chamber determines the scope of Case 002/01.<sup>149</sup> The Co-Prosecutors contend that there is no barrier to the hearing of experts in the interim, who may be questioned on the entire scope of Case 002, or of witnesses called primarily to give evidence on the Accuseds' character.<sup>150</sup> Although concurring with the Co-Prosecutors that experts may be distinguished from fact witnesses, the Lead Co-Lawyers noted that the scheduling of witnesses in a context where the scope of proceedings is uncertain risks inconvenience and logistical difficulty due to the potential need to recall witnesses at a later date.<sup>151</sup> Some prejudice results from their hearing in these circumstances, as the parties, while able to question experts on the entirety of Case 002, have nonetheless been directed to focus their questioning on matters within the scope of Case 002/01. The Lead Co-Lawyers thus propose that advance summary notification of the Chamber's decision of

<sup>145</sup> T., 25 March 2013, pp. 108-110 (also disputing that the presence or otherwise of an international armed conflict may require the calling of significant additional evidence).

<sup>146</sup> T., 25 March 2013, pp. 120-121 (urging further trials after the conclusion of Case 002/01).

<sup>147</sup> T., 25 March 2013, pp. 112-113 (indicating that they wished "the Trial Chamber to proceed expeditiously" but simultaneously requesting that the trial be "as comprehensive as possible").

<sup>148</sup> T., 25 March 2013, pp. 104-105 (NUON Chea Defence), 105-106 and 118-119 (KHIEU Samphan Defence); see also KHIEU Samphan Provisional Release Application.

<sup>149</sup> See T., 20 February 2013, pp. 19-21 (NUON Chea Defence); T., 20 February 2013, pp. 54-55 (IENG Sary Defence) and 87 (KHIEU Samphan Defence) and T., 21 February 2013, pp. 36 (NUON Chea Defence), 41-43 (IENG Sary Defence) and 52-53 (KHIEU Samphan Defence).

<sup>150</sup> T., 21 February 2013, pp. 20-22.

<sup>151</sup> T., 21 February 2013, pp. 29-31 (citing Memorandum E215, para. 4, which directed the parties to focus their questioning of experts on matters within the scope of Case 002/01 and other areas relevant to Case 002 which the experts are considered to be uniquely qualified to answer).

severance be provided to the parties as soon as the Trial Chamber has reached a decision of the scope of Case 002/01, with a fully-reasoned decision to follow.<sup>152</sup>

75. The Trial Chamber's ability to proceed to the hearing of even a limited quantity of evidence prior to the issue of this decision was in any case prevented both by the unavailability of in-court interpretation and the hospitalization of the Accused IENG Sary from 4 March 2013 onwards, thus rendering these issues moot.

76. On 29 March 2013, the Trial Chamber provided to the parties advance notification of its disposition of the present decision and its determination of the Accused NUON Chea's fitness to stand trial, informing them that the hearing of evidence in Case 002/01 would resume on Monday 8 April 2013, subject to the availability of essential Cambodian staff.<sup>153</sup>

### **3.5. Modalities for the hearing of the remaining portions of the Closing Order**

77. While most parties acknowledge the unlikelihood that all charges and factual allegations in the Case 002 Closing Order can be heard within the natural lifespan of the Accused or while they remain fit to be tried, there is nevertheless no consensus among the parties either as to the future shape of Case 002/01 or the appropriate treatment of any factual allegations or charges that may remain outside its scope.

78. Regarding the former, the NUON Chea and KHIEU Samphan Defence oppose the notion of severance altogether and submit that the only appropriate response to the SCC Decision is a single trial of all allegations in the Closing Order.<sup>154</sup> Whilst the KHIEU Samphan Defence support a separate trial for the Accused KHIEU Samphan, the Civil Party Lead Co-Lawyers oppose this request on grounds that the Accused NUON Chea remains fit to be tried.<sup>155</sup>

79. Concerning treatment of those charges and factual allegations in the Case 002 Closing Order unable to be accommodated within the scope of Case 002/01, the Co-Prosecutors submit that in all likelihood, Case 002/01 will be the only trial that will take place. They

<sup>152</sup> T., 21 February 2013, p. 33.

<sup>153</sup> T., 29 March 2013; *see also* T., 29 March 2013, p. 6 (announcing notification received that morning of the availability of in-court interpretation for the week commencing 8 April 2013 following agreement on the modalities of payment of a portion of the arrears owed on Cambodian staff salaries) and Status of ECCC Funding, E272, 27 March 2013.

<sup>154</sup> T., 25 March 2013, pp. 123-124.

<sup>155</sup> T., 23 March 2013, pp. 114-115.

therefore favour a single, shortened, but nonetheless representative trial.<sup>156</sup> The Lead Co-Lawyers support the notion of a reasonably representative first trial, but disagree with the Co-Prosecutors that a single, representative trial may be considered to rule out the possibility of subsequent trials or the need for a plan for these trials.<sup>157</sup>

80. The Co-Prosecutors counter that if the Trial Chamber opts for a single, representative trial, the SCC Decision does not require it to formulate a plan for subsequent trials.<sup>158</sup> It identified no concrete prejudice stemming from a lack of plan for future trials, whose possibility can only be the subject of unknown contingencies, beyond the control of the Trial Chamber, such as the continued fitness of the Accused to stand trial and on-going donor support to the ECCC.<sup>159</sup> The Lead Co-Lawyers by contrast submit that the Chamber should plan for future trials to hear the entire Closing Order, on grounds that the “Civil Parties are owed a [...] degree of certainty [...] that any decision not be tantamount to a miscarriage of justice [...] and] must have the impression that forced transfer is not a single, stand-alone case.”<sup>160</sup> The IENG Sary Defence concur that a plan for future trials is required irrespective of which alternative posed by the SCC is taken by the Trial Chamber.<sup>161</sup>

81. In relation to options that may enable the Trial Chamber to arrive at an earlier, partial verdict in Case 002/01 whilst planning for trial of the remaining allegations in the Case 002 Closing Order, the Co-Prosecutors and Lead Co-Lawyers both submit that commencing a second trial in Case 002 whilst simultaneously engaged in judgement drafting in Case 002/01 would result in a number of legal and practical difficulties. It would be likely to delay the issue of the Case 002/01 verdict.<sup>162</sup> The Co-Prosecutors and Lead Co-Lawyers further suggest that it would be improper for the Trial Chamber to move to a subsequent

<sup>156</sup> T., 25 March 2013, p. 127 (affirming also its opposition to the inclusion of genocide in that trial, on grounds that it encapsulates only a small cross-section of the overall victimization in DK); *see also* T., 18 February 2013, p. 19 (viewing the remaining charges and factual allegations in the Case 002/01 Closing Order as “regretfully but indefinitely stayed”).

<sup>157</sup> T., 25 March 2013, pp. 120-121 (urging further trials after the conclusion of Case 002/01).

<sup>158</sup> *Cf.* T., 18 February 2013, pp. 96-97, 99-100; 20 February 2013, pp. 103-104 (submitting that the Co-Prosecutors do not propose dismissal of the remaining charges, but severance of some of them) and T., 20 February 2013, pp. 103-104 (refuting the argument that the Co-Prosecutors thus propose that the severed charges be ignored, suggesting that they instead be stayed and that the Trial Chamber “schedule a hearing following the issuance of [the Case 002/01] judgment and consider all issues at the appropriate time”).

<sup>159</sup> T., 18 February 2013, pp. 101-102 (acknowledging a number of factors that complicate trial management in Case 002 but identifying the prejudice suffered by the Co-Prosecutors solely in terms of the alleged lack of representativeness of the scope of Case 002/01).

<sup>160</sup> T., 18 February 2013, pp. 102-103 (submitting that the Civil Parties “are entitled to have an idea of the nature of future trials”).

<sup>161</sup> T., 20 February 2013, pp. 39, 52, 58, 123-124.

<sup>162</sup> T., 18 February 2013, pp. 38, 91-94, 99-101, 102-103.

trial in Case 002 prior not only to a first-instance verdict in Case 002/01, but also a judgement by the SCC on any appeal.<sup>163</sup>

82. The NUON Chea and KHIEU Samphan Defence contest the Trial Chamber's ability to hear future trials at all, and find in the SCC Decision support for the proposition that successive trials on closely-related crimes conducted by the same Trial Chamber may violate the Accused's right to the presumption of innocence and impartial judgment, particularly if later trials follow a finding of guilt in the first.<sup>164</sup>

83. By contrast, the IENG Sary Defence contend that Case 002/01 stemmed from the severance rather than dismissal of counts, all of which are contained in the same Indictment. It would therefore be entirely possible for the Trial Chamber to proceed to the hearing of evidence on successive portions of the Closing Order shortly after the conclusion of the hearing of evidence in Case 002/01: reinforcing their argument that a plan for subsequent trials and the remainder of charges in the Closing Order is necessary.<sup>165</sup>

84. No party considered the SCC's suggestion that a second Trial Chamber be installed in order to expedite the hearing of the remaining charges and factual allegations in the Indictment to be viable.<sup>166</sup> It is unlikely that a second Trial Chamber could be identified, recruited, deployed and familiarized with proceedings in Case 002 in time to ensure an expeditious trial of these remaining charges or factual allegations, or that the financial resources could be found to support it.<sup>167</sup>

<sup>163</sup> T., 25 March 2013, pp. 126 (Co-Prosecutors) and 128 (Lead Co-Lawyers); *see also* T., 18 February 2013, pp. 92-94.

<sup>164</sup> T., 20 February 2013, pp. 7-8; T., 25 March 2013, pp. 123-124 (noting difficulties of alleged bias if the Trial Chamber proceeded to multiple trials and of undertaking a comprehensive search for truth within the confines of a more limited trial, and submitting that the assessment of the Accused as fit to stand trial favour a more extensive trial (NUON Chea Defence) and 125-126 (contending that the SCC Decision indicates that pre-judgement would result should the Trial Chamber proceed to a second trial in Case 002 but that this risk may be averted entirely by declining to sever proceedings (KHIEU Samphan Defence)); *cf.* SCC Decision, para. 51.

<sup>165</sup> T., 20 February 2013, pp. 54-55 (noting a number of complications that would follow should the Trial Chamber commence the hearing of evidence in Case 002/02 shortly after the conclusion of the hearing of evidence in Case 002/01) and T., 20 February 2013, pp. 49, 51-52, 56, 58 (emphasizing that the primary position of the IENG Sary Defence, in the wake of the annulment of the Severance Order, is that all allegations in the Case 002 Closing Order should be tried).

<sup>166</sup> T., 18 February 2013, pp. 101-102.

<sup>167</sup> T., 18 February 2013, pp. 101-102; T., 25 March 2013, pp. 125-127; *see also* Article 9, Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea and Article 3, 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 (envisaging a single Trial Chamber).

## 4. FINDINGS

### 4.1. Preliminary issues

85. Although the Co-Prosecutors object to the scope of Case 002/01 as determined by the Severance Order, all parties had acknowledged that this order formed the basis of a single, multi-Accused trial for the past 16 months. There is, however, no longer any consensus as to the appropriateness of renewed severance following the SCC's annulment of the Severance Order on 8 February 2013, nor agreement with the premise that the trial should continue as a multi-Accused case. The Trial Chamber therefore addresses, as a preliminary matter, whether renewed severance is appropriate at this late stage of trial, and continuance of this trial as a multi-accused case.<sup>168</sup>

#### 4.1.1. *Should the Trial Chamber undertake renewed severance of Case 002?*

86. Internal Rule 89<sup>ter</sup> was enacted by the ECCC Plenary Session in February 2011, at a time when the ECCC already confronted the possibility that Case 002 may not be concluded within the natural lifespan of all four Accused or while they remained fit to be tried. When severance of proceedings was first undertaken by the Chamber in September 2011, 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. The Trial Chamber had considered the precedents before the *ad hoc* tribunals, where cases of similar scale and complexity frequently required between 6 and 10 years to reach a verdict, and the unlikelihood within the specific ECCC context that a case of similar magnitude could be brought to a conclusion in significantly less time.<sup>169</sup>

87. The Trial Chamber notes that the SCC Decision expressly, albeit conditionally, envisages the possibility of a renewed severance of Case 002 by the Trial Chamber.<sup>170</sup> The Trial Chamber considers that the constraints that made severance necessary in September 2011 (namely, the advanced age and increasing physical frailty of the Case 002 Co-

<sup>168</sup> See also T., 20 February 2013, p. 77 (suggesting that the impact of the SCC Decision may also be to require the commencement anew of proceedings in Case 002 (KHIEU Samphan Defence)). However, the issue is not clearly or consistently elaborated in the KHIEU Samphan submissions. It follows that the Trial Chamber finds no support in the SCC Decision or elsewhere for any suggestion that following the SCC's annulment of the Severance Order, Case 002 must commence *de novo*).

<sup>169</sup> See e.g. *Bagosora et al* (ICTR-96-7) (multi-Accused case against 6 defendants): 6.5 years between the commencement of trial and issuance of first-instance verdict; *Nyiramasuhuko et al* (ICTR-97-21) (6 defendants): 10 years; *Bizimungu et al* (ICTR-00-56) (4 defendants): 7 years; *Karemera et al* (ICTR-97-24) (3, latterly 2 defendants, following the death of one in custody): 8 years.

<sup>170</sup> SCC Decision, para. 50.

Accused, and the unlikelihood that all allegations in the Case 002 Closing Order could be heard during the lifespan of the 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.

88. In relation to the recent Defence objection to the concept of severance, the Chamber considers that the concerns they expressed concerning legal certainty in the wake of the annulment of the Severance Order given the late stage of proceedings in Case 002/01 to be legitimate. It considers, however, that these concerns are best alleviated not by the hearing of the entire Case 002 Closing Order but by returning to the previous form of Case 002/01 and the continuation of proceedings in accordance with the parameters of trial understood by all parties from the outset of the trial.

89. For these reasons, and those that follow, the Trial Chamber therefore determines the scope of Case 002/01 to comprise crimes against humanity associated with the forced movement of population (phases 1 and 2) and executions committed at Toul Po Chrey.

90. The Trial Chamber accordingly finds that renewed severance of the Case 002 Closing Order is still required in the interests of justice, and allows it to proceed with a first case of a more limited range of charges and factual allegations. It has ordered the resumption of proceedings in Case 002/01 from the point it had reached when the SCC Decision was rendered on 8 February 2013.<sup>171</sup>

#### 4.1.2. *Should Case 002/01 continue as a multi-Accused trial following renewed severance?*

91. A further consequence of the annulment of the Severance Order is the fracturing of consensus as to the appropriateness or otherwise of Case 002 remaining as a multi-Accused trial. At the Severance Hearing, the KHIEU Samphan Defence announced its intention to seek individual severance of the Accused KHIEU Samphan, and subsequently filed a written motion seeking the severance of the Accused from the trial of his Co-Accused, arguing that this was necessary to safeguard the Accused KHIEU Samphan's right to a fair and expeditious trial.<sup>172</sup>

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<sup>171</sup> T., 29 March 2013, pp. 2-4.

<sup>172</sup> T., 20 February 2013, pp. 61, 75-76, 88-90 (submitting that unlike the Accused NUON Chea, whose ill-health has frequently impeded the ability of the Trial Chamber to conduct hearings, the Accused KHIEU



92. As the SCC Decision notes, considerations of efficiency and fairness lend support to the general principle that charges concerning similar events against several Accused should preferably be tried in joint proceedings.<sup>173</sup> At the core of Case 002 is a common purpose to implement radical socialist revolution by achieving a great leap forward and eliminating internal and external enemies by whatever means possible, in which all Accused are alleged to have participated. It follows that continuance of Case 002/01 as a single multi-Accused trial, to the extent consistent with the right of all Accused to a fair and expeditious trial, is likely to facilitate the Trial Chamber's search for truth and is otherwise in the interests of justice. A further justification for retaining Case 002/01 as a joint trial and thus preserving the possibility of a single verdict in relation to all remaining Accused, is that the ECCC possesses, and is only ever likely to possess, a single Trial Chamber. Experience from the *ad hoc* Tribunals shows that where a single Trial Chamber must preside over multiple trials simultaneously, both cases are inevitably delayed.<sup>174</sup>

93. For these reasons, and those which follow, the Trial Chamber determines that Case 002/01 shall continue as a multi-Accused trial and has ordered its immediate resumption, in the interests of safeguarding the right of both remaining Accused to a fair and expeditious trial. In accepting that Case 002/01 should continue as a multi-accused trial, as both the SCC and Trial Chamber do, it follows that the physical frailty of the Accused NUON Chea, and the time required to conclude the hearing of evidence and arrive at a partial verdict in Case 002, are significant factors in the Trial Chamber's determination of the scope of Case 002/01.

#### **4.2. Determination of the scope of Case 002/01 in light of the SCC Decision**

94. The present decision stems from an appeal by the Co-Prosecutors which requested the SCC to direct the Trial Chamber to include crimes committed at S-21 and District 12 within the scope of Case 002/01. In its Decision, the SCC declined to exercise its corrective jurisdiction by ordering the Trial Chamber to add S-21 (or any other specific count or

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Samphan is generally in good health and has not sought to challenge his fitness to stand trial); *see also* T., 25 March 2013, pp. 105-106, 118-119 (indicating an intention to seek provisional release (subsequently filed on 1 April 2013 (E275))).

<sup>173</sup> SCC Decision, para. 33 (finding severance, where deemed necessary, to characteristically involve separating an accused person from joint proceedings and as constituting an exception to the general preference for joint trials).

<sup>174</sup> *See e.g.* Thirteenth Annual Report of the International Criminal Tribunal for Rwanda [to the United Nations General Assembly and Security Council], UN Doc. A/63/209-S/2008/514, 4 August 2008, paras 10, 17 and 26 (indicating inevitable delay to the issuance of a verdict in all affected cases where the Chamber in question must try multiple cases in shifts).

factual allegation) to Case 002/01. The Trial Chamber therefore finds no support in the SCC Decision for the Co-Prosecutors' contention that, in determining the scope of future proceedings in Case 002, the Trial Chamber is precluded from reinstating the original Severance Order.<sup>175</sup> Although it neither mandates nor prevents the inclusion of any specific factual allegations or charges, the SCC Decision has, however, directed the Trial Chamber to undertake a renewed weighing of the considerations set forth in the SCC Decision in the light of its "organic familiarity" with Case 002 and following a re-hearing of the parties on these issues.<sup>176</sup>

95. The SCC further directs the Trial Chamber, should it contemplate at least one smaller trial on some portion of the Indictment, to "state this clearly and give due consideration to [the] reasonable representativeness of the Indictment."<sup>177</sup> Mindful that an attempt to try the entirety of the Case 002 Closing Order would be unlikely to result in a timely verdict, the Trial Chamber, in opting for the severance of proceedings and the continuation of the trial, clearly seeks to ensure that at least a portion of the Indictment is heard within the natural lifespan of the Accused or while they remain fit to be tried. The Trial Chamber has therefore evaluated the criterion of representativeness in relation to this future trial.

#### 4.2.1. *The criterion of representativeness in the SCC Decision*

96. The SCC Decision indicates that the requirement of reasonable representativeness of an Indictment is "dictated by common sense and the interests of meaningful justice, and conforms with comparable international legal standards."<sup>178</sup> The SCC Decision provides no further guidance regarding the notion of reasonable representativeness, but referred to ICTY Rule 73bis(D).<sup>179</sup> This sub-rule provides as follows:

##### **Rule 73bis**

##### **Pre-Trial Conference**

(Adopted 10 July 1998, amended 17 November 1999, amended 17 July 2003)

[...]

(D) After 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

<sup>175</sup> T., 20 February 2013, p. 90.

<sup>176</sup> SCC Decision, para. 50.

<sup>177</sup> SCC Decision, para. 50; *see also* paras 42-44.

<sup>178</sup> SCC Decision, paras 42 and 43.

<sup>179</sup> SCC Decision, para. 42 (referencing only ICTY Rule 73bis(D)).

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.<sup>180</sup>

97. This sub-rule creates a mechanism enabling an ICTY Trial Chamber, at the pre-trial stage, to invite the Prosecutor to make reductions in the counts of an Indictment, and to fix the number of crime sites or incidents included in one or more of the charges. The sub-rule which follows instead enables an ICTY Trial Chamber to direct the Prosecutor to select the counts on which to proceed to trial, and cites only the fundamental principle of a fair and expeditious trial as a constraint on the Chamber's discretion.<sup>181</sup> Once the Prosecution's case-in-chief is limited in the pre-trial phase pursuant to ICTY Rule 73bis, the trial proceeds only on the basis of those charges and the remaining counts in the Indictment are withdrawn.<sup>182</sup>

98. 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 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.

99. Unless therefore the Trial Chamber disregards the current legal framework, the notion of "representativeness of an Indictment" is meaningless. However, as the Supreme Court Chamber expressly referred to this concept, the Trial Chamber considers that it must consider a hypothetical situation where the proceedings are terminated after a first trial. If termination of proceedings were possible, then it would be appropriate to determine if the

<sup>180</sup> ICTY Rules of Procedure and Evidence, IT/32/Rev.47, 28 August 2012, Rule 73bis(D).

<sup>181</sup> *Prosecutor v. Milutinović et al.*, Decision on Application of Rule 73bis, ICTY Trial Chamber (IT-05-87-T), 11 July 2006 ("*Milutinović*"), para. 6; see also ICTY Rule 73bis(D) (permitting the Prosecutor, after commencement of the trial, to file motions to vary a decision as to the number of crime sites or incidents in respect of which evidence may be presented or the number of witnesses to be called or requesting additional time to present evidence, and empowering the Chamber to grant these requests "if satisfied that this is in the interests of justice").

<sup>182</sup> ICTY Rules of Procedure and Evidence, IT/32/Rev.47, 28 August 2012, Rule 73bis(E); see also *Prosecutor v. Mladić*, Decision Pursuant to Rule 73bis(D), ICTY Trial Chamber (IT-09-92-PT), 2 December 2011 ("*Mladić*"), para. 12 (noting that an Accused cannot be convicted in relation to crimes which have been removed pursuant to ICTY Rule 73bis(D)).

first portion of the Indictment to be adjudicated is reasonably representative of the entirety of the charges contained in the Closing Order. As no final determination can as yet be made concerning the fate of future trials after Case 002/01, however, it is preferable to refer to the representativeness of the scope of Case 002/01 than to the representativeness of the Indictment.

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 73bis(D) and to consider how it might assist in determining the representativeness of the scope of Case 002/01. The Trial Chamber agrees with the Co-Prosecutors that, pursuant to the SCC Decision, the representativeness of the first portion of the indictment to be adjudicated following severance need only be reasonable rather than absolute, but notes that widely divergent views exist among the parties regarding the application of this criterion to the future scope of Case 002/01.<sup>183</sup>

#### 4.2.2. *Representativeness as interpreted in the relevant ICTY jurisprudence*

101. A review of the relevant jurisprudence shows that the application of ICTY Rule 73bis(D) is highly fact-dependent and approaches have varied greatly between cases.<sup>184</sup>

102. In *Milutinović*, the Prosecution contended that as a general matter, Rule 73bis did not permit a Chamber to fix the particular crime sites on which evidence may or may not be led at trial. Such an approach would “allow[] the judiciary to intrude in the area of what should be the Prosecution’s bailiwick”, as “the Prosecution should be in the best position to determine what’s representative of their case.”<sup>185</sup> The Chamber rejected that argument on grounds that an approach whereby the Co-Prosecutors could propose certain sites or incidents, which are then reviewed by the Chamber for conformity with the requirements of Rule 73bis(D), would be unnecessarily cumbersome. This interpretation was also considered to be “inconsistent with a proper construction of the Rule, which empowers the Chamber, after having heard the Prosecutor, to fix a number of crime sites or incidents [...] which, having regard to all the relevant circumstances, [...] are reasonably representative of the

<sup>183</sup> T., 18 February 2013 (Co-Prosecutors), pp. 57, 58.

<sup>184</sup> See *Prosecutor v. Stanišić and Simatović*, Decision Pursuant to Rule 73bis(D), ICTY Trial Chamber (IT-03-69-PT), 4 February 2008 (“*Stanišić*”), para. 15 (finding that case to be distinctly different from the case of *Prosecutor v. Haradinaj et al.*, and declining to follow the approach taken by that Trial Chamber).

<sup>185</sup> *Milutinović*, para. 8 (citations omitted).

crimes charged.”<sup>186</sup> The Chamber nonetheless acknowledged its obligation to ensure that the requirement of reasonable representativeness is met, which “points to the Chamber itself identifying the sites or incidents that will satisfy this standard, having regard to the factors listed in the Rule [73bis(D)], and in light of all the relevant circumstances of the case”.<sup>187</sup>

103. These relevant circumstances have been held to include “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.”<sup>188</sup> In *Stanišić*, the Trial Chamber noted, in relation to the criterion of reasonable representativeness, that the reductions in question were equally and proportionately distributed among the regions where the crimes are alleged to have occurred, and as such, a reduction of incidents would not affect the representative nature of the Indictment in terms of geographical distribution of the crimes originally charged. Nor would they jeopardize the Prosecution’s ability to prove the victimisation of the relevant ethnic communities.<sup>189</sup> In relation to the reference to ‘victims of crimes’ in Rule 73bis(D), the *Šešelj* Trial Chamber also considered this to permit the Chamber to consider the ethnicity of the victims when determining whether the crime sites or incidents retained in an Indictment are reasonably representative of the crimes charged. However, it considered that this factor alone would be insufficient to persuade the Trial Chamber that certain evidence should be presented in respect of alleged crimes, indicating that the number of victims is also a consideration.<sup>190</sup> The same Trial Chamber considered that the notion of geographical representativeness of the Indictment in that case was satisfied by the ability of the Prosecution to present non-crime-base evidence in respect of all crime sites in the Indictment.<sup>191</sup>

<sup>186</sup> *Milutinović*, paras 8-9.

<sup>187</sup> *Milutinović*, para. 9

<sup>188</sup> *Mladić*, paras 1, 4 and 9 (noting that a number of counts charged in the *Mladić* Indictment had since been removed from the *Karadžić* Indictment, and requesting the Prosecution to address this matter in its submissions, following which the Prosecution voluntarily reduced the Indictment from 196 scheduled crimes to 106); see also *Prosecutor v. Šešelj*, Decision on the Application of Rule 73bis, ICTY Trial Chamber (IT-03-67-PT), 8 November 2006 (“*Šešelj*”), paras 12, 30-31 (identifying crime sites or incidents considered to be reasonably representative of the crimes charged, removing five counts and several crime sites and concluding that the geographical scope and scale of the alleged criminal activity would be maintained in the Indictment without those counts and crime sites) and *Prosecutor v. Dragomir Milošević*, Decision on Amendment of the Indictment and Application of Rule 73bis(D), ICTY Trial Chamber (IT-98-29/1-PT), 12 December 2006, paras 38-39 (identifying the sites and incidents that were reasonably representative of the crimes charged and removing 16).

<sup>189</sup> *Stanišić*, paras 23, 26.

<sup>190</sup> *Šešelj*, para. 25 (noting as a justification for its exclusion as a crime site that the number of alleged victims in Bosanski Samac was less compared to the other sites for which evidence will be presented).

<sup>191</sup> *Šešelj*, para. 30.

104. In *Dragomir Milošević*, the Trial Chamber characterised its obligations under Rule 73bis(D) as requiring the Trial Chamber to “strike a delicate balance between several considerations. The Trial Chamber therefore has a discretion, ‘having regard to all the relevant circumstances’, to fix the number of ‘reasonably representative’ crime sites and incidents in respect of which evidence is to be presented by the Prosecution. Moreover, the Trial Chamber’s discretion must be exercised in the interest of a fair and expeditious trial.”<sup>192</sup> It rejected a later request to add evidence in relation to incidents that had previously been dropped, on grounds that this would

disturb the balance struck in the [earlier] Decision [to reduce the number of crime sites], and particularly the representative nature of the fixed crime sites and incidents, which resulted from the exercise of the Trial Chamber’s discretion. Furthermore, [that] Decision informed the Accused that evidence would not be presented by the Prosecution on the dropped incidents; a variation would have repercussions for notice of the Accused of the case he has to answer. For these reasons, the Trial Chamber considers that a variation is only in the interests of justice where there are compelling reasons for it.<sup>193</sup>

105. In *Milutinović*, by contrast, the Chamber did not wish to simply specify a number of crime sites or incidents on which evidence may be led, as it considered this to run the risk of imposing “an arbitrary and ill-fitting numerical constraint on a case that is fundamentally based on allegations of deportation and forcible transfer, [and] which [...] comprise a series of occurrences over a period of time in different locations.”<sup>194</sup> It therefore exercised its discretion under this sub-rule instead to “identif[y] those crime sites or incidents that are clearly different from the fundamental nature or theme of the case, [...] ordering the Prosecution to lead evidence relating to [...] sites or incidents that fall squarely within that nature or theme.”<sup>195</sup> Based on this approach, the Chamber determined a number of crime sites not to be associated with the core theme of forcible deportation or transfer but rather, confined to distinct municipalities. It concluded by noting that the remaining paragraphs

<sup>192</sup> *Prosecutor v. Dragomir Milošević*, Decision on Prosecution’s Motion pursuant to Rule 73bis(F), ICTY Trial Chamber (IT-98-29/1-T), 3 April 2007 (“*Dragomir Milošević*”), para. 11 (characterizing an earlier Decision of the Chamber to limit the number of crime sites as having taken “into consideration the widest possible set of factors in order to ensure both a fair and expeditious trial and the reasonable representativity of crime sites and incidents”).

<sup>193</sup> *Dragomir Milošević*, paras 12 and 18 (disagreeing with the Prosecution that the Accused would not be unfairly prejudiced if the requested variation was granted on grounds that he had long been on notice concerning the incidents and the relevant evidence, and considering that reversal of the decision not to proceed to trial on these allegations would create a burden for the Accused).

<sup>194</sup> *Milutinović*, para. 9.

<sup>195</sup> *Milutinović*, para. 10; cf. *Šešelj*, para. 12 (considering that the identification of crime sites or incidents in respect of which evidence may not be led is less a question of determining the fundamental nature or theme of the Prosecution case and identifying crime sites or incidents that do not fall within that nature or theme than it is an identification, on the basis of the criteria set out in Rule 73bis(D), of the crime sites or incidents that are ‘reasonably representative of the indictment’).

“adequately reflect the scale of the alleged criminal activity, as well as the extremely large number of alleged victims, and are reasonably representative of the crimes charged in the Indictment.”<sup>196</sup> The Chamber further stressed

that this Decision *should in no way be interpreted as a determination that the events in [the excluded] locations are of less significance or are not representative at all* of the Prosecution’s case against the Accused. Rather, its application of Rule 73bis(D) reflects its present conclusion that the case the Prosecution seeks to establish, based on allegations of forcible displacements, killings, and acts of persecution, will be adequately presented even if evidence in relation to these three sites is not led, and that *focusing the trial on the remaining charges will improve the expeditiousness of the proceedings while ensuring that they remain fair.*<sup>197</sup>

106. An example of yet another approach is provided by *Haradinaj*, which also followed a refusal by the Prosecution to accede to an invitation by the Chamber to reduce the number of crime sites to be lead at trial.<sup>198</sup> In that case, the Trial Chamber was persuaded by the Prosecution’s arguments against a reduction in the Indictment, in part because the Trial Chamber agreed that the removal of any of the counts or incidents “may affect the Prosecutor’s ability to present evidence on the scope of the alleged widespread or systematic attack and joint criminal enterprise.”<sup>199</sup> The Prosecutor declined the invitation to reduce the Indictment on a number of grounds, their submissions amounting to a proposition that the case was not reducible.<sup>200</sup> A later ICTY decision has concluded that it “will only be in very exceptional circumstances that a case cannot be reduced within the terms of Rule 73bis(D).”<sup>201</sup> In that case, the Chamber rejected the submission that a reduction of the Indictment would impair the Prosecution’s ability to prove its case. Nor was it persuaded by the Prosecution’s concern to create a fuller and more accurate historical record, noting that

<sup>196</sup> *Milutinović*, para. 11.

<sup>197</sup> *Milutinović*, para. 12 (emphasis added); see also *Stanišić*, para. 29.

<sup>198</sup> *Prosecutor v. Haradinaj et al.*, Decision Pursuant to Rule 73bis(D), ICTY Trial Chamber (IT-04-84-PT), 22 February 2007 (“*Haradinaj*”), paras 2-3; see further e.g. *Stanišić*, para. 4, *Šešelj*, para. 5; *Prosecutor v. Gotovina et al.*, Order Pursuant to Rule 73bis(D) to Reduce the Indictment, ICTY Trial Chamber (IT-06-90-PT), 21 February 2007, p. 2 and *Prosecutor v. Karadzic*, Decision on the Application of Rule 73bis, ICTY Trial Chamber (IT-95-5/18-PT), 8 October 2009, para. 3 and Ogon Kwon, “The Challenge of an International Criminal Trial as Seen from the Bench”, 5 *Journal of International Criminal Justice* (2007), p. 73 (noting that a basis of the reluctance to reduce the scope of cases is that many human rights groups, and much of the public, consider that one of the central duties of an international tribunal is to do justice to every single victim, to actively foster national reconciliation and to compile a complete historical record of the events in question, which would ostensibly require trial to proceed on charges that are as comprehensive as possible).

<sup>199</sup> *Haradinaj*, para. 9.

<sup>200</sup> *Haradinaj*, paras 9-12 (noting that the Prosecutor’s case is different in kind from *Šešelj*, *Milutinović*, and *Dragomir Milošević*, in that the Prosecution must now rely on a relatively small number of victims and witnesses in order to prove broad allegations, and finding that the removal of incidents may upset the balance of the ethnicity of the victims and may diminish the alleged scope of the joint criminal enterprise, and therefore contravene the requirement of reasonable representativeness in Rule 73bis(D)).

<sup>201</sup> *Stanišić*, para. 11.

the Tribunal was established to administer justice, and not to create a historical record. The Trial Chamber will therefore not consider this argument as relevant for a decision taken pursuant to Rule 73bis(D).<sup>202</sup>

107. The relevant ICTY jurisprudence has also rejected Prosecution objections to limitations of the scope of an Indictment in circumstances where the Prosecution does not specifically elaborate on how exactly it will be prejudiced if its request is not granted.<sup>203</sup>

#### 4.2.3. *Application of the notion of representativeness to Case 002*

108. On the basis of this jurisprudence, the Co-Prosecutors and Lead Co-Lawyers contend that the addition of S-21 alone would satisfy the criterion of reasonable representativeness. The Defence teams disagree with this assessment, and the NUON Chea Defence instead urges the exclusion of S-21 and the inclusion of genocide charges in the interests of reasonable representativeness. In the absence of express guidance in the SCC Decision regarding how this criterion is to be applied, and the lack of consensus among the parties as to its impact on Case 002/01, the Trial Chamber has determined for the reasons that follow that a trial incorporating forced population movement and executions at Toul Po Chrey reflects the criterion of reasonable representativeness and is in the interests of justice and of a fair and expeditious trial.

109. Firstly, the Chamber notes that the following crimes are charged in the Case 002 Indictment: genocide,<sup>204</sup> crimes against humanity<sup>205</sup> and grave breaches of the Geneva Conventions.<sup>206</sup> These offences include killings and other deprivations of fundamental rights and international humanitarian law allegedly committed at 11 security centres, six worksites, three execution sites, as well as two allegations of genocide and two of religious persecution, spanning the entire territory of the Kingdom of Cambodia over approximately a four-year period. It was apparent to the Trial Chamber from the outset that a case containing even a single example of each category of crime or serious violation of

<sup>202</sup> *Stanišić*, para. 21.

<sup>203</sup> *Dragomir Milošević*, paras 19, 20 (stressing that addition of further incidents would be inconsistent with the Chamber's earlier attempts to reduce the scope of the Prosecution case in a representative manner and as unfairly prejudicing the Accused).

<sup>204</sup> Genocide is charged in the Case 002 Closing Order in relation to the killing of Cham and Vietnamese.

<sup>205</sup> The crimes against humanity charged in the Case 002 Closing Order are murder, extermination, enslavement, deportation, imprisonment, torture, persecution on political, racial or religious grounds, rape, other inhumane acts through attacks against human dignity, other inhumane acts through forced marriage, other inhumane acts through forced transfer, and other inhumane acts through enforced disappearances.

<sup>206</sup> The grave breaches charged in the Case 002 Closing Order are 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 and unlawful confinement of a civilian.



humanitarian law would be one of such breadth and scope as to be unable to conclude within the Accused's natural life-span or whilst they remained fit to be tried: a fact implicitly acknowledged by the Co-Prosecutors in seeking to add only a single security centre to the scope of Case 002/01.

110. The Chamber further notes that the victimization resulting from these allegations is estimated to comprise between 1.7 and 2.2 million deaths (an estimated 800,000 of which were violent), of which approximately 12,273 executions occurred at S-21.<sup>207</sup> Between 2,000 and 3,000 killings are alleged to have occurred at Toul Po Chrey.<sup>208</sup> It is apparent from the chronology of events in the Closing Order that the alleged forced evacuations both preceded and precipitated these violent and consequential deaths that occurred during the DK period. Countless deaths allegedly occurred due to starvation, deprivation of medical care and other necessities of life during and in the aftermath of these forced evacuations.<sup>209</sup>

111. Although the forced evacuations included within the scope of Case 002/01 occurred during the early stages of the Indictment period, the express terms of ICTY Rule 73bis(D) do not expressly require representativeness in relation to the entire duration of the Indictment period. Further, and as indicated in the Severance Order, commencement of proceedings in Case 002 with forced evacuations enabled the Chamber to proceed in a manner consistent with the chronological and logical structure of the Closing Order: a legitimate consideration in both the relevant ICTY jurisprudence and the SCC Decision.<sup>210</sup>

112. A further issue confronting the Trial Chamber in determining the representativeness of Case 002/01 is that forced movement perhaps constitutes the only theme in the Indictment

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<sup>207</sup> Closing Order Case 002, D427, 15 September 2010 ("Closing Order Case 002"), paras 460 (noting that more than 12,273 S-21 detainees were executed at Choeng Ek, within the S-21 complex or nearby, or died as a result of the detention conditions at S-21) and 1360 ("The principal mode of operation consisted of standardized methods of applying violence, dictated from above and reported on from below, carried out on a grand scale (such as the torture system set up in all security centres in order to identify and smash "enemies"), and relying on all State institutions of Democratic Kampuchea. This system resulted in millions of victims, including 1.7 to 2.2 million deaths, of which some 800,000 were violent. Beyond the direct victims, enforced disappearances, carried out systematically by the authorities in order to conceal arrests, caused suffering amongst those who witnessed them as a result of the climate of fear and uncertainty that they engendered").

<sup>208</sup> Closing Order Case 002, paras 704, 711.

<sup>209</sup> See e.g. Closing Order Case 002, paras 239, 1434 and 1436 (alleging that during phases 1 and 2 of the population movement, the population was forced to move from their places of residence on short notice without proper preparation, were not provided with sufficient food or water, forced to sleep in the open, and in most cases lacked access to medical care despite the presence of vulnerable groups in the populations transferred such as the sick and the elderly. As a result of the inhumane conditions during the population movement, many people developed sicknesses or injuries, exhaustion and psychological trauma or died).

<sup>210</sup> Severance Order, paras 1, 5; see also SCC Decision, para. 36 (finding the Trial Chamber's consideration of factors related to the logical sequence of Case 002/01 not to "evince unreasonableness at first appearance").

to have involved or directly affected the entire Cambodian population. Other crime sites or charges, whilst each encompassing significant offences and victim classes, describe crimes that occurred either within an individual locality or against a particular religious group or ethnicity.<sup>211</sup> Whilst these crime sites and groups individually comprise important parts of the overall pattern of victimization within DK, no instance alone can be described as particularly representative in terms of the number and nature of victims, when measured against the total criminality encapsulated in the Case 002 Closing Order. In a context where most must inevitably be excluded, incorporation of any individual allegation or crime site thus confronted the Trial Chamber with the spectre of elevating particular categories of victims over others, or of incorporating within Case 002/01 those victims with political, ethnic or religious distinctiveness, at the expense of the vast majority of the victims described in the Case 002 Closing Order. Mindful of the inevitable disappointment that would follow for many from the unavoidable exclusion of so many significant crime sites and charges, none of which have as yet been tried, the Trial Chamber also doubts the desirability of including within the scope of Case 002/01 the only crime site to have been conclusively adjudicated by the ECCC to date.

113. Similar considerations are reflected in the Trial Chamber's decision to limit the offences incorporated in Case 002/01 to crimes against humanity. Despite the perception of genocide as the gravest offence punishable before the ECCC, these allegations in the specific context of Case 002 extend to killings of Vietnamese and Cham: a significant but in numerical terms, comparatively small percentage of the overall DK-era victimization. For the same reasons, grave breaches (which, due to their narrow legal scope, were in Case 001 primarily limited to Vietnamese detainees of S-21) were also not included within Case 002/01.<sup>212</sup>

114. A further relevant feature of the ECCC legal framework is that approximately 4000 Civil Parties were joined to these proceedings during the pre-trial phase, following individual determinations by the Co-Investigating Judges that their harm suffered is linked

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<sup>211</sup> See for e.g. Vietnamese (in relation to genocide and grave breaches of the Geneva Conventions) and Cham (in relation to genocide and persecution on religious grounds).

<sup>212</sup> *KAING Guek Eav*, Trial Chamber Judgement, E188, 26 July 2010, paras 401, 410, 417-419, 425-426 and 433-437 (explaining the limited scope of application of grave breaches and the need to prove the existence of an international armed conflict, and finding their scope of application in Case 001 to be principally limited to Vietnamese victims of S-21); see also Rule 89 Preliminary Objection (Statute of Limitations for Grave Breaches) (IENG Sary Defence), E43, 14 February 2011 (resolution of which was deferred by the Trial Chamber to future trials).

to one or more allegations in the entirety of the Case 002 Closing Order. There is no possibility (legally or practically) of revisiting the basis of these admissibility decisions at trial or following the severance of proceedings in Case 002.<sup>213</sup> However, the Trial Chamber considered that forced movement, which impacted virtually all victims of the DK era, ensures that the continued participation of all individuals previously admitted to Case 002 has no adverse impact upon the fair trial rights of the remaining Case 002/01 Accused.<sup>214</sup>

115. Reflecting considerations of inclusivity and the need to ensure that all Civil Parties admitted to Case 002 retained a meaningful connection to the offences charged in Case 002/01, the Trial Chamber incorporated within the scope of Case 002/01 primarily those features of the Case 002 Closing Order that were most universal in application, limiting its scope equally and proportionately in relation to all remaining offences across all regions and victim classes in the Case 002 Closing Order. Against this backdrop, the addition of further, specific offences or crime sites to the scope of Case 002/01 threatened to disturb this delicate, albeit painful, balance of considerations.

116. Due to the sheer number of allegations in the Case 002 Closing Order, the fact that the thousands of victims of S-21 still nonetheless comprise a relatively small percentage of Case 002's overall victimization, and the absence of any obvious connection (geographically or temporally) to the major theme of Case 002/01 (*i.e.* forced evacuations), the Chamber did not consider the incorporation of S-21 within the scope of Case 002/01 to be essential to any criterion of reasonable representativeness. The Trial Chamber did, however, incorporate another example of the extermination of enemies (namely, the executions at Toul Po Chrey in the immediate aftermath of the evacuation of Phnom Penh), on grounds that this incident did fit within the logical and chronological sequence of Case 002/01, and as its addition would not jeopardize the Chamber's ability to render a timely verdict in Case 002/01.

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<sup>213</sup> See *e.g.* Internal Rules 23 and 23bis (providing that decisions regarding the admissibility of Civil Party applications are made during the pre-trial stage by the Co-Investigating Judges. All Civil Parties admitted by the Co-Investigating Judges or by the Pre-Trial Chamber upon appeal form a single, consolidated group at the trial stage and beyond); see also *KAING Guek Eav*, Supreme Court Chamber Judgement, F28, 3 February 2012, paras 471, 473-475.

<sup>214</sup> See Decision on Request for Reconsideration, para. 11; see also Internal Rule 23bis(1) (providing that in order for a Civil Party to be admissible, the Civil Party shall demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based).

117. It follows that the 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 Accused in relation to all policies of the DK era.<sup>215</sup> 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, to the extent this is relevant to leadership or communications structures, or other overarching themes in Case 002/01.<sup>216</sup>

118. The Chamber further notes that the inclusion within the scope of Case 002/01 of the alleged population movement and executions committed at Tuol Po Chrey, and associated crimes against humanity, enable examination of two of the five main themes of the Case 002 Closing Order, *i.e.* forced movement and execution of purported enemies of the regime. It therefore considers this scope of Case 002/01 to satisfy, in all the relevant circumstances, the criterion of reasonable representativeness of the Case 002 Closing Order. These charges and factual allegations reflect the alleged criminality of the policies of the DK regime, incorporate a significant portion of the Indictment’s geographical range and a large percentage of the victimized Cambodian population, and enable the Co-Prosecutors to place these offences within the broader context of the joint criminal enterprise in which all Accused are alleged to have participated.

119. In undertaking severance, the Chamber sought to limit the quantity of crime-base evidence to that which can be accommodated within the particular constraints within which the Trial Chamber is compelled to operate. As shown by the above, the Chamber has also curtailed the crime-base evidence to be led at trial on grounds that it would otherwise

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<sup>215</sup> Closing Order Case 002, paras 869-993 (NUON Chea), paras 1001-1125 (IENG Sary), paras 1131-1200 (KHIEU Samphan); *see also* Decision on Assignment of Experts, E215, 5 July 2012, para. 4 (permitting experts to be questioned on the entire scope of the Case 002 Closing Order).

<sup>216</sup> *See also* Response to Co-Prosecutors’ Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 (NUON Chea Defence), E163/5/1/4, 19 November 2012, para. 35 (observing that if evidence has been put before the Chamber which is relevant to S-21, there is no reason to assume that this evidence will not be used by the Trial Chamber in reaching the verdict, in relation to the assessment of several overarching themes in Case 002, including the history, authority structure and communications of the CPK and the DK regime, roles and positions of the Accused, as well as the development of the five criminal policies alleged in the Closing Order).

confront insuperable challenges in undertaking a fair and equitable selection between numerous and equally-deserving candidates for inclusion.

120. The Trial Chamber emphasises that by no means does it follow from the above that the charges and factual allegations excluded from the scope of Case 002/01 are less important or their victims in any way less deserving.

#### 4.2.4. *Conclusion*

121. Given the age and physical frailty of all Accused, remission of a case of the size and scope of Case 002 presented the Trial Chamber from the outset with few good options. It was clear that the need for a dramatic limitation of the scope of Case 002/01, which both the Co-Prosecutors and Lead Co-Lawyers concede to be necessary in the interests of obtaining any timely verdict in Case 002, could only be achieved in significant measure at the expense of the representativeness of the totality of charges and factual allegations in the Case 002 Closing Order. The issue before the Chamber is whether the reasonable representativeness of Case 002/01 is critically dependent upon the inclusion of S-21 within its scope.

122. For the foregoing reasons, the Chamber considers that while the addition of S-21 may render Case 002/01 *more* representative (in the sense that the addition of *any* crime site would further this objective), it does not on its own satisfy the notion of “reasonable” representativeness when measured against the totality of crime sites and charges in the Case 002 Closing Order: the vast majority of which cannot be included within the scope of Case 002/01 in the interests of safeguarding the Trial Chamber’s ability to render any timely verdict in that case.

123. Finally, the express terms of ICTY Rule 73*bis*(D), as confirmed by the relevant jurisprudence, indicate that the Trial Chamber’s discretion to fix the number of crime sites and charges upon which to proceed at trial reflects a delicate balance between a number of competing considerations, and the Trial Chamber’s discretion to sever proceedings must be exercised having regard to all the relevant circumstances.

### **4.3. Other Relevant Circumstances**

124. The SCC ruled that a Trial Chamber may legitimately have regard to a number of factors when considering the issue of severance. It held for instance that the “‘interest of justice’ to sever [pursuant to Internal Rule 89*ter*] lies 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.”<sup>217</sup> The SCC Decision further noted the need to balance the interests of “*all parties* [...] against *all* relevant factors,” referring to considerations of judicial manageability and the possibility that, in light of the deteriorating health of a Co-Accused, the Trial Chamber may consider that justice is better served by concluding with a judgement, whether resulting in a conviction or acquittal, of at least one smaller trial on some portion of the Indictment.<sup>218</sup> It also found the Chamber’s weighing of factors related to expeditiousness and the logical sequence of Case 002/01 not to “evince unreasonableness at first appearance”, although it considered the Impugned Decision to “evince a *prima facie* paucity [both] of reasoning and consideration of other conceivably relevant factors.”<sup>219</sup>

125. An exhaustive list of “all” or “other conceivably relevant” factors that a Trial Chamber may consider before proceeding to severance or in determining the scope of trial is not provided. The SCC Decision also does not provide express guidance regarding how these considerations are to be weighed against the criterion of representativeness, particularly where these may suggest different outcomes or otherwise conflict. The Chamber has therefore concluded that the factors to be weighed are within its trial management discretion. It determines that the below factors are 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:

- (1) the advanced age and physical frailty of the remaining Case 002 Accused;
- (2) the public interest in achieving a verdict in relation to at least a portion of the Case 002 Closing Order;
- (3) judicial manageability of Case 002/01 in the light of the late stage of trial, including possible prejudice to the 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.

<sup>217</sup> SCC Decision, para. 35.

<sup>218</sup> SCC Decision, para. 50 (emphasis in original).

<sup>219</sup> SCC Decision, paras 36 and 37.

#### 4.3.1. *Advanced age and physical frailty of the remaining Case 002 Accused*

126. On 25 March 2013, the court-appointed medical experts testified that while the Accused NUON Chea is 86 years old and suffers from a number of chronic conditions, he remains capable of meaningful participation in his own defence. On the basis of these conclusions, on 29 March 2013, the Trial Chamber ruled orally that the Accused NUON Chea remained fit to stand trial and issued its written, reasoned decision on 2 April 2013.<sup>220</sup>

127. In their report and testimony, the medical experts nonetheless emphasised the Accused's advanced age and physical frailty, noting that the Accused NUON Chea receives treatment for heart failure, although his cardiovascular disease is presently stable and well-controlled.<sup>221</sup>

128. Professor A. John CAMPBELL, the court-appointed geriatrician, testified on 25 March 2013 that the Accused's prognosis is limited and that given the Accused's age and number of chronic medical conditions, it would be unsurprising if the Accused were no longer alive in six months.<sup>222</sup> While emphasising that it is impossible to indicate with certainty how long the Accused will continue to survive, at 86 years of age, with underlying cardiovascular disease, cerebrovascular disease and frailty, the Accused's prognosis is precarious and uncertain.<sup>223</sup>

129. In discussing the Accused's recent episode of acute bronchitis, for which the Accused was hospitalized, the expert also noted the Accused's vulnerability to inter-current illnesses (*i.e.* illnesses other than the Accused's pre-existing chronic conditions), which due to the Accused's age and physical frailty have a significant and disproportionate effect on the Accused's well-being and health.<sup>224</sup> The Chamber further notes that the Accused IENG Sary died in hospital on 14 March 2013 following his admission due to examples of such inter-current illnesses.<sup>225</sup>

<sup>220</sup> T., 29 March 2013, p. 2; Second Decision on Accused NUON Chea's Fitness to Stand Trial, E256/5, 2 April 2013 ("Second Decision on Accused NUON Chea's Fitness").

<sup>221</sup> Expert Report of 20 March 2013, paras 8 and 15 (noting a number of medical conditions contributing to the Accused's physical frailty and low levels of physical reserve); Second NUON Chea Fitness Decision, paras 17, 21 (citing Expert Report of March 2013, paras 9, 18).

<sup>222</sup> T., 25 March 2013, pp. 25, 75-76.

<sup>223</sup> T., 25 March 2013, pp. 25, 75-76.

<sup>224</sup> T., 25 March 2013, p. 17.

<sup>225</sup> Acknowledgement Receipt of Report of the Inquiry into the Cause of Death of IENG Sary, E270/2, 2 April 2013; *see also* Rapport médical de IENG Sary, E11/117/1, 11 March 2013 (noting that IENG Sary was admitted to hospital on 4 March 2013 with symptoms of vomiting, constipation, and ischemic heart disease),

130. Although the Accused KHIEU Samphan has not sought to contest his fitness to stand trial, the Accused is nonetheless 82 years of age. In late 2007, KHIEU Samphan suffered an ischaemic cerebrovascular event (stroke) from which he required several months to recover, in addition to other ailments.<sup>226</sup>

131. Both Accused have been hospitalized for various periods throughout the trial. Most recently, the Accused NUON Chea was hospitalized from 13 to 31 January 2013 (with acute bronchitis), and from 2 to 19 February 2013 (due to severely low blood pressure).<sup>227</sup> KHIEU Samphan was also hospitalized between 16 and 25 January 2013 (with acute pharyngitis).<sup>228</sup>

132. To date, the trial has been marked by numerous interruptions due to the ill-health of one or more Accused. The Chamber's ability to continue with trial proceedings has therefore frequently depended in large part upon the willingness of the Accused to waive their right to be present in the courtroom: an agreement that has fluctuated and which the Defence teams signalled at the Severance Hearing will not extend to the hearing of evidence in relation to S-21. Notwithstanding the parties' flexibility in accommodating last-minute changes to the schedule when a waiver of an Accused's right to be present was not granted, the Chamber was, prior to the resumption of trial proceedings on 8 April 2013, able to utilize only seven courtroom days for the hearing of evidence during the first quarter of 2013 due principally to the various health concerns of one or more Accused. In 2012, the Accused IENG Sary was also hospitalized for almost two months, resulting in significant

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Certificate of Death of IENG Sary, E270, 13 March 2013 (noting cause of death as irreversible cardiogenic shock) and "Co-Prosecutors submits report on the passing of IENG Sary", ECCC Press Release of 2 April 2013 (accessed on <http://www.eccc.gov.kh/en/articles/co-prosecutors-submits-report-passing-ieng-sary>) (noting that the Accused died of natural causes at 8:45 a.m. on 14 March 2013 from "irreversible cardiogenic shock due to a long-standing ischaemic cardiopathy that predated his arrest and detention at the ECCC").

<sup>226</sup> See e.g. Strictly Confidential Report of Neurological Expertise of KHIEU Samphan dated 5 July 2008, B11/2, 1 August 2008; Strictly Confidential Compte Rendu d'Examen Endoscopique ORL de KHIEU Samphan, E13/35/1.1, 30 January 2012; Strictly Confidential Rapport Médical Hebdomadaire de KHIEU Samphan en date du 29-02-2012, E13/59, 2 March 2012; Strictly Confidential Rapport Médical Hebdomadaire de KHIEU Samphan en date du 07-03-2012, E13/60, 9 March 2012; Strictly Confidential Rapport Médical Hebdomadaire de KHIEU Samphan en date du 14-03-2012", E13/61, 16 March 2012; Strictly Confidential Rapport Médical Hebdomadaire de KHIEU Samphan en date du 21-03-2012, E13/62, 23 March 2012; Strictly Confidential Rapport Médical Hebdomadaire de KHIEU Samphan en date du 28-03-2012, E13/63, 30 March 2012.

<sup>227</sup> Second Decision on Accused NUON Chea's Fitness, para. 9.

<sup>228</sup> See e.g. Strictly Confidential Medical Report for KHIEU Samphan on 16-01-2013, E13/106, 23 January 2013 (indicating deteriorated condition, persistent cough and pain in throat); Strictly Confidential Medical Report for KHIEU Samphan on 18-01-2013, E13/108, 23 January 2013 (indicating cough, throat pain, fever and chills); Strictly Confidential Medical Report for KHIEU Samphan on 22-01-2013, E13/110, 23 January 2013 (noting improved condition) and Strictly Confidential Letter from the Khmer Soviet Friendship Hospital to Acting Director of the ECCC Concerning Medical Report of KHIEU Samphan on 24 January 2013, E13/112, 29 January 2013 (noting considerably improved condition and expected release the following day).



disruptions to the flow of testimony and other trial management challenges, despite the grant of waivers and considerable flexibility being shown by the Trial Chamber and the parties.

133. Advanced age and physical frailty also afflict many Civil Parties and potential witnesses in Case 002. Several passed away in the interval between their identification as individuals likely to be heard before the Chamber and the scheduling of their evidence.<sup>229</sup> On other occasions, the hearing of evidence in Case 002/01 has been interrupted or delayed by the ill-health of those testifying, requiring in some cases the use of video-link testimony or other measures to alleviate the impact of these health concerns.<sup>230</sup>

134. The Chamber therefore considers that the age-related and other health concerns of both Accused (in particular, NUON Chea), the latter's physical frailty, coupled with the advanced age and physical frailty of many witnesses and Civil Parties, also favour an expeditious conclusion to trial proceedings in Case 002/01.<sup>231</sup>

#### 4.3.2. *The public interest in achieving a timely verdict in Case 002*

135. The Trial Chamber is also aware of the overriding public interest in ensuring that a verdict is rendered in relation to at least some of the allegations contained in the Case 002 Closing Order. The trial in Case 002/01 has proceeded for approximately 16 months, and despite measures to confine its scope and expedite proceedings, the Trial Chamber has already lost its ability to render any verdict in relation to two of the four Case 002 Accused, due either to incapacity to stand trial (IENG Thirith, at aged 80) or death (IENG Sary, at aged 87). The remaining two Accused are 86 and 82 years old respectively.

136. The Trial Chamber's consideration of the scope of Case 002/01 also occurs against the backdrop of the experience of other internationalized tribunals, which have generally struggled to streamline voluminous trial proceedings, occasionally to the detriment of their

<sup>229</sup> Individuals contained on the Trial Chamber's priority list for call during Case 002/01 (E131/1.1) who deceased before their testimony could be scheduled in Case 002/01 include KANG Sophat (TCW-285) and KE Pich (TCW-297) whereas others, such as Jean DYRAC (TCW-161) and SAO Phen (TCW-601) were no longer able to testify on medical grounds by the time their evidence was scheduled.

<sup>230</sup> Video-link evidence was required, for instance, in relation to Denise AFFONCO (TCCP-1), LONG Norin (TCW-395) and SA Vi (TCW-620), due principally to health concerns.

<sup>231</sup> Cf. *Prosecutor v. Mladić*, Decision on Consolidated Prosecution Motion to Sever the Indictment, to conduct Separate Trials, and to Amend the Indictment, ICTY Trial Chamber (IT-09-92-PT), 13 October 2011, paras 28 (considering as a relevant factor the relative manageability for the Chamber and the parties of a single trial versus separate trials) and 30 (declining to consider the Accused's health to be a relevant consideration in support of severance, on grounds that the Chamber had no information properly before it to demonstrate this to be a relevant concern).

ability to achieve a timely verdict. As one commentator noted after the termination of proceedings against the Accused Slobodan Milošević, following his death in custody:

The Milošević trial lasted four years and one month and ended abruptly with the death of the accused months before its projected conclusion. It might have taken anything up to a further year to render the judgement in the case. In such circumstances, it is not possible to define the trial as expeditious. [...] When in hindsight the possibility existed for a two-year trial resolving the Kosovo indictment, and the outcome was a four-year trial without conclusion and an accused dead on remand, questions may also legitimately be posed concerning the conduct of the proceedings.<sup>232</sup>

137. Whilst the issuance of the Case 002 Closing Order and the trial process are themselves important features of the struggle to end impunity for DK era crimes, the Trial Chamber is aware that trial proceedings which are lengthy but ultimately inconclusive are likely to result in profound disappointment for the countless victims of DK era crimes who have awaited justice for decades, the parties to the ECCC Agreement and donors who have invested significant resources in the ECCC over several years, and the public. The Trial Chamber has therefore exercised its trial management discretion so as to minimise the risk that proceedings in Case 002/01 may be unable to conclude. The Chamber has therefore declined to add S-21 to its scope, which it considers to only marginally advance the goal of representativeness, but which may serve to jeopardize the Chamber's ability to reach any timely verdict in Case 002/01.

#### 4.3.3. *Uncertain impact on the length of proceedings should S-21 be added to Case 002/01*

138. The Trial Chamber considers the addition of S-21 to Case 002/01 may risk a substantial or indeterminate prolongation of trial proceedings. It observes that the Co-Prosecutors' initial estimate at the Severance Hearing of the time required to hear the evidence sought in support of an S-21 trial segment (11 days) was immediately qualified by the need also to consider a limited amount of additional documentary evidence, as well as additional evidence sought by the Lead Co-Lawyers and the Defence. The NUON Chea Defence has indicated an intention to call rebuttal evidence in relation to these allegations,

<sup>232</sup> Gideon Boas, *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings*, Cambridge University Press, 2007, pp. 272, 274; see also *Prosecutor v. Slobodan Milošević*, Reasons for Decision on Prosecution Interlocutory Appeal from Refusing to Order Joinder, ICTY Appeals Chamber (IT-99-37-AR73), 18 April 2002 ("*Slobodan Milošević*"), para. 2 (granting an appeal against a Trial Chamber Decision ordering that the first of three Indictments against the Accused, concerning Kosovo, be tried separately, followed by trial of the two remaining Indictments concerning events in Croatia and Bosnia. The Appeals Chamber allowed the appeal and ordered that there should be one trial and that for the purposes of that trial, the three Indictments were deemed to constitute one Indictment). Milošević died in custody on 11 March 2006, before trial proceedings could conclude and any verdict rendered (*Prosecutor v. Slobodan Milošević*, Order terminating the Proceedings, ICTY Appeals Chamber (IT-02-54-T), 14 March 2006).

and even if substantial reductions are possible to the NUON Chea Defence's preliminary list of 27 individuals, the Chamber infers that a number of witnesses are nonetheless still likely to be required in the interests of a fair trial. The Defence has also indicated that requests to adjourn proceedings to permit preparation for a new trial segment and objections to written statements and other documents may also be forthcoming. The Chamber further notes that while many more witnesses were heard in Case 001 than are likely to be sought cumulatively by all parties in support of an S-21 trial segment within Case 002/01, Case 001 was also a far simpler, single-Accused trial of a co-operative, healthy defendant who in large part admitted his role and responsibility in relation to the crimes at issue.<sup>233</sup> Despite most allegations regarding crimes committed at S-21 being uncontested in Case 001, that trial ran for approximately eight months.<sup>234</sup>

139. In a confidential annex to a filing of 27 March 2013, the Co-Prosecutors tendered a revised estimate of 19 courtroom days as being necessary to hear a proposed S-21 trial segment in Case 002/01, including eleven days for witnesses and Civil Parties sought by the Co-Prosecutors, four days for the resolution of documentary and translation issues concerning S-21, and assuming that all evidence sought by the Lead Co-Lawyers and Defence could be heard within four days. This estimate is therefore that the hearing of S-21 would require a cumulative total of 15 days of testimony, and four days to resolve document and other issues (a total of 5 uninterrupted trial weeks).<sup>235</sup> Many of these assumptions, and particularly the estimate of time required for Defence witnesses, were strongly contested by the other parties at the Severance Hearing. In view of the likely Defence and other objections to much of this evidence (documentary as well as oral), the Chamber therefore doubts whether this trial segment can be so confined.

140. However, and even if accepting the Co-Prosecutors' projections, the Trial Chamber notes that the time required to conclude 15 days of testimony under conditions prevailing in Case 002/01 is highly variable and uncertain, due to the impact of a variety of factors,

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<sup>233</sup> *KAING Guek Eav*, Trial Chamber Judgement, E188, 26 July 2010, Annex I: Procedural History, para. 19 (indicating that 9 experts, 24 witnesses (including 7 of character) and 22 Civil Parties were heard over the course of trial in Case 001).

<sup>234</sup> *KAING Guek Eav*, Trial Chamber Judgement, E188, 26 July 2010, Annex I: Procedural History, paras 17, 26 (indicating that the hearing of the substance in Case 001 commenced on 30 March 2009 and that trial proceedings were closed on 27 November 2009).

<sup>235</sup> Annex A (confidential): OCP Proposed Trial Schedule for Final Phase of Case File 002, E273.1, 27 March 2013 (proposing the recall of *KAING Guek Eav* (4 days), the testimony of TCW-698 (2 days), TCW-540 (2 days), TCCP-21 (1 day); TCW-232 (2 days), 'additional witnesses proposed by Defence or CPs' (4 days), and hearings re admission of witness statements, S-21 Documents and 'translation issues' (4 days).

including the health of the Accused, witness availability, and the appeal process. By way of illustration, between 6 December 2011 (when the hearing of evidence in Case 002/01 commenced) and 8 February 2013 (when the SCC Decision was issued), the evidence of a total of 52 individuals has been heard before the Chamber over the course of 117 sitting days.<sup>236</sup> Of the sixteen months of trial conducted to date, the Chamber has been able to hear oral evidence for more than 10 days per month during only three of these months.<sup>237</sup> By contrast, and during four other trial months, the Chamber was able to hear testimony for between only zero and five days.<sup>238</sup> Over the course of the trial, the Chamber has therefore been able to hear testimony on an approximate average of 7.3 courtroom days per month, although this figure has varied sharply from month to month, depending on the circumstances prevailing at the time. From another perspective, but again based on experience in Case 002/01 to date, the scheduling of 15 days of witness testimony would have required virtually the entirety of December 2011 through February 2012 (approximately 3 months); most of May and June 2012 (1.5 months); most of June and July 2012 (1.5 months), the entirety of August 2012 alone (1 month); September to November 2012 (almost 3 months) or December 2012 to March 2013 (4 months).<sup>239</sup>

141. On the basis of the foregoing, the Chamber concludes that the addition of the S-21 trial segment may therefore require between two and four months for the hearing of witness testimony alone. However, it notes that many of the above projections in relation to the conduct of proceedings to date benefitted from the willingness of one or more Accused to waive their right to be present where health concerns prevented their attendance: a willingness that has been expressly withdrawn in relation to evidence pertaining to S-21. Accordingly, future incapacitation of one or both Accused during a hypothetical S-21 trial segment may threaten the indefinite prolongation of proceedings in Case 002/01.

<sup>236</sup> The following is a breakdown of the number of days per month during which the Chamber has been able to hear oral testimony: December 2011 (5 sitting days); January 2012 (7 days); February 2012 (3 days); March 2012 (7 days); April 2012 (14 days); May 2012 (9 days); June 2012 (11 days); July 2012 (9 days); August 2012 (16 days); September 2012 (6 days); October 2012 (11 days); November 2012 (6 days); December 2012 (9 days); January 2013 (6 days); February 2013 (1 day) and March 2013 (0 days).

<sup>237</sup> Namely, April 2012, August 2012, and October 2012. The impact of judicial recesses has been included in these calculations.

<sup>238</sup> Namely, December 2011, February 2012, February 2013 and March 2013.

<sup>239</sup> An average of these figures suggests approximately 2.5 months for the hearing of 15 days of witness testimony. The Chamber notes that the Accused IENG Sary was hospitalized on 7 September 2012, where he remained until 7 November 2012, thus bringing to an end three consecutive months of relatively high volumes of witness testimony. The fact that the Chamber could hear evidence at all during this period was due entirely to the Accused's waiver. As previously noted, these considerations weighed directly on the Trial Chamber in its original partial denial of the Co-Prosecutors' request to expand the scope of trial and following the TMM, which enabled adversarial discussion of these considerations.

142. Given the large number of contingencies, many of which are unknown, that accompany any projection of the time that may be required to conclude an S-21 trial segment, but based on its own assessment of the trial record to date, the Trial Chamber considers it to be well within its trial management discretion to minimise the risk of a substantial prolongation of proceedings by excluding S-21 from the scope of Case 002/01.

#### 4.3.4. *Trial management considerations*

143. The SCC Decision further refers to “judicial manageability” as a consideration the Chamber may properly take account of in determining the scope of Case 002/01.<sup>240</sup> The relevant ICTY jurisprudence expresses similar tendencies, and has held that when undertaking severance, a Chamber must at all times ensure that its discretion is exercised in the interests of a fair and expeditious trial.<sup>241</sup> ICTY Trial Chambers have expressed particular reluctance to expand the scope of trial where an Accused’s defence has proceeded on the basis that evidence would not be presented in relation to certain incidents, due to its repercussions for notice to the Accused of the case he has to answer.<sup>242</sup>

144. The Chamber further considers that significant trial management challenges would stem from the addition of a new trial segment at this late stage of proceedings in Case 002/01. For instance, the Trial Chamber is close to concluding all pending decisions on the admissibility of documents tendered in Case 002/01: a process that would be inevitably delayed should it need to schedule hearings on any objections to the further 200-250 documents that would be proffered by the Co-Prosecutors alone in relation to S-21. Opportunity would also need to be provided to the other parties to tender documents relevant to this additional trial segment. The Chamber had similarly also taken steps to schedule the hearing of evidence in relation to the last remaining trial segments, namely the Accused’s character and victim impact, to make final determinations on which remaining experts, witnesses and Civil Parties would ultimately be heard before the Chamber, and to

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<sup>240</sup> SCC Decision, para. 50.

<sup>241</sup> See e.g. *Prosecutor v. Mladić*, Decision on Consolidated Prosecution Motion to Sever the Indictment, to conduct Separate Trials, and to Amend the Indictment, Case No. ICTY Trial Chamber (IT-09-92-PT), 13 October 2011, paras 16 (noting that a decision to sever proceedings is discretionary and “requires a complex balancing of intangibles to properly regulate the proceedings”) and 25 (noting that “if it becomes apparent to a Trial Chamber that a trial has become unmanageable, the Trial Chamber may order a severance of the charges” (citing *Slobodan Milošević*, paras 22-26)).

<sup>242</sup> See e.g. *Dragomir Milošević*, paras 11-12, 18 (disagreeing with Prosecution that the Accused would not be unfairly prejudiced if the requested variation was granted on grounds that he had long been on notice concerning the incidents and the relevant evidence, and considering that reversal of the decision not to proceed to trial on these allegations would create a burden for the Accused).

provide reasons why the Chamber considers the remaining individuals sought by the parties need not be heard in Case 002/01. The need to incorporate and evaluate witnesses requested for a further crime-base segment would further delay this process. Preliminary preparations by the Trial Chamber on the Case 002/01 verdict have also been seriously delayed by the need to reconsider the scope of the trial during its concluding stages. The Trial Chamber therefore finds that considerations of efficiency and effective trial management, including considerations of trial fairness for all remaining Accused, are best served by rejecting the request to add S-21 to the scope of trial and by instead permitting the trial to conclude on the basis of the parameters that have been known and understood by all parties from the outset.

#### 4.3.5. *Uncertainty regarding the duration of financial support to the ECCC*

145. A further factor considered relevant by the Trial Chamber is the uncertainty regarding the duration and continuity of financial support to the ECCC. At the time of the hospitalization of the Accused IENG Sary on 4 March 2013, trial proceedings in Case 002/01 had in any event been unable to proceed due to a strike by in-court interpreters and other key Cambodian staff following financial shortfalls and prolonged non-payment of Cambodian staff salaries.<sup>243</sup> The Chamber's ability to resume proceedings thereafter also remained uncertain, due to the continuation of this strike, as well as the conditions that gave rise to it. Given the demonstrated impact of financial considerations on the Chamber's ability to conduct trial proceedings, the Trial Chamber President on 27 March 2013 wrote to the Acting ECCC Director of Administration, requesting him to "seek confirmation from the parties to the [ECCC] Agreement of stable and adequate funding for the Trial Chamber's requirements for the year 2013 and the first quarter of 2014", which is "necessary to enable the Trial Chamber to plan as it works to conclude the current trial", and to respond no later than 3 April 2013.<sup>244</sup>

146. No confirmation of the continuity of funding for 2013 and early 2014 has been received, although the Trial Chamber was in a position to advise the parties on 29 March 2013 that a partial solution had been found that enabled the resumption of trial proceedings

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<sup>243</sup> T., 4 March 2013, p. 1 (announcement by the ECCC in-court interpreters that they were implementing with immediate effect a work boycott, and would not resume until salaries from the months of December 2012, January 2013 and February 2013 were fully paid).

<sup>244</sup> The Status of ECCC Funding (memorandum from Trial Chamber President to ECCC Acting Director of Administration), E272, 27 March 2013.

on 8 April 2013.<sup>245</sup> The Chamber therefore infers that the ECCC's persistent financial malaise, which is a matter of public knowledge, is likely to continue, and that these are also considerations favouring severance (enabling the Trial Chamber to issue a verdict concerning at least a first limited trial) and the implementation of all reasonable measures to ensure that Case 002/01 may conclude expeditiously.

#### 4.3.6. *Conclusion*

147. The Trial Chamber has endeavoured to identify and weigh the notion of representativeness when reconsidering the scope of trial in Case 002/01 in the light of the SCC Decision. It is clear, however, that *any* solution that might grant the Chamber a realistic possibility of concluding trial proceedings in Case 002/01 in a timely manner must inevitably extend only to a fraction of the totality of offences and crime sites included in the Case 002 Closing Order. Further, the Trial Chamber confronts insuperable difficulties of trial management stemming from, amongst other things, the advanced age and physical frailty of the Accused, which threaten to defeat the purpose of severance altogether. The Trial Chamber therefore considered it to be a reasonable exercise of its trial management discretion to exclude S-21 and grave breaches charges in relation to these crimes from the scope of Case 002/01, given that their inclusion would still encapsulate only a fraction of the victimization that occurred during the DK era, and as the inclusion of these additional charges would add depth but not breadth to the catalogue of offences already at issue in Case 002/01.

148. In essence, the SCC, Lead Co-Lawyers and Co-Prosecutors seek a trial that is both representative, but which concludes within the shortest possible time. In practical terms, however, the length of a trial is directly related to its scope. Although expeditiousness and representativeness are competing considerations, the SCC Decision provides no tangible guidance regarding how a more representative (and thus inevitably longer) trial should be concluded in the shortest amount of time, or exactly where this balance of interests must fall. Further, the parties are sharply divided as to the basis upon which the trial should proceed and indeed, the appropriateness of any change to its scope at this late stage.

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<sup>245</sup> T., 29 March 2013, p. 6 (noting that it was unclear whether essential Cambodian staff would be available that week, but informing the parties and public that “the Coordinator of UNAKRT has, just this morning, informed the International Judges that funding for the national staff has been secured through to the end of April [2013] and that ongoing discussions are under way to stabilize funding from that point on”).

149. The Trial Chamber further emphasizes, on the basis of the foregoing, that its decision is based not on one consideration alone, but reflects a careful balance of a number of competing considerations.<sup>246</sup> Having weighed all relevant circumstances, the Trial Chamber considers that any gains to the representativeness of Case 002/01 through the addition of S-21 would be offset by the risks that this may entail for the Chamber's ability to render any timely verdict in this trial. The Trial Chamber therefore considers any further extension of the scope of Case 002/01 neither to be an appropriate exercise of its trial management discretion nor to properly discharge its obligations in Article 33 (new) of the ECCC Law.<sup>247</sup>

#### **4.4. A plan for future trials**

150. The SCC considered the Severance Order to in substance terminate proceedings in relation to all charges and factual allegations not included within the scope of Case 002/01. Their adjudication was considered by the SCC to be effectively precluded by virtue of their deferral to a future trial, as it is probable that subsequent trials in Case 002 will not occur due to the Accused's advanced age and declining health.<sup>248</sup> The SCC nonetheless directed the Trial Chamber to outline a precise plan for the adjudication of these future trials.<sup>249</sup>

151. In relation to the trial of all allegations in the Case 002 Closing Order, the Co-Prosecutors interpret the SCC Decision as providing the Trial Chamber with two equally-available alternatives: either adjudication of the entire Case 002 Closing Order *via* a series of smaller trials (for which a plan is required), or, if opting instead for a single, representative trial, accepting that the remaining charges and factual allegations in the Closing Order are indefinitely stayed, in which case no plan for future trials is necessary.<sup>250</sup>

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<sup>246</sup> Cf. SCC Decision, para. 45 (alleging that the Trial Chamber in the Impugned Decision "continues to rely heavily on considerations of expeditiousness alone, with the only added reasoning that the killings at Tuol Po Chrey 'appear to be a logical extension of the existing allegations in Case 002/01', whereas, in the Trial Chamber's view, the killings at District 12 and S-21 do not" (citations omitted)).

<sup>247</sup> Article 33 (new) of the ECCC Law provides that "the Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level."

<sup>248</sup> SCC Decision, paras 23-24.

<sup>249</sup> SCC Decision, paras 24, 46, 47 and 50.

<sup>250</sup> T., 18 February 2013 (Co-Prosecutors), pp. 25, 99; *see, however*, T., 20 February 2013 (Co-Prosecutors), pp. 103-104 (denying that the Co-Prosecutors thus propose that the severed charges be ignored, suggesting that they instead be stayed and that the Trial Chamber "schedule a hearing following the issuance of [the Case 002/01] judgment and consider all issues at the appropriate time").



152. As no legal basis has been provided to support this last option or to justify termination of proceedings concerning the remaining charges after severance, and as the Civil Party Lead Co-Lawyers and the Defence contend that a plan is required under either limb, the Trial Chamber must therefore consider the requests for a plan for future trials.<sup>251</sup>

153. At present, a timetable for future trials could be based only on unknown contingencies, outside the control of the Trial Chamber, such as the continued fitness of the Accused to be tried and the continuity of donor support to the ECCC. The Trial Chamber therefore doubts that projections for future trials can meaningfully constitute a plan, in the sense of serving as a precise guide to the parties' future conduct or decisions on resource allocation. In the interests of the avoidance of doubt, however, the Trial Chamber has provided a tentative outline for future trials in Case 002 in an Annex to this decision. This outline currently assumes that Case 002 remains a multi-Accused trial. In response to the submission that the Accused KHIEU Samphan may alone remain capable of being heard on the entirety of the Case 002 Closing Order, the Chamber notes that the possibility of subsequent single-Accused trial(s) may also in future be explored, should circumstances require and should resources be available to support them at the relevant time.

154. The SCC has highlighted the "imperative that the ECCC utilize every available day to ensure a final determination of the remaining charges as expeditiously as possible".<sup>252</sup> However, the parties are also fundamentally divided on the issue of the conduct of any subsequent trials. Of the array of options presented, the Co-Prosecutors and Lead Co-Lawyers appear to support the view that no future trial proceedings in Case 002/02 may commence until the conclusion of a decision by the SCC on any appeal of the Case 002/01 verdict. One approach that may enable future proceedings to commence far earlier, namely, commencement of Case 002/02 following a short judicial recess after the conclusion of the evidence in Case 002/01, was favoured by one Defence team. It was, however, opposed by the Co-Prosecutors and Lead Co-Lawyers on grounds that this option would inevitably delay the conclusion of the Case 002/01 verdict. It would also pose a number of legal complexities. The Trial Chamber therefore infers that the Co-Prosecutors favour an expeditious verdict in Case 002/01, even at the expense of earlier consideration of the remaining charges and factual allegations in the Case 002 Closing Order.

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<sup>251</sup> See SCC Decision, para. 50.

<sup>252</sup> SCC Decision, para. 51.

155. The Trial Chamber proposes holding a Trial Management Meeting later in the year, when the issue can be revisited anew in the light of the circumstances then prevailing. In the interim, the Trial Chamber emphasises that no factual allegations or charges in the Case 002 Closing Order are dismissed as the result of the present Decision. There is no barrier to the later trial of the remaining Case 002 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.

#### **4.5. Civil Party submissions on the consequences of severance**

156. The SCC Decision found that a number of submissions made by the Lead Co-Lawyers regarding severance have never been addressed by the Trial Chamber.<sup>253</sup> These submissions sought clarification regarding, or reconsideration of, the following issues:

- the impact on the consolidated group of Civil Parties of restrictions in scope of facts to be tried during the first case, including on rights of individual participation<sup>254</sup>;
- the impact of the Severance Order on reparations requests, given that these must “acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted” and which “provide benefits to the Civil Parties which address this harm”<sup>255</sup>;
- whether the Severance Order prejudices the Trial Chamber’s determination of the legal characterization of crimes committed during forced transfer, submitting that the legal characterization of crimes is a matter for the Trial Chamber to determine once all evidence is heard<sup>256</sup>;
- the exclusion of, amongst other crimes, genocide, religious persecution, forced marriage and rape, and phase three of population movement<sup>257</sup>; and
- the right of Civil Parties to an effective remedy, particularly in the absence of details about the substance and timing of subsequent envisaged trials<sup>258</sup>.

Some of these requests were repeated by the Lead Co-Lawyers during the severance hearings which followed the SCC Decision.<sup>259</sup>

<sup>253</sup> SCC Decision, footnote 110 (citing 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”), paras 7-21, 32, 35-42, 44, and Urgent Request on the Scope of Trial One and the Need for a Reasoned Decision Following the Civil Parties Request for Reconsideration of the Severance Order, E124/10, dated 17 November 2011 and filed on 22 November 2011 (“Civil Party Request for Clarification and Reasoned Decision”), paras 6-11).

<sup>254</sup> Civil Party Request for Reconsideration, paras 7-15 and Civil Party Request for Clarification and Reasoned Decision, paras 6-11.

<sup>255</sup> Civil Party Request for Reconsideration, paras 16-21 and Civil Party Request for Clarification and Reasoned Decision, paras 6-11, *citing* Internal Rule 23*quinquies*(1)(a) and (b).

<sup>256</sup> Civil Party Request for Reconsideration, para. 35.

<sup>257</sup> Civil Party Request for Reconsideration, paras 36-40.

<sup>258</sup> Civil Party Request for Reconsideration, paras 32 and 44.

157. The Trial Chamber has previously noted that the Severance Order had no impact on the nature of Civil Party participation at trial. It follows that the Trial Chamber has not sought to re-open admissibility decisions taken during the pre-trial phase and that membership of the consolidated group also remains unchanged following renewed severance of Case 002.<sup>260</sup>

158. The Trial Chamber has similarly not sought to place limitations on the ability of individual members of the consolidated group to benefit from any reparations ultimately endorsed or awarded by the Trial Chamber.<sup>261</sup> The Trial Chamber has nonetheless noted that the formulation of reparations claims made on their behalf by the Lead Co-Lawyers should take account of Internal Rule 23*quinquies*(1)(a).<sup>262</sup> The Chamber has however previously provided guidance to the Lead Co-Lawyers to assist their efforts in formulating requests that may result in meaningful measures in reparation and encompass the entire consolidated group of Civil Parties.<sup>263</sup> The Chamber reminds the Lead Co-Lawyers that

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<sup>259</sup> T., 18 February 2013, pp. 105-113.

<sup>260</sup> Severance Order, para. 8 (indicating, on the basis of Internal Rule 23(3), that Civil Parties participate, at the trial stage and beyond, as members of a single, consolidated group, whose interests are represented by the Civil Party Lead Co-Lawyers and thus, that limitation of the scope of facts to be tried during the first trial has no impact on the nature of Civil Party participation at trial). Although Civil Parties may, and have, testified before the Chamber in Case 002/01, the Chamber has, in the interests of an expeditious trial, limited their number to a representative sample of those able to speak to facts relevant to the scope of Case 002/01 and others who instead provide evidence in relation to suffering (*see* Direction to the parties, E108, 8 July 2011, para. 5 (indicating that in order to ensure the expeditiousness of trial, decisions as to which Civil Parties will be heard at trial will be made by the Trial Chamber); *see also* paras 10 and 15, above).

<sup>261</sup> *See, however*, Internal Rule 23*quinquies*(1): “[i]f an Accused is convicted, the Chambers may award only collective and moral reparations to Civil Parties [...] These benefits shall not take the form of monetary payments to Civil Parties.”

<sup>262</sup> Severance Order, para. 8. Internal Rule 23*quinquies*(1)(a) provides that “[R]eparations for the purpose of these Rules are measures that ... acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted.” Internal Rule 23*quinquies*(1)(a) provides that “[i]f an Accused is convicted, the Chambers may award [...] collective and moral reparations [that] acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted”; *see also* Severance Order, para. 8 (acknowledging the impact of this sub-rule in relation to the formulation of reparations claims post-severance).

<sup>263</sup> *See* TMM Scheduling Order, para. 19 (suggesting, in order to ensure that proceedings in Case 002/01 may result in meaningful reparation for victims, and in view of limited donor funds and finite human resources in both the Lead Co-Lawyers’ and Victims’ Support Sections, that the Lead Co-Lawyers prioritize for development a small number of reparations awards out of the totality currently contemplated pursuant to Internal Rule 23*quinquies*(3)(b), and to commence preparation for their implementation as soon as possible) and Indication of Priority Projects for Implementation as Reparation, E218/7, 4 December 2012 (requesting the Lead Co-Lawyers to identify, pursuant to Internal Rule 80*bis*(4), the Civil Parties’ prioritized list of reparation projects currently under development, clarifying that implementation of these measures may begin prior to the verdict in Case 002/01 and requesting, in consultation with the Victims’ Support Section, information regarding the current status of the financing of these projects in order to ensure that measures sought pursuant to Internal Rule 23*quinquies*(3)(b) are able to be realized, with the support of donor assistance and external collaborators, within a meaningful time-frame); *see also* Lead Co-Lawyers’ Indication to the Trial Chamber of the Priority Projects for Implementation as Reparations [...], E218/7/1, 19 February 2013 (“Indication of Priority Reparations Projects for Implementation”), paras 3, 30-36 (response of Lead Co-

severance has no impact whatsoever in relation to the new and separate reparations avenue created by Internal Rule 23*quinqüies*(3)(b), pursuant to which the initiatives proposed as possible measures do not result in enforceable claims against an Accused, and may be developed in parallel with the trial.<sup>264</sup>

159. Internal Rule 89*ter* indicates that in deciding to sever proceedings, the Trial Chamber may “order the separation of proceedings [...] concerning part or the entirety of the *charges* contained in an Indictment” (emphasis added). Within the ECCC legal framework, severance may therefore be carried out the basis not only of specific factual allegations but also in relation to the legal characterization afforded them in the Indictment. For the benefit of the Accused, the Chamber has previously confirmed that it does not intend to proceed in relation to factual allegations specific to the crime against humanity of persecution on religious grounds, nor with those specific to genocide.<sup>265</sup> A change to the legal characterization of facts would also require timely notice to be provided to the Accused, and compliance with the provisions of Internal Rule 98(2).<sup>266</sup> While genocide and persecution on religious grounds as crimes against humanity are contained in the Case 002 Indictment, it appears that the forced movement of population is nowhere characterized in the Indictment as constituting genocide, which is instead confined to the killings of Cham or Vietnamese. In response to the Co-Prosecutors’ Request of 8 April 2013, the Chamber

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Lawyers, indicating seven prioritized reparations projects for implementation. The Trial Chamber’s endorsement or otherwise of these priority projects remains pending, but will be issued shortly).

<sup>264</sup> In relation instead for requests for awards borne by the Convicted Person pursuant to Internal Rule 23*quinqüies*(3)(a), the Chamber notes that the inherent unlikelihood, within the specific Cambodian context, of reparations awards against ECCC Convicted Persons resulting in meaningful outcomes for Civil Parties (as borne out by the experience in Case 001) was a significant part of the rationale for the adoption of the alternative reparations limb in Internal Rule 23*quinqüies*(3)(b) (*see* ECCC Press Release of 17 September 2010 (accessed on: <http://www.eccc.gov.kh/en/articles/eight-eccc-plenary-session-concludes>): “the February 2010 Plenary Session had empowered a Sub-Committee to explore possibilities for expanding the current reparations scheme before the ECCC. Previous Internal Rules specified that awards under the Civil Party system may be awarded exclusively against convicted persons. Experience has also shown that where convicted persons are indigent, reparations awards under the classic Civil Party model are unlikely to yield significant tangible results for Civil Parties. A traditional Civil Party claim must also satisfy stringent admissibility and pleading requirements. Within the specific Cambodian context, these are frequently difficult for Civil Parties to satisfy. Further, in cases where the convicted person does not voluntarily comply with a reparations award against him or her, enforcement must be sought before Cambodian national courts. The Rules and Procedure Committee sought to address these limitations by proposing additional reparations avenues that may instead utilize external resources or third party funding in support of reparations, or otherwise provide more effective forms of redress”).

<sup>265</sup> The Trial Chamber has issued a comprehensive list of all Closing Order paragraphs relevant to Case 002/01: Annex: List of paragraphs and portions of the Closing Order Relevant to Case 002/01, amended further to the Trial Chamber’s Decision on IENG Thirith’s Fitness to Stand Trial (E138) and the Trial Chamber’s Decision on Co-Prosecutors’ Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163), E124/7.3, 18 October 2012 (“Annex of Relevant Closing Order paragraphs”).

<sup>266</sup> *See* Internal Rule 98(2): “[...] The Chamber may [...] change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced.”

notes that even if it is arguable that the factual allegations surrounding population movement could be re-characterized as persecutions on religious grounds or genocide, in order to ensure the expeditiousness of proceedings, the Trial Chamber has previously ruled that these charges have been excluded from the scope of the first trial and will be part of further trials, if any.<sup>267</sup>

160. The reason that the scope of trial was limited to population movement phases 1 and 2 and executions committed at Toul Po Chrey, and not expanded to many other equally deserving criminal incidents, is addressed elsewhere in this decision. In addition to these general considerations, the Chamber notes that population movement phase 3 was considered to be removed geographically and temporally from the offences encapsulated in the Closing Order, and thus better suited for adjudication in later trials. Inclusion of offences concerning forced marriage and rape in addition confront particular issues, some of which stem from their manner of incorporation into the Case 002 Closing Order, which binds the Trial Chamber. Their inclusion also remains subject to the resolution of various legal challenges concerning the exact nature of the crimes alleged.<sup>268</sup>

161. Finally, the Chamber acknowledges that circumstances beyond the control of the Chamber, namely the limited availability of financial resources to fund reparations pursuant to Internal Rule 23<sup>quinqies</sup>(3)(b), and the likelihood that future trials may be prevented by the death or unfitness of the remaining Case 002 Accused, may regrettably deprive many Civil Parties of their right to an effective remedy for the harm they have suffered.<sup>269</sup> It is against this backdrop that the Chamber has sought to take all reasonable measures to minimise the risk that it may be prevented also from rendering any timely verdict in Case 002/01.

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<sup>267</sup> Severance Order, para. 7; *see also* Co-Prosecutors' Request to Clarify Closing Order Paragraphs Included Following 29 March 2013 Severance Announcement, E279, 8 April 2013, paras 2-4 (requesting clarification as to whether certain allegations regarding forced movement of Cham may be characterized as persecutions on religious grounds).

<sup>268</sup> *See e.g.* Co-Prosecutors' Request for the Trial Chamber to Re-characterize the Facts Establishing the Conduct of Rape as the Crime Against Humanity of Rape Rather than the Crime Against Humanity of Other Inhumane Acts, E99, 16 June 2011; *see also* Preliminary Objection concerning the Jurisdiction of the Trial Chamber, E44, 14 February 2011, paras 8, 29-30 (alleging that the legal ingredients of rape are not made out by the notion of forced marriage, as both parties were forced to consummate these marriages). Decisions on both motions have been deferred by the Trial Chamber to future trials.

<sup>269</sup> *See e.g.* Lead Co-Lawyers' Indication of Priority Reparations Projects for Implementation, paras 3, 30-36 (indicating seven prioritized reparations projects for implementation and detailing fundraising efforts undertaken to date, but indicating that no financial guarantees or funds have yet been secured in support of these initiatives).

## 5. DISPOSITION

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

**DECIDES** that severance of proceedings in Case 002 remains necessary in the interests of justice and required in view of the increasing physical frailty of the remaining Case 002 Co-Accused;

**SEVERES** proceedings in this case pursuant to Internal Rule 89<sup>ter</sup> so as to safeguard the Trial Chamber's ability to proceed to a first verdict in relation to both remaining Case 002 Accused on a more limited range of charges and factual allegations in Case 002 ("Case 002/01");

**DECIDES** that the scope of Case 002/01 crime base shall comprise the portions of the Closing Order pertaining to forced movement phases one and two, executions committed at Toul Po Chrey in the aftermath of the evacuation of Phnom Penh and associated crimes against humanity, comprising all Case 002 Closing Order paragraphs previously communicated to the parties in E124/7.3;

**CONSIDERS** in all the circumstances that the addition of S-21 to the scope of Case 002/01 does not significantly advance the objective of reasonable representativeness of this first trial, whilst entailing risks to the Chamber's ability to render any timely verdict in relation to both remaining Case 002 Accused;

**DECLARES** therefore that further expansion of the scope of Case 002/01 does not represent a prudent exercise of the Chamber's trial management discretion;

**FURTHER DECLARES** in the interests of certainty, that no further extensions to the scope of Case 002/01 trial shall be entertained; and

**NOTES** that in accordance with Internal Rule 104(4), immediate appeal of the present decision does not stay proceedings before the Trial Chamber. *ff*

Phnom Penh, 26 April 2013  
President of the Trial Chamber



*Nil Nonn*

## 6. ANNEX

### **6.1. Tentative plan for future trial of the remaining portions of Case 002**

#### *6.1.1. List of paragraphs of the Closing Order relevant to Case 002/02<sup>270</sup>*

#### **1. Implementation of the Joint Criminal Enterprise in relation to Case 002/02**

##### *Joint Criminal Enterprise (156-159)*

- a. Policy as implemented – security centres and execution sites (178-181) (limited to S-21 Security Centre, Au Kanseng Security Centre)
- b. Policy as implemented – treatment of targeted groups (205-207) (limited to the treatment of the Cham and the treatment of the Vietnamese).

#### **2. Alleged crimes encompassed by Case 002/02**

##### *Security centres and execution sites*

- a. S-21 Security Centre
- b. Au Kanseng Security Centre (617-623)

##### *Treatment of targeted groups*

- a. Treatment of the Cham (745-770)
  - i. Kroch Chhmar Security Centre, East Zone (771-775)
  - ii. Wat Au Trakuon Security Centre, Central (Old North) Zone (776-783)
  - iii. Trea Village Security Centre, Kroch Chhmar District, East Zone (784-789)
- b. Treatment of the Vietnamese (791-840)

#### **3. Role of the Charged Persons**

##### *a. Nuon Chea*

Participation in The Common Purpose – security centres and execution sites (limited to S-21 Security Centre, Au Kanseng Security Centre, Kroch Chhmar Security Centre, Wat Au Trakuon Security Centre and Trea Village Security Centre, 916-974), targeting of groups (limited to the treatment of the Vietnamese and the Cham) (975, 976, 979-990)

##### *b. Khieu Samphan*

Participation in the common purpose – security centres and execution sites (limited to S-21 Security Centre, Au Kanseng Security Centre, Kroch Chhmar Security Centre, Wat Au Trakuon Security Centre and Trea Village Security Centre, 1172-1190), targeting of groups (limited to the treatment of the Vietnamese and the Cham) (1191-1192, 1195-1198)

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<sup>270</sup> In accordance with the principles outlined in this decision, Case 002/02 shall commence, circumstances permitting and unless directed to the contrary, after the conclusion of Case 002/01. Projections drawn from Case 001 suggest that a first-instance verdict in this case may follow approximately 8 months after the conclusion of the hearing of evidence in Case 002/01 (namely, during the first quarter of 2014), and a verdict on any eventual appeal 18 months thereafter (namely, late 2015). All projections are indicative only.

#### 4. Applicable law

*Genocide* (1336-1349)

- a. Genocide by killing: Cham (1336-1342)
- b. Genocide by killing: Vietnamese (1343-1349)

*Grave breaches of the Geneva Conventions 1949* (1491-1520)<sup>271</sup>

Underlying offences constituting grave breaches of the Geneva conventions 1949:

- i. Willful killing (1491-1493, 1485, 1494-1495, 1496-1497)
- ii. Torture (1498-1500)
- iii. Inhumane Treatment (1501-1503)
- iv. Willfully causing great suffering or serious injury to body or health (1504-1506)
- v. Willfully depriving a prisoner of war or a civilian the rights of fair and regular trial (1507-1510, 1511-1514)
- vi. Unlawful deportation of a civilian (1515-1517)
- vii. Unlawful confinement of a civilian (1518-1520)

#### 5. Modes of responsibility

*Joint Criminal Enterprise*

1525 (iv) (limited to the targeting of the Cham and the Vietnamese), 1527

*Other Modes of Responsibility*

- i. Planning (1544-1545 (limited to relevant underlying offences))
- ii. Instigating (1547-1548 (limited to relevant underlying offences))
- iii. Aiding and Abetting (1550-1551 (limited to relevant underlying offences))
- iv. Ordering (1553-1554 (limited to relevant underlying offences))
- v. Superior Responsibility (1557-1560) (limited to relevant underlying offences))

#### 6.1.2. *List of paragraphs of the Closing Order relevant to Case 002/03*<sup>272</sup>

##### 1. Implementation of the Joint Criminal Enterprise in relation to Case 002/03

*Joint Criminal Enterprise (156-159)*

- a. Policy as implemented –cooperatives and worksites (168-169) (all limited to Tram Kok Cooperatives, Trapeang Thma Dam worksite, 1st January Dam Worksite, Srae Ambel Worksite, Kampong Chhnang Airport Construction Site, Prey Sar Worksite)
- b. Policy as implemented - security centres and executions sites (178-181) (all limited to Sang Security Centre, Kraing Ta Chan Security Centre, Koh Kyang Security Centre, Prey Damrei Srot Security Centre, Wat Kirirum Security Centre, North Zone Security Centre, Phnom Kraol Security Centre, Wat Tlork Security Centre, Kok Kduoch

<sup>271</sup> See, however, Rule 89 Preliminary Objection (Statute of Limitations for Grave Breaches) (IENG Sary Defence), E43, 11 February 2011 (resolution of which was deferred by the Trial Chamber to future trials).

<sup>272</sup> To commence, circumstances permitting and unless directed to the contrary, after the conclusion of Case 002/02 (approximately 2016-2017), with a first-instance verdict following a trial (approximately 2019-2020) and decision on any appeal to follow (approximately 2020-2021).



Security Centre, Execution Sites in District 12, Steung Tauch Execution Site), Purges (192-204)

- c. Policy as implemented – Movement of the Population (160-163, 166-167) (all limited to Movement of the Population from the East Zone (Phase 3))
- d. Policy as implemented - treatment of targeted groups (205-207) (all limited to the treatment of Buddhists)
- e. Policy as implemented – the regulation of marriage (216-217)<sup>273</sup>

## **2. Factual findings concerning crimes alleged**

- a. Movement of the Population from the East Zone (Phase 3) (283-301)
- b. Worksites and cooperatives
  - a. Tram Kok Cooperatives (302-322)
  - b. Trapeang Thma Dam worksite (323-350)
  - c. 1st January Dam Worksite (351-368)
  - d. Srae Ambel Worksite (369-382)
  - e. Kampong Chhnang Airport Construction Site (383-399)
  - f. Prey Sar Worksite (400-414)
- c. Security centres and executions sites
  - a. Sang Security Centre (476-488)
  - b. Kraing Ta Chan Security Centre (489-515)
  - c. Koh Kyang Security Centre (516-534)
  - d. Prey Damrei Srot Security Centre (535-550)
  - e. Wat Kirirum Security Centre (551-571)
  - f. North Zone Security Centre (572-588)
  - g. Phnom Kraol Security Centre (625-643)
  - h. Wat Tlork Security Centre (644-666)
  - i. Kok Kduoch Security Centre (667-685)
  - j. Execution Sites in District 12 (686-697)
  - k. Steung Tauch Execution Site (715-739)
- d. Treatment of specific groups
  - a. Treatment of Buddhists (740-744)
  - b. Regulation of Marriage (842-861)

## **3. Role of the Charged Persons**

### *i. NUON Chea*

Participation in the common purpose – movement of population (limited to population movement phase 3) (895-897, 902), cooperatives and worksites (903-915), security centres and execution sites (916-948), targeting of groups (limited to the treatment of Buddhists) (975, 978), the regulation of marriage (991-992)  
 Knowledge of the existence of an international armed conflict (993)

<sup>273</sup> See, however, Preliminary Objection concerning the Jurisdiction of the Trial Chamber (IENG Thirith Defence), E44, 14 February 2011, paras 8, 25-28 (contending that the alleged crime of regulation of marriage is not defined in the Closing Order and did not exist as a recognized offence within general international law at the time these acts were committed).

ii. *KHIEU Samphan*

Participation in The Common Purpose – movement of population (limited to population movement phase 3) (1153, 1163), cooperatives and worksites (1164-1171), security centres and execution sites (1172-1181), targeting of groups (limited to the treatment of Buddhists) (1191-1192, 1194), the regulation of marriage (1199)

Knowledge of the existence of an international armed conflict (1200)

#### 4. Applicable law

*Crimes against humanity* (1350-1372)

Relevant underlying offences:

- a. Murder (1373, 1375, 1376, 1377, 1378, 1379-1380) (limited to population movement phase 3 and the treatment of the Cham)
- b. Extermination (1381, 1384, 1385, 1389, 1390)
- c. Enslavement (1391-1396)
- d. Deportation (1397-1401)
- e. Imprisonment (1402-1407)
- f. Torture (1408-1414)
- g. Persecution on Political, Racial or Religious Grounds (1415-1425)
- h. Rape (1426-1433)
- i. Other Inhumane Acts through ‘Attacks against Human Dignity’ (1434-1441)
- j. Other Inhumane Acts through Forced Marriage<sup>274</sup> (1442-1447)
- k. Other Inhumane Acts through Forced Transfer (1448-1469) (limited to population movement phase 3)
- l. Other Inhumane Acts through Enforced Disappearances (1470-1478)

*Grave breaches of the Geneva Conventions 1949* (1491-1520)<sup>275</sup>

Underlying offences constituting grave breaches of the Geneva Conventions 1949

- i. Willful killing (RAK incursions into Vietnam) (1496-1497)

#### 5. Modes of responsibility

*Joint Criminal Enterprise* (1525)

*Other Modes of Responsibility*

- i. Planning (1544-1545 (limited to relevant underlying offences))
- ii. Instigating (1547-1548 (limited to relevant underlying offences))
- iii. Aiding and Abetting (1550-1551 (limited to relevant underlying offences))
- iv. Ordering (1553-1554 (limited to relevant underlying offences))
- v. Superior Responsibility (1557-1560 (limited to relevant underlying offences))

<sup>274</sup> Subject to resolution of Co-Prosecutors’ Request for the Trial Chamber to Re-characterize the Facts Establishing the Conduct of Rape as the Crime Against Humanity of Rape Rather than the Crime Against Humanity of Other Inhumane Acts, E99, 16 June 2011; *see also* Preliminary Objection concerning the Jurisdiction of the Trial Chamber (IENG Thirith Defence), E44, 14 February 2011, paras 8, 29-30 (alleging that the legal ingredients of rape are not made out by the notion of forced marriage, as both parties were forced to consummate these marriages) (resolution of which deferred by the Trial Chamber to future trials).

<sup>275</sup> *See, however*, Rule 89 Preliminary Objection (Statute of Limitations for Grave Breaches) (IENG Sary Defence), E43, 11 February 2011 (deferred to future trials).