



## **Trial Chamber Case 002 Severance Decision Upholds Status Quo**

Anne Heindel, Legal Advisor – Documentation Center of Cambodia

April 29, 2013

Responding to appellate criticism that its decision to sever the mammoth Case 002 indictment was made without party consultation and offered an “alarming” paucity of reasoning, the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia has now issued a 74-page decision confirming the validity of the existing scope of Case 002/01 and setting out a tentative plan for two additional Case 002 trials. The decision to continue Case 002/01 in its current form is not unexpected due to the substantial amount of trial time expended, the hope that a judgment can be issued in the near future, and increasing alarm about the health of the octogenarian accused since the death of Ieng Sary last month.

On the eve of trial in October 2011, the Trial Chamber severed the Case 002 indictment pursuant to Internal Rule 89*ter*, which provides:

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

The Trial Chamber ruled that Case 002/01, the first of an unspecified number of successive mini-trials, would address only one of five country-wide criminal policies for which the former senior Khmer Rouge leaders are accused of responsibility: crimes related to the forced transfer of the population of Phnom Penh beginning on April 17, 1975, the subsequent forced transfer of hundreds of thousands of Cambodians to the north of the country between late 1975 and 1977, and related crimes against humanity. The remaining charges addressing worksites and cooperatives, security centers, execution sites, forced marriage and genocide, were left for uncertain future cases. The Co-Prosecutors immediately requested reconsideration of the decision, seeking the inclusion of a more representative selection of charges due to their concern that the advanced age and poor health of the accused would preclude the possibility of additional trials.<sup>1</sup>

The Trial Chamber rejected their request; nevertheless, the scope of the first trial was left open for more than a year because the Trial Chamber said it would consider adding additional charges “at any time ... subject to the right of the Defence to be provided with opportunity to prepare an effective defence and all parties to be provided with timely notice.”<sup>2</sup> In October 2012, the Chamber added one additional crime site requested by the Prosecution and rejected two others, and the Prosecution appealed.

---

<sup>1</sup> Co-Prosecutors’ Request for Reconsideration of “Severance Order Pursuant to Internal Rule 89*ter*” (Oct. 3, 2011).

<sup>2</sup> Severance Order Pursuant to Internal Rule 89*ter*, ¶ 6 (Sept. 22, 2011).

In its February 2013 decision, the Supreme Court Chamber (SCC) found a number of errors of law by the Trial Chamber, including a lack of reasoning regarding “how the severance advances the interests of the justice” and the failure to consult with the parties on the terms of severance,<sup>3</sup> which the Trial Chamber had considered both legally unnecessary and likely to result in unacceptable delay.<sup>4</sup> By the time the Trial Chamber agreed to hear the Co-Prosecutors’ arguments for expanding the case, “nearly a year of hearings on the substance under the terms of the Severance Order had already passed, effectively rendering the scope of Case 002/01 as shaped thereby a *fait accompli*.”<sup>5</sup>

The Supreme Court Chamber annulled the original severance decision and ruled that the Trial Chamber must reassess its approach to severance after hearing party submissions and balancing all parties’ interests against all relevant factors, as well as explain its plan for adjudicating any charges excluded from the first trial.

Already a year-and-a-half into trial and nearing the end of evidentiary hearings, the Trial Chamber immediately scheduled three days of hearings on the parties’ views in light of the SCC decision. The Co-Prosecutors, cognizant of the time and effort already expended, sought to add only the S-21 security center to increase the representativeness of the charges. The Civil Party lawyers, likewise concerned that an expansion of the original charges would prevent a timely verdict from being reached, did not propose adding any additional crimes but limited themselves to supporting the Prosecution request. In contrast, all Defense teams argued that their clients’ rights could be protected only if they were tried on the totality of the charges in the indictment.

In its newly issued, “fully-reasoned decision,” the Trial Chamber affirms the appropriateness of the status quo, finding it most likely to promote legal certainty and “to represent a proportionate balance between the factors identified by the SCC Decision and necessary in order to safeguard [the Chamber’s] ability to reach any timely verdict in Case 002”<sup>6</sup> due to the advanced age and fragile health of both the accused and many victims.

One factor highlighted by the SCC was the obligation to ensure that the scope of the Case 002/01 included charges reasonably representative of the totality of the charges against the accused, in particular as the possibility of holding additional trials was remote. Following the indications of the SCC, the Trial Chamber interpreted this obligation in light of jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY). The ICTY has emphasized taking into account the “relevant circumstances of the case” when assessing representativeness, including “the crimes charged in the Indictment, their classification and nature, the places where

---

<sup>3</sup> Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision Concerning the Scope of Case 002/01, ¶ 44 (Feb. 8, 2013) [hereinafter SCC Decision]. *See also* Expert Commentary on Legal Filings, Supreme Court Chamber Invalidates Case 002 Severance (Feb. 12, 2013), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

<sup>4</sup> Decision on Co-Prosecutors’ Request for Reconsideration of the Terms of the Trial Chamber’s Severance Order (E124/2) and Related Motions and Annexes, ¶¶ 4-6 (Oct. 18, 2011).

<sup>5</sup> SCC Decision, *supra* note 3, ¶¶ 45, 49.

<sup>6</sup> Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, ¶ 4 (Apr. 26, 2013).

they are alleged to have been committed, their scale, and the victims of the crimes.”<sup>7</sup>

In support of its decision to try the accused on only one of five criminal policies charged, the Trial Chamber says:

Forced movement perhaps constitutes the only theme in the Indictment 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.”

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.<sup>8</sup>

However, according to the Civil Party lead co-lawyers, of the nearly 4,000 victims participating as civil parties in Case 002, only around 750 were admitted due to harm related to the charges of forced movement.<sup>9</sup> Moreover, crimes that take place in one locality are by definition considered “representative” if the same types of crimes were also committed in other localities—such as crimes at the many Khmer Rouge worksites and security centers. Indeed, numerous admitted Civil Parties were not required to link their injuries to the crime sites charged in the Case 002 Closing Order, which “serve only as examples in order to demonstrate how all these centres and sites functioned *throughout* Cambodia.”<sup>10</sup>

In the Trial Chamber’s view, a trial addressing representative examples of crimes would have been impracticable: “It was apparent ... from the outset that a case containing even a single example of each category of crime” would be too broad to be concluded before the death of the accused, “a fact implicitly acknowledged by the Co-Prosecutors in seeking to add only a single security centre to the scope of Case 002/01.”<sup>11</sup> However, this type of approach is exactly what the Co-Prosecutors proposed after the initial severance decision. The Co-Prosecutors scaled back their request only after the Trial Chamber refused to reconsider and stated there was no right of appeal. As noted by the SCC, once trial was well underway, the scope of trial was a *fait accompli*. For that reason, the Trial Chamber’s decision is not a reevaluation of how Case 002 should have been severed, but a decision about whether adding the S-21 security center is necessary to make the trial reasonably representative.

Rejecting the argument by Co-Prosecutors and Lead Co-Lawyers that “the addition of S-21 alone would satisfy the criterion of reasonable representativeness” by adding geographical scope and additional offenses, the Trial Chamber noted that S-21’s thousands of victims are nevertheless a

---

<sup>7</sup> *Id.* ¶ 103.

<sup>8</sup> *Id.* ¶ 112.

<sup>9</sup> See Lead Co-Lawyers Urgent Request on the 19 October 2011 Hearing Following the Chambers’ Memorandum E125, ¶¶ 12-13 (Trial Chamber, Oct. 7, 2011).

<sup>10</sup> Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, Case No. 002/19-09-2007-ECCC/OCIJ, ¶ 75 (June 24, 2011). See also *id.* ¶ 72.

<sup>11</sup> TC Decision, *supra* note 6, ¶¶ 109 (emphasis in original).

“relatively small percentage of Case 002’s overall victimization.” Moreover, the site lacks any obvious connection to the forced movement policy and is “the only crime site to have been conclusively adjudicated by the ECCC to date.”<sup>12</sup>

According to the Trial Chamber, the pre-existing scope of trial already “reflects the criterion of reasonable representativeness and is in the interests of justice and of a fair and expeditious trial.” The charges 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” and “incorporate a significant portion of the Indictment’s geographical range and a large percentage of the victimized Cambodian population[.]”<sup>13</sup>

In finding the exclusion of S-21 to be warranted, the Trial Chamber also considered:

- (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>14</sup>

With regard to its obligation to set forth a plan for adjudicating the remaining charges in the indictment, the Trial Chamber said:

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.<sup>15</sup>

Nevertheless, the Trial Chamber provided an annex with a “tentative outline for future trials in Case 002,” anticipating two additional trials, and proposed holding a future management meeting to discuss potential legal complexities “in the light of the circumstances then prevailing.”<sup>16</sup> The second would address security centers, execution sites, and genocide charges related to treatment of the Cham and Vietnamese population. The third trial would address crimes related to cooperatives and worksites, the third forced population movement, the targeting of Buddhists, and forced marriage.

---

<sup>12</sup> *Id.* ¶¶ 108, 112, 116.

<sup>13</sup> *Id.* ¶¶ 108, 118.

<sup>14</sup> *Id.* ¶ 125.

<sup>15</sup> *Id.* ¶ 153.

<sup>16</sup> *Id.* ¶ 155.

With regard to the uncertain impact of severance on the standing of civil parties admitted in Case 002 for unrelated harms,<sup>17</sup> the Trial Chamber reiterated:

[T]he 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>18</sup>

The Chamber also restated that it has not sought to limit the ability of individual civil parties to benefit from any reparations ultimately granted; however, “the formulation of reparations claims made on their behalf” must take into account the requirements of the Internal Rules allowing reparations measures funded by sources other than the accused.<sup>19</sup> Most notably, for the first time, the Trial Chamber:

[A]cknowledges that circumstances beyond the control of the Chamber, namely the limited availability of financial resources to fund reparations ... 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>20</sup>

It is unclear if the Co-Prosecutors will once again seek to appeal this *fait accompli*.

---

<sup>17</sup> See Cambodia Tribunal Monitor, Expert Commentary on Legal Filings, *Impact of Severance on Individual Civil Parties' Legal Status and Right to Reparations* (Feb. 23, 2013), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

<sup>18</sup> *Id.* ¶ 157.

<sup>19</sup> *Id.* ¶ 158.

<sup>20</sup> *Id.* ¶ 161.