



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia

Nation Religion King

Royaume du Cambodge

Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber

Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

Before:

Judge NIL Nonn, President

Judge Jean-Marc LAVERGNE

Judge YA Sokhan

Judge Claudia FENZ

Judge YOU Ottara

Date:

27 February 2017

Original language(s):

Khmer/English/French

Classification:

PUBLIC

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception):
27 / 02 / 2017
ម៉ោង (Time/Heure):
15:30
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier:
SANN ADA

DECISION ON REDUCTION OF THE SCOPE OF CASE 002

Co-Prosecutors

CHEA Leang

Nicholas KOUMJIAN

Accused

NUON Chea

KHIEU Samphan

Civil Party Lead Co-Lawyers

PICH Ang

Marie GUIRAUD

Lawyers for the Defence

SON Arun

Victor KOPPE

KONG Sam Onn

Anta GUISSÉ

1. INTRODUCTION

1. The Trial Chamber is seised of a request by the Co-Prosecutors, in accordance with Internal Rule 89 *quater*, for the termination of proceedings concerning the facts contained in the Case 002 Closing Order, which, following previous severance decisions, were not included within the scope of Cases 002/01 or 002/02 (“Request to Terminate Proceedings”).¹

2. On 22 September 2011, pursuant to Internal Rule 89 *ter*, the Chamber issued an order severing the proceedings in Case 002 into two or more cases (“First Severance Decision”).² On 8 October 2012, the Chamber decided to expand the scope of Case 002/01.³ On 8 February 2013, the First Severance Decision was declared invalid by the Supreme Court Chamber, which also annulled the Trial Chamber’s decision to expand the scope of Case 002/01.⁴ Consequently, on 26 April 2013, the Trial Chamber issued a second decision on severance⁵ which was confirmed by the Supreme Court Chamber on 23 July 2013.⁶ On 4 April 2014, the Trial Chamber issued its Decision on Additional Severance of Case 002 and Scope of Case 002/02 (“Additional Severance Decision”).⁷ The Trial Chamber decided not to include certain facts, charges and crime sites from the scope of Case 002/02.⁸ The Trial Chamber found that given that it was not seised of a request by the Co-Prosecutors to withdraw charges not included in the scope of Case 002/02 from the Closing Order, it “need not address this issue at the current stage of proceedings”.⁹ Following this decision, which was appealed by the KHIEU Samphan Defence, the Supreme Court Chamber upheld the additional severance of Case 002 and declared a

¹ Co-Prosecutors’ Response to Civil Party Lead Co-Lawyers’ Request for Clarification Relating to Remaining Charges in Case 002, 19 September 2016, E439/3, paras 6, 17.

² Severance Order pursuant to Internal Rule 89*ter*, E124, 22 September 2011.

³ Notification of Decision on Co-Prosecutors’ Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163) and deadline for submission of applicable law portion of Closing Briefs, E163/5, 8 October 2012.

⁴ Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision Concerning the Scope of Case 002/01 (SCC), E163/5/1/13, 8 February 2013, para. 52.

⁵ Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, E284, 26 April 2013.

⁶ Decision on Immediate Appeals Against Trial Chamber’s Second Decision on Severance of Case 002: Summary of Reasons, E284/4/7, 23 July 2013, para. 13; Decision on Immediate Appeals Against Trial Chamber’s Second Decision on Severance of Case 002, E284/4/8, 25 November 2013 (“SCC Second Decision on Severance”), para. 76.

⁷ Decision on Additional Severance of Case 002 and Scope of Case 002/02, E301/9/1, 4 April 2014, (“Additional Severance Decision”).

⁸ Additional Severance Decision, para. 45. Annexed to the Additional Severance Decision was a list of the paragraphs and portions of the Closing Order relevant to Case 002: E301/9/1.1.

⁹ Additional Severance Decision, para. 45.

provisional stay of the charges outside the scope of Cases 002/01 and 002/02, pending appropriate disposal by the Trial Chamber.¹⁰ The charges against KHIEU Samphan and NUON Chea relevant to the facts within the scope of Case 002/01 have been finally adjudicated.¹¹

3. On 9 September 2016, the Civil Party Lead Co-Lawyers filed a Request for Clarification Relating to Remaining Charges in Case 002 (“Request for Clarification”).¹² The other Parties to Case 002/02 subsequently filed responses, which included the Request to Terminate Proceedings.¹³ On 22 September 2016, the Trial Chamber noted that the NUON Chea Response raised a new issue with respect to the exclusion of the Kroch Chhmar Security Centre from the Scope of Case 002/02 and accordingly granted the Parties leave to respond to this issue.¹⁴ Only the Lead Co-Lawyers filed a submission on 23 September 2016.¹⁵ On 11 January 2017, the Trial Chamber heard oral submissions on the status of the facts in the Closing Order outside the scope of Cases 002/01 and 002/02 (“Facts at Issue”).

2. SUBMISSIONS

4. The Co-Prosecutors submit that it is in interests of justice for the Trial Chamber, pursuant to Internal Rule 89 *quater*, to terminate the proceedings in respect of those facts which it excluded from the scope of Case 002/02.¹⁶ The Co-Prosecutors note their respect for the right of all Civil Parties in Case 002 to timely and transparent information concerning the future progress of the case.¹⁷ They contend that all parties and the ECCC would benefit from clarity on this issue and that clarification would facilitate the orderly conclusion of the trial.¹⁸ The Co-Prosecutors

¹⁰ Decision on KHIEU Samphan’s Immediate Appeal against the Trial Chamber’s Decision on Additional Severance of Case 002 and Scope of Case 002/02, 29 July 2014, E301/9/1/1/3, paras 88-91 (“Supreme Court Decision”).

¹¹ Case 002/01, Appeal Judgement, F36, 23 November 2016.

¹² Civil Party Lead Co-Lawyers’ Request for Clarification Relating to Remaining Charges in Case 002, 9 September 2016, E439, paras 1, 10.

¹³ See Observations de la Défense de M. KHIEU Samphân en réponse à la demande de clarification des Parties civiles concernant les poursuites restantes du dossier 002, E439/1 (“KHIEU Samphan Response”); NUON Chea’s Response to Civil Party Lead Co-Lawyers’ Request for Clarification relating to the Remaining Charges in Case 002, 19 September 2016, E439/2 (“NUON Chea Response”); Request to Terminate Proceedings.

¹⁴ See Email from Trial Chamber Legal Officer, 22 September 2016.

¹⁵ Civil Party Lead Co-Lawyers’ Reply to NUON Chea’s Response to Request for Clarification Relating to Remaining Charges in Case 002, 23 September 2016, E439/4 (“Lead Co-Lawyers’ Reply”).

¹⁶ Request to Terminate Proceedings, paras 6, 17.

¹⁷ Request to Terminate Proceedings, para. 2.

¹⁸ Request to Terminate Proceedings, paras 2, 6.

submit that in December 2013 they had proposed certain facts for inclusion in or exclusion from the scope of Case 002/02 and publicly indicated that they did not envisage a third trial in respect of the facts excluded from the scope of Case 002/02. The Co-Prosecutors further submit that “all of the legal charges in the Closing Order” have been fully examined in Cases 002/01 and 002/02. They submit that at the end of Case 002/02, the Trial Chamber will have heard or admitted evidence on a range of crimes which are reasonably representative of the criminal policies of the Democratic Kampuchea regime and the true extent of the criminal responsibility of the Accused.¹⁹

5. The Co-Prosecutors note that after the Additional Severance Decision, in which the Trial Chamber did not expressly address the withdrawal of charges, the ECCC Plenary in January 2015 adopted Internal Rule 89 *quater*. This rule allows the Trial Chamber to reduce the scope of the trial by excluding facts set out in the Closing Order and requires the termination of proceedings in respect of those excluded facts.²⁰ The Co-Prosecutors submit that a reduction of the scope of the trial decided in accordance with Internal Rule 89 *quater* will not affect the participation of any Civil Party or the composition of the Civil Party groups, and that those victims who have been permitted to participate in Case 002 would continue to enjoy participation rights after termination of the proceedings.²¹

6. The Lead Co-Lawyers submit that the Civil Parties who are “directly affected by the status of the remaining charges” have a right to legal certainty and to be informed with respect to all of the charges in Case 002.²² The Lead Co-Lawyers note that 446 Civil Parties were admitted by the Office of the Co-Investigating Judges as direct or indirect victims of the charges falling outside the scope of Cases 002/01 and 002/02 (“Affected Civil Parties”).²³ They submit that the following factors are relevant to the Chamber’s decision on the status of the proceedings: (i) the death of more than 200 Civil Parties since the beginning of Case 002; (ii) the advanced age or ill health of many Civil Parties who are no longer able to participate personally in the proceedings

¹⁹ Request to Terminate Proceedings, paras 5, 13-15; T. 11 January 2017, pp 13-16 (Draft).

²⁰ Request to Terminate Proceedings, paras 11-12.

²¹ Request to Terminate Proceedings, para. 16.

²² Request for Clarification, paras 7-8.

²³ Request for Clarification, paras 7-8. During oral submissions, the Lead Co-Lawyers further noted that only 34 of the Affected Civil Parties were admitted solely on the basis of facts not heard in Case 002. However, the Lead Co-Lawyers noted that this number did not include Civil Parties who were admitted in connection with the treatment of Buddhists and population movement phase 3: T. 11 January 2017, pp 7-8 (Draft).

or attend forums regarding reparations; and (iii) the length of the judicial process in Case 002, which started almost 10 years ago. The Lead Co-Lawyers also submit that the Civil Parties in this case are no longer participating on an individual basis but in a consolidated group and that the Accused in Case 002 have already been convicted for their participation in “a criminal project which was at the heart of the harm” suffered by all of the Civil Parties.²⁴

7. Having consulted with Civil Parties, including the Affected Civil Parties, the Lead Co-Lawyers submit that many of the Civil Parties belonging to the consolidated group want, as a matter of principle, all facts contained in the Closing Order of Case 002 to be tried. In this regard they submit that the suffering of some of the Civil Parties is related to facts which have neither been adjudicated in Case 002/01, nor examined during Case 002/02. However, for many more Civil Parties, their priority is to seek non-judicial measures to support their day-to-day lives and to allow them to speak about what they experienced.²⁵

8. The NUON Chea Defence submits that the charges already heard in Case 002/02 were broader than the minimum advised by the Supreme Court Chamber and concludes that there is no legal necessity to have a third trial in this case.²⁶

9. The KHIEU Samphan Defence opposes the application of Internal Rule 89 *quater* on the basis that it violates fair trial rights in two ways (“KHIEU Samphan Objection”). First, it contravenes the principle of legality as Cambodian Law does not allow for interference with or disregard of what has been decided in the Closing Order, which is a judicial decision. Secondly, it permits the Chamber to rely upon evidence relating to the facts excluded to the extent it is relevant to the facts that remain within the scope of the case. The KHIEU Samphan Defence considers that when the scope of the trial is reduced by excluding facts set out in the Closing Order, this prevents any use of evidence relevant to facts that are excluded. However, the KHIEU Samphan Defence submits that it is impossible to proceed with the “remainder of the trials in Case 002/02” in a reasonable time and that the Trial Chamber has no choice but to put an end to the proceedings for reasons of legal certainty. In this regard the KHIEU Samphan Defence further notes that according to the Supreme Court Chamber any subsequent trials in Case 002

²⁴ T. 11 January 2017, pp 3-12 (Draft).

²⁵ T. 11 January 2017, pp 3-12 (Draft).

²⁶ T. 11 January 2017, pp 16-19 (Draft).

would not have a common evidentiary basis to Cases 002/01 and 002/02 and would thus require the Trial Chamber to “start from scratch.” This would make it impossible to be tried in a timely manner.²⁷ Finally, the KHIEU Samphan Defence contends that this issue should have been clarified in April 2014 and that the Trial Chamber has accordingly violated the principle of legal certainty and the fundamental principles enumerated in Internal Rule 21.²⁸

3. APPLICABLE LAW

10. Pursuant to Internal Rule 89 *ter*²⁹ when the interest of justice so requires, the Chamber may at any stage order the separation of proceedings concerning part of the charges contained in the Closing Order.

11. Internal Rule 89 *quater*³⁰ provides that “[i]n order to ensure a fair, meaningful and expeditious judicial process, in consideration of the specific requirements of the proceedings before the ECCC, the Trial Chamber may decide to reduce the scope of the trial by excluding certain facts set out in the Indictment. The Trial Chamber shall ensure that the remaining facts are representative of the scope of the Indictment.”³¹ Before excluding facts from the scope of the trial, the Trial Chamber must hear the parties.³² It shall terminate proceedings concerning excluded facts and, once a decision to reduce the scope of the trial becomes final, the excluded facts shall not form the basis for proceedings against the same accused.³³ A decision to reduce the scope of the trial shall not affect the participation of the Civil Parties or the composition of the consolidated group of Civil Parties.³⁴

²⁷ T. 11 January 2017, pp 19-25 (Draft) referring to Supreme Court Decision, para. 76.

²⁸ KHIEU Samphan Response, paras 12-14.

²⁹ Internal Rule 89 *ter* was adopted on 23 February 2011.

³⁰ Internal Rule 89 *quater* was adopted on 16 January 2015.

³¹ Internal Rule 89 *quater* (1). The Trial Chamber notes that Internal Rule 89 *ter* refers to separating the proceedings in relation to “charges”, while Internal Rule 89 *quater* refers to excluding “facts”. However, the Trial Chamber agrees with the observation of the Supreme Court Chamber that in the context of the ECCC “the limits of criminal action that seizes the court are determined by factual allegations set out in an indictment rather than by their legal characterisation”: Supreme Court Decision, para. 18. The terminology of Internal Rule 89 *quater* is unequivocal and reflects this position that what is important are the “facts”.

³² Internal Rule 89 *quater* (2).

³³ Internal Rule 89 *quater* (3).

³⁴ Internal Rule 89 *quater* (4).

4. ANALYSIS

12. At the outset, for the sake of clarity the Trial Chamber notes that the term Facts at Issue covers all facts set out in the Closing Order in Case 002 not included in Case 002/01 or Case 002/02.³⁵ In the Annex to the Additional Severance Decision, the Trial Chamber noted that it may, upon reasoned application, expand the scope of Case 002/02 to include further facts additional to those already included with respect to purges in the North and East Zones. No such applications were made.³⁶

13. On 29 July 2014, the Supreme Court Chamber declared a provisional stay of the charges outside the scope of Cases 002/01 and 002/02, pending appropriate disposal by the Trial Chamber.³⁷ In January 2015, the adoption of Internal Rule 89 *quater* expressly provided Chambers with the power to reduce the scope of the trial by excluding certain facts set out in the Indictment. Following the Request to Terminate Proceedings, the Trial Chamber provided the parties with an opportunity to be heard on the proposed exclusion of the Facts at Issue.

14. As a preliminary matter the Trial Chamber addresses the KHIEU Samphan Objection. The Khieu Samphan Defence appears to challenge the legality of Internal Rule 89 *quater* (3), which allows evidence relating to the facts excluded to be relied upon to the extent it is relevant to the facts that remain within the scope of the case. The Trial Chamber notes that the KHIEU Samphan Defence somewhat inconsistently declares on the one hand that the Trial Chamber has no other choice than to “put an end to the proceedings for the remaining charges” in order to satisfy the need for legal certainty and to ensure an expeditious trial, while on the other hand opposing the application of Rule 89 *quater*, the purpose of which is precisely to “to ensure a fair, meaningful and expeditious judicial process”.

15. The fact that there is no provision in Cambodian domestic legislation which foresees the possibility to reduce the scope of the trial is not as such a valid argument with respect to the

³⁵ The Trial Chamber notes the clarification by the Lead Co-Lawyers that reference to the Kroch Chhmar Security Centre was inadvertently omitted in the Request for Clarification: Lead Co-Lawyers’ Reply, paras 2-3. *See also* Additional Severance Decision, para. 45.

³⁶ Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, E301/9/1.1, 4 April 2014, fn. 9.

³⁷ Supreme Court Decision, paras 88-90.

legality of Internal Rule 89 *quater*. The Trial Chamber has previously denied a request to nullify the Internal Rules, finding persuasive the reasoning of the Pre-Trial Chamber:

[t]he Internal Rules... form a self-contained regime of procedural law related to the unique circumstances of the ECCC, made and agreed upon by the plenary of the ECCC. They do not stand in opposition to the Code of Criminal Procedure of the Kingdom of Cambodia (“CPC”) but the focus of the ECCC differs substantially enough from the normal operations of Cambodian criminal courts to warrant a specialised system. Therefore, the Internal Rules constitute the primary instrument to which reference should be made in determining procedures before the ECCC where there is a difference between the procedures in the Internal Rules and the CPC.³⁸

16. Similarly, given that Internal Rule 89 *quater* was adopted in accordance with the legal framework of the ECCC, all of its provisions are valid and applicable in this case. This includes the provision in Rule 89 *quater* (3) which allows evidence “relating to the facts excluded” to be “relied upon to the extent it is relevant to the remaining facts”.³⁹

17. The Chamber now turns to whether the requirements for reducing the scope of Case 002 pursuant to Internal Rule 89 *quater* have been satisfied. The Supreme Court Chamber has provided clear guidance on how to assess the criterion of “representativeness”, having had regard to the practice of international tribunals related to the exclusion of facts and the reduction of the scope of trials.⁴⁰ While this guidance was set out in the context of severance, the Trial Chamber considers that it is equally applicable in assessing representativeness for the purposes of Internal Rule 89 *quater*. The Supreme Court Chamber mandates a balancing exercise between the “interest of a fair and expeditious trial” and the need to ensure the trial is “reasonably representative” of the Indictment. It concludes that the “overarching goal of the representativeness criterion is to select a minimum quantum of charges that would reasonably reflect the scale and nature of the totality of the alleged criminal acts and individual culpability”.⁴¹

³⁸ Decision on NUON Chea’s Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules, E51/14, 8 August 2011, para. 7 referring to Decision on NUON Chea’s Appeal Against Order Refusing Request for Annulment, D55/I/8, 26 August 2008, para. 14.

³⁹ The Chamber notes that while the English version of Internal Rule 89 *quater* (3) refers to “remaining facts”, the French version refers to “des faits restant l’objet du procès”, which clarifies that this provision relates to the facts which remain within the scope of the case.

⁴⁰ SCC Second Decision on Severance, paras 61-70.

⁴¹ SCC Second Decision on Severance, para. 64. *See also* Supreme Court Decision, para. 87.

18. Having considered the submissions of the Parties and the nature of the Facts at Issue, the Trial Chamber finds that the facts adjudicated or to be adjudicated in both Case 002/01 and Case 002/02 are representative of the scope of the Indictment, as contained in the Closing Order. The facts heard in Cases 002/01 and 002/02 include all legal counts for the crimes indicted and cover the most significant events during which crimes allegedly occurred. The facts heard also encompass alleged crimes which were committed in diverse geographical areas throughout Cambodia during the temporal jurisdiction of the ECCC and reasonably reflect the totality of the alleged criminal acts and individual culpability of the Accused.

19. For the purposes of Rule 89 *quater* the Chamber also needs to ensure a fair, meaningful and expeditious judicial process, in consideration of the specific requirements of the proceedings before the ECCC.

20. In assessing whether the judicial process is fair and meaningful, one of the factors the Chamber has regard to is the position of the Civil Parties. Given that the Civil Parties in Case 002 participated as a consolidated group, the Chamber has considered whether the judicial process was meaningful to the group as a whole. The Trial Chamber acknowledges that the Affected Civil Parties, who were admitted as direct or indirect victims of the charges falling outside the scope of Cases 002/01 and 002/02, have an interest in having those facts heard. The Chamber notes that there are 446 Affected Civil Parties. This is a clear minority compared to the whole consolidated group of over 3,800 Civil Parties. In addition, as noted by the Lead Co-Lawyers, many of the Affected Civil Parties were also *de facto* victims of the charges encompassed by Cases 002/01 and 002/02.⁴² The Chamber is therefore satisfied that reducing the scope of Case 002 would objectively be in the interests of a fair, meaningful and expeditious judicial process for the consolidated group of Civil Parties. The Trial Chamber notes that, in accordance with Internal Rule 89 *quater* (4), this decision does not affect the participation of the Civil Parties or the composition of the consolidated group of Civil Parties in this case.

21. The Trial Chamber notes the legitimate desire of individual Civil Parties to non-judicial measures which would support their day-to-day lives and allow them to speak about what they

⁴² During oral submissions, the Lead Co-Lawyers further noted that only 34 of the Affected Civil Parties were admitted solely on the basis of facts not heard in Case 002. However, the Lead Co-Lawyers noted that this number did not include Civil Parties who were admitted in connection with the treatment of Buddhists and population movement phase 3: T. 11 January 2017, pp 7-8 (Draft).

experienced in particular in relation to the Facts at Issue. However, the Trial Chamber observes that the reduction of the scope of Case 002 does not prevent the Lead Co-Lawyers from seeking recognition that a specific project proposed, in accordance with Internal Rule 23 *quinquies* (2)(b), appropriately gives effect to the award sought for the benefit of the whole consolidated group, including the Affected Civil Parties.

22. The Chamber also has regard to the length of the proceedings to date in Case 002, the age of the Accused, the age and availability of witnesses,⁴³ the inevitable delays and length of time it would take to conclude a third trial and the position taken by the Parties on the need for a further trial in this case. The Chamber does not consider that proceeding with a trial in relation to the Facts at Issue would be in the interests of a fair and expeditious procedure. The Chamber therefore decides in the interests of a fair, meaningful and expeditious judicial process, to exclude and terminate the proceedings concerning the Facts at Issue.

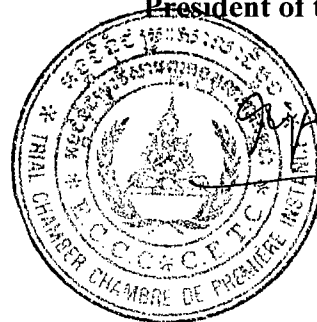
FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

REJECTS the KHIEU Samphan Defence Objection to Internal Rule 89 *quater*;

DECIDES to reduce the scope of Case 002 by excluding all facts set out in the Closing Order in Case 002 not included in Case 002/01 or Case 002/02 pursuant to Internal Rule 89 *quater* (1); and

TERMINATES the proceedings concerning all facts set out in the Closing Order in Case 002 not included in Case 002/01 or Case 002/02 pursuant to Internal Rule 89 *quater* (3).

Phnom Penh, 27 February 2017
President of the Trial Chamber



Nil Nonn

⁴³ The Chamber notes that even in Case 002/02 it faced difficulties given that an increasing number of witnesses and Civil Parties were unable to testify due to death or serious medical conditions.