

## Prosecution Appeals for More Representative Charges in Case 002/01

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In October 2012, the Trial Chamber finalized the scope of charges against the three senior Khmer Rouge leaders currently on trial at the Extraordinary Chambers in the Courts of Cambodia (ECCC).<sup>1</sup> The Office of the Co-Prosecutors is now appealing that decision, arguing that the Chamber’s refusal to add two crime sites, if uncorrected, “will result in a trial and a legacy that fails to adequately represent the enormity and gravity of the crimes committed during the period of Democratic Kampuchea.”<sup>2</sup> Though its concern is warranted, it is unfortunately doubtful that the addition of these sites alone would remedy the problem.

Before the start of the Case 002 trial in November 2011, the Trial Chamber decided to separate the indictment into “a number of discrete cases that incorporate particular factual allegations and legal issues.”<sup>3</sup> Case 002/01, the first of an anticipated sequence of trials against the same accused, is factually limited to the implementation of one of five criminal policies charged in the indictment: forced population movement encompassing the displacement of up to two million people from Phnom Penh after its occupation by Khmer Rouge troops on April 17, 1975, and the transfer of thousands of people, including some of those previously displaced from Phnom Penh, to the north of the country from late 1975 into 1977.<sup>4</sup> “[W]orksites, security centres, execution sites or facts relevant to the third phase of population movements” were specifically excluded from consideration.

The OCP immediately sought reconsideration of that decision and the inclusion of nine additional crime sites to increase the representativeness of the charges. When its proposal was rejected,<sup>5</sup> it sought to add only three crime sites—two execution sites and one security center—to facilitate its ability to meet its burden of proof. Nine months later, the Trial Chamber agreed to add only one: a site where soldiers and officials of the defeated Khmer Republic regime were executed shortly after the Phnom Penh evacuation. It rejected inclusion of District 12, where civilians from Phnom Penh were executed soon after they were evacuated, and the S-21 security center complex.

In its ruling, the Trial Chamber said it “remains unconvinced that these [two] additional crime sites are closely connected to the existing factual allegations in Case 002/01 or that their inclusion fits within the logical sequence of the trial,” and said adding them “would risk a

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<sup>1</sup> See Trial Chamber Defines the Scope of Charges in Case 002/01, at <http://www.cambodiatribunal.org/blog/2012/10/trial-chamber-defines-scope-charges-case-00201>.

<sup>2</sup> Co-Prosecutors’ Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 with Annex I and Confidential Annex II, ¶ 2 (Nov. 7, 2012) [hereinafter “OCP Nov. 7 Appeal”].

<sup>3</sup> Severance Order Pursuant to Internal Rule 89ter, ¶ 2 (Sept. 22, 2011). See also Reconsidering the Scope of the First “Mini-Trial” in the Case against Khmer Rouge Senior Leaders, at <http://www.cambodiatribunal.org/blog/2012/08/expert-commentary-legal-filings-reconsidering-scope-first-“mini-trial”-case-against>.

<sup>4</sup> See Case 002 Closing Order, ¶¶ 211-26, 262-65 (Sept. 15, 2010).

<sup>5</sup> See Co-Prosecutors’ Request for Reconsideration of “Severance Order Pursuant to Internal Rule 89ter” (Oct. 3, 2011).

substantial prolongation of the trial.”<sup>6</sup>

On appeal, the Prosecution is forcefully arguing that there will be no further trials in an effort to convince the Supreme Court Chamber (SCC) that (1) the matter falls within the narrow scope of its interim appellate jurisdiction and (2) the Trial Chamber abused its discretion.

The ECCC Internal Rule 104(4) limits the SCC’s immediate appeal jurisdiction to only four types of rulings, including decisions that have “the effect of terminating the proceedings.”<sup>7</sup> For all other questions, the parties must wait to appeal the Trial Chamber’s judgment on the merits. The OCP is arguing that in order to ensure an effective right to appellate review, the SCC should interpret its jurisdiction broadly and find that the Trial Chamber decision has the effect of terminating the proceedings against the accused with regard to the two rejected crime sites, due to the improbability that additional trials incorporating the excluded charges will ever be held. Moreover, they emphasize that if the SCC fails to rule now, by the time Case 002/01 has reached judgment, it will no longer be possible for the SCC to grant an effective remedy.<sup>8</sup>

The OCP also seeks to convince the SCC that the extreme unlikelihood of additional trials makes the Trial Chamber’s failure to consider if the charges in Case 002/01 are “reasonably representative of the crimes charged in the Closing Order” an abuse of its discretion.<sup>9</sup> In rejecting the OCP’s original request to expand the scope of charges, the Trial Chamber said it was merely ruling on the sequence in which it would hear the allegations: “[A]s no allegations or charges in the Indictment are discontinued in consequence of the Severance Order, there is no need for the first trial to be reasonably representative of the totality of the charge in the Indictment.”<sup>10</sup> If the OCP can convince the SCC that the possibility of additional proceedings after Case 002/01 is sufficiently remote, the SCC may agree that, following jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Trial Chamber’s failure to take into account the representativeness of the charges amounts to reversible legal error.

According to the OCP:

What all of [the ICTY] decisions demonstrate is that a trial chamber must ensure that its exercise of discretion to sever proceedings upholds the legal obligation to adequately reflect the crimes with which an accused has been charged. This ensures that the severed trial does not provide an inaccurate portrait of the potential culpability of the accused, nor deny victims the opportunity to see justice done.<sup>11</sup>

The OCP emphasizes that Case 002/01 is currently not representative because it focuses on

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<sup>6</sup> 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, ¶ 2 (Oct. 8, 2012).

<sup>7</sup> The other three are decisions on detention and bail, decisions on protective measures, and decisions on interference with the administration of justice.

<sup>8</sup> OCP Nov. 7 Appeal at ¶¶ 11-19.

<sup>9</sup> *Id.* at ¶ 23.

<sup>10</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, ¶ 9 (Oct. 18, 2011) [hereinafter “Request for Reconsideration”].

<sup>11</sup> OCP Nov. 7 Appeal at ¶ 35.

crimes committed against only one category of enemies over a limited period of time in one location and “excludes judicial accounting for some of the most serious criminal conduct alleged in the Closing Order.”<sup>12</sup> This is beyond dispute; however, the two crime sites the Prosecution seeks to add would not solve the problem. With the case now one year into trial, the Prosecution does not have the luxury of re-proposing the addition of multiple security centers, a work site, and cooperatives.<sup>13</sup> The scope of its appeal is thus necessarily limited by what it thinks can be practically added without the proceedings, now well underway, being unduly delayed. Nevertheless, it is a reality that, even if the SCC should agree to add the two additional crime sites, the accused senior leaders’ responsibility for worksites, cooperatives, security centers other than S-21, execution sites unrelated to forced movement, forced marriage, and the targeting of religious and ethnic groups is unlikely to ever be addressed.

The Prosecution request to include District 12, where scores of Phnom Penh residents were allegedly killed within months of being forcibly evacuated, importantly would expand the discussion of “enemies” targeted for execution beyond officials of the fallen regime. The crime site appears to have a close nexus with forced movement from the capital, and, according to the Prosecution, it could be included with only six additional witnesses. The Trial Chamber’s reasons for rejecting it are not entirely clear.

On the other hand, despite dogged OCP efforts to link the S-21 security center to the narrow Case 002/01 subject matter, the connection appears tenuous. The OCP argues that the evacuation of the cities was “an initial act” implementing a policy to identify and root out perceived enemies that continued with the establishment of security centers such as S-21. It notes that Case 002/01 already includes overarching themes—such as the authority structure and communications of the Communist Party of Kampuchea (CPK) and the roles of the accused—and discussion of a significant amount of evidence that “goes directly to the development and enforcement of the CPK policy to destroy its perceived enemies including at S-21.”<sup>14</sup> These are valid arguments, and they highlight an inherent flaw in the Trial Chamber’s approach to severance that has resulted in continued debate over the scope of evidence that may be heard and arguably prolonged the proceedings, namely, the incongruity of divorcing the evacuations from other Khmer Rouge policies and the crimes that followed.

There is no doubt that the inclusion of S-21 would ease the Prosecution’s burden of proof due to the mountains of official documentation that have survived, some of which offer direct evidence of accused Nuon Chea’s oversight authority. It is not obvious, however, that S-21, a detention and torture center primarily associated with internal party purges and the execution of foreigners in the later years of the regime, has a closer link to the policy of forced evacuations than any other crime sites in the indictment, almost all of which could be linked to anti-enemy policies.

Notably, adding S-21 to the proceedings would do nothing to increase the overall “representativeness” of the charges that will be heard by the ECCC. Case 001 was entirely devoted to S-21 crimes. The OCP now argues that “[t]he exclusion of S-21, a mass crime site which was central to the implementation of the CPK’s alleged policy of killing its perceived

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<sup>12</sup> *Id.* at ¶ 36.

<sup>13</sup> *See* Request for Reconsideration at ¶ 36.

<sup>14</sup> OCP Nov. 7 Appeal at ¶ 70.

enemies, removes from the first [Case 002] trial consideration of events which are crucial to a proper understanding of Case 002 as a whole.”<sup>15</sup> If the crimes that took place at S-21—one of nearly 200 Khmer Rouge security centers and publicized since 1979 through the establishment of the Tuol Sleng Genocide Museum—are the missing central narrative of Case 002, then the ECCC process will not add greatly to what is popularly known and understood about the Democratic Kampuchea period, but instead reinforce S-21 as a symbol of all the crimes that will never be discussed, and for which there will never be a judicial accounting.

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<sup>15</sup> *Id.* at ¶ 36.