

## Reconsidering the Scope of the First “Mini-Trial” in the Case Against Khmer Rouge Senior Leaders

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August 7, 2012

Last September the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) split the indictment against the surviving senior Khmer Rouge leaders into five core criminal policies with the intention of holding several short sequential trials.<sup>1</sup> The Chamber noted that in cases of similar complexity at international courts, up to 10 years had been required to reach judgment.<sup>2</sup> In recognition of the advanced age of both the Case 002 accused and many victims, the Chamber sought “to limit the number of witnesses, experts and Civil Parties called,” enabling it “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 Accused in Case 002 to an expeditious trial.”<sup>3</sup>

Pursuant to the severance order, the Case 002/1 trial is currently addressing only the alleged criminal policy of forced movement comprising the evacuation of Phnom Penh after April 17, 1975, and the forced migration to the North and Northwest Zones from 1975 to 1977. The Trial Chamber ruled:

No co-operatives, worksites, security centers, execution sites or facts relevant to the third phase of population movements will be examined during the first trial. Further, all allegations of, *inter alia*, genocide, persecution on religious grounds as a crime against humanity and Grave Breaches of the Geneva Conventions of 1949 have also been deferred to later phases of the proceedings in Case 002.<sup>4</sup>

None of the parties were asked for their views in advance of this decision, as the Trial Chamber believed that a consultative procedure would itself result in unacceptable delay.<sup>5</sup> Although supporting the purpose behind the order, the Co-Prosecutors strongly objected to the Chamber’s approach, noting:

[T]he charges selected for the first and likely only trial of the Accused would not be representative of their alleged criminal conduct, in contrast to international practice; it would not promote an accurate historical record; and would diminish the legacy of ECCC proceedings in advancing national reconciliation.<sup>6</sup>

The Co-Prosecutors argued that the first trial should instead include “the most grave forms of harm suffered by the great majority of Cambodians during the [Democratic Kampuchea] period,”

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<sup>1</sup> Internal Rule 89*ter* allows the Trial Chamber to separate the proceedings at any stage and try them in the order it deems appropriate “[w]hen the interests of justice so requires.”

<sup>2</sup> Press Release, ECCC, Severance of Proceedings Ordered in Case 002 (Sept. 22, 2011).

<sup>3</sup> Severance Order Pursuant to Internal Rule 89*ter*, ¶ 8 (Sept. 22, 2011).

<sup>4</sup> Severance Order, ¶ 7.

<sup>5</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, ¶¶ 4-5 (Oct. 18, 2011).

<sup>6</sup> Co-Prosecutors’ Request for Reconsideration of “Severance Order Pursuant to Internal Rule 89*ter*,” ¶ 3 (Oct. 3, 2011).

including not only the evacuation of Phnom Penh, but also two related execution sites, as well as a few security centers, work sites, and cooperatives.<sup>7</sup>

The Trial Chamber rejected the prosecution's request for reconsideration but did allow for the possibility that additional charges could be added at a later date.<sup>8</sup> In response, in January 2012, the Co-Prosecutors filed a truncated request to add only two related execution sites and the S-21 Security Center/Choeung Ek killing fields and asked the Chamber to rule on their request immediately.<sup>9</sup> On August 3, 2012, the Trial Chamber announced that it would hold a management conference later this month — nine months after the start of trial — to discuss the Co-Prosecutors' outstanding motion and determine the final scope of the Case 002/1 proceedings.<sup>10</sup>

After assessing the prosecution request in detail, the Trial Chamber agrees that adding the three additional crime sites may be appropriate. However, it believes that hearing all of the prosecution's proposed witnesses would be unnecessary and would undercut the Chamber's other efforts to "streamline" the proceedings and ensure that all evidence is heard by the end of 2013.<sup>11</sup> Noting that 10 of the prosecution's proposed witnesses have already been heard and that it does not wish to take the time to recall them, the Chamber proposes that if the sites are added, only four currently scheduled witnesses and eight new witnesses be heard on these charges. It therefore is asking the Co-Prosecutors to advise it if adding the new crime sites with these evidentiary limitations will assist the prosecution in meeting its burden of proof and also "outweighs the risks" inherent in a projected additional three months of trial.<sup>12</sup>

For the same reasons that the Trial Chamber seeks to act quickly to reach an initial trial verdict before one of the accused dies or becomes incapacitated, all Case 002 parties and trial observers agree that the advanced age and poor health of the accused make it extremely unlikely that additional "mini-trials" will ever be held. The ECCC is the first mass crimes court to contemplate consecutive trials based on one indictment, and the first trial is not proceeding swiftly, in part due to many novel procedural questions raised. Case 002/1 evidentiary proceedings are now projected to last more than two years.

Procedural issues are also likely to prevent an expeditious start to a second trial. The Trial Chamber said that it selected Case 002/1's subject matter "to ensure that the issues examined in the first trial provide a basis to consider the role and responsibility of all Accused, and to provide

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<sup>7</sup> Co-Prosecutors' Request for Reconsideration, ¶ 36.

<sup>8</sup> Severance Order, ¶¶ 2, 12.

<sup>9</sup> Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/1, ¶¶ 4, 7 (Jan. 27, 2012).

<sup>10</sup> Memorandum from President Nil Nonn to All Parties, *Scheduling of Trial Management Meeting to Enable Planning of the Remaining Trial Phases of Case 002/01 and Implementation of Further Measures Designed to Promote Trial Efficiency*, ¶¶ 13-15 (Aug. 3, 2012).

<sup>11</sup> Memorandum from President Nil Nonn to All Parties, *Annex: Co-Prosecutors' Proposed Extension of Scope of Trial in Case 002/1 (E163)*, ¶¶ 3-12 (Aug. 3, 2012). The Chamber apparently intends to rule on the accuseds' responsibility for S-21 crimes based solely on documentation and previous testimony by Kaing Guek Eav *alias* Duch.

<sup>12</sup> *Id.*

a foundation for the remaining charges in later trials.”<sup>13</sup> However, as noted by the Co-Prosecutors, the only way the Trial Chamber could adopt facts established in the first trial into a subsequent trial would be through judicial notice of adjudicated facts or *res judicata*.<sup>14</sup> It is unclear whether the Trial Chamber has the ability to take judicial notice of adjudicated facts as it has previously determined that “there is no legal basis in the Law on the Establishment of the ECCC or in the Internal Rules for the Chamber to take judicial notice of adjudicated facts ... before the ECCC.”<sup>15</sup> Moreover, neither mechanism would be available in Case 002/2 until the Supreme Court Chamber issues its final judgment, as Trial Chamber rulings could be overturned. In the Court’s first case, the time between the issuance of the trial and appeal judgments was a year and a half.

The Trial Chamber, however, believes there is no impediment using a trial verdict as a legal and factual foundation for a second trial without waiting for the Supreme Court Chamber to issue a final judgment.<sup>16</sup> Even if this were possible, it is questionable how the Trial Chamber could draft a complex foundational judgment while overseeing a new trial. After the first trial involving one accused who admitted to many of the allegations against him, the Trial Chamber took over eight months to draft the judgment.

In seeking to reach an expedited verdict against the accused senior Khmer Rouge leaders and ensure that victims will receive some measure of justice after more than 30 years, the Trial Chamber has paradoxically limited the trial’s relevance for survivors, as it no longer includes discussion of many crimes that epitomize the DK regime, including forced labor, forced collectivization, forced marriage, and genocide. The addition of only the three proposed crime sites would do much more to ease the prosecution’s burden of proof than to increase the relevance of the proceedings for the majority of survivors.

Due to the narrow charges at issue in Case 002/1 and the implausibility of any other cases going to trial — either against the senior Khmer Rouge leaders or the suspects in controversial Cases 003 and 004 — there are strong reasons to fear that many of the emblematic atrocities of the Khmer Rouge era will never be addressed by the ECCC.

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<sup>13</sup> Severance Order, ¶ 8.

<sup>14</sup> Co-Prosecutors’ Request for Reconsideration, ¶ 26. *Res judicata* supports the finality of legal judgments. In the *Celebici* case at the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Trial Chamber determined:

The principle of *res judicata* only applies *inter partes* in a case where a matter has already been judicially determined within that case itself. ... The doctrine of *res judicata* is limited, in criminal cases, to the question of whether, when the previous trial of a particular individual is followed by another of the same individual, a specific matter has already been fully litigated.

Prosecutor v. Delalic, Case No. IT-96-21-T, Judgement, ¶ 228 (Trial Chamber, Nov. 16, 1998).

<sup>15</sup> Decision on IENG Sary’s Motions Regarding Judicial Notice of Adjudicated Facts from Case 001 and Facts of Common Knowledge Being Applied in Case 002, at 3 (April 4, 2011). Judicial notice of a fact shifts the burden to the disputing party to disprove it.

<sup>16</sup> Decision on Co-Prosecutors’ Request for Reconsideration, ¶¶ 8, 10.