



Supreme Court Chamber Invalidates Case 002 Severance
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February 13, 2013

Throwing proceedings into potential disarray, the Supreme Court Chamber (SCC) of the Extraordinary Chambers in the Courts of Cambodia (ECCC) has annulled the Trial Chamber’s rulings on the scope of Case 002/01—15 months into a trial dogged by the failing health of the octogenarian accused. Finding that the Trial Chamber had violated both the right of the parties to a reasoned opinion and the right to be heard, the SCC overturned the Trial Chamber’s decisions splitting the mammoth Case 002 indictment into “mini trials” and told it to revisit the matter from scratch.¹ The Trial Chamber has now scheduled two days of hearings next week to address the implications of the SCC decision.²

In October 2011, the Trial Chamber decided *proprio motu* to “separate the [Case 002] proceedings . . . into a number of discrete cases that incorporate particular factual allegations and legal issues.”³ Case 002/01 addresses foundational topics such as the structure and policies of the Khmer Rouge regime and the roles of the co-accused before and after the regime took power. Of the five country-wide criminal policies for which the former senior Khmer Rouge leaders are accused of responsibility, only one is at issue: crimes related to the forced transfer of the population of Phnom Penh beginning on April 17, 1975, and the subsequent forced transfer of hundreds of thousands of Cambodians to the north of the country between late 1975 and 1977. Charges related to worksites, cooperatives, security centers, and execution sites—as well as the crimes of forced marriage and genocide—were left for uncertain future trials.

Although agreeing that the indictment should be trimmed, the Prosecution immediately asked for the inclusion of a more representative selection of charges due to its concern that the elderly accused would not live to face a second trial.⁴ The Trial Chamber rejected its request⁵ but reserved the right to decide “at any time” to incorporate additional portions of the indictment.⁶ As a consequence, in January 2012, the Prosecution asked the Trial Chamber to add three more crime sites.⁷ In October—nearly one year into trial—the Trial Chamber finalized the scope of charges, including one of the three sites requested by the Prosecution.⁸ The Prosecution

¹ Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision Concerning the Scope of Case 002/01 (Feb. 8, 2013) [hereinafter SCC Decision].

² 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) (Feb. 12, 2013) [hereinafter TC Directions].

³ Severance Order Pursuant to Internal Rule 89*ter*, ¶ 2 (Sept. 22, 2011) [hereinafter Severance Order].

⁴ Co-Prosecutors’ Request for Reconsideration of “Severance Order Pursuant to Internal Rule 89*ter*” (Oct. 3, 2011).

⁵ Decision on Co-Prosecutors’ Request for Reconsideration of the Terms of the Trial Chamber’s Severance Order (E124/2) and Related Motions and Annexes (Oct. 18, 2011) [hereinafter Decision on Request for Reconsideration].

⁶ Severance Order, *supra* note 3, ¶ 6.

⁷ Co-Prosecutors’ Request to Include Additional Crime Sites Within the Scope of Trial in Case 002/1 (Jan. 27, 2012).

⁸ See 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, ¶ 3 (Oct. 8,

appealed, asking the SCC to include the two rejected sites in order to improve the representativeness of the charges.⁹ The SCC ruling addresses not only the impugned decision but also the Trial Chamber’s earlier severance decisions, as together they form “a year-long decision-making process” during which “the Trial Chamber consistently kept the limits of the scope of Case 002/01 uncertain and open to change, without defining any criteria that could influence a change.”¹⁰

The ECCC’s severance rule 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.¹¹

The Supreme Court Chamber said that this language limits the Trial Chamber’s discretion to sever to circumstances when, with adequate reasoning, it can demonstrate “the interest of justice”—“a condition where ... charges tried separately better serve the objectives of the criminal proceedings and principles on which they are premised.” Relevant factors must be assessed on a “case-by-case basis” and appropriately include two previously considered by the Trial Chamber: the need for expeditious proceedings and a logical case sequence. Nevertheless, the SCC expressed “alarm” at the Trial Chamber’s “paucity of reasoning” regarding “how the severance advances the interests of the justice” and found this to amount to an error of law.¹²

In particular, the SCC rejected the Trial Chamber’s justification that it was unnecessary for Case 002/01 to be “reasonably representative of the totality of the charges in the Indictment” because no charges in the indictment had been dropped.¹³ This reasoning was “irreconcilable” with the Trial Chamber’s justification for severing Case 002: its doubts about the defendants’ mental and physical capacity to participate in a long trial.

If 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 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.¹⁴

2012). *See also* 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>.

⁹ Co-Prosecutors’ Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 with Annex I and Confidential Annex II (Nov. 7, 2012).

¹⁰ SCC Decision, *supra* note 1, ¶ 17.

¹¹ Internal Rule r. 89ter.

¹² SCC Decision, *supra* note 1, ¶¶ 35, 36, 44.

¹³ Decision on Request for Reconsideration, *supra* note 5, ¶ 9.

¹⁴ SCC Decision, *supra* note 1, ¶ 43 (emphasis in original).

The SCC also found that the Trial Chamber committed an error of law by failing to consult with the parties on the terms of severance.¹⁵ None of the parties were asked for their views in advance, as the Trial Chamber believed that this was unnecessary in an inquisitorial legal system where indictments are judicially controlled. Moreover, it said that a consultative procedure would itself result in unacceptable delays.¹⁶ The Supreme Court Chamber agreed that the Court’s Rules give the Trial Chamber broad discretion both to decide when severance is necessary and to determine the order in which separated cases should be tried but not an unfettered right to determine the form of severance. To find otherwise would ignore both the significant impact on the rights of the parties and also adversarial features of ECCC proceedings including “the Co-Prosecutors’ crucial role and responsibility in creating ECCC indictments and proving the charges therein.”¹⁷

Although the failure to hear the parties was partially remedied when the Trial Chamber agreed to consider submissions on the Prosecutors’ proposed expansion of the case to include more crime sites, “[b]y then ... 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*.” Ruling that the severance as a whole was invalid by the errors of law, it found the Prosecutors’ appeal seeking the addition of specific crime sites to be moot.¹⁸

The Trial Chamber is now tasked with reassessing the appropriateness of severance after hearing party submissions and balancing all parties’ interests against all relevant factors. In doing so, it must determine whether it is judicially manageable to sever the indictment into smaller trials, or into “at least one smaller trial on some portion of the Indictment.” If the former, the Trial Chamber must develop and articulate a “tangible plan” for how the remaining charges will be heard and address the practical concerns raised by the parties. If the latter, it should “state clearly” that due to the declining health of the accused, “justice is better served by concluding with a judgment” on a smaller number of charges and “give due consideration to the reasonable representativeness of the Indictment within the smaller trial(s).”¹⁹

Significantly, the SCC provided forewarning of its concerns regarding the legal and practical capacity of the Trial Chamber to hear consecutive cases against the accused. Calling on the ECCC to “explore the establishment of another panel within the Trial Chamber to support the timely adjudication of the remainder of Case 002[.]” it noted that a “second panel would safeguard any potential concerns about actual or appearance of bias” if the same judges were to try more than one case against the same accused. It also noted that a second panel would be able to immediately begin a second trial while the current Trial Chamber is occupied drafting the first judgment²⁰—a task that took over eight months in the much less contentious *Duch* trial (Case 001).

¹⁵ *Id.* ¶ 44.

¹⁶ Decision on Request for Reconsideration, *supra* note 5, ¶¶ 4-5.

¹⁷ SCC Decision, *supra* note 1, ¶ 42.

¹⁸ *Id.* ¶¶ 45, 49.

¹⁹ *Id.* ¶¶ 47, 50.

²⁰ *Id.* ¶ 51.

Given the Court’s ongoing and severe financial constraints and the accuseds’ recent health woes, it seems unlikely that the Trial Chamber will decide to continue with its plan for multiple smaller trials on the entirety of the indictment and will instead focus on defining the appropriate scope—and representativeness—of the charges in Case 002/01. Ultimately, it can be expected that the Trial Chamber will seek to frame the scope of Case 002/01 as close to its current form as possible to reach a speedy judgment. Indeed, in its directions to the parties on the consequences of the SCC decision, it asks pointedly:

Since the lodging of the Co-Prosecutors’ appeal ... 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 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?²¹

The Prosecutors and Civil Parties are acutely aware of the substantial time already spent hearing evidence tailored to the annulled severance decision and the need to reach an expeditious end to proceedings and are unlikely to present expansive requests to radically reshape the trial. While the Prosecutors are likely to request only the addition of the two crime sites rejected in the impugned decision, the Civil Parties face a more difficult decision. Of the nearly 4,000 Civil Parties participating in Case 002/01, only around 750 have any link with the policy of forced population movement at issue. Those who are excluded will not hear their harms discussed and are likely to be excluded from some or all forms of reparation should there be a conviction. The Defense teams, who have no interest in increasing the number of charges, are likely to argue forcefully for key witnesses to be recalled if their testimony will be used to prove additional unanticipated charges.

Although the SCC decision will undoubtedly delay judgment and is unlikely to result in Case 002/01 encompassing a fully representative selection of charges, genuine implementation of the principles it upholds should increase the number of victims whose harms are addressed and the likelihood that, if and when a verdict is reached, it will provide an estimable model of fair trial rights for the Cambodian judiciary.

²¹ TC Directions, *supra* note 2, ¶ 3(iii). *See also id.* ¶ 3(v) (proposing “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” as “[i]t is impracticable at this stage to require the expert and parties to prepare for this testimony on an entirely different basis”).