

Co-Prosecutors Appeal Trial Chamber Severance Decision, Again

Anne Heindel, Legal Advisor – Documentation Center of Cambodia

May 16, 2013

The Co-Prosecutors of the Extraordinary Chambers in the Courts of Cambodia have appealed the Trial Chamber's second attempt to sever the Case 002 indictment into consecutive mini trials, arguing forcefully that crimes committed at the S-21 Security Center must be included in the first, and likely only, trial of surviving senior Khmer Rouge leaders. According to the Co-Prosecutors:

- (a) The Impugned Decision effectively terminates the prosecution of the Accused for the most serious charges of the Indictment, including the arrest, detention, torture and execution of hundreds of thousands of Cambodians at the network of security centres across Democratic Kampuchea;
- (b) The Trial Chamber has failed to follow the directives of [the Supreme Court] Chamber, dismissing as “meaningless” the requirement that the Trial Chamber consider whether the scope of trial in Case 002/01 is reasonably representative of the Case 002 Indictment as a whole;
- (c) The S-21 security centre is the single most representative crime site of the Case 002 Indictment, and the one and only security centre that reported directly to the senior leaders of the CPK; and
- (d) There is no rational basis to conclude that the short period of additional trial time necessary to include S-21 in Case 002/01 would materially increase the risk that a judgment could not be rendered before the death or incapacity of the Accused.¹

In September 2011, the Trial Chamber severed the Case 002 indictment *proprio motu*, ruling that Case 002/01, the first of an unspecified number of successive mini-trials, would address only one of the 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 between late 1975 and 1977, and related crimes against humanity.² In October 2012, the Chamber added one additional crime site requested by the Co-Prosecutors and rejected two others, including S-21, and the Co-Prosecutors appealed.³

In February 2013, the Supreme Court Chamber (SCC) annulled all severance decisions, ruling that the Trial Chamber must reassess its entire approach, taking into account the views of the

¹ Co-Prosecutors' Immediate Appeal of Second Decision on Severance of Case 002 (May 10, 2012) [hereinafter Immediate Appeal], available at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-05-15%2010:53/E284_2_1_EN.pdf.

² See generally Severance Order Pursuant to Internal Rule 89ter (Sept. 22, 2011).

³ See generally 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 (Oct. 8, 2012). The Chamber added Tuol Po Chrey, where soldiers and officials of the prior Lon Nol regime were executed immediately after the evacuation of Phnom Penh in 1975.

parties and the need for the charges in the first trial to be reasonably representative of the totality of the charges in the indictment if additional proceedings are likely to be infeasible.⁴ In April, the Trial Chamber issued a new decision on severance, confirming the original scope of Case 002/01, and rejecting the Co-Prosecutor's argument that "the addition of the S-21 Security Center would satisfy the criterion of reasonable representativeness" because its thousands of victims are nevertheless a mere fraction of the total number; because the site lacks any obvious connection to the forced movement policy at issue in Case 002/01; and because S-21 — which was the sole topic of Case 001 — is "the only crime site to have been conclusively adjudicated by the ECCC to date." It also determined that adding S-21 to the charges would require an additional two to four months of trial, risking "the indefinite prolongation of proceedings in Case 002/01" should the co-accused's health further deteriorate.⁵

On appeal, the Co-Prosecutors argue that the Trial Chamber failed to apply the legal standards mandated by the SCC decision, including the need for reasonable representativeness of the indictment within any smaller trial. They argue:

The Trial Chamber should have considered anew whether the two forced movements and Tuol Po Chrey were reasonably representative of the whole Indictment and *which additional charges and crime sites* should be added to render the scope of Case 002/01 reasonably representative.⁶

Instead, the Trial Chamber considered only if S-21 would add representativeness "in the context of the annulled Case 002/01 forced movement trial." Moreover, the Trial Chamber failed to consider the actual consequences of severance, "*i.e.*, that proceedings against the Accused with respect to all severed charges would be effectively terminated," but instead assumed that further trials may occur. "By refusing to apply [the SCC's] directive to choose either a series of trials or a single more representative trial, the Trial Chamber thus repeated the same error of law that invalidated its initial severance decision."⁷

The Co-Prosecutors also argue that the Trial Chamber did not properly analyze the representativeness of Case 002/01 in light of international legal practice, which takes into account factors including "the crimes charged in the Indictment," "their classification and nature," "the places where they are alleged to have been committed," "their scale," "the victims of the crimes charged," "the time period of the crimes charged," and "the fundamental nature or theme of the case."⁸

⁴ Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01 (Feb. 8, 2013). *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>.

⁵ Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, ¶¶ 108, 112, 116, 138-42. (Apr. 26, 2013) (emphasis in original). *See also* Expert Commentary on Legal Filings, *Trial Chamber Case 002 Severance Decision Upholds Status Quo* (April 30, 2013), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

⁶ Immediate Appeal, ¶¶ 20-23, *supra* note 1 (emphasis in original).

⁷ *Id.* ¶¶ 24, 26.

⁸ *Id.* ¶ 28.

According to the Co-Prosecutors, the legal categories of crimes at issue in Case 002/01 are not reasonably representative of the indictment because they include only crimes against humanity and not genocide or war crimes, whereas adding S-21 would expand the scope to include war crimes charges. Moreover, the current charges include only six types of crimes against humanity (forced transfer, attacks against human dignity, political persecution, enforced disappearance, murder, and extermination), whereas incorporating S-21 would add five more (imprisonment, torture, enslavement, racial persecution, and rape).⁹

The Co-Prosecutors assert that, of all the crime sites in the indictment, S-21 provides the most representative sample of Khmer Rouge victims because persons imprisoned and killed there came from all parts of Cambodia and included men, women, and children, as well as people of all ethnicities and classes, whereas “the persons who were subject to the forced movements ... were primarily those from the urban population of Cambodia as of 17 April 1975.”¹⁰

They say that S-21 is also the most representative temporally, as the crimes that took place there spanned most of the four years covered by the indictment:

It would ensure that Case 002/01 reflects the key phases of crimes in the DK period, including the initial targeting of persons associated with the Khmer Republic regime, the purge of the RAK that began in mid-1976, and the massive purges of the North Zone in 1977 and the East Zone and Vietnamese in 1978.¹¹

With regard to the “fundamental theme” of the case, the Co-Prosecutors note that the Khmer Rouge regime’s network of security centers is “by far the most prevalent type of crime site in the Indictment” with 11 sites included. They argue that a “single smaller trial cannot be considered representative of the Indictment as a whole if it does not include one of those security centres,” and S-21 is not only the most representative security center but also the one with the closest connection to the senior leaders. Although S-21 was the focus of the trial of prison chief Kaing Guek Eav *alias* Duch, yet to be examined is “who was responsible for the decisions and policies that resulted in the arrest, torture and execution” of the victims.¹²

The Co-Prosecutors say that incorporating S-21 would require only one additional month of trial time. As a consequence of the Trial Chamber’s previous ruling “allowing the use of witness statements, without the appearance of the witness at trial, if such statements do not relate to the acts or conduct of the Accused,” fewer witnesses would need to be called to prove the charges than in Case 001 against Duch.¹³ However, this is a highly contentious assertion, as the Defense teams continue to challenge all statements the Prosecution seeks to enter into evidence in lieu of live testimony with the opportunity for confrontation.¹⁴ The Co-Prosecutors also say that

⁹ *Id.* ¶¶ 35-36.

¹⁰ *Id.* ¶¶ 37-40.

¹¹ *Id.* ¶ 44 (footnotes omitted).

¹² *Id.* ¶¶ 45-46, 49.

¹³ *Id.* ¶ 56.

¹⁴ *See, e.g.* Objections to Requests to Put Before the Chamber Written Statements and Transcripts (Nuon Chea, Apr. 26, 2013). *See also* Expert Commentary on Legal Filings, Defense Challenges Admission of 1350 Witness Statements In Lieu of Oral Testimony (Nov. 19, 2012), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

“[b]ecause almost all the witnesses with knowledge of acts and conduct of the Accused relating to S-21 have already testified in the Case 002/01 trial, the hearing of evidence relating to that crime site can be completed with minimal additional witnesses.”¹⁵ However, the accused have made it clear from the first day of trial that they would question witnesses only on subjects relevant to charges in the severed indictment, and they may be expected seek the recall of all witnesses whose testimony would be used as evidence of their responsibility for S-21 crimes.

The Co-Prosecutors argue at length that the health of the accused is not the primary impediment to a speedy Trial and that the Trial Chamber itself is responsible for much of the delay:

[T]he principal reason for that low average [days of hearing each month] is not the health of the Accused or factors beyond the control of the Trial Chamber, but rather matters within its control, such as the scheduling of judicial recesses and the number of days it sits each week.¹⁶

The Co-Prosecutors also take issue with the Trial Chamber’s assertion that the addition of S-21 would delay its near final determinations on the logistics for concluding Case 002/01:

[I]t is now three months after this Chamber’s severance decision and the parties still have not received any schedule or plan informing them of when the Trial Chamber plans to complete witness testimony, the identity of the remaining witnesses who will testify, and when closing arguments will be scheduled and final written submissions due. In circumstances where the Trial Chamber is managing and planning the trial on a week-to-week basis, it cannot assert that logistical problems associated with the late addition of S-21 justify its exclusion from the trial.¹⁷

Finally, the Co-Prosecutors argue that the Trial Chamber failed to follow the directions of the SCC and explain how “subsequent proceedings could commence prior to the conclusion of any appeals in Case 002/01.” Although the impugned decision describes the possible scope of two anticipated future trials, it discusses neither their timing nor how potentially significant legal impediments would be resolved.¹⁸

The SCC has three months to decide the Co-Prosecutor’s appeal; however, the Co-Prosecutors are seeking an expedited summary decision in light of the Trial Chamber’s intent to quickly conclude Case 002/01 testimony.

¹⁵ Immediate Appeal, ¶ 56, *supra* note 1.

¹⁶ *Id.* ¶ 71.

¹⁷ *Id.* ¶ 75.

¹⁸ *Id.* ¶¶ 76-79.

