



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber
Chambre de la Cour Suprême

ឯកសារដើម
ORIGINAL/ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ (Date): 23-Jul-2013, 16:00
CMS/CFO: Sann Rada

សំណុំរឿងលេខ: ០០២/១៩-កញ្ញា-២០០៧-អ.វ.ត.ក-អ.ជ.ស.ដ/អ.ជ.ត.ក(២៨)

Case File/Dossier N°. 002/19-09-2007-ECCC-TC/SC(28)

Before: Judge KONG Srim, President
Judge Chandra Nihal JAYASINGHE
Judge Agnieszka KLONOWIECKA-MILART
Judge MONG Monichariya
Judge Florence Ndepele Mwachande MUMBA
Judge SOM Sereyvuth
Judge YA Narin

Date: 23 July 2013
Language(s): English/Khmer
Classification: PUBLIC

**DECISION ON IMMEDIATE APPEALS AGAINST TRIAL CHAMBER’S SECOND DECISION
ON SEVERANCE OF CASE 002
SUMMARY OF REASONS**

Co-Prosecutors
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SON Arun
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Accused
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1. **THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Supreme Court Chamber” and “ECCC”, respectively) is seized of the “Co-Prosecutors’ Immediate Appeal of Second Severance Decision of Case 002” filed on 10 May 2013 (“Co-Prosecutors’ Appeal”),¹ and of the “Immediate Appeal against Trial Chamber’s Second Decision on Severance and Response to Co-Prosecutors’ Second Severance Appeal” filed by NUON Chea on 27 May 2013 (“NUON Chea’s Appeal” and “NUON Chea’s Response”, respectively).²

2. The Co-Prosecutors’ Appeal and NUON Chea’s Appeal (together, “Appeals”) concern a decision of the Trial Chamber to sever the proceedings in the present case (“Case 002”) into discrete trials (“Second Severance of Case 002”) and to confine the scope of the first trial (“Case 002/01”) to the charges relating to forced population movements 1 and 2, and the executions at Tuol Po Chrey.³ The Impugned Decision follows a decision of the Supreme Court Chamber declaring the invalidity of the Trial Chamber’s previous similar severance of Case 002 (“First Severance of Case 002” and “SCC Decision”, respectively).⁴

On Admissibility

3. The Supreme Court Chamber considers that the Appeals are timely under Rules 39(3) and 107(1) of the Internal Rules and admissible under Rule 104(4)(a) of the Internal Rules.

On the Merits

4. The Co-Prosecutors submit that the Trial Chamber erred in failing to apply the legal standards for severance mandated by the Supreme Court Chamber.⁵ They contend that the Trial Chamber erred in concluding that the existing scope of Case 002/01 was sufficiently representative of the Indictment without the addition of S-21,⁶ and in concluding that the addition of S-21 would unreasonably delay the trial.⁷ They further argue that the Trial Chamber erred in proposing a series of future trials, given the age and health of the Co-Accused.⁸ The Co-Prosecutors accordingly

¹ E284/2/1.

² E284/4/1.

³ T. (EN), 29 March 2013, E1/176.1, pp. 1-4; Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, E284, 26 April 2013 (“Impugned Decision”).

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

⁵ Co-Prosecutors’ Appeal, paras. 20-27.

⁶ Co-Prosecutors’ Appeal, paras. 28-50.

⁷ Co-Prosecutors’ Appeal, paras. 51-75.

⁸ Co-Prosecutors’ Appeal, paras. 76-79.

request the Supreme Court Chamber to amend the Impugned Decision so as to include S-21 within the scope of Case 002/01.⁹

5. NUON Chea submits that the Trial Chamber erred in deciding to sever Case 002 anew,¹⁰ and in failing to include charges relating to genocide and cooperatives and worksites in Case 002/01.¹¹ He accordingly requests the Supreme Court Chamber to annul the Impugned Decision with prejudice to future severance orders, or, in the alternative, to expand of the scope of Case 002/01 such that it includes charges of genocide and those concerning crimes allegedly committed at cooperatives and working sites.¹²

a. Alleged Impropriety of Ordering the Second Severance of Case 002

6. The Supreme Court Chamber recalls that the Trial Chamber's discretion pursuant to Rule 89*ter* of the Internal Rules to sever a case into discrete trials is broad. The burden on an appellant to demonstrate an abuse in the exercise of this discretion resulting in prejudice to him or her is accordingly high. For the reasons that will be expressed fully in writing as soon as possible, the Supreme Court Chamber finds that the Trial Chamber's determination that renewed severance of Case 002 is required in the interest of justice is not so unreasonable as to as to warrant appellate intervention.

7. NUON Chea's request that the Second Severance of Case 002 be annulled is accordingly denied.

b. Alleged Errors in the Mode of the Second Severance of Case 002

8. The Supreme Court Chamber recalls that, in declaring the invalidity of the First Severance of Case 002, it specified that the SCC Decision was without prejudice to the Trial Chamber's reassessment of severing Case 002, but that renewed severance must entail a tangible plan for the adjudication of the entirety of the charges in the Indictment and due consideration to reasonable representativeness of the Indictment within the smaller trials.¹³

9. The Trial Chamber dismissed "the notion of 'representativeness of the Indictment' [a]s meaningless",¹⁴ and proceeded to resume the proceedings in Case 002/01 from the point it had

⁹ Co-Prosecutors' Appeal, para. 84.

¹⁰ NUON Chea's Appeal, paras. 9-27.

¹¹ NUON Chea's Appeal, paras. 28-55.

¹² NUON Chea's Appeal, para. 84.

¹³ SCC Decision, para. 50.

¹⁴ Impugned Decision, para. 99 (emphasis added).

reached when the SCC Decision was rendered. The Trial Chamber also declared that it “doubts that projections for future trials can meaningfully constitute a plan”,¹⁵ and abstained from resolving the issue as to how any subsequent trials might be conducted, and particularly when a potential second trial in Case 002 (“Case 002/02”) could commence.¹⁶ Instead, the Trial Chamber proposed to “hold[] a Trial Management Meeting later in the year, when the issue can be revisited anew in the light of circumstances then prevailing.”¹⁷ The Supreme Court Chamber considers that the Trial Chamber’s failure to comply with its instructions constitute an error of law and an error in the exercise of its discretion.

10. For the reasons that will be expressed fully in writing as soon as possible, the Supreme Court Chamber holds that, considering the advanced age of the accused and their deteriorating health, the notion of representativeness of the Indictment is valid for the question of severance of Case 002 in so far as it determines priority in addressing the severed charges. Case 002/01 could be reasonably representative of the Indictment not just by expanding its scope to include S-21, as per the Co-Prosecutors’ request, but also by including the genocide charges, a cooperative, and a worksite, as per NUON Chea’s request. However, the fact that, despite having spent 14 months preparing for the trial in Case 002,¹⁸ and having kept the scope of Case 002/01 open to change for a year,¹⁹ the Trial Chamber still declines to adjust its original position on severance in order to accommodate the parties’ requests and address any of the parties concerns with the consequences of renewed severance for any future trials, suggests that the Trial Chamber may be unprepared to adjudicate the remaining charges in the Closing Order within Case 002/01.

11. As such, the Supreme Court Chamber considers that to order an expansion of Case 002/01 and to require the Trial Chamber to reconfigure its schedule would inevitably result in unnecessary delays. In the present circumstances, concerns of the effective management of the entirety of charges pending before the Trial Chamber prevail over the postulate that Case 002/01 be reasonably representative of the Indictment. The Supreme Court Chamber therefore considers that a more appropriate course of action at this stage is to instruct that charges that should have been included within the scope of Case 002/01 will instead form part of the scope of Case 002/02, so as to render the combination of Cases 002/01 and 002/02 reasonably representative of the Indictment. Case 002/02 must therefore commence as soon as possible. The Supreme Court Chamber considers that

¹⁵ Impugned Decision, para. 153.

¹⁶ Impugned Decision, paras. 154-155.

¹⁷ Impugned Decision, para. 155.

¹⁸ The Closing Order in Case 002 was filed on 16 September 2010, which is the date that the Trial Chamber has gained access to the file of Case 002 in accordance with Rule 69(3) of the Internal Rules. The trial in Case 002 began on 21 November 2011. *See* T. (EN), 21 November 2011, E1/13.1.

¹⁹ *See* SCC Decision, paras. 17, 37, 46.

the establishment of a second panel in order to achieve this has now become imperative. The Supreme Court Chamber accordingly instructs the Office of Administration of the ECCC to immediately explore the establishment of a second panel of national and international judges within the Trial Chamber to hear and adjudicate Case 002/02.

12. The Co-Prosecutors' request to add S-21, and NUON Chea's request to add the genocide charges as well as a cooperative and a worksite, to the scope of Case 002/01 are accordingly denied.

Disposition

13. For the foregoing reasons, the Supreme Court Chamber:

ADMITS the Appeals under Rule 104(4)(a) of the Internal Rules;

DENIES the Appeals on the merits; and,

ORDERS that the evidentiary hearings in Case 002/02 shall commence as soon as possible after closing submissions in Case 002/01, and that Case 002/02 shall comprise at minimum the charges related to S-21, a worksite, a cooperative, and genocide.

The present decision is issued within the period prescribed by Rule 108(4)(*bis*)(b) of the Internal Rules, and includes only a summary of the reasons. Full reasons shall be delivered as soon as possible.

Phnom Penh, 23 July 2013

President of the Supreme Court Chamber



KONG Srim