

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC **Party Filing:** Co-Prosecutors

Filed to: Trial Chamber **Original Language:** English

Date of document: 5 December 2013



CLASSIFICATION

Classification of the document suggested by the filing party: PUBLIC

Classification by Trial Chamber: សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

**CO-PROSECUTORS' SUBMISSION REGARDING THE SCOPE OF
CASE 002/02 AND TRIAL SCHEDULE with Annex A**

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SUBMISSION

1. In response to the Trial Chamber's memorandum of 8 November 2013¹ and the recent decision of the Supreme Court Chamber regarding the severance of Case 002,² the Co-Prosecutors submit the following proposal regarding the scope of Case 002/02 and the schedule for such trial.

Trial Schedule

2. The Supreme Court Chamber has ordered that evidentiary hearings in Case 002/02 commence "as soon as possible" and "promptly" following the Trial Management Meeting scheduled for 11-13 December 2013.³ The Co-Prosecutors accordingly propose that the trial of Case 002/02 begin by late February 2014. The Co-Prosecutors note that the opening statements made at the start of the Case 002/01 trial in November 2011 addressed all charges and crimes included in the Case 002 indictment.⁴ Accordingly, the Co-Prosecutors suggest that no further opening statements are required under Rule 89(2)*bis*, and propose that the Trial Chamber proceed immediately to the hearing of evidence.
3. The Supreme Court Chamber has further advised the President of the Trial Chamber to "avail himself of the existing possibilities" to convene a second panel for the hearing of the Case 002/02 trial.⁵ The Co-Prosecutors submit that the "existing possibilities" are that the President forms a trial panel from the seven judges who presently comprise the Trial Chamber, or requests the appointment of additional judges if there are not a sufficient number of available national and international judges to constitute a trial panel for Case 002/02.
4. A trial conducted by acting or reserve judges who are already familiar with the evidence and procedure from Case 002/01 would, by far, be the most efficient and expeditious manner in which to complete the Case 002 proceedings, and is the only available option by which this Chamber can comply with the Supreme Court directive to "promptly" begin evidentiary hearings in Case 002/02. The use of a second panel of entirely new judges is not an "existing

¹ **E301** Trial Chamber Memorandum titled "Scheduling of Trial Management Meeting in Case 002/02," 8 November 2013.

² **E284/4/8** Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013.

³ **E284/4/8** Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, para. 72, 76.

⁴ **E131** Scheduling Order for Opening Statements and Hearing on the Substance in Case 002, 18 October 2011 ["while the Chamber's Severance Order of 22 September 2011 (E124) separates proceedings into a series of smaller trials, it is envisaged that the first trial will provide a general foundation for all the charges, including those which will be examined in later trials. The Co-Prosecutors shall accordingly present opening statements in relation to all charges and factual allegations against the Accused in the Indictment"].

⁵ **E284/4/8** Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, para. 74.

possibility” available to the President of the Trial Chamber, given that any new judges need to be nominated by the United Nations and/or approved by the Supreme Council of Magistracy.

5. The November 2013 decision of the Supreme Court Chamber does not disqualify or otherwise preclude the same judges who tried Case 002/01 from also being part of the second panel that will hear Case 002/02. There is no legal basis on which to conclude that such judges would not fulfil their professional responsibilities and remain impartial in their hearing of the evidence and adjudication of the charges in the second trial, and any deviation from their duty of impartiality cannot be “lightly presumed.”⁶
6. While the Supreme Court Chamber decision included the directive that evidentiary hearings in Case 002/02 commence “as soon as possible,” the decision’s discussion of the formation of a second trial panel is not part of the dispositive order. Rather, the Supreme Court has made it clear that a second trial chamber is necessary only if the current panel is unable or otherwise unavailable to expeditiously begin the hearing of evidence in Case 002/02. Under the existing circumstances, the Co-Prosecutors do not believe that the formation of a second panel of new judges would expedite either the commencement or completion of Case 002/02.
7. To the contrary, it appears unlikely that a second panel of entirely new judges could be constituted either in the immediate future or before the existing panel is expected to complete its deliberations in Case 002/01.⁷ Once constituted, a second panel of new judges would also require considerable time to become familiar with the Indictment, over twenty-four thousand pages of trial transcripts and well over one hundred thousand pages of documentary evidence in order to be prepared to commence legal proceedings in Case 002/02.
8. The Co-Prosecutors recognize that the obligation to start the Case 002/02 trial prior to the completion or issuance of the judgement in Case 002/01 would put a significant strain on the resources of the Trial Chamber, and it is therefore important that the administration ensure the Chamber is fully resourced for its task. The Co-Prosecutors will face similarly competing resource demands in relation to the ongoing Case 003 and 004 investigations and any appeals

⁶ See, *inter alia*, **Special PTC 02(3)5** Decision on Ieng Sary’s Request for Appropriate Measures Concerning Certain Statements by Prime Minister Hun Sen Challenging the Independence of Pre-Trial Judges Katinka Lahuis and Rowan Downing, 30 November 2009, paras. 6-7; **E55/4** Decision on Ieng Thirith, Nuon Chea and Ieng Sary’s Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, 23 March 2011 at para. 12; **E137/5/1/3** Decision on Ieng Sary’s Appeal Against the Trial Chamber’s Decision on Motions for Disqualification of Judge Silvia Cartwright, 17 April 2012; **E137/5** Decision on Motions for Disqualification of Judge Silvia Cartwright, 2 December 2011.

⁷ The Agenda for the Trial Management Meeting that was circulated to the parties on 3 December 2013 states that “the President estimates that the judgement in Case 002/01 can be issued during the second quarter of 2014.” If a judgement is to be issued in the second quarter, it is likely that the deliberations of the Trial Chamber Judges and the submission of a draft judgement for translation would need to be completed by the end of the first quarter of 2014.

of the Case 002/01 judgement. The Co-Prosecutors observe that it is quite common in international tribunals for judges to be simultaneously drafting one judgment at the same time they are involved in hearing evidence on a second trial. Particularly in cases like this where drafts will need to be translated in order to be discussed, it is unlikely that the Trial Chamber judges will be involved in judgement drafting at all times. The Co-Prosecutors further suggest that the burden on this Chamber could be alleviated by limiting trial proceedings to three days per week during the period that the Case 002/01 judgement is being drafted.

Scope of Case 002/02 Trial

9. The Supreme Court Chamber has also ordered that “Case 002/02 shall comprise at minimum the charges related to S-21, a worksite, a cooperative, and genocide.”⁸ This is to ensure that “the combination of Cases 002/01 and 002/02 will be reasonably representative of the Indictment.”⁹ The Supreme Court Chamber decision sets out the applicable factors or criteria for determining representativeness, noting that the “overarching goal” of the process is to “select a minimum quantum of charges that would reasonably reflect the scale and nature of the totality of the alleged criminal acts and individual culpability.”¹⁰
10. Pursuant to the order of the Supreme Court Chamber, Case 002/02 must include the *S-21 Security Centre* (including Choeng Ek), *Genocide of the Vietnamese* and *Genocide of the Cham*. The directive that the case shall include “a cooperative” also mandates the inclusion of the *Tram Kok Cooperatives* crime site, the only cooperative in the Case 002 indictment. With respect to the requirement that Case 002/02 also include “a worksite,” the Co-Prosecutors submit that the *1st January Dam Worksite* should be selected by the Trial Chamber, as it is representative of the large-scale irrigation projects at which hundreds of thousands of Cambodians were forced to work during the DK period.
11. The Supreme Court decision confirms that this Chamber is not obligated to include all crime sites, events or allegations in relation to a particular charge, and can reduce the number of crime sites or incidents for which evidence is presented as a “trial management tool.”¹¹ In line with the rules and practice of the *ad hoc* Tribunals concerning reduction of crime sites or incidents, which may be properly applied in ECCC proceedings,¹² the Co-Prosecutors

⁸ E284/4/8 Decision on Immediate Appeals Against Trial Chamber’s Second Decision on Severance of Case 002, 25 November 2013, para. 76.

⁹ *Id.* at para. 70.

¹⁰ *Id.* at para. 64.

¹¹ E284/4/8 Decision on Immediate Appeals Against Trial Chamber’s Second Decision on Severance of Case 002, 25 November 2013, para. 63.

¹² E284/4/8 Decision on Immediate Appeals Against Trial Chamber’s Second Decision on Severance of Case 002, 25 November 2013, paras. 59, 63.

accordingly propose that the allegations in the Closing Order relating to “Crimes Committed by the Revolutionary Army of Kampuchea on Vietnamese territory” (paras. 832-840) be severed and excluded from Case 002/02, as such allegations concern separate or discrete events that are not intrinsically related to the Genocide of the Vietnamese who lived in Democratic Kampuchea. For similar reasons, the Co-Prosecutors propose that the allegations relating to the Kroch Chhmar Security Centre (paras. 771-775) be severed and excluded from the scope of Case 002/02.

12. The Co-Prosecutors request that the religious persecution charges and allegations in the Closing Order relating to the late 1975 dispersal or “break up” of the Cham population (paras. 266, 268, 281, 758-761) be included as part of Case 002/02. The Trial Chamber excluded from the scope of the first trial religious persecution and genocide charges relating to the movement of the Cham population.¹³ These charges and allegations should be included as part of Case 002/02, as they concern facts and evidence that are essential in order to prove the policy of the CPK leaders to persecute the Cham population, and thus are directly related to the charge of Genocide against the Cham.¹⁴
13. In relation to the *Tram Kok Cooperatives* crime site, the Co-Prosecutors request that the Tram Kok District security office (Kraing Ta Chan) be included as part of Case 002/02. The *Tram Kok Cooperatives* section of the Closing Order contains numerous allegations relating to the arrest, detention, interrogation and torture of enemies in Tram Kok District and the use of reeducation offices such as Kraing Ta Chan,¹⁵ including an entire sub-heading titled “Security.”¹⁶ These allegations support the Crimes Against Humanity charges of imprisonment, torture, political persecution and enforced disappearances that are made against the Accused in relation to the *Tram Kok Cooperatives* site.¹⁷ Accordingly, in order to fully and properly adjudicate the Crimes Against Humanity charges relating to this site, the Trial Chamber will need to admit and consider the evidence relating to the Tram Kok District security office, and thus should include the *Kraing Ta Chan Security Centre* crime site (paras. 489-515) within the scope of Case 002/02.

¹³ **E284** Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, para. 159, fn. 267; **E124/7.3** List of Paragraphs and Portions of the Closing Order Relevant to Case 002/01, para. 4, footnote 1.

¹⁴ See, e.g., **D427** Closing Order, 15 September 2010, para. 751, 758-761.

¹⁵ **D427** Closing Order, paragraphs 309 [meeting re purges of enemies], 311 [persons who failed or refused to meet work plans were subject to arrest and reeducation], 312 [“arrest of people who had complained about work and living conditions in the cooperatives”], 315 [persons to be reeducated were “arrested by the subdistrict militia and sent to Kraing Ta Chan Security Centre”], 317 [arrest, detention, interrogation and torture of prisoners], 318 [disappearance of residents of Tram Kok].

¹⁶ *Id.* at para. 315-318.

¹⁷ *Id.* at para. 1402, 1408, 1416, 1418, 1470.

14. The Co-Prosecutors note that crimes relating to the treatment of Buddhists and forced marriage would also be included and tried through the *Tram Kok Cooperatives* site, as the Crimes Against Humanity charges against the Accused in relation to that site include Religious Persecution of the Buddhists¹⁸ and Other Inhumane Acts through Forced Marriage.¹⁹ Forced Marriage would also be included as one of the crimes charged relating to the *1st January Dam Worksite*.²⁰ While the Co-Prosecutors do not propose that Buddhist pagodas from other regions of the country be included as crime sites,²¹ nor that forced marriage be prosecuted for all regions of the country, the Co-Prosecutors do request that the general allegations in the Closing Order relating to Treatment of Buddhists (para. 740-743) and Regulation of Marriage (para. 842-860) be included. This would ensure that general evidence can be introduced to prove the CPK policies on these issues, the existence of a Joint Criminal Enterprise and the widespread and systematic nature of the crimes, in support of the charges against the Accused relating to the *Tram Kok Cooperatives* and *1st January Dam Worksite*.
15. In addition to the crimes sites or events set forth above (S-21, Genocide of Vietnamese and Cham, Tram Kok Cooperatives/Kraing Ta Chan and 1st January Dam), which constitute the “minimum” crime base that must be included to satisfy the order of the Supreme Court Chamber, the Co-Prosecutors also propose including within the scope of Case 002/02 three additional crime sites that could be tried on an expeditious basis and would make the second trial more representative of the Case 002 indictment. The three proposed additional sites are the *Kampong Chhnang Airport Construction Site*, the *Au Kanseng Security Centre* and the *Phnom Kraol Security Centre*.
16. The inclusion of these three crime sites would make the Case 002/02 trial more geographically representative, by adding sites from the West, Northeast and Sector 105 (Mondulkiri) regions to a crime base that represents the Southwest (Tram Kok/Kraing Ta Chan), East (Treatment of Vietnamese and Cham), old North/Central (Treatment of Cham, 1st January Dam) and Northwest Zones (Tuol Po Chrey and Phase 2 Population Movement). It would ensure that the security centre crime base in Case 002/02 includes a district-level security office (Kraing Ta Chan), a RAK Division prison (Au Kanseng), a security office of an autonomous sector (Phnom Kraol) and the top-level security centre that reported directly to the Standing Committee (S-21). It would add what is believed to be the largest worksite in Democratic

¹⁸ D427 Closing Order, para. 321, 1421.

¹⁹ *Id.* at para. 314, 1442.

²⁰ *Id.* at para. 361, 1442.

²¹ See D427 Closing Order, para. 743 [listing eight individual pagodas from various zones or regions].

Kampuchea, the Kampong Chhnang Airport site, a project that was decided and initiated by the CPK Standing Committee.

17. The Co-Prosecutors note that the Trial Chamber has already heard linkage evidence in the Case 002/01 trial relating to the three proposed additional crime sites, including testimony from the former Sector 105 Secretary (Sao Sarun), a cadre who worked in that Sector office (Kham Phan), the chief of the Division 801 Au Kanseng security office (Chhaom Se) and the former Deputy Secretary of that Division (Ung Ren). As will be set forth in the detailed Trial Plan to be filed prior to the Trial Management Meeting, the Co-Prosecutors anticipate that the additional witnesses they will propose relating to these three crime sites would only require a total of 14 trial days. Moreover, the Trial Chamber would retain the authority to sever any or all of these additional crime sites during trial, should circumstances arise that made it necessary to expedite the completion of the Case 002/02 trial.²²
18. In summary, the crime sites or events that are proposed for inclusion in Case 002/02 by the Co-Prosecutors, along with their associated Closing Order paragraphs, are the following:
 - (a) *S-21 Security Centre (para. 415-475);*
 - (b) *Treatment of Vietnamese (para. 791-831);*
 - (c) *Treatment of Cham (para. 266, 268, 281, 745-770, 776-790);*
 - (d) *Trak Kok Cooperatives/Kraing Ta Chan Security Centre, including Treatment of Buddhists and Forced Marriage (para. 302-322, 489-515, 740-743, 842-860);*
 - (e) *1st January Dam Worksite (para. 351-368);*
 - (f) *Kampong Chhnang Airport Construction Site (para. 383-399);*
 - (g) *Au Kanseng Security Centre (para. 589-624); and*
 - (h) *Phnom Kraol Security Centre (para. 625-643).*

The Trial Chamber would also need to include within the scope of Case 002/02 the Closing Order paragraphs from the JCE and Role of Accused sections relating to Cooperatives and Worksites,²³ Security Centres and Execution Sites,²⁴ Treatment of the Cham, Vietnamese and

²² **E284/4/8** Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, para. 68 ["concerns of effective management so understood may prevail over the postulate that the scope of Case 002/01 be representative of the Indictment"].

²³ **D427** Closing Order, para. 168-177 [JCE], 903-915 [Nuon Chea], 1164-1171 [Khieu Samphan].

²⁴ *Id.* at para. 178-204 [JCE], 916-974 [Nuon Chea], 1172-1190 [Khieu Samphan].

Buddhists²⁵ and the Regulation of Marriage,²⁶ as well as the allegations relating to Armed Conflict.²⁷

19. Under the OCP proposal, the combination of the Case 002/01 and Case 002/02 trials would cover all of the legal characterization of charges within the Indictment in Case 002. These criminal charges would be covered by hearing evidence concerning two of the three forced movements contained in the Case 002 Indictment, three of the six worksites or cooperatives, five of the fourteen security centres and execution sites, all four targeted groups (former Khmer Republic officials, Buddhists, Cham and the Vietnamese) and forced marriage. **Annex A** hereto is a chart that lists the crimes charged in the Case 002 Indictment, along with the crime sites or events for which each such crime is charged, as specified in paragraphs 1335 to 1520 of the Closing Order.
20. As discussed further below, the Co-Prosecutors submit that the proposed Case 002/02 trial can be completed in a reasonably expeditious time period – as short as 12 months and no longer than 18 months of trial time.

OCP Trial Plan & Estimated Length of Trial

21. The Co-Prosecutors will file prior to the Trial Management Meeting a plan for the trial of the crime sites proposed for inclusion in Case 002/02, which includes a tentative or preliminary list of the witnesses, civil parties and experts that the Co-Prosecutors intend to request for each proposed crime site and the requested time allocation for each such person. The OCP Trial Plan will also identify proposed witnesses relating to the Role of the Accused and existence of the JCE, as well as experts relating to various subject matters that would be addressed in Case 002/02. The Co-Prosecutors note that their review and assessment of necessary witness testimony is ongoing, and that a definitive witness list will be filed after the scope of Case 002/02 is determined and dates established by the Chamber for the filing of the parties' witness and document lists.
22. As indicated in their 20 November 2013 filing,²⁸ the Co-Prosecutors submit that evidence admitted in the Case 002/01 trial, including the testimony of the witnesses, civil parties and experts who appeared in that trial, should be considered part of the Case 002/02 record without the need for any application from the parties. The Trial Chamber should afford the parties the right to propose the recall of Case 002/01 witnesses, subject to a showing that additional

²⁵ *Id.* at para. 205-215 [JCE], 975-976, 978-990 [Nuon Chea], 1191-1192, 1194-1198 [Khieu Samphan].

²⁶ *Id.* at para. 216-220 [JCE], 991-992 [Nuon Chea], 1199 [Khieu Samphan].

²⁷ *Id.* at para. 150-155, 993, 1200.

²⁸ **E301/1** Co-Prosecutors' Comments on Agenda of Trial Management Meeting for Case 002/02, 20 November 2013, para. 2.

testimony is necessary from such individuals and that they did not have the opportunity to ask relevant questions of the witness during the first trial.

23. The witnesses, civil parties and experts to be requested in the Co-Prosecutors' Trial Plan for Case 002/02 will require a total of less than 100 court days. Taking into consideration the additional witnesses, civil parties and experts that would be proposed by the Accused and Lead Co-Lawyers, a trial of the crime sites proposed by the Co-Prosecutors could thus be completed by mid-2015.
24. The documents that were admitted in Case 002/01 should be considered to be admitted evidence before the Trial Chamber for purposes of the Case 002/02 trial, subject to the right of all parties to make submissions on the probative value of the evidence with respect to the charges in the second trial. This approach is consistent with the Trial Chamber's decision to have Case 002/01 serve as a foundation for subsequent trials. It would also mean that minimal time would be required in the second trial for hearings on the admission of further documentary evidence. The majority of the contemporaneous documents from S-21 and Tram Kok District were already admitted by the Chamber in Case 002/01, and the remaining documents from those sites are the exact same types of documents as those already determined to be admissible. New documents relating to the other proposed Case 002/02 crime sites would largely be limited to witness statements relevant to those sites.

Disposition of Excluded Crime Sites or Events

25. The recent decision of the Supreme Court Chamber clarifies that the Trial Chamber is not obligated to try all crime sites, events or incidents included in the Case 002 Indictment, provided that the "combination of Cases 002/01 and 002/02" is "reasonably representative of the Indictment."²⁹ The Supreme Court Chamber has further determined that a rigid application of the principle of mandatory prosecution is unwarranted within the ECCC legal framework.³⁰
26. Thus, the Trial Chamber has the option, in accordance with international standards, to authorise the withdrawal of charges with the "agreement" of the Co-Prosecutors, when "so warranted by the interests of justice."³¹ The Supreme Court Chamber has also determined that the ICTY procedure for "reduction of charges" is available to this Court as a "trial management tool."³² The Co-Prosecutors do not propose to drop any "count" from the Indictment but rather,

²⁹ **E284/4/8** Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, para. 70.

³⁰ *Id.* at para. 61- 62.


³¹ *Id.* at para. 62.

³² *Id.* at para. 63.

in the interests of an expeditious and representative trial, to limit the evidence presented to prove each of the charges by excluding certain events and crime sites from the trial.

27. Under the OCP's Proposed Trial Plan, the crime sites or events that would be excluded from the Case 002/02 trial are: the Phase 3 Population Movement; the Trapeang Thma Dam, Srae Ambel and Prey Sar worksites; the Sang, Koh Kyang, Prey Damrei Srot, Wat Kirirum, North Zone, Wat Thlork, Kok Kduoch and Kroch Chhmar security centres; the District 12 and Steung Tauch execution sites; and RAK Incursions into Vietnam.
28. Regardless of the specific legal procedure ultimately adopted in relation to the excluded crime sites and events, the Co-Prosecutors do not anticipate a third trial of the Accused in relation to these matters. Case 002/02 will deal with all the remaining criminal charges in the Closing Order that were not covered in Case 002/01 by selecting representative crime sites for each charge. In order to provide clarity to the victims, Accused and donors, the Co-Prosecutors thus submit that Case 002/02 should conclude the trial of Nuon Chea and Khieu Samphan at the ECCC on the Case 002 Indictment.

Respectfully Submitted,

Date	Name	Place	Signature
5 December 2013	CHEA Leang Co-Prosecutor	Phnom Penh	
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