

**BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**CO-PROSECUTORS' RESPONSE TO CIVIL PARTY LEAD CO-LAWYERS'
REQUEST FOR CLARIFICATION RELATING TO REMAINING CHARGES IN CASE
002**

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Introduction

1. The Co-Prosecutors hereby respond to the “Civil Party Lead Co-Lawyers’ Request for Clarification relating to Remaining Charges in Case 002”, filed on 9 September 2016 (“Request”).¹
2. The Co-Prosecutors respect the right of all civil parties in Case 002 to timely and transparent information concerning the future progress of Case 002. Further, it is agreed that it would benefit all parties, and the ECCC as an institution, to have clarity on the issue of the remaining factual allegations not covered by Case 002/01 and 002/02.
3. No trial, of any duration, can fully reflect the true extent of the crimes committed against, and the suffering inflicted upon, millions of women, children and men by the leadership of the CPK between 17 April 1975 and 6 January 1979. All trials, however, must come to a conclusion. This is in the interest of all victims. As the Trial Chamber noted: “[T]rial proceedings which are lengthy but ultimately inconclusive are likely to result in profound disappointment for the countless victims of DK era crimes who have awaited justice for decades, the parties to the ECCC Agreement and donors who have invested significant resources in the ECCC over several years, and the public.”²
4. Decisions to exclude certain incidents or crime sites from the scope of the present trial will inevitably disappoint victims of some of those crimes. Determining which crime sites to include and which to exclude involves, as the Trial Chamber has said, a “delicate, albeit painful, balance of considerations”.³
5. Since trial hearings in Case 002/01 began nearly five years ago, the Co-Prosecutors have been consistently mindful of the need to ensure that the events examined in Case 002 are reasonably representative of the true extent of the criminal responsibility of the Accused. As set out in greater detail below, the Co-Prosecutors in December 2013 proposed certain facts for inclusion in, and exclusion from, the scope of Case 002/02. They publicly indicated at that time that they did not envisage a third trial in respect of the excluded facts.

¹ **E439** Civil Party Lead Co-Lawyers’ Request for Clarification relating to Remaining Charges in Case 002, 9 September 2016.

² **E284** Decision on Severance of Case 002/01 following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, para. 137.

³ **E284** Decision on Severance of Case 002/01 following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, para. 115.

By the time the present trial ends, the Trial Chamber will have received a great quantity of documentary and testimonial evidence concerning massive crimes committed against Khmer, Cham and Vietnamese in almost all parts of Cambodia. That evidence is reasonably representative of the totality of the criminal responsibility of the Accused.

6. In these circumstances, the Co-Prosecutors submit that it is in the interests of justice and efficiency for the Trial Chamber to order, in accordance with Rule 89 *quater*, termination of the proceedings in respect of the facts it excluded from the scope of Case 002/02. This will not affect the participation of any Civil Parties in Case 002, and will facilitate the orderly and dignified conclusion of the trial.

The Case 002/01 and 002/02 trials reasonably reflect the scale and nature of the totality of the alleged criminal acts and the individual culpability of the Accused

7. On 25 November 2013, the Supreme Court Chamber gave guidance to ensure that “the combination of Cases 002/01 and 002/02 will be reasonably representative of the Indictment”.⁴ They referred to provisions from the legal frameworks of the International Military Tribunal at Nuremberg, the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone (“SCSL”) and the International Criminal Court, and stated: “At the international and hybrid criminal tribunals, mandatory prosecution is limited in favour of selective prosecution of persons from among ‘those most responsible’, with a focus on policies that balance the goals of criminal justice against limited resources”.⁵
8. The Supreme Court Chamber also noted that the ICTY and SCSL had amended their rules to allow their respective Trial Chambers to invite the Prosecutor to reduce, or order *proprio motu* the reduction of, the number of counts charged in an indictment or to fix a number of crime sites or incidents in respect of which evidence may be presented.⁶ The Supreme Court Chamber said that principles governing the reduction of charges in such circumstances, such as the criterion of representativeness, become comparable and

⁴ E284/4/8 Decision on Immediate Appeals against Trial Chamber’s Second Decision on Severance of Case 002, 25 November 2013, para. 70.

⁵ E284/4/8 Decision on Immediate Appeals against Trial Chamber’s Second Decision on Severance of Case 002, 25 November 2013, para. 61.

⁶ E284/4/8 Decision on Immediate Appeals against Trial Chamber’s Second Decision on Severance of Case 002, 25 November 2013, para. 63.

relevant.⁷ They noted: “The overarching goal of the representativeness criterion is thus 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”.⁸

9. On 5 December 2013, in accordance with the Supreme Court Chamber’s guidance, the Co-Prosecutors made public submissions as to which crimes sites to include⁹ and which to exclude¹⁰ from the scope of Case 002/02 in order to ensure that the Case 002/02 trial – in combination with the Case 002/01 trial – was reasonably representative of the criminality set out in the Closing Order. The events proposed for exclusion were further corroborative examples of areas where crimes were committed in pursuance of national policies which lie at the heart of the alleged joint criminal enterprise. As discussed below, those national policies, and their implementation by criminal means, has been fully examined in the Case 002/01 and Case 002/02 trials.
10. In the interest of transparency, the Co-Prosecutors publicly clarified in December 2013 that they did not envisage a third trial in Case 002 in respect of matters which they proposed for exclusion:

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

⁷ **E284/4/8** Decision on Immediate Appeals against Trial Chamber’s Second Decision on Severance of Case 002, 25 November 2013, para. 63.

⁸ **E284/4/8** Decision on Immediate Appeals against Trial Chamber’s Second Decision on Severance of Case 002, 25 November 2013, para. 64.

⁹ The Co-Prosecutors recommended that the following crime sites and events be included in Case 002/02: (1) the S-21 Security Centre, including Choeung Ek; (2) Treatment of the Vietnamese (excluding Crimes Committed by the Revolutionary Army of Kampuchea on Vietnamese territory); (3) Treatment of the Cham (excluding the Kroch Chhmar Security Centre); (4) the Tram Kok Cooperatives and Kraing Ta Chan Security Centre, including Treatment of Buddhists and Forced Marriage; (5) the 1st January Dam Worksite; (6) the Kampong Chhnang Airport Construction Site; (7) Au Kanseng Security Centre; and (8) Phnom Kraol Security Centre. **E301/2** Co-Prosecutors’ Submission Regarding the Scope of Case 002/02 and Trial Schedule with Annex A, 5 December 2013, para. 18.

¹⁰ The Co-Prosecutors recommended the exclusion of the following from the scope of Case 002/02: (1) the Phase 3 Population Movement; (2) the Trapeang Thma Dam, Srae Ambel and Prey Sar worksites; (3) the Sang, Koh Kyang, Prey Damrei Srot, Wat Kirirum, North Zone, Wat Thlork, Kok Kduoch and Kroch Chhmar security centres; (4) the District 12 and Steung Tauch execution sites; and (5) RAK Incursions into Vietnam. **E301/2** Co-Prosecutors’ Submission Regarding the Scope of Case 002/02 and Trial Schedule with Annex A, 5 December 2013, para. 27.

Case 002/02 should conclude the trial of Nuon Chea and Khieu Samphan at the ECCC on the Case 002 Indictment.¹¹

11. On 4 April 2014, the Trial Chamber issued a decision¹² in which it set out the scope of Case 002/02 in order to ensure that its scope was representative of the remaining charges in the Indictment, in accordance with the Supreme Court Chamber's 25 November 2013 decision. The Trial Chamber did not expressly address the question of withdrawing charges, partly on the basis that it had not been seized of a request from the Co-Prosecutors to do so, and partly on the basis that there was at that time no express legal provision to permit withdrawal of charges.¹³ The Trial Chamber's decision was upheld on appeal by the Supreme Court Chamber on 29 July 2014.¹⁴
12. In January 2015, the Judges of the ECCC at the 11th ECCC Plenary adopted Rule 89 *quater*. This permits the Trial Chamber to reduce the scope of the trial by excluding facts set out in the indictment, provided that the remaining facts are "representative of the scope of the Indictment". The Trial Chamber is then required to terminate the proceedings in respect of the excluded facts.¹⁵
13. Together, the trials of Cases 002/01 and 002/02 have covered all of the crimes charged in the Case 002 Closing Order (albeit, not all sites where those crimes committed were examined), which include: the crimes against humanity of murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial, and religious grounds and other inhumane acts; genocide, by killing members of the groups of Vietnamese and Cham; grave breaches of the Geneva Conventions of 1949, specifically wilful killing, torture or inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian the rights of fair and regular trial, and unlawful deportation or unlawful confinement of a civilian; and

¹¹ **E301/2** Co-Prosecutors' Submission Regarding the Scope of Case 002/02 and Trial Schedule with Annex A, 5 December 2013, para. 28.

¹² **E301/9/1** Decision on Additional Severance of Case 002/02 and Scope of Case 002/02, 4 April 2014.

¹³ **E301/9/1** Decision on Additional Severance of Case 002/02 and Scope of Case 002/02, 4 April 2014, para. 45.

¹⁴ **E301/9/1/1/3** Decision on KHIEU Samphân's immediate appeal against the Trial Chamber's decision on additional severance of case 002 and scope of case 002/02, 29 July 2014.

¹⁵ Internal Rule 89 *quater* (3).

violations of the 1956 penal code of Cambodia, specifically homicide, torture and religious persecution.¹⁶

14. As the Co-Prosecutors have and will further argue in greater detail in due course, the trials of Case 002/01 and 002/02 have demonstrated that CPK leaders, including the Accused, participated in a joint criminal enterprise that involved the pursuit of policies, that resulted in these crimes, in five general areas:
- a) The repeated movement of the population from towns and cities to rural areas, as well as from one rural area to another;
 - b) The establishment and operation of cooperatives and worksites;
 - c) The reeducation of “bad-elements” and killing of “enemies”, both inside and outside the Party ranks;
 - d) The targeting of specific groups, in particular the Cham, Vietnamese, Buddhists and former officials of the Khmer Republic, including both civil servants and former military personnel and their families; and
 - e) The regulation of marriage.¹⁷
15. The Co-Prosecutors submit that all of the legal charges in the Closing Order and all of the policies behind the alleged joint criminal enterprise, which led to the suffering of millions of people in Cambodia, have been fully examined in the trials of Case 002/01 and 002/02. These trials together are fully representative of the charges in the Closing Order.

Operation of Rule 89 quater does not affect the participation rights of Civil Parties

16. An order under Rule 89 *quater* does not affect the participation of any civil party or the composition of the consolidated group of civil parties.¹⁸ Therefore, all civil parties who are permitted to participate at trial in Case 002 – including those who were victims of events which have been excluded from the scope of Case 002¹⁹ – will continue to enjoy participation rights after termination of the proceedings in respect of the excluded facts.

¹⁶ D427 Closing Order, 15 September 2010, para. 1613.

¹⁷ D427, Closing Order, 15 September 2010, para. 157.

¹⁸ Internal Rule 89 *quater* (4).

¹⁹ D404/2/4 Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, Pre-Trial Chamber, 24 June 2011, pages 51-55. *See also* E284 Decision on Severance of Case 002/01 following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, para. 114.

Conclusion

17. For the foregoing reasons, the Co-Prosecutors submit that it is in the interest of justice for the Trial Chamber to terminate, pursuant to Rule 89 *quater*, the proceedings in respect of those facts which it has excluded from the scope of Case 002/02.

Respectfully submitted,

Date	Name	Place	Signature
19 September 2016	SENG Bunkheang Deputy Co-Prosecutor	Phnom Penh	
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