BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' REQUEST FOR RECONSIDERATION OF "SEVERANCE ORDER PURSUANT TO INTERNAL RULE 89*TER*"

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I. INTRODUCTION

1. In response to the Trial Chamber's "Severance Order Pursuant to Rule 89*ter*" issued on 22 September 2011 ("Order" or "Severance Order")[1] which severs in full the charges of Genocide and Grave Breaches of the Geneva Conventions and in part the charges of Crimes Against Humanity from the Indictment for the purposes of the first trial, the Co-Prosecutors respectfully request that the Trial Chamber reconsider and revise its Order as proposed in section IV, below. In the alternative, it is requested that all parties be given the opportunity to be heard on the substance of this Order in writing or at an oral hearing.

2. The Co-Prosecutors support the purpose of the Order, acknowledging the need to reduce the size of the case in the interests of an expeditious trial for the Accused and timely justice for victims and civil parties. The Chamber has the inherent power to reconsider any of its orders, and the Co-Prosecutors submit that reconsideration is necessary in the circumstances. The Chamber has not yet heard from the parties on the substance of the Order – particularly from the Co-Prosecutors, whose legal duty to prove the case is materially affected by the Order.

3. While motivated by legitimate considerations, in its current form, the Order is not in the interests of justice: the charges selected for the first and likely only trial of the Accused would not be representative of their alleged criminal conduct, in contrast to international practice; it would not promote an accurate historical record; and it would diminish the legacy of ECCC proceedings in advancing national reconciliation. Furthermore, the Order is unlikely to achieve its stated purpose: for legal and practical reasons set out in this request, the first trial would not safeguard the fundamental interest of victims to achieve meaningful and timely justice nor would the Severance Order, as proposed, safeguard the right of all Accused in Case 002 to an expeditious trial. The first trial can be shortened more effectively, while ensuring that it is both fair and expeditious and more representative of the Indictment, by revising the nature of the criminal acts that would be severed. By doing so in the manner submitted by the Co-Prosecutors the Severance Order will enable any subsequent trials to be more efficient.

II. BACKGROUND

4. The Order separates the proceedings into several distinct trials, each of which would, in turn, return a verdict and sentence. The first trial would be limited to the following issues:

   (1) the issues already specified by the Chamber for the first phase of the trial, namely the structure of Democratic Kampuchea ("DK"), the roles of the Accused prior to and during the DK government and DK policies on the "issues raised in the Indictment" ("First Phase Issues");[2]

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1 **E124** Severance order pursuant to Rule 89*ter*, 22 September 2011.
2 Transcript, Trial management meeting of 5 April 2011 at p. 52; Transcript, Initial hearing, 27 June 2011 at p. 8.

(2) the factual allegations concerning the movement of the population from Phnom Penh (phase 1) and from the Central (old North), Southwest, West and East Zones (phase 2); and

(3) crimes against humanity of murder, extermination, persecution (except on religious grounds), forced transfer and enforced disappearance, insofar as these crimes pertain to phases 1 and 2 of the population movement.[3]

5. The Order excludes from the first trial:

(1) all co-operatives, worksites, security centres and execution sites;

(2) all facts relevant to population movement from the East Zone (phase 3); and

(3) the crimes of genocide, the crime against humanity of persecution on religious grounds and grave breaches of the Geneva Conventions of 1949.[4]

6. On 23 September 2011, the Co-Prosecutors notified the Chamber of their intention to request reconsideration of the terms of the Order, undertaking to file this request by 3 October 2011, being the first opportunity to make submissions to the Chamber following the judicial recess for the Pchum Ben period.[5]

III. AUTHORITY TO RECONSIDER

1. LAW

7. The Chamber recognises its discretion to reconsider or modify the Order in the text itself:

> *the Trial Chamber may at any time decide to include in the first trial additional portions of the Closing Order in Case 002, subject to the right of the Defence to be provided with opportunity to prepare an effective defence and all parties to be provided with timely notice.*[6]

While the Chamber recently held that requests for reconsideration of issues that have become moot are not expressly considered within the ECCC framework,[7] this ruling is not applicable to the present situation as the parties have not yet made submissions on the issue of severance. The Chamber's notice to the parties of its ability to adjust the terms of the Order is

3 **E124**, *supra* note 1 at paras. 1, 5.
4 *Ibid.* at para. 7.
5 **E120** Memorandum from Trial Chamber entitled 'Judicial recess during Pchum Ben period', 20 September 2011.
6 **E124**, *supra* note 1 at para. 6.
7 **E117/2** Trial Chamber's disposition of Lead Co-Lawyers' "Submission purpose for reconsideration and Correction of Memorandum E62/3/10/4" (E62/3/10/4/1) and Motion E117, 23 September 2011; **E62/3/10/4/1** Submission for purpose of reconsideration and Correction of Memorandum E62/3/10/4, 18 August 2011.

supported by the jurisprudence of the Pre Trial Chamber[8] and international criminal tribunals as discussed below.[9]

8. The Pre-Trial Chamber has acknowledged the power to reconsider when a "legitimate basis" exists,[10] or when circumstances change, "which may include new facts or arguments…presented or if an unexpected result leading to an injustice has been caused."[11] As the Internal Rules and Cambodian Law are properly silent on reconsideration – being an inherent power of a judicial body – the Chamber may seek guidance from applicable international procedure, in line with Article 33 new of the ECCC Law. The practice of other international criminal tribunals clearly supports the inherent power of reconsideration and provides guidance on the applicable legal standards. These standards draw a clear distinction between reconsideration of substantive legal and factual findings and reconsideration of purely administrative decisions concerning effective trial management.

9. Reconsideration of decisions on the substance of the facts or law is usually considered an exceptional measure[12] justified by special circumstances.[13] At the *ad hoc* Tribunals, where – like the ECCC – internal procedural rules are silent on reconsideration, Trial Chambers have consistently ruled that silence "is not, in itself, determinative of the issue whether or not reconsideration is available"[14] and have developed and applied similar international standards for reconsideration.[15] It has been held that "a Trial Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice.'"[16]

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8 **C22/I/41** Decision on Admissibility of Civil Party General Observations, 24 June 2008 (Pre Trial Chamber) at paras. 3, 25; **C22/I/68** Decision on Application for Reconsideration of Civil Party's Application to Address the Pre-Trial Chamber in Person, 28 August 2008 at para. 25; **D99/3/41** Decision on Ieng Sary's Motion for Reconsideration of Ruling on the Filing of a Motion in the Duch Case File, 3 December 2008 at para 6.

9 *Prosecutor v Stanislav Galić*, IT-98-29-A, Decision on Application by Prosecution for Leave to Appeal (ICTY Appeals Chamber), 14 December 2001 at para. 13; *Prosecutor v Fulgence Kayishema*, ICTR-01-67-R11*bis*, Decision on prosecutor's request for reconsideration and, in the alternative, for certification of interlocutory appeal (ICTR Trial Chamber), 3 February 2011 at para. 3. *Prosecutor v Stanislav Galić*, IT-98-29-A, Decision on Defence Request for Reconsideration (ICTY Appeals Chamber), 16 July 2004 at p. 2.

10 **C22/I/68**, *supra* note 8 at para 25.

11 **D99/3/41**, *supra* note 8 at para 6.

12 *Prosecutor v Ephrem Setako*, ICTR-04-81-I, Decision on Defence motion for reconsideration or certification to appeal the Chamber's decision on Defence requests to lift confidentiality of filings (ICTR Trial Chamber), 17 June 2008 at para. 5.

13 *Prosecutor v Augustin Bizimungu* et al., ICTR-00-56-T, Decision on the Prosecution's Motion for Reconsideration of the Chamber's (ICTR Trial Chamber), 19 March 2009 at para. 2.

14 *Prosecutor v Augustin Ngirabatware*, ICTR-99-54-T, Decision on the defence motion for reconsideration and or certification to appeal the decision of 26 August 2011 (ICTR Trial Chamber) 15 September 2011 at para. 36.

15 *Prosecutor v Edouard Karemera* et al., ICTR-98-44, *Decision on the Defence Motions for Reconsideration of Pr*otective Measures for Prosecution Witnesses (ICTR Trial Chamber), 29 August 2005, para. 8; *Prosecutor v Callixte Nzabonimana*, ICTR-98-44D-T, Decision on defence motion for reconsideration on prosecution motion to call rebuttal evidence (ICTR Trial Chamber), 31 March 2011 at para. 15; *Prosecutor v Augustin Bizimungu* et al., ICTR-99-50-T, Decisions on Four Prosper Mugiraneza Motions Concerning Witness List (ICTR Trial Chamber), 4 November 2008 at para. 9.

16 *Prosecutor v Radovan Karadžić*, IT-95-511 8-T, Decision on Prosecution motion For reconsideration, alternatively for certification, of the Decision concerning the evidence Of Miroslav Deronjić (ICTY Trial Chamber), 20 April 2010 at para. 7; *Prosecutor v. Milan Milutinović* et al., IT-05-87, Decision on Šainovic motions re exhibit P1468 (ICTY Trial Chamber), 21 November 2007.

10. At the ICTR, reconsideration is justified when the requesting party can establish: (1) that the impugned decision contains a clear error of reasoning;[17] (2) particular circumstances, whether new facts or arguments;[18] or (3) a demonstrated injustice as a result of the previous decision.[19] The party seeking reconsideration bears the burden of proof and must sufficiently demonstrate one of the applicable justifications for reconsideration.[20]

11. The power of reconsideration of decisions on substantive issues is anchored in sound legal policy. Ruling on a request to reconsider evidentiary material during one of the first cases before the ICTY, the Trial Chamber did not question its inherent power to reconsider, but reiterated: "the mission of the Tribunal is to ascertain the truth…in accordance with rules that are fair to the Defence without being oppressive to the Prosecution."[21] In a recent assessment of international standards on reconsideration, the ICC Trial Chamber considered that the need for achieving certainty in legal proceedings and the presumption that a Chamber is bound by its own decisions are strong reasons limiting recourse to reconsideration.[22] Nonetheless, the Chamber found that the discretion to vary "irregular decisions" on substantive law or facts if these are "manifestly unsound" and their "consequences manifestly unsatisfactory" is absolutely necessary to "maintain public confidence in the criminal justice system."[23]

12. Administrative and case management decisions require flexibility and may be reconsidered and varied whenever necessary. In the decision referred to above, the ICC Trial Chamber clearly distinguishes purely administrative decisions such as "case management decisions and orders" and finds that:

> *it would cause injustice - indeed it may well lead to absurdity - if the Chamber was unable to alter the procedural orders that, in reality, need constant review as the issues, the evidence and the circumstances of the case evolve. Accordingly, decisions or orders of this kind will, of necessity, need to be varied, sometimes repeatedly.*[24]

13. The flexibility of this less stringent legal standard for reconsideration of case management decisions is equally justified by legal policy. As the ICC Trial Chamber observes, the basis

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17 *Prosecutor v Jadranko Prlić* et al., IT-04-74-T, Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence (ICTY Trial Chamber), 29 June 2009 at para. 25; *Prosecutor v Milan Milutinović* et al., IT-05-87-T, Decision on Prosecution Motion for Reconsideration of Decision on Prosecution Motion for Additional Trial-Related Protection Measure for Witness K56 (ICTY Trial Chamber), 9 November 2006 at para. 2.

18 *Ibid.*

19 *Prosecutor v Stanislav Galić*, IT-98-29-A, Decision on Application by Prosecution for Leave to Appeal (ICTY Appeals Chamber), 14 December 2001 at para. 13

20 *Prosecutor v Augustin Bizimungu* et al., ICTR-00-56, Decision on the Prosecution's Motion for Reconsideration of the Chamber's (ICTR Trial Chamber), 19 March 2009; *Prosecutor v. Léonidas Nshogoza*, ICTR-07-91-T, Decision on Motion for Reconsideration of the Chamber's Decision on Motion for Postponement of Defence Case (ICTR Trial Chamber), 4 March 2009.

21 *Prosecutor v Tihomir Blaškic*, IT-95-14, Decision on the defense motion for reconsideration of the ruling to exclude from evidence authentic and exculpatory documentary evidence (ICTY Trial Chamber), 30 January 1998.

22 *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Defence request to reconsider the "Order on numbering of evidence" of 12 May 2010 (ICC Trial Chamber), 30 March 2011 at para. 18.

23 *Ibid.*

24 *Ibid.* at para. 13.

for this power of reconsideration is the duty of a Trial Chamber to ensure that "the trial is fair and expeditious".[25] The Chamber in the present case bears the same duty under the Internal Rules,[26] and the Co-Prosecutors have no doubt that these considerations lie at the core of the rationale for the Order itself.

14. Where the opportunity to be heard on a significant decision has not been provided to the affected parties a request for reconsideration attains greater merit. The right to be heard on matters affecting the interests of a party is a fundamental principle of fairness in legal proceedings.[27] A Trial Chamber has the discretion to make decisions *proprio motu*, but "the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made."[28] In such circumstances it is crucial to allow parties to comprehensively address the legal and factual issues being determined by the Chamber. A Trial Chamber's failure to hear a party is inconsistent with the requirements of a fair trial.[29] ICTR jurisprudence affirms that international tribunals' internal rules "include a right of the parties to be heard in accordance with the judicial character of the Trial Chamber."[30] Furthermore, the "availability of this right to the prosecution and its exercise of the right can be of importance to the making of a correct decision by the Trial Chamber."[31] A Chambers' consideration of severance would substantially benefit "from the analysis of the evidence made by the prosecution and from its argument on the applicable law."[32]

15. Most significantly, as described in section III(1) below, giving the prosecution an opportunity to be heard is crucial in decisions relating to the severing of indictments. The structure and content of the Indictment are central to the effective exercise of the Prosecution's duty to prove the case. It is therefore necessary to hear the Prosecution and give it an opportunity to make any submissions with respect to the impact of severance on its ability to meet its evidential burden in a single trial or a series of trials. Although the procedural rules and cases described below are not entirely analogous to the present case, the core concepts of consultation with the parties and ensuring a representative sample of crimes is dealt with at

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25 *Ibid.*

26 Internal Rule 21(1)(a) and 21(4).

27 Internal Rule 21; *Prosecutor v Goran Jelisić*, IT-95-10-A, Judgement (ICTY Appeals Chamber), 5 July 2001 at paras. 25, 27-28, referring to *R v Barking and Dagenham Justices,* ex parte *Director of Public Prosecutions* [1995] Crim LR 953 at p. 381 and *Director of Public Prosecution v Cosier*, High Court of Justice Queen's Bench Division (England and Wales), CO/4180/9, 5 April 2000; *Pérez v France*, No. 47287/99, Judgment (European Court of Human Rights Grand Chamber), 12 February 2004 at para. 80; *Andrejeva v Latvia*, No. 55707/00, Judgment (European Court of Human Rights Grand Chamber), 18 February 2009 at para. 96; **D274/4/5** Decision on Appeals against Co-Investigating Judges' Combined Order 250/3/3 Dated 13 January 2010 and Order D250/3/2 dated 13 January 2010 on Admissibility of Civil Party Applications, 27 April 2010, Opinion of Judges Prak Kimsan and Rowan Downing in Respect of the Declared Inadmissibility of Admitted Civil Parties at paras. 10, 13.

28 *Prosecutor v Goran Jelisić*, IT-95-10-A, Judgement (ICTY Appeals Chamber), 5 July 2001 at para. 27.

29 *Ibid.*

30 *Ibid.* See also *Prosecutor v Edouard Karemera*, ICTR-98-44-A15bis, Decision in the matter of proceedings under Rule 15bis (D) (ICTR Appeals Chamber), 21 June 2004 at para. 9.

31 *Ibid.*

32 *Ibid.*

trial are directly relevant to the Trial Chamber's consideration of this issue. This is particularly so given the real possibility that further trials against the Accused may not take place.

2. ARGUMENT

16. The Order is a case management decision with wide-ranging impact on the parties in a complex trial. It does not purport to make substantive findings of fact or law. In conformity with the international procedure set out above, the Order should be open to review and reconsideration as necessary, without the need for a party to demonstrate error, new circumstances or injustice. Reconsideration is essential to safeguard the fairness of the proceedings, particularly as (i) the parties have not been heard on the substance of the Order; (ii) an immediate appeal is unavailable and the effect of the Order could not be remedied on final appeal; and (iii) the arguments raised by the Co-Prosecutors are new, not repetitive, and have not yet been considered by the Chamber.

IV. SEVERANCE OF INDICTMENTS

1. LAW

17. Rule 89*ter* allows the Trial Chamber to order the separation of the proceedings in relation to the accused or the charges contained in the indictment. The Trial Chamber's discretion to make such an order is limited only by the requirement that separation be in the "interests of justice". There is no guidance provided in the Rules, in the ECCC Law or in Cambodian criminal procedure as to the elements to be considered when determining if a severance order should be issued or structured or is in the interests of justice. It is therefore appropriate to look to international practice, in accordance with Article 33 new of the ECCC Law, for guidance on these issues.

18. The ICTY Rules of Procedure and Evidence provide a mechanism for the Trial Chamber to, directly or indirectly, order a reduction of the number of counts charged in the indictment and fix the number of factual allegations (crime sites and/or incidents) associated with the charges.[33] Rule 73*bis* states, at paragraphs (D), (E) and (F) respectively:

> *After having heard the Prosecutor, the Trial Chamber, in the* ***interest of a fair and expeditious trial****, may* ***invite the Prosecutor*** *to reduce the number of counts charged in the indictment and* ***may fix a number of crime sites or incidents comprised in one or more of the charges*** *in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes,* ***are reasonably***

[33] See also ICTY/R Rule 49 (severance of counts) and Rule 48 (separation of trials of co-accused). In practice, motions for severance of counts has rarely been requested. At the ICC, the Prosecutor may amend the charges with the permission of the Trial Chamber. In one case, the Prosecutor was effectively 'invited' during a status conference to invoke its power to amend the charges; see *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Transcript of Status Conference, 20 November 2007 at p. 36.

> ***representative of the crimes charged.*** *(Rule (Amended 17 July 2003, amended 30 May 2006)*
>
> [...] *the Trial Chamber, having heard the parties and in the interest of a fair and expeditious trial, may direct the Prosecutor to select the counts in the indictment on which to proceed.* [...] *(Amended 30 May 2006)*
>
> *After commencement of the trial, the Prosecutor may file a motion to vary the decision as to the number of crime sites or incidents in respect of which evidence may be presented or the number of witnesses that are to be called or for additional time to present evidence and the Trial Chamber may grant the Prosecutor's request if satisfied that this is in the interests of justice.*

19. Severance must be in the interests of a "fair and expeditious" trial and be "*reasonably representative" of the crimes charged* (emphasis added). The overriding consideration for the Trial Chamber in taking any action to reduce the scope of the trial pursuant to 73*bis* is that the reduction be in the interests of a "fair and expeditious trial". Most significantly, however, with respect to fixing the number of crime sites and/or incidents, the Trial Chamber must also ensure that the final selection is "reasonably representative of the crimes charged" taking into account certain factors including their "classification and nature," the "places where they are alleged to have been committed", their "scale" and "the victims of the crimes."

20. According to ICTY procedure, when severance is being considered, the Prosecution must be provided with an opportunity to be heard. Although the Trial Chamber has the power to compel a reduction of the counts in the indictment, the Prosecution, and indeed all the parties, must be provided with the opportunity to comment on any proposed reduction. Further it is ultimately the Prosecution that selects *which* counts are to be reduced. The Trial Chamber may, after hearing the Prosecutor, "invite" the Prosecutor to reduce the counts. The Trial Chamber may, having heard the parties, further "direct the Prosecutor to select the counts ... on which to proceed". In both scenarios the Trial Chamber must consult the Prosecution (in addition to other parties) prior to exercising powers to reduce the scope of the trial. The Prosecution has an automatic right of appeal against any severance order and may seek to vary the number of crime sites or incidents to be included in its presentation of evidence at trial.

21. In practice, the ICTY Trial Chamber have ordered a reduction in counts or in crime sites and incidents in a small number of cases[34] and, in doing so, they have closely adhered to the requirements in Rule 73*bis* to seek the views of the Prosecutor (and other parties as

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[34] In addition to the cases specifically addressed below, the Co-Prosecutors have identified four further cases in which the number of counts and/or factual allegations were reduced on the initiative of the Trial Chamber. See *Prosecutor v Ante Gotovina* et al., IT-06-90, Order pursuant to Rule 73*bis* (D) to reduce the Indictment (ICTY Trial Chamber), 21 February 2007; *Prosecutor v Ramush Haradinaj* et al., IT -04-84, Decision pursuant to Rule 73 *bis* (D) (ICTY Trial Chamber), 22 February 2007; *Prosecutor v Dragomir Milošević*, IT-98-2911, Decision on amendment of the Indictment and Application of Rule 73*bis* (D) (ICTY Trial Chamber) 12 December 2006; *Prosecutor v Vojislav Šešelj,* IT-03-67, Decision On The Application Of Rule 73*bis* (ICTY Trial Chamber), 8 November 2006.

appropriate) and to ensure that the resulting indictment is "reasonably representative" of the crimes charged.

22. In *Karadžić*, the Trial Chamber directed the Prosecution to propose ways to reduce the scope of trial, including particular counts which could be removed and crime sites or incidents which could be excluded.[35] In response, the Prosecution proposed (in addition to other measures relating to witness testimony) to remove eight municipalities and a limited number of individual incidents and crimes sites.[36] The Prosecution argued that any further reductions would "have an adverse impact on its ability to fairly present its case."[37] Ultimately, despite its ongoing concerns as to scope of the trial, the Trial Chamber did not order a further reduction of crime sites or incidents beyond what was proposed by the Prosecution.[38]

23. In *Milutovinić*, the Trial Chamber invited submissions from the parties as to the potential exercise of its powers to reduce the scope of the trial under Rule 73*bis*. In determining which crime sites or incidents to exclude from the trial, the Trial Chamber sought to identify "those crime sites or incidents that are *clearly different from the fundamental nature or theme of the case*"(emphasis added) and for which there was "no problem of disentangling … from the other alleged incidents and crime sites."[39] The Trial Chamber ordered that the Prosecution not present evidence in relation to three crime sites nominated by the Prosecution. It observed that the remaining crime sites and incidents "more than adequately reflect the scale of the alleged criminal activity, as well as the extremely large number of alleged victims, and are reasonably representative of the crimes charged in the Indictment."[40] It is also noteworthy that the Trial Chamber in this case interpreted the requirement under Rule 73*bis* is to act in the interests of a "fair and expeditious trial" and to include a "*fair opportunity [for the Prosecution] to present its case*" (emphasis added).[41]

2. ARGUMENT

24. The Severance Order foresees the Accused facing more than one trial. This is unlikely. In the present case, the interests of justice could largely be served if, as the Severance Order assumes, subsequent trials could be held in quick succession, allowing the prosecution of

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35 *Prosecutor v Radovan Karadžić*, IT-95-5, Order to the Prosecution under Rule 73 *bis* (D) (ICTY Trial Chamber), 22 July 2009. Following the Prosecutor's initial response to the order, a second direction was issued, orally, to the Prosecution during a status conference on 8 September 2009 to propose further reductions. *See* transcript of Status Conference, 8 September 2009, p. 451.

36 *Prosecutor v Radovan Karadžić*, IT-95-5, Prosecution Submission Pursuant to Rule 73 *bis* (D), 31 August 2009; *Prosecutor v. Radovan Karadžić*, IT-95-5, Prosecution Second Submission Pursuant to Rule 73*bis*(D) (ICTY Trial Chamber), 18 September 2009.

37 *Ibid. at* para. 1.

38 *Prosecutor v Radovan Karadžić*, IT-95-5, Decision on the application of Rule 73 *bis* (ICTY Trial Chamber), 8 October 2009.

39 *Prosecutor v Milan Milutinović* et al., IT-05-87, Decision on application of Rule 73 *bis* (ICTY Trial Chamber), 11 July 2006 at paras. 10-11.

40 *Ibid.* at para 11.

41 *Prosecutor v Milan Milutinović* et al., IT-05-87, Decision Denying Prosecution's Request For Certification Of Rule 73 *Bis* Issue For Appeal (ICTY Trial Chamber), 30 August 2006 at para. 10.

alleged criminal conduct in the Indictment which is more serious and more representative than those acts which would be the subject of the first trial. However, future trials for these Accused although legally possible are highly unlikely having regard to the (i) advanced age of the accused and (ii) the likely significant delays between the end of the first trial and start of the second trial, if the trial judgment is appealed by the parties. Thus, at this time it is almost certainly flawed to justify the severance as currently ordered in the first trial on the basis that any injustice that may arise from this Order would be cured in subsequent trials.

25. The advanced age of the Accused: Given that the average life expectancy in Cambodia is 61 years,[42] the advanced age of the Accused is a critical factor in predicting whether a second trial will be possible. As of now, Nuon Chea is 85 years, Ieng Sary is 86 years, Khieu Samphan is 80 years and Ieng Thirith is 79 years of age. Real concerns exist as to whether or not they will be physically and mentally able to participate in a second trial as contemplated by the Chamber. The ability of all Accused to participate in a second trial will certainly be significantly less predictable in a few years time, the earliest point at which the Co-Prosecutors believe a second trial could commence.

26. The likely delay between the commencement of the first and second trial due to issues relating to adjudicated facts and *res judicata*: It may be legally impossible to expedite subsequent trials by relying on the foundation established in the first trial concerning the roles of the Accused. The press release notifying the public of the Order states that the Trial Chamber seeks "*to ensure that the issues examined in the first trial provide a basis to consider the role and responsibility of all Accused, and to provide a foundation for the remaining charges in later trials.*"[43] The Order itself is silent on this point. The two legal mechanisms by which the Trial Chamber might take expeditious account of issues examined in the first trial as a basis for subsequent trials are the principles of *judicial notice of adjudicated facts* and *res judicata*. Neither mechanism may be available to the Trial Chamber in a second trial before any possible appeals are resolved from the first trial. This significant delay, in light of the advanced age of the Accused, will consequently make a second trial unlikely.

27. In the practice of most international courts and tribunals, a Trial Chamber may exercise discretion to admit a factual finding that has been "truly adjudicated" in prior proceedings before the same court or tribunal as either presumptively or conclusively accurate.[44] The fact does not need to be proven in the subsequent trial. Before the ICTY, the fact can be contested

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42 "Cambodia: health profile", 4 April 2011, Word Health Organisation (www.who.int/countries/khm/en).

43 "Severance of proceedings ordered in Case 002", Press Release, 22 September 2011 (www.eccc.gov.kh).

44 See e.g. ICTY & ICTR Rules of Procedure and Evidence, Rule 94(B); Special Court for Sierra Leone Rules of Procedure and Evidence, Rule 94(B); Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by the ICTY in Proceedings before the Court of BiH, article 4 (concerning the War Crimes Chamber of the Court of Bosnia and Herzegovina). The International Criminal Court does not take judicial notice of adjudicated facts; see Rome Statute, article 69(6) and ICC Rules of Procedure and Evidence, Rule 69. The very limited set of cases from a given situation before the ICC diminishes the utility of adjudicated facts as a means of expediting subsequent trials.

in the subsequent trial – the burden of proof to disqualify the fact shifts to the disputing party, which must adduce new evidence to disprove the fact.[45] Before the ICTR and the SCSL, the adjudicated fact – being beyond reasonable dispute – is deemed conclusively proven in the subsequent trial.[46] In order to be "truly adjudicated", the particular factual finding must (i) be distinct, concrete and identifiable; (ii) be restricted to factual findings and not include legal characterisations; (iii) have been contested at trial and form part of a judgment which has either not been appealed or has been finally settled on appeal; or fall within issues which are not in dispute during a pending appeal; (iv) not have a bearing on the criminal responsibility of the accused; (v) not be the subject of (reasonable) dispute between the parties in the present case; (vi) not be based on plea agreements in previous cases (or voluntary admissions by the accused);[47] and (vii) not negatively affect the right of the Accused to a fair trial.[48] In disposing of a request by the Defence for Ieng Sary that the Chamber not take judicial notice of adjudicated facts from Case 001 in Case 002, the Chamber has stated that there is "no legal basis in the Law on the Establishment of the ECCC or in the Internal Rules for the Chamber to take judicial notice of adjudicated facts."[49] Even should the Trial Chamber wish to revisit this point of law, the exercise of judicial notice in any subsequent trial would most likely need to await the determination of appeals from the first trial, which would further frustrate the objective of expeditiousness.

28. In the practice of international criminal courts and tribunals, the principle of *res judicata* applies *inter partes* in a case where a matter has already been judicially determined within that case itself, and is limited, in criminal cases, "to the question of whether, when the previous trial of a particular individual is followed by another of the same individual, a specific matter has already been fully litigated."[50]

29. The Severance Order is not reasonably representative of the Indictment. As such, it is contrary to international standards and to the detriment of the rights of victims. Given the substantial risk that the Accused will only stand trial once at the ECCC, the current Order has the effect of excluding crimes that represent the core and most serious alleged criminal

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45 *Prosecutor v Slobodan Milošević*, IT-02-54-AR73.5, Decision on the Prosecution's interlocutory appeal against the Trial Chamber's 10 April 2003 decision on Prosecution motion for judicial notice of adjudicated facts (ICTY Appeals Chamber), 28 October 2003 at para. 14; citing with approval *Prosecutor v Momčilo Krajišnik*, IT-00-39-PT, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92*bis* (ICTY Trial Chamber), 28 February 2003 at paras. 16-17 ("Krajišnik Decision").

46 *Prosecutor v Laurent Semanza*, Decision on the Prosecution Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54 (ICTR Trial Chamber), 3 November 2000 at para. 41; *Prosecutor v Moinana Fofana* Decision on Appeal Against 'Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence' (SCSL Appeals Chamber), 16 May 2005 at paragraph 31.

47 *Prosecutor v Elizaphan Ntakirutimana and Gerard Ntakirutimana*, ICTR-96-10 & ICTR-96-17-T, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts (ICTR Trial Chamber), 22 November 2001 at para. 25.

48 Krajišnik Decision, *supra* note 45 at para. 15.

49 **E69/1** Decision on Ieng Sary's motions regarding judicial notice of adjudicated facts from Case 001 and facts of common knowledge being applied in Case 002, 4 April 2011 at p. 3

50 *Prosecutor v Zejnil Delalić* et al., IT-96-21-T, Judgment (ICTY Trial Chamber), 16 November 1998 at para. 228.

conduct in the Indictment. The exclusion of criminal acts committed at security centres, execution sites, co-operatives and worksites removes from the first trial the massive scale of the crimes and the extreme seriousness of the alleged criminal behaviour of the Accused. The Order focuses primarily on one type of criminal act – the forced transfer of the civilian population in two of the three phases including crimes committed as part of that forced transfer.

30. In essence, if the Severance Order stands, the trial will only consider criminal acts arising out of one of the five core criminal policies that formed a part of the alleged joint criminal enterprise ("JCE") in which the Accused participated. The criminal acts arising out of the other policies of the JCE, namely (1) the establishment and operation of co-operatives and worksites; (2) the re-education of "bad elements" and killing of "enemies", both inside and outside of Party ranks; (3) the targeting of specific groups, in particular the Cham, Vietnamese, and Buddhists; and (4) the regulation of marriage will be excluded from the trial.[51] The central and most serious criminal acts arising out of the alleged common purpose of the Accused to "implement rapid socialist revolution in Cambodia through a "great leap forward" and defend the Party against internal and external enemies, by whatever means necessary"[52] are therefore unlikely to be adjudicated by the ECCC.

31. In stark contrast to international practice, such severance is not reasonably representative of the alleged criminal acts, taking into account their classification, nature and scale, where they were committed, and their impact on victims. By excluding even a reasonably representative sample of security centres and worksites, the first trial would exclude the most grave forms of harm suffered by the great majority of Cambodians during the DK period. If for any reason the Court is unable to proceed with subsequent trials, most victims would not benefit from judicial acknowledgement and assessment of the harm they endured, nor witness the punishment of those found responsible for that harm if convicted.

32. The non-representative character of the Severance Order will diminish the ECCC's potential impact on furthering national reconciliation in Cambodia. The focus on one type of criminal act – which is comparatively less grave than several of the other criminal acts charged – significantly reduces the contribution any potential judgement would have to furthering national reconciliation and an accurate historical record for crimes committed during the DK period. The pursuit of national reconciliation and justice is recognised as a key objective of the ECCC.[53] Further, the importance of establishing an accurate historical record of criminal conduct in proceedings before internationalised criminal tribunals has been recognised both by the Pre-Trial Chamber and at the ICTY:

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51 **D427** Closing Order at paras. 56 and 57.

52 *Ibid.* at para. 1524.

53 United Nations General Assembly Resolution 57/228 entitled Khmer Rouge trials, U.N. Doc. No. A/RES/57/228, 27 February 2003 at para. 2; Internal Rules, Preamble at para. 2.

> *[The Agreement] guides the Judges and Chambers of the ECCC to not only seek the truth about what happened in Cambodia, but also to pay special attention and assure a meaningful participation for the victims of crimes committed as part of its pursuit for national reconciliation.*[54]

33. In *Momir Nikolić*, the ICTY Trial Chamber recognised the role of international criminal tribunals in contributing to the ascertainment of "the truth about the possible commission of war crimes, crimes against humanity and genocide... thereby establishing an accurate, accessible historical record".[55]

34. Any severance of the Indictment therefore, while necessary, must be undertaken in a manner that ensures the accuracy of the historical record and facilitates the attainment of justice and national reconciliation. In the present case, focusing on the first two phases of forced movements in isolation would not create an accurate historical record of the alleged commission of crimes during the DK period and would therefore not significantly advance national reconciliation.

35. In its current form, the Severance Order does not promote the effective management of witness testimony at trial. Of the 56 witnesses tentatively identified by the Trial Chamber for the first phase of the trial,[56] only a small proportion would give evidence relevant to population movement phases 1 and 2. A number of these witnesses can give testimony relevant to numerous core crimes not included in the first trial as currently proposed. These testimonies are also key to the ascertainment of the truth regarding the criminal responsibility of the accused, including their participation in the joint criminal enterprise as alleged in the Indictment. Some of these witnesses are at an advanced age. To promote judicial efficiency, and ensure that the witnesses are heard while they are still available, the Co-Prosecutors would request that, in the first trial, these witnesses testify to all of the alleged facts in the Indictment of which they have knowledge. This is the only way to avoid having to call these witnesses more than once, which is one the Chamber's stated aims.[57] Since these witnesses can provide extensive evidence on the joint criminal enterprise and the involvement of the accused, including a small but representative part of the crime base events in the first trial will ensure that: (1) the testimonies are used in the most effective and efficient manner; and (2) the first trial maximises the use of these testimonies with respect to both issues of context and role of the Accused, and core crimes included in the Indictment.

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54 **D404/2/4**, Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011 at para 65.

55 *Prosecutor v Momir Nikolic*, IT-02-60/1-S, Sentencing Judgment (ICTY Trial Chamber), 2 December 2003 at para. 60.

56 Tentative list of witnesses for the first phase of the Trial, 27 June 2011 (circulated by email).

57 **E1/2.1** Transcript of Trial Management Meeting, 5 April 2011 at p. 53.

V. PROPOSED ALTERNATIVE SEVERANCE ORDER

36. Consequently, the Co-Prosecutors propose an alternative form of severance of the Indictment which is more representative of the core criminal allegations but could still be heard in a similar time frame as that envisaged in the Severance Order. This proposal will make the first trial and any possible, albeit unlikely, future trials more effective in that it maximises the interests of justice in the first trial and minimises case management inefficiencies in the first and future trials. The alternative severance proposal would include, in the first trial:

(1) the phase 1 forced movement from Phnom Penh[58] and ensuing executions of Lon Nol officials or soldiers and class enemies in District 12[59] and Tuol Po Chrey[60];

(2) the S-21 Security Centre,[61] including the purges of cadres from the new North, Central (old North) and East Zones sent to S-21,[62] but excluding the Prey Sar Worksite;[63]

(3) the North Zone,[64] Kraing Ta Chan[65] and Au Kanseng[66] Security Centres; and

(4) the Kampong Chhnang Airport Construction Site[67] and Tram Kok Cooperatives.[68]

37. The inclusion of these additional crime sites will not lengthen the first trial unduly, as issues relating to specific crime sites can be considered expeditiously, in contrast to the complex issues regarding structure, policy and role of the Accused that must first be completed. Specifically, the Co-Prosecutors have notified the Trial Chamber that of the 6488 documents included on their original Trial Document List, 4768 are directly relevant to the First Phase Issues and the other 1720 to other phases.[69] Documents relevant to First Phase Issues include those establishing CPK policy relating to cooperatives and the elimination of enemies at security centres and the knowledge and role of the Accused, and many key contemporaneous documents relating to the security centres, worksite and cooperatives listed above.[70]

38. The additional trial time needed to hear witnesses concerning these sites would be reasonable and warranted, given that the inclusion of such crime sites in the first trial is necessary in order to make material and relevant the First Phase Issues for which the parties have been preparing. Specifically, the Trial Chamber has already tentatively selected 56 witnesses in

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58 **D427** Closing Order, *supra* note 51 at paras. 221-261.
59 *Ibid.* at paras. 686-697.
60 *Ibid.* at paras. 698-714.
61 *Ibid.* at paras. 415-475.
62 *Ibid.* at paras. 192-204.
63 *Ibid.* at paras. 400-414.
64 *Ibid.* at paras. 572-588.
65 *Ibid.* at paras. 489-515.
66 *Ibid.* at paras. 589-624.
67 *Ibid.* at paras. 383-399.
68 *Ibid.* at paras. 302-322.
69 **E109/4** Co-Prosecutors' Response to the Trial Chamber's Request for Documents Relating to the First Phase of Trial, 22 July 2011, at ERN 00717678 (para. 3).
70 See, e.g., **E109/4.8** (Annex 8: Tram Kak District Records), **E109/4.9** (Annex 9: S-21 Prisoner Records) and **E109/4.10** (Annex 10: S-21 Confessions).

relation to those First Phase Issues and is considering requests by the parties to supplement that list. In addition to those 56 or more witnesses, the Co-Prosecutors previously proposed 32 witnesses to testify in relation to the forced movement from Phnom Penh and ensuing executions.[71]

39. The additional witnesses related to the security centres, cooperatives and worksites that the Co-Prosecutors believe would need to be heard total as follows: S-21 (10); North Zone Security Centre (6); Kraing Ta Chan (7); Au Kanseng (5); 3 witnesses providing a general overview on security centres; Kampong Chhnang Airport (5); and Tram Kok Cooperatives (4).[72] The Co-Prosecutors believe that the testimonies of such individual crime site witnesses will require significantly less time than those of the policy and structure witnesses who will testify to the First Phase Issues in the trial.

40. The inclusion of these additional crime sites is justified. S-21 reported directly to the CPK Standing Committee and was the primary security centre used by the CPK senior leaders for the detention, interrogation and execution of purged cadres. The other security centres are representative examples of Zone, District and Military Division prisons for which there is particularly compelling witness testimony and documentary evidence that will prove the Accused's responsibility for widespread and systematic crimes throughout the country.

41. For example, the North Zone security centre was a Zone-level prison supervised by leaders that reported directly to the CPK Standing Committee, and for which there are surviving high-level cadres[73] and probative examples of the regular reports sent to the Party Centre leaders. Au Kanseng was a security centre for Centre Military Division 801, for which there is testimonial and documentary evidence linking the Accused to a mass execution of over 100 captured Jarai soldiers from Vietnam. Kraing Ta Chan was the security centre for Tram Kok District and a prison for which there are extensive surviving records from district, commune and prison officials demonstrating how the joint criminal enterprise was implemented on the ground.[74] It can be efficiently tried together with the Tram Kok Cooperatives, which would only necessitate four additional witnesses, but would then provide a comprehensive picture of crimes from that district. The Kampong Chhnang Airport site adds to the trial a major worksite established by the CPK Standing Committee that was used to "temper" suspect military cadres, including purged cadres from the East Zone.

42. Moreover, the Co-Prosecutors propose that any trial of the forced movement from Phnom Penh should also include the two related execution sites at which Lon Nol officials, soldiers

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71 **E9/4.1** Annex 1 to Co-Prosecutors' Rule 80 Expert, Witness and Civil Party Lists, Including Confidential Annexes, 28 January 2011, at ERN 00640705 (proposed witnesses P-001 to P-034, excluding P-005 and P-015 who are already included in Trial Chamber's Tentative List of Witnesses for 1st Phase of Trial).

72 *Ibid.* at ERN 00640708-12. On request by the Trial Chamber, the Co-Prosecutors will identify the specific witnesses they propose be heard in relation to each crime site selected for the first trial

73 *Ibid.* at ERN 00640708 (witnesses P-106, P-110 and P-111, two of whom have already been tentatively selected by the Trial Chamber for the 1st Phase of Trial).

74 **E109/4.8**, *supra* note 70 at ERN 00719018-31.

and other class enemies identified during the forced movement were executed - District 12[75] and Tuol Po Chrey.[76] The removal of these targeted groups from their urban base so that they could be identified and eliminated was the primary purpose of the Phase 1 Forced Movement. Because the crimes committed at those two execution sites in April or May 1975 resulted from the same decisions and policies as the forced movement, it would be judicially efficient for those crimes to be tried together.

43. The Co-Prosecutors submit that the Phase 2 Forced Movement should not be included in the first trial. That forced movement resulted from different policy considerations than the Phase 1 movement, and would be more efficiently tried with forced labour sites such as the Trapeang Thma Dam worksite at which many Phase 2 evacuees were assigned to work.

44. The crime sites proposed by the Co-Prosecutors would provide a sufficiently representative crime base to support consideration of all the First Phase Issues for which the parties have prepared, but at the same time significantly reduce the scope of the first trial by severing 18 of the 27 crime sites or events included in the Closing Order.

V. RELIEF REQUESTED

45. For the reasons given above, the Co-Prosecutors request that the Chamber:

(1) exercise its judicial discretion to reconsider and revise the Order in the terms proposed in this Request; or alternatively,

(2) hear the parties, in writing or orally, on alternate formats of severance in Case 002.

Respectfully submitted,

Date	Name	Place	Signature
3 October 2011	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		

[75] **D427** Closing Order, *supra* note 51 at paras. 693-697.
[76] *Ibid.* at paras. 705-713.