

BEFORE THE TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** The Defence for IENG Sary**Filed to:** The Trial Chamber**Original language:** ENGLISH**Date of document:** 13 October 2011**CLASSIFICATION****Classification of the document
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**IENG SARY'S RESPONSE TO THE CO-PROSECUTORS' REQUEST FOR
RECONSIDERATION OF "SEVERANCE ORDER PURSUANT TO INTERNAL
RULE 89TER"**

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby responds to the Co-Prosecutors’ Request for Reconsideration of the “Severance Order Pursuant to Rule 89*ter*” (“Request”).¹ The Defence submits: **a.** reconsideration is permissible, though takes a neutral position as to whether the OCP has sufficiently established a “legitimate basis” to warrant reconsideration of the Severance Order Pursuant to Internal Rule 89*ter* (“Severance Order”);² **b.** severance must be consistent with Rule 89*ter* of the Internal Rules (“Rules”), i.e. according to the charges; **c.** guidance on severance cannot be taken from the ICTY; **d.** the OCP’s questioning of the genuineness of the Severance Order – that there will be subsequent trials in Case 002 – is unbecoming; **e.** the OCP has not demonstrated that the Severance Order is not in the interests of justice; and **f.** the alternative severance proposed by the OCP, even if considered consistent with Rule 89*ter* of the ECCC Internal Rules (“Rules”), will not result in an expeditious trial as claimed by the OCP. A public oral hearing is requested.

I. BACKGROUND

A. The Severance Order

1. The Severance Order sets out the trial topics for the first trial in Case 002:
 - a) The structure of Democratic Kampuchea;
 - b) Roles of each Accused during the period prior to the establishment of Democratic Kampuchea, including when these roles were assigned;
 - c) Role of each Accused in the Democratic Kampuchean government, their assigned responsibilities, the extent of their authority and the lines of communication throughout the temporal period with which the ECCC is concerned;
 - d) Policies of Democratic Kampuchea on the issues raised in the Indictment;
 - ...
 - [e)] Factual allegations described in the Indictment as population movement phases 1 and 2; and
 - [f)] Crimes against humanity including murder, extermination, persecution (except on religious grounds), forced transfer and enforced disappearances (insofar as they pertain to the movement of population phases 1 and 2).³
2. The Severance Order separates the charges of crimes against humanity of murder, extermination, persecution (except on religious grounds), forced transfer and enforced

¹ Co-Prosecutors’ Request for Reconsideration of “Severance Order Pursuant to Rule 89*ter*,” 3 October 2011, E124/2.

² Severance Order Pursuant to Internal Rule 89*ter*, 22 September 2011, E124.

³ *Id.*, paras. 1, 5.

disappearances in relation to the population movement phases 1 and 2 from the Closing Order. The rest of the charges in the Closing Order are deferred to later trials.

B. Summary of the OCP Request

3. In the Request, the OCP:
 - a. asserts the Trial Chamber has discretion to reconsider;⁴
 - b. proposes severance according to alleged crime sites and incidents;⁵
 - c. relies upon ICTY procedure,⁶ Rule 73bis of the ICTY Rules of Procedure and Evidence (“ICTY Rule 73bis”),⁷ and ICTY jurisprudence;⁸
 - d. asserts that any subsequent trials in Case 002 are unlikely;⁹
 - e. asserts that the Severance Order is not in the interests of justice;¹⁰ and
 - f. asserts that “[t]he inclusion of ... additional crime sites will not lengthen the first trial unduly.”¹¹

II. RESPONSE

A. Reconsideration is permissible

4. The OCP asserts that the Trial Chamber has discretion to reconsider its Severance Order.¹² The Pre-Trial Chamber has held that the parties should have the right to file for reconsideration where a “legitimate basis” exists.¹³ In the present instance, nothing prevents the Trial Chamber from reconsidering the Severance Order. The Defence takes a neutral position as to whether a legitimate basis for reconsideration exists, though shares the OCP’s view that in light of the significance of the issues involved, the Trial Chamber would have profited from input by the parties prior to deciding on the nature of and the extent of any severance of Case 002.

⁴ Request, paras. 7-16.

⁵ *Id.*, para. 36.

⁶ *Id.*, para. 20.

⁷ *Id.*, para. 21.

⁸ *Id.*, paras. 22-23.

⁹ *Id.*, paras. 3 (“the charges selected for the first and likely only trial of the Accused...”); 15 (“This is particularly so given the real possibility that further trials against the Accused may not take place.”); 24 (“The Severance Order foresees the Accused facing more than one trial. This is unlikely.”); 29 (“Given the substantial risk that the Accused will only stand trial once at the ECCC...”).

¹⁰ *Id.*, para. 3. *See also* paras. 24-35.

¹¹ *Id.*, para. 37.

¹² *Id.*, paras. 7-16.

¹³ Decision on Application for Reconsideration of Civil Party’s Right to Address Pre-Trial Chamber in Person, 28 August 2008, C22/I/41, para. 25; Request, para. 8.

B. Severance must be consistent with Internal Rule 89ter, i.e. according to the charges

5. The OCP proposes severance according to crime sites and incidents.¹⁴ Rule 89ter is clear that severance must be according to the charges.¹⁵ The Trial Chamber has severed the Closing Order according to the charges, and thus the Severance Order is consistent with the intent of the Plenary¹⁶ when it modified the Rules to permit severance of charges within a case.¹⁷
6. The OCP's alternative proposal is not based on charges.¹⁸ Through its proposed alternative severance, the OCP is requesting the Trial Chamber to act *ultra vires*. Indeed, the OCP proposes that the Trial Chamber effectively amend the Closing Order through reducing its scope.¹⁹ Nothing in the Rules permits the Trial Chamber the discretionary authority to do so.²⁰ The OCP has, in the past, agreed with this position: "the ECCC Internal Rules do not allow for a Motion to strike or amend portions of the Closing Order once it has become final."²¹

C. Guidance on severance cannot be taken from the ICTY

i. ICTY procedure is inappropriate to guide the Trial Chamber

7. The OCP relies upon ICTY procedure arguing that the Trial Chamber should obtain guidance from ICTY Rule 73bis.²² ICTY procedure for reducing the scope of an indictment is incompatible with ECCC procedure on severance of the Closing Order.

¹⁴ Request, para. 36. The Civil Parties also consider, contrary to the Rules, that "...if there is a severance, it should be only factual." Lead Co-Lawyers Notice of Request for Reconsideration of the Terms of "Severance Order Pursuant to Internal Rule 89ter," 6 October 2011, E124/4, para. 6(d).

¹⁵ Rule 89ter states, "When the interest of justice so requires, the Trial Chamber may at any stage order the separation of proceedings in relation to one or several accused and concerning part or the entirety **of the charges** contained in an Indictment. The cases as separated shall be tried and adjudicated in such order as the Trial Chamber deems appropriate." (emphasis added).

¹⁶ On 23 February 2011, the ECCC Judges at the seventh Plenary session voted in favor of amended the Rules to include Rule 89ter.

¹⁷ Severance Order, para. 5.

¹⁸ The OCP acknowledges that any severance must be based on the charges. See Request, para. 17.

¹⁹ Request, paras. 3, 15, 24, 29.

²⁰ The Trial Chamber held that "motions to strike or amend the Closing Order do not generally form part of the ECCC's legal framework." Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), 22 September 2011, E122, para. 16. National Crimes were struck from the Closing Order due to non-compliance with Rule 67(2).

²¹ Co-Prosecutors' Response to "IENG Sary's Motion to Strike Portions of the Closing Order due to Defects", 16 March 2011, E58/1, para. 3.

²² Request, paras. 17, 20.

8. At the ICTY, which is predominantly based on the adversarial Common Law system, the prosecution drafts the indictment.²³ The onus is upon the prosecution to reduce the indictment when invited to do so by the Trial Chamber.²⁴ The indictment may be reduced according to “the number of counts charged in the indictment,” or “crime sites or incidents comprised in one or more of the charges.”²⁵ In effect, during the trial phase of proceedings, the prosecution has control over the indictment.
9. In comparison, the ECCC is based on the Civil Law system.²⁶ The Co-Prosecutors draft an Introductory Submission.²⁷ The Co-Investigating Judges investigate the Introductory Submission, which culminates in a Closing Order (indictment) or a Dismissal Order.²⁸ The Trial Chamber becomes seized of the case once it receives a Closing Order.²⁹ Nothing in the Rules permits a Closing Order to be reduced or amended by the Trial Chamber or any party. The Rules do, however, permit a Closing Order to be severed.³⁰ Only the Trial Chamber may sever the Closing Order.³¹ The Closing Order can only be severed according to the charges.³² This is consistent with the Civil Law system since during the trial stage of proceedings, the Trial Chamber’s role is to ascertain the truth.³³

²³ ICTY Rules of Procedure and Evidence, Rule 47.

²⁴ ICTY Rule 73*bis*.

²⁵ *Id.*

²⁶ A fact which the OCP has, when it has found it convenient, had little hesitation in relying upon: “It still is the civil law system...” Deputy International Co-Prosecutor Bill Smith, Transcript, Trial Management Meeting, 5 April 2011, E1/2.1, p. 85. “The civil law procedure applicable before the ECCC...” Co-Prosecutors’ Request for a Direction Regarding the Intentions of the Accused with Respect to Testifying, 17 June 2011, E101, para. 2; Co-Prosecutors’ Response to IENG Sary’s Motion for the Trial Chamber to Conduct the Trial in Case 002 by Following a Proposed Revised Procedure & Request for an Expedited Stay on the Order to File Materials in Preparation for Trial, 4 February 2011, E9/3/1, para. 2(c).

²⁷ Rule 53.

²⁸ Rule 67(1).

²⁹ Rule 79(1).

³⁰ Rule 89*ter*.

³¹ *Id.*

³² *Id.*

³³ The OCP agrees that the Trial Chamber’s role is to ascertain the truth. “The fact that Judges concurrently play an active role during the proceedings in order to ascertain the truth does not shift that burden of proof.” Co-Prosecutors’ Response to IENG Sary’s Motion for the Trial Chamber to Conduct the Trial in Case 002 by Following a Proposed Revised Procedure & Request for an Expedited Stay on the Order to File Materials in Preparation for Trial, 4 February 2011, E9/3/1, para. 2(c)(i), *citing* H.D. BOSLY & D. VANDERMEERSCH, DROIT DE LA PROCEDURE PENALE, 916 (LA CHARTE, 2001): “Contrary to the English procedure where the judge plays solely an arbitrator role during the hearings, under the Belgian law the judge must actively contribute to seeking the truth.” (unofficial translation). *See e.g.*, Rule 85(1): “In consultation with the other judges, the President may exclude any proceedings that unnecessarily delay the trial, and are not conducive to ascertaining the truth.” Rule 87(4): “During the trial, either on its own initiative or at the request of a party, the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth.” Rule 91(3): “The Co-Prosecutors and all the other parties and their lawyers may object to the continued hearing of the testimony of any witnesses, if they consider that such testimony is not conducive to ascertaining the truth.”

The Trial Chamber has control over the Closing Order and the presentation of the evidence.³⁴

10. Furthermore, guidance cannot be taken from Rule 72(A)(iii) of the ICTY Rules of Procedure and Evidence (“ICTY Rule 72(A)(iii)”). ICTY Rule 72(A)(iii) permits parties to seek the severance of counts joined in one indictment.³⁵ Rule 72(A)(iii) permits the severance of charges which were initially separate, then joined. In practice, this was used in the *Mladić* case.³⁶ In *Mladić*, the prosecution requested the severance of an indictment which was consolidated from two indictments: one relating to *Srebrenica* and the second relating to *Sarajevo, Municipalities and Hostages*.³⁷ The prosecution requested severance back to the original two separate indictments *inter alia* on the basis that the case was severed according to distinct sets of events and two distinct joint criminal enterprises.³⁸
11. Guidance cannot be taken from ICTY Rule 72(A)(iii) or the *Mladić* case. First, Case 002 never initially had any separate charges; there is only one Closing Order. Second, Case 002 does not have alleged separate joint criminal enterprises. Case 002 has an alleged overarching joint criminal enterprise. The OCP’s proposed severance does not set out distinct sets of events such as that set out by the prosecution in *Mladić*.
12. The stark differences between the procedure at the ICTY and the ECCC, or the inappropriate nature of procedure from the ICTY, means that ICTY procedure cannot be applied or even guide the Trial Chamber at the ECCC with respect to severance of Case 002. The Trial Chamber must only be guided in this instance by the Rules which explicitly set out the extent to which severance is permissible.

³⁴ The Deputy International Co-Prosecutor, Bill Smith, has observed: “As Your Honours know, and as the Ieng Sary defence knows, a civil law case is not bifurcated, it’s not split between the prosecution case and the defence case ... we’re operating in a civil law environment and not a common law environment, like the Rwanda and Yugoslav tribunal.” Transcript, Trial Management Meeting, 5 April 2011, E1/2.1, p. 114.

³⁵ ICTY Rule 72(A)(iii) states: “Preliminary motions, being motions which ... seek the severance of counts joined in one indictment under Rule 49 or seek separate trials under Rule 82 (B) ... shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66 (A)(i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84.” Rule 49 of the ICTY Rules of Procedure and Evidence, entitled Joinder of Crimes, states: “Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.”

³⁶ *Prosecutor v. Mladić*, IT-09-92-PT, Consolidated Prosecution Motion to Sever Indictment, to Conduct Separate Trials and to Amend Resulting Srebrenica Indictment, 16 August 2011.

³⁷ *Id.*, paras. 7-14.

³⁸ *Id.*

ii. ICTY Rule 73bis is an inappropriate rule to guide the Trial Chamber

13. The OCP relies upon ICTY Rule 73bis in the Request.³⁹ It does so on the basis that:

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.⁴⁰

14. It is prudent to consider and, when appropriate, refer to the practice of international tribunals and national courts. However, ICTY Rule 73bis is an inappropriate rule from which to seek guidance on the severance procedure at the ECCC. ICTY Rule 73bis “reduce[s]” an indictment as opposed to severing it as envisaged by Rule 89ter. A reduced indictment results when the cuts from the original indictment are permanently discarded. A severed Closing Order, according to Rule 89ter, results when the Trial Chamber divides / separates the Closing Order on the basis of the charges, thus permitting the Trial Chamber to hold two or more trials for the entire Closing Order. In other words, nothing from the original Closing Order is discarded. Thus, the effect of reducing an indictment as envisaged by the ICTY is that an Accused will face trial with fewer charges than originally intended / confirmed. Conversely, the ECCC confers no authority on the Trial Chamber to permanently discard portions of the Closing Order (and thus effectively amend). To discard portions of a Closing Order which are not defective would be contrary to the Civil Law principle to ascertain the truth. Severance pursuant to Rule 89ter simply means that the Accused will face trial for all charges in the Closing Order, albeit in stages / series of trials.

15. As ICTY Rule 73bis reduces an indictment, it is understandable that, in the interests of justice, the reduced indictment must be “reasonably representative of the crimes charged.”⁴¹ In comparison, as a Closing Order at the ECCC is not reduced, but merely severed, Rule 89ter need not have a requirement that, in the interests of justice, a severed Closing Order must be reasonably representative of the crimes charged. Hence the fallacy of the OCP’s argument for the adoption and application of ICTY procedure, and why its proposed severance is not consistent with Rule 89ter.

³⁹ Request, paras. 18-35.

⁴⁰ *Id.*, para. 17.

⁴¹ ICTY Rule 73bis.

iii. ICTY jurisprudence is inappropriate to guide the Trial Chamber

16. The OCP asserts that the ICTY cases of *Karadžić*⁴² and *Milutinović*⁴³ should be used as guidance for Case 002. The indictments in both of these cases were reduced rather than severed. In *Karadžić*, the prosecution removed eight municipalities in their entirety from the presentation of evidence, as well as individual incidents or crime sites connected to the remaining municipalities, Srebrenica enclave, and Sarajevo siege.⁴⁴ In *Milutinović*, the Prosecution cut three crime sites from the indictment, which the Trial Chamber considered to be “associated with a single alleged attack or a discrete set of events that form part of one distinct alleged criminal transaction or incident, so there is no problem of disentangling them from the other alleged incidents and crime sites in the Indictment.”⁴⁵ Furthermore, the Trial Chamber in *Milutinović* found that “[t]he other 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.”⁴⁶
17. The OCP’s assertion that guidance should be taken from the approach used by the ICTY in *Karadžić* and *Milutinović* is ill-conceived. Such an approach cannot be followed in Case 002. **First**, Case 002 has four Accused, an alleged overarching joint criminal enterprise, five alleged policies and numerous crime sites and incidents, all of which are allegedly interrelated. The OCP has not identified crime sites or incidents that are **clearly different** from the fundamental nature or theme of the case and for which there is no problem of disentangling from the other alleged incidents and crime sites. **Second**, removing crime sites and incidents amounts to denial of justice to the victims from those crime sites and incidents.

⁴² Request, para. 22, citing *Prosecutor v. Karadžić*, IT-95-5-T, Order to the Prosecution under Rule 73bis (D), 22 July 2009; *Prosecutor v. Karadžić*, IT-95-5-T, Transcript of Status Conference, 8 September 2009, p. 451; *Prosecutor v. Karadžić*, IT-95-5-T, Prosecution Submission Pursuant to Rule 73bis (D), 31 August 2009; *Prosecutor v. Karadžić*, IT-95-5-T, Prosecution Second Submission Pursuant to Rule 73bis (D), 18 September 2009; *Prosecutor v. Karadžić*, IT-95-5-T, Decision on the application of Rule 73bis, 8 October 2009.

⁴³ Request, para. 23, citing *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on application of Rule 73bis, 11 July 2006, paras. 10-11; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision Denying Prosecution’s Request For Certification Of Rule 73bis Issue For Appeal, 30 August 2006, para. 10.

⁴⁴ *Prosecutor v. Karadžić*, IT-95-5-T, Prosecution Submission Pursuant to Rule 73bis (D), 31 August 2009. For example, the reduced indictment excluded the massacre of hundreds of Kosovo-Albanian prisoners from the prison in Niš, Serbia. *Prosecutor v. Milutinović et al.*, IT-05-87-PT, (Redacted) Third Amended Joinder Indictment, 21 June 2006, para. 75(j).

⁴⁵ *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on application of Rule 73bis, 11 July 2006, para. 11.

⁴⁶ *Id.*

18. In contrast to *Karadžić* and *Milutinović*, the Severance Order does not reduce or discard charges. The Trial Chamber has severed the Closing Order to logically enable the charges to be tried, as opposed to dissecting the Closing Order based on crime sites and incidents which cannot be clinically disentangled.

D. The OCP's questioning of the genuineness of the Severance Order – that there will be subsequent trials in Case 002 – is unbecoming

19. The OCP assumes throughout the Request that the first trial in Case 002 will be the only trial.⁴⁷ The OCP does not accept the Trial Chamber's representations in the Severance Order that there will be further trials in Case 002. Through the use of nuanced language, the OCP questions the Trial Chamber's judgement in not having the prescience to appreciate certain inherent challenges in trying Case 002 in a segmented fashion, while also, quite unbecomingly, questioning the Trial Chamber's genuine belief that a second trial will occur. This may explain why the OCP proposes that the Trial Chamber amend the Closing Order in such a way so that the entire case is effectively litigated in a reduced form.

E. The OCP has not demonstrated that the Severance Order is not in the interests of justice

20. The OCP asserts that the Severance Order is not in the "interests of justice."⁴⁸ The OCP ignores the Trial Chamber's representations that the severance advances the interests of justice.

21. The Establishment Law states that the ECCC shall ensure that trials "are fair and expeditious."⁴⁹ Rule 21(4), entitled "Fundamental Principles," states, "Proceedings before the ECCC shall be brought to a conclusion within a reasonable time." The Trial Chamber has found the right to an expeditious trial to be in the interests of justice.⁵⁰

22. The OCP asserts that "[i]n its current form, the Severance Order does not promote the effective management of witness testimony at trial ... witnesses [should] testify to all of the alleged facts in the Indictment of which they have knowledge. This is the only way

⁴⁷ Request, paras. 3, 15, 24, 29.

⁴⁸ Request, para. 3.

⁴⁹ Establishment Law, Art. 33 new.

⁵⁰ "Separation of proceedings will enable the Chamber to issue a verdict following a shortened trial, safeguarding the fundamental interest of victims in achieving meaningful and timely justice, and the right of all Accused in Case 002 to an expeditious trial." Severance Order, para. 8.

to avoid having to call these witnesses more than once...”⁵¹ This issue arises whether the case is severed as proposed by the OCP or is severed as ordered in the Severance Order. It has nothing to do with how Case 002 is severed.

23. The OCP asserts that severance “must be undertaken in a manner that ensures the accuracy of the historical record and facilitates the attainment of justice and national reconciliation.”⁵² Though the purpose of the ECCC is not to establish the historical truth,⁵³ the Trial Chamber’s severance enables historical facts to be established in the ascertainment of the truth.

F. The alternative severance proposed by the OCP will not result in an expeditious trial

24. The OCP asserts that “[t]he inclusion of these additional crime sites will not lengthen the first trial unduly.”⁵⁴ This assertion is logically untenable. The OCP proposes more crime sites, incidents, and crimes to be tried. This will lead to a potential 73 more witnesses from the OCP alone (there are only 56 witnesses currently on the Trial Chamber’s tentative list),⁵⁵ thousands more documents, and numerous more legal filings. As such, the OCP’s proposed severance cannot possibly result in a more expeditious trial than that envisaged in the Severance Order. Simply, the OCP makes no credible showing that its proposed severance, which is *ultra vires*, is more likely to advance the interests of justice than the Trial Chamber’s Severance Order, which is consistent with the letter and spirit of Rule 89*ter*.
25. The OCP justifies an increase in the size of the first trial as adjudicated facts are not permitted.⁵⁶ The Trial Chamber however has noted that it “may at any time decide to

⁵¹ Request, para. 35.

⁵² *Id.*, para. 34.

⁵³ For an interesting discussion on the relevant purpose of international criminal tribunals, and specifically why it is not within their mandate to “provide an antidote to revisionist history by preserving adjudicated accounts of what happened...”, see Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J. L. & POL’Y, 87, 116 (2001).

⁵⁴ Request, para. 37.

⁵⁵ “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.” *Id.*, para. 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).” *Id.*, para. 40.

⁵⁶ *Id.*, paras. 26-27; 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, E69/1, p. 2.

