

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**CO-PROSECUTORS' SUBMISSION REGARDING THE USE OF EVIDENCE AND
PROCEDURE FOR RECALL OF WITNESSES FROM CASE 002/01 IN CASE
002/02**

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SUBMISSION

1. The Co-Prosecutors request the Trial Chamber (“Chamber”) to rule that: a) all evidence accepted in Case 002/01 and assigned an E3 number will be considered as duly placed before the Trial Chamber for the purpose of all future trial proceedings concerning the remaining charges; and b) witnesses, civil parties and experts heard in Case 002/01 may be recalled in the trial Case 002/02 only if the requesting parties satisfy the court that further questioning is in the interests of justice. The Co-Prosecutors submit that an early resolution of this issue is critical to the efficiency of the trial of the remaining charges in Case 002.
2. None of the parties or participants will be able to submit conclusive lists of additional witnesses, experts, and Civil Parties to be heard or documents to be introduced¹ without knowing how the evidence from the trial in Case 002/01 will be treated in Case 002/02. Additionally, a determination on this issue will be relevant to the parties’ filings and oral arguments in regard to the determination of the scope of Case 002/02.² Furthermore, a decision on this issue is also a prerequisite for any personnel planning and institutional budgeting as it will have a decisive impact on any estimates of the expected length of a trial in Case 002/02. Were the Trial Chamber to rule that the evidence from Case 002/01 needed to be repeated for Case 002/02, this would roughly double the time needed to try the remaining charges. An expedited ruling on this issue is thus a necessary prerequisite to an informed decision as to the scope and timing of Case 002/02, the subject of the upcoming 11 February 2014 Trial Management Hearing.

***A. The Chamber has implicitly endorsed
the requested ruling in its previous decisions***

3. The automatic availability of evidence from Case 002/01 to Case 002/02 is an assumption within a number of Trial Chamber decisions to date. As the Trial Chamber has consistently indicated, Case 002/01 was meant to “provide a foundation for a more detailed examination of the remaining charges and factual allegations against the Accused in later

¹ E301/5 Memorandum: Trial Chamber Workplan for Case 002/02 and Schedule for Upcoming Filings, 24 December 2013 at para. 3.

² Ibid. at para. 5.

trials.”³ As such, the first trial was designed to “encompass[] a thorough examination of the fundamental issues and allegations against all Accused.”⁴

4. Likewise, the Trial Chamber allowed for the questioning of expert witnesses in Case 002/01 to include matters related to charges that would only be addressed in later trials. The Trial Chamber held that expert witnesses “may be questioned on all matters within their knowledge or expertise relevant to the entirety of the Closing Order in Case 002.”⁵ Similarly, the Trial Chamber permitted parties to question elderly witnesses on all issues within the purview of Case 002.⁶
5. That evidence in Case 002/01 would be directly applied in future trials is also evident in the “tentative outline”⁷ for future trials that the Trial Chamber included with its re-severance decision in Case 002/01. Whereas Case 002/01 included paragraphs of the indictment related to various foundational matters (such as the historical background of Democratic Kampuchea and of the Accused, and the CPK’s administrative, communications, and military structures⁸) this Chamber’s plan for subsequent trials did not provide for evidence to be re-submitted regarding those paragraphs of the Closing Order, which would nonetheless be relevant. Rather, future trials would address the additional particular factual matters related to the particular charges and crime sites at issue in each

³ **E124/7** Decision on Co-Prosecutors’ Request for Reconsideration of the Terms of the Trial Chamber’s Severance Order (E124/2) and Related Motions and Annexes, 18 October 2011 (“Reconsideration of Terms of Severance Decision”) at para. 10; **E284** Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013 (“Second Severance Decision”) at para. 15. See also **E131** Scheduling Order for Opening Statements and Hearing on the Substance in Case 002, 18 October 2011 at p. 2: “[W]hile 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”.

⁴ **E124/7** Reconsideration of Terms of Severance Decision, *supra* note 4 at para. 10; **E284** Second Severance Decision, *supra* note 4 at para. 15.

⁵ **E215** Decision on Assignment of Experts, 5 July 2012 at para. 4. See also, **E284** Second Severance Decision, *supra* note 4 at para. 45(i); **E264/1** Memorandum: Scheduling of Experts Phillip Short and Elizabeth Becker and Postponement of Fact Witnesses until Decision on Severance, 26 February 2013 at para. 2.

⁶ **E194** Memorandum: Order of Witnesses for Current Segment of Case 002/01, 11 May 2012.

⁷ **E284** Second Severance Decision, *supra* note 4 at para. 153.

⁸ **E124/7.3** Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/01, amended further to the Trial Chamber’s Decision on Ieng Thirith’s Fitness to Stand Trial (E138) and the Trial Chamber’s Decision on Co-Prosecutor’s Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163).

trial.⁹ The clear assumption, then, is that evidence would be cumulative, and already be available in future trials due to it being admitted in Case 002/01.

6. Most recently, the Trial Chamber's assumption regarding the direct applicability of the record in Case 002/01 to Case 002/02 was evident in the President's Memorandum of 20 December 2013, wherein he declined to appoint a second Trial Chamber.¹⁰ In that Memorandum, the President, in the course of describing why hiring new judges and staff would cause delay, stated that "[o]nce new judges and legal staff have arrived in Cambodia, they will need to familiarise themselves with the Closing Order, the evidence on the case file, the procedure and the proceedings thus far."¹¹ The President also took into consideration the need for potential new judges to read all of the transcripts from Case 002/01, without questioning whether the testimony in those transcripts would be part of the Case 002/02 record.¹²
7. Furthermore, throughout his Memorandum the President noted the need for expeditiousness in proceeding with Case 002/02. A formal ruling now that implements the Trial Chamber's implicit intention to consider all evidence in Case 002/01 on the record in Case 002/02 is by far the most expeditious way to proceed.

B. The Chamber should continue its established practice and procedure allowing recall of witnesses and Civil Parties

8. This Chamber has previously recalled Civil Parties for questioning when it found such an action to be in the "interests of justice".¹³ This Chamber found that the interests of justice standard will be satisfied where it was necessary to recall a Civil Party to address new information.¹⁴

⁹ E284 Second Severance Decision, *supra* note 4 at pp. 71-74.

¹⁰ E301/4 President's Memorandum on the Proposal to Appoint a Second Panel of the Trial Chamber to Try the Remaining Charges in Case 002, 20 December 2013.

¹¹ *Ibid.* at para. 7 (emphasis added).

¹² *Ibid.*

¹³ E267/3 Decision on Request to Recall Civil Party TCCP-187 for Review of Procedure Concerning Civil Parties' Statements on Suffering and Related Motions and Responses (E240, E240/1, E250, E250/1, E267, E267/1 and E267/2), 2 May 2013 at para. 20.

¹⁴ *Ibid.* at p. 10.

9. In keeping with this established procedure, the Co-Prosecutors submit that in the course of Case 002/02 the Trial Chamber should allow the parties to make a showing on a case-by-case basis that certain witnesses, experts, or Civil Parties who testified in Case 002/01 should be recalled to provide additional testimony in Case 002/02 on matters relevant to the scope of the latter proceedings. To the extent that a party can demonstrate to the satisfaction of the Chamber that its ability to put questions relevant to Case 002/02 to a witness, expert or Civil Party was restricted by the scope of Case 002/01 and that it has further questions which are relevant to Case 02/02 and which would not unduly delay the proceedings, the Chamber may order the recall of that witness or Civil Party for additional questioning.
10. Such a process would be consistent with international procedural rules adopted at the *ad hoc* tribunals, where the recall of witnesses may occur where the requesting party has demonstrated good cause, taking into consideration “the purpose for which the witness will testify, as well as the reasons why the witness was not questioned earlier on those matters.”¹⁵

C. The requested ruling and recall procedure would have no adverse impact on Defence rights

11. The requested ruling on the use of evidence from Case 002/01 and the proposed procedure for the recall of witnesses, experts, and Civil Parties fully uphold the Co-Accused’s right to confrontation of the evidence against them, as enshrined in Articles 33 new and 35 new (e) of the ECCC Law and Internal Rule 21.
12. The proposed use of evidence already on the record against the same Co-Accused in Case 002/02 in no way hampers the full and free exercise of this fundamental fair trial right. The right to confront is guaranteed by numerous international legal instruments.¹⁶ It comprises:

¹⁵ *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Motion to Recall Prosecution Witness BDW (ICTR Trial Chamber), 23 July 2009 at para. 3; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused’s Motion to Recall Harry Konings for Further Cross-Examination (ICTY Trial Chamber), 11 February 2011 at para. 8; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on Prosecution Motion to Recall Marko Rajčić (ICTY Trial Chamber), 24 April 2009 at para. 10.

¹⁶ European Convention on Human Rights, art. 6(3): “Everyone charged with a criminal offense has the following minimum rights . . . (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him . . .”; International Covenant on Civil and Political Rights, art. 14(3): “In the determination of any criminal

(i) the right of the defendant to examine or have examined witnesses against them; and (ii) the right to obtain the attendance and examination of witnesses on the defendant's behalf under the same conditions as witnesses against him or her.¹⁷ The central aim of this right is to enable the defendant in a criminal case to test the reliability of the witness or cast doubt upon their credibility.¹⁸

13. For all of the evidence in Case 02/01 which this motion seeks to have admitted in Case 02/02, no party's right to confrontation would be compromised as all parties have already had the opportunity to exercise the right to confront each of the witnesses concerned. Further, the Co-Accused and their Defence teams have been provided with ample opportunities to challenge all documentary evidence in Case 002/01 through adversarial debate, including through document hearings on the authenticity, relevance, and reliability of individual documents and established categories of documents¹⁹ and the submission of written requests.²⁰ Finally, there is no bar to any party presenting further evidence or arguments regarding the probative value of documentary evidence already admitted in Case 002/01 in the context of the issues in Case 002/02.

D. The requested ruling and recall procedure would promote an efficient and expeditious trial

14. By minimising duplication of the Chamber's time and resources through redundant re-admission of evidence proceedings, the requested ruling and recall procedure promotes both efficiency and expeditiousness of the proceedings in Case 002/02. As the Supreme

charge against him, everyone shall be entitled to the following minimum guarantees, in full equality (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"; American Convention on Human Rights, 'Pact of San Jose, Costa Rica', art. 8.2(f), "the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts"; cf. African (Banjul) Charter on Human and Peoples' Rights.

¹⁷ European Convention on Human Rights, art. 6(3)(d).

¹⁸ *Windisch v Austria*, Application No. 12489/86, Judgment (European Court of Human Rights), 27 September 1990 at para. 28.


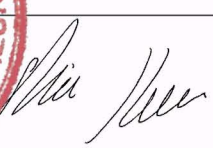
¹⁹ See proceedings of 16-19 January 2012; 23-25 January 2012; 1, 2 6, 8-9, 13-16 February 2012; 12-15 March 2012; 21-31 January 2013; 5 February 2013; 24-27 June 2013; and 8-9 July 2013.

²⁰ See, e.g., **E131/6** Objections to the Admissibility of other Parties' Document Lists for the First Session of the First Trial, 25 November 2011; **E131/1/11** Objection to the Admissibility of the Other Parties' Remaining Document Lists for the First Four Segments of the First Trial, 5 January 2012; **E223/2/8/1** Supplementary Annexes in Connection with Objections to Statements and Transcripts, 29 April 2013; **E131/1/12** Document Objections & Further Submissions Pursuant to Rule 92, 5 January 2012; **E131/1/9** Objections, Observations, and Notifications Regarding Various Documents to be Put Before the Trial Chamber, 14 November 2011.

Court Chamber has recently confirmed, “Judges are at all times certainly obligated to be mindful of the efficiency of the proceedings”.²¹ Further, the need for streamlined case management methods, fully consistent with fair trial rights, is specifically mandated by the December 2013 Report of the Advisory Committee on Administrative and Budgetary Questions (ACABQ) to the Fifth Committee of the UN General Assembly concerning the financing of the ECCC. The ACABQ required, as a condition for access to subvention funds, the “timely completion of the three remaining cases and the development and implementation of a disciplined case-management methodology”.²² In the Co-Prosecutors’ submission, the discharge of this duty warrants the requested ruling, which would promote an efficient and expedient trial wholly consistent with Defence rights.

15. For these reasons, the Co-Prosecutors respectfully request that the Chamber:
- a. **determine** that all evidence admitted in Case 002/01 will be automatically available and placed before the Chamber in Case 002/02;
 - b. **direct** the Record and Archives Unit to assign identical E3 numbers to all such evidence made available from Case 002/01 for use in Case 002/02; and
 - c. **rule** upon this matter as soon as possible in order to allow all parties to assist the Trial Chamber on issues regarding the scope and commencement date for Case 002/02 on a fully informed basis at the scheduled hearing of 11 February 2014.

Respectfully submitted,

Date	Name	Place	Signature
15 January 2014	CHEA Leang Co-Prosecutor	Phnom Penh	
	Nicholas KOUMJIAN Co-Prosecutor		

²¹ **E284/4/8** Decision on Immediate Appeals against Trial Chamber’s Second Decision on Severance of Case 002, 25 November 2013 at para. 75.

²² Request for a subvention to the Extraordinary Chambers in the Courts of Cambodia, UN Doc. A/68/7/Add.12, Report (Advisory Committee on Administrative and Budgetary Questions), 4 December 2013 at para. 23.