



**ព្រះរាជាណាចក្រកម្ពុជា**  
**ជាតិ សាសនា ព្រះមហាក្សត្រ**

**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia

Nation Religion King

Royaume du Cambodge

Nation Religion Roi

**អង្គជំនុំជម្រះសាលាដំបូង**

Trial Chamber

Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសជ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

<b>ឯកសារដើម</b>	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception):	18 / 10 / 2011
ម៉ោង (Time/Heure) :	16:35
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier:	Ratanak

**Before:** Judge NIL Nonn, President  
Judge Silvia CARTWRIGHT  
Judge YA Sokhan  
Judge Jean-Marc LAVERGNE  
Judge YOU Ottara

**Date:** 18 October 2011

**Original languages:** Khmer/English

**Classification:** PUBLIC

**DECISION ON CO-PROSECUTORS' REQUEST FOR RECONSIDERATION OF THE TERMS OF THE TRIAL CHAMBER'S SEVERANCE ORDER (E124/2) AND RELATED MOTIONS AND ANNEXES**

**Co-Prosecutors**

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**Accused**

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## **1. INTRODUCTION**

1. On 3 October 2011, the Co-Prosecutors sought reconsideration of the terms of the Trial Chamber's Severance Order of 22 September 2011 and sought an oral hearing on the issue.<sup>1</sup> On 6 October 2011, the Lead Co-Lawyers provided notice to the Chamber that they would also request reconsideration of this Order "as soon as a consensus has been reached among the Civil Party lawyers".<sup>2</sup> Whilst taking no position on whether the Co-Prosecutors have satisfied the threshold required for reconsideration, the IENG Sary Defence submit that guidance on severance cannot be taken from the ICTY legal framework, that the Co-Prosecutors had failed to demonstrate that the Severance Order was not in the interests of justice, and that the alternative severance proposal they outline would not result in an expeditious trial. They request a public oral hearing on the issue of severance if the Chamber is inclined to reconsider its Severance Order but do not otherwise oppose the Order.<sup>3</sup> The NUON Chea Defence opposes the Co-Prosecutors' request for both reconsideration and a hearing.<sup>4</sup>

2. The Chamber rejects the Co-Prosecutor's request for reconsideration of its Severance Order. It nonetheless provides the following clarifications in relation to this Order, as it is clear that the Request is based upon a number of misconceptions regarding both the nature of the Severance Order and its assumed impact on the course of trial proceedings in Case 002.

## **2. DELIBERATIONS**

### **2.1. Procedural modalities before the ECCC where severance is contemplated**

3. In their Request, the Co-Prosecutors place considerable reliance on Rule 73*bis* before the International Criminal Tribunal for Yugoslavia ("ICTY"), deriving from it a mandatory and universal obligation to seek the views of the Co-Prosecutors before decisions on

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<sup>1</sup> Co-Prosecutors' Request for Reconsideration of "Severance Order pursuant to Internal Rule 89*ter*", E124/2, 3 October 2011 ("Request"); *see also* Severance Order pursuant to Internal Rule 89*ter*, E124, 22 September 2011 ("Severance Order").

<sup>2</sup> Lead Co-Lawyers Notice of Request for Reconsideration of the Terms of "Severance Order pursuant to Internal Rule 89*ter*", E124/4, 6 October 2011.

<sup>3</sup> IENG Sary's Response to the Co-Prosecutor's Request for Reconsideration of "Severance Order pursuant to Internal Rule 89*ter*", E124/6, 13 October 2011; *see also* IENG Sary's Conditional Support to the Co-Prosecutors' Notice of Request for Reconsideration of the Terms of "Severance Order pursuant to Internal Rule 98*ter*", E124/3, 3 October 2011.

<sup>4</sup> Response to Co-Prosecutors' Request for Reconsideration of the Severance Order, E124/5, 11 October 2011.

severance are taken.<sup>5</sup> Far from representing a universal minimum procedural standard, ICTY Rule 73bis is instead a specific measure adopted within an institutional setting that differs significantly from that of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”).

4. ICTY Rule 73bis evolved in the context of adversarial proceedings, where indictments are initiated and amended by the Prosecution.<sup>6</sup> A similar rule is, by contrast, ill-suited to the ECCC, where proceedings are instead inquisitorial and whose indictments are judicially controlled. The Trial Chamber further notes that in practice, attempts by ICTY Trial Chambers to reduce the scope of indictments pursuant to Rule 73bis have seldom been uncontested by the Prosecution.<sup>7</sup> Hearings and related procedural steps pursuant to this Rule have inevitably delayed the commencement of trial in affected cases before the ICTY.<sup>8</sup> The ECCC, whose docket is limited and Accused elderly, is less able than the ICTY to absorb the impact of similar delays in proceedings.

5. In consequence, the ECCC Plenary Session in February 2011 chose not to merely replicate ICTY Rule 73bis but instead enacted the present Rule 89ter.<sup>9</sup> This rule was intended to grant the Trial Chamber, where the interests of justice so require, a discretionary trial management mechanism enabling it on its own motion to separate proceedings and to

<sup>5</sup> Request, paras 18-23.

<sup>6</sup> Rule 73bis was adopted before the ICTY in July 1998. In 2003, the scope of Rule 73bis was expanded significantly, allowing the Trial Chamber to establish, before the beginning of a trial, the number of crime sites or incidents comprised in the charges with respect to which evidence may be presented by the prosecution. In 2006, Rule 73bis was again amended, providing the Chamber with the power to direct the Prosecutor to select the counts in the indictment on which to proceed.

<sup>7</sup> See e.g. *Prosecutor v. Milošević*, ICTY Case No. IT-02-54-T, T., 29 November 2005, pp. 46640-66, 46676-77, 46688-96; *Prosecutor v. Milutinović*, ICTY Case No. IT-05-87-PT, T., 7 July 2006, p. 374; *Prosecutor v. Šešelj*, ICTY Case No. IT-03-67-PT, Prosecution's Response to Trial Chamber's "Request to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment", 12 September 2006; *Prosecutor v. Haradinaj*, ICTY Case No. IT-04-84-PT, Prosecution's Response to Trial Chamber's "Request to the Prosecutor to Make Proposals to Reduce the Size of the Indictment," 13 February 2007, para. 4; *Prosecutor v. Stanišić*, ICTY Case No. IT-03-69-PT, Prosecution Response to the Trial Chamber's "Request to the Prosecution Pursuant to Rule 73bis(D) to Reduce the Indictment," 3 December 2007, para. 44.

<sup>8</sup> See e.g. *Prosecutor v. Karadžić*, ICTY Case No. IT-95-5/18-I (following the arrest of the Accused, on 22 September 2008, the Prosecution filed a motion to amend the indictment. On 16 February 2009, the Trial Chamber granted the motion with the exception of three alleged incidents. On 17 February 2009, the Prosecution filed an urgent motion requesting the Chamber to reconsider its decision regarding one incident. On 26 February 2009, the Chamber reconsidered its previous decision and ordered the Prosecution to file a new indictment. The amended indictment was filed on 27 February 2009. On 22 July 2009, the Trial Chamber ordered the Prosecution to make submissions on the potential application of Rule 73bis to reduce the size of the trial. On 31 August 2009, the Prosecution filed its submissions. On 8 October 2009, the Prosecution was ordered to file a new indictment in accordance with its submission. The trial started on 26 October 2009); see also *Prosecutor v. Gotovina*, ICTY Case No. IT-06-90 (on 9 February 2007, the Chamber ordered the Prosecution to reduce the indictment pursuant to Rule 73bis. Subsequently, the Prosecution filed a reduced indictment on 6 March 2007. On 17 May 2007, the Prosecution filed a motion to amend the indictment to provide additional specification in the pleading of certain acts. On 14 February 2008, the Chamber granted the motion. On 12 March 2008, the day after the commencement of the trial, the Prosecution filed a new indictment).

<sup>9</sup> ECCC Internal Rules (Rev.7), 23 February 2011.

examine in different trials different parts of the Indictment.<sup>10</sup> To safeguard the expeditiousness of proceedings, decisions taken pursuant to this rule are not subject to immediate appeal.

6. In the present context, the Trial Chamber has recently announced the commencement of the trial of the substance in Case 002 for late November 2011. In the exercise of its duty to ensure an expeditious trial, the Chamber has declined to reconsider this Order or to hold a hearing, which would ensure that the substantive trial could instead not open before 2012.

## **2.2. Alleged impact of the Severance Order on trial management in Case 002**

7. The Request assumes, erroneously, a) that subsequent proceedings in Case 002 could rely on findings in the first trial only through the mechanisms of judicial notice of adjudicated facts and *res judicata*, and b) that the commencement of subsequent proceedings in Case 002 could occur only substantially after the conclusion of the first trial and/or following determination of any appeals from that trial, thereby frustrating the objective of expeditiousness.<sup>11</sup>

8. The Severance Order is relevant only to the order and sequencing of the trials in Case 002, enabling the Chamber to issue a first verdict limited to certain counts and factual allegations at an earlier stage, without the need to await a conclusion of the whole trial in relation to all portions of the Indictment.<sup>12</sup> The Chamber does not consider that any appeal of the first verdict prevents continuation of the subsequent trials in Case 002 in relation to the remaining counts and factual allegations in the Indictment.

9. Further, and as no allegations or charges in the Indictment are discontinued in consequence of the Severance Order, there is no need for the first trial to be reasonably representative of the totality of charges in the Indictment.

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<sup>10</sup> See further *Prosecutor v. Mladić*, Decision on Consolidated Prosecution Motion to Sever the Indictment, to Conduct Separate Trials, and to Amend the Indictment, ICTY Case No. IT-09-92-PT, 13 October 2011 (while finding, within the ICTY's distinctive legal framework, no reason to sever the Indictment at issue in that case (para. 38), the Trial Chamber nonetheless acknowledged that a Trial Chamber's decision on severance is "discretionary and requires a complex balancing of intangibles in order to properly regulate the proceedings" (para. 16, citations omitted). This decision was also based at least in part on factual considerations distinct from the present case (such as the absence of proper documentation before the Chamber indicating the fragility of the Accused's health (para. 30), and the opposition to severance by the Defence in that case, who alleged that severance would prejudice the Accused and violate his right to a fair trial (para. 5)).

<sup>11</sup> Request, paras 24-28.

<sup>12</sup> See Severance Order, para. 8 ("Separation of proceedings will enable the Chamber to issue a verdict following a shortened trial") and para. 6 ("At the conclusion of the first trial, a verdict in relation to these allegations, and appropriate sentence in the event of conviction, will be issued").

10. The Chamber in its Severance Order was instead motivated by the following objectives:

- To divide Case 002 into manageable parts that each take an abbreviated time to determine;
- To ensure that the first trial encompasses a thorough examination of the fundamental issues and allegations against all Accused;
- To provide a foundation for a more detailed examination of the remaining charges and factual allegations against the Accused in later trials;
- To follow as far as possible the chronology and/or logical sequence of the Closing Order (approximately 1975-1976);
- To ensure as far as possible that the issues examined in the first trial provide a basis for the consideration of the mode of liability of joint criminal enterprise by including all Accused; and
- To select those factual allegations that affect as many victims as possible.

11. It follows that the Chamber during the early trial segments will give consideration to the roles and responsibilities of the Accused in relation to all policies relevant to the entire Indictment, but will give detailed factual consideration in the first trial mainly to a feature of the Indictment which affected virtually all victims of the Democratic Kampuchea regime (namely population movement phases one and two).<sup>13</sup> Given, as the Co-Prosecutors allege, that there is real concern as to whether the Accused will be physically and mentally able to participate in a lengthy trial, the Chamber considered these measures to be essential in order to “[safeguard] the fundamental interest of victims in achieving meaningful and timely justice, and the right of all Accused in Case 002 to an expeditious trial”.<sup>14</sup>

**2.3. The Severance Order does not preclude the inclusion of additional charges and factual allegations within the first trial, where circumstances permit**

12. In its Severance Order, the Trial Chamber did not exclude the possibility of adding additional charges or counts to the first trial in Case 002 where circumstances permit.<sup>15</sup> Although the Chamber takes note of the Co-Prosecutors’ indication in its Request of possible additional topics for inclusion in the first trial and will be guided by its views as to priority allegations for consideration during later phases of the trial, it finds no basis to reconsider its Severance Order at this stage. The Request is therefore rejected. The Co-Prosecutors’ request for a hearing on this issue is further denied, in the interests of permitting the Trial Chamber to retain its current schedule by commencing the trial of the substance in Case 002 in 2011.

<sup>13</sup> Severance Order, paras 1, 5 and 7.

<sup>14</sup> Severance Order, para. 8.

<sup>15</sup> As the Trial Chamber noted in the Severance Order, it “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 the parties to be provided with timely notice” (Severance Order, para. 6).

13. Pursuant to its previous indications given in the Severance Order and in order to facilitate effective pre-trial preparation, the Chamber provides in the attached annex details of the paragraphs and portions of the Closing Order relevant to the first trial in Case 002.

**FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:**

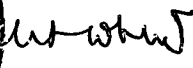
**REJECTS** the Request for reconsideration of the Severance Order;

**DENIES** in consequence the request for an oral hearing;

**ANNEXES** to this decision further details of the paragraphs and portions of the Closing Order relevant to the first trial in Case 002.



Phnom Penh, 18 October 2011  
President of the Trial Chamber



**Nil Nonn**