

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**CO-PROSECUTORS' REQUEST FOR CLARIFICATION OF
THE SCOPE OF THE FIRST TRIAL**

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I. REQUEST

1. The Trial Chamber has recently outlined the scope of the first trial in Case 002 through its Severance Order Pursuant to Internal Rule 89*ter* (“Severance Order”)¹ dated 22 September 2011, its Decision on the Co-Prosecutors’ Request for Reconsideration of the Terms of the Trial Chamber’s Severance Order (“Decision on Severance”)² and its Scheduling Order for Opening Statements and Hearing on the Substance in Case 002 (“Scheduling Order”).³ For the reasons stated below, the Co-Prosecutors request that the Trial Chamber confirm the scope of the first trial and consequently the scope of permissible questioning and admission of evidence.
2. As to the potential scope of the first trial, paragraphs 5, 6 and 7 of the Severance Order and Paragraph 12 of the Decision on Severance read as follows:
 5. *The Trial Chamber has determined separation of proceedings to be in the interests of justice. In addition to the areas listed in paragraph 1, the first trial in Case 002 shall comprise:*
 - a) *Factual allegations described in the Indictment as population movement phases 1 and 2; and*
 - b) *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).*
 6. *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 [sic] opportunity to prepare an effective defence and all parties to be provided with timely notice. 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.*
 7. *No co-operatives, worksites, security centres, execution sites or facts relevant to the third phase of population movements will be examined during the first trial. Further, all allegations of, inter alia, genocide, persecution on religious grounds as a crime against humanity and Grave Breaches of the Geneva Conventions of 1949 have also been deferred to later phases of the proceedings in Case 002.*⁴
 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. 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 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.[footnote deleted]*⁵

¹ E124 Severance Order Pursuant to Internal Rule 89*ter*, 22 September 2011 (“Severance Order”).

² E124/7 Decision on Co-Prosecutors’ Request for Reconsideration of the Terms of the Trial Chamber’s Severance Order (E124/7) and related motions and annexes, 18 October 2011 (“Decision on Severance”).

³ E131 Scheduling Order for Opening Statements and Hearing on the Substance in Case 002, 18 October 2011 at p.2.

⁴ E124 Severance Order, *supra* note 1 at paras. 5-7.

⁵ Decision on OCP Request, *supra* note 2, para. 12.

3. To ensure no misunderstanding as to the scope of the first trial by the Co-Prosecutors and the parties it is requested that the Trial Chamber confirm that paragraph 7 of the Severance Order does not limit in any way the Trial Chamber's discretion, referred to in paragraph 6, to include any other charge or count in the Indictment in addition to those identified in paragraph 5 of the Severance Order in the first trial.
4. Regarding the scope of permissible questioning of the five policies constituting the joint criminal enterprise and the Accused's role and participation in these five policies the Co-Prosecutors request further clarification. The Decision on Severance reads as follows:
- 11. It follows that the Chamber during the early trial segments will give consideration to the **roles and responsibilities** of the Accused **in relation all policies relevant to the entire Indictment**, but will give detailed factual consideration in the first trial mainly to the feature of the Indictment which affected virtually all victims of the Democratic Kampuchea regime (namely population movement phases one and two).⁶*
5. The Annex to the same decision entitled 'List of paragraphs and portions of the Closing Order relevant to Trial One in Case 002' in paragraph 1 entitled "Factual Findings" at subparagraphs (vi) (vii) reads:
- (vi) Factual Findings JCE (156-159); and*
- (vii) Policy as implemented (160-165) (all limited to population movement phases one and two)*
6. Further, in this same Annex the last line of paragraph 3 entitled "Roles of the Accused" in relation to each Accused reads:⁷
- Participation in the Common Purpose (limited to population movement phases one and two)***
7. Some clarification was provided as to the permissible scope of the questioning by inference on 18 October 2011 in the Trial Chamber's Scheduling Order which states:
- ...while 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.⁸*
8. It is requested that the Trial Chamber confirm that (i) the five policies constituting the common purpose of the joint criminal enterprise and the role and participation of the Accused in those policies are material issues in the first trial; and (ii) that these issues require examination, proof to the requisite level and therefore questioning and the

⁶ Decision on OCP Request, *supra* note 2, para. 10.

⁷ E124/7.1 Annex: List of paragraphs and portions of the Closing Order relevant to Trial One in Case 002, 18 October 2011 at p.1.

⁸ E131 Scheduling Order for Opening Statements and Hearing on the Substance in Case 002, 18 October 2011 at p.2 (emphasis added).

admission of documentary evidence. It is respectfully submitted that a definitive determination in advance of trial on these two issues is necessary in order to achieve the aims of the Trial Chamber with regard to the Severance Order particularly, and the multiple trial approach to the prosecution of these Accused generally.

9. On the basis of the text of the Decision on Severance and the Scheduling Order it appears that the Trial Chamber intends that the five policies and the Accuseds' participation in them are material issues in this first trial which require proof. However, at this point, it is clear that the Trial Chamber has not determined what, if any, further charges or counts will be included in the first trial in addition to the factual findings of crimes other than population movement phase 1 and 2 and pertaining crimes as identified in para. 6 of the Severance Order.
10. Clearly, it is essential that the five policies of the joint criminal enterprise and the Accused's role and participation in them is examined fully in the first phase of the first trial in order to allow the Trial Chamber to retain its option to include additional charges or counts. Failing to do so would mean that if the Trial Chamber included additional charges or counts at some point later in this trial the evidence led in the first phase of the trial would likely be insufficient to connect the Accused to the factual allegations of those charges or counts. It is the policy relating to those additional factual allegations and the Accused's role and participation in those policies that would provide that link.
11. It is further noted that many of the witnesses who may be called to testify as to the five policies have knowledge of the implementation of those policies in relation to other charges or counts (for example, in relation to security centres, work sites and co-operatives) that are presently outside the scope of the first trial according to Severance Order. The Co-Prosecutors request clarification from the Trial Chamber as to whether they may question these witnesses about all facts within their knowledge relating to the allegations in the Closing Order. This would prevent the need to recall these witnesses if additional charges or counts are added at some point later in this trial or potentially in a subsequent trial.
12. To preserve the Trial Chamber's aim of ensuring efficient subsequent trials, and in particular the aim of "*provid[ing] a general foundation for all the charges, including those which will be examined in later trials*"⁹ the inclusion of the examination of the five policies and the Accused participation in them is necessary. No such potential tangible and effective foundation can be laid for later trials if there is no sufficient examination of these issues in this first trial.
13. It is requested, therefore, that any inconsistency between the text of the Decision on Severance and Scheduling Order and the text of the Annex to the Severance Decision be

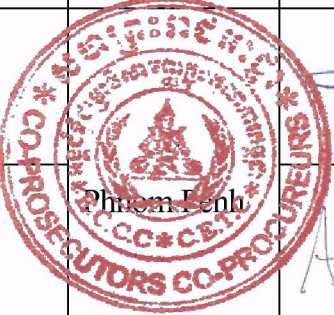

⁹ *Ibid.*

resolved in favor of the text of the Decision on Severance and Scheduling Order. However, if the Trial Chamber intends not to examine the five policies other than forced transfer and the Accuseds' role and participation in them the Co-Prosecutors request that it be heard on the 65 witnesses the Trial Chamber intends to call in the first phase of this trial so it can make submissions concerning their probative value to prove the material issues in the first trial. This request is made with the aim of assisting the Trial Chamber to ensure that the first trial is both fair and expeditious.

II. RELIEF REQUESTED

14. For the reasons given above, the Co-Prosecutors request that the Trial Chamber:
- (a) confirm that paragraph 6 of the Severance Order is not limited in any way by paragraph 7 and therefore the Accused and the parties are on notice that any of the charges and counts in the Indictment may be heard in the first trial;
 - (b) confirm that the five policies constituting the joint criminal enterprise alleged in the Indictment and the Accuseds' role and participation in them are all material facts requiring to be proved in the first trial;
 - (c) clarify whether witnesses may be questioned on the implementation of the five policies in relation to other charges and counts in the Closing Order that are not presently covered by the Severance Order; and
 - (d) should the Trial Chamber not include the five policies of the joint criminal enterprise and the Accuseds' role therein as part of the first trial, to invite the Co-Prosecutors and the parties to make urgent submissions on the existing witness list for the first phase of the trial.
15. The Co-Prosecutors respectfully submit that such clarification now will avoid delays in the substantive hearing and ensure that the parties trial preparation is more informed and therefore contribute to a more efficient and expeditious trial.

Respectfully submitted,

Date	Name	Place	Signature
4 November 2011	CHEA Leang Co-Prosecutor	 Phnom Penh	
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