

**BEFORE THE TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**LEAD CO-LAWYERS AND CIVIL PARTY LAWYERS REQUEST FOR  
RECONSIDERATION OF THE TERMS OF THE SEVERANCE ORDER E124**

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**Before:**

**The Trial Chamber**

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Judge Silvia CARTWRIGHT

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## I – INTRODUCTION AND SUMMARY

1. As reflected in the Internal Rules, Civil Parties enjoy the status of full-rights participants in the trial proceedings<sup>1</sup>. Although the Lead Co-Lawyers and the Civil Party Lawyers (hereafter the “Civil Parties”) do not oppose severance in principle, the Civil Parties consider that it should take full account of the interests of Civil Parties and maximize their inclusion in the first trial. Given the legal and procedural consequences that the Chamber’s Severance Order has on the fundamental rights of Civil Parties, the Civil Parties request reconsideration in order to avoid a miscarriage of justice, specifically where parties with full procedural rights are rendered excluded from exercising those rights. In light of the advanced age of the Accused and the perpetual problems of the Court in securing adequate funding, we believe there is a possibility that this trial could be the last. If this is the case; severance would represent a *de facto* discontinuation of proceedings for a large number of Civil Parties.

## II – PROCEDURAL BACKGROUND

2. On 22 September 2011 the Trial Chamber issued a « Severance Order Pursuant to Rule 89ter »<sup>2</sup> (hereafter « Severance Order ») which severs the proceedings into several distinct trials “*that incorporate particular factual allegations and legal issues*”<sup>3</sup> in addition to the four first “segments” identified during the Trial Management Meeting and the Initial Hearing<sup>4</sup>: *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*

<sup>1</sup> See in particular rules 12, 12ter, 23 23 bis, 23 ter, 23quater, 23quinquies, 29, 41, 67(5), 74(4), 80, 88, 91, 91 bis103, 105 66 and 100 of the ECCC Internal Rules and the Practice Direction on Victim Participation

<sup>2</sup> E124, Severance order pursuant to Rule 89ter, 22 September 2011

<sup>3</sup> See supra footnote 2 at para. 2

<sup>4</sup> Held respectively on 5 April and 27 June 2011. These four segments are “1).Structure of Democratic Kampuchea, 2. Roles of each accused during the period prior to the establishment of Democratic Kampuchea, including when these roles were assigned, 3. Roles of each accused during DK government, their assigned responsibilities, the extent of their authority and the lines of communication, throughout the temporal period with which the ECCC is concerned and 4.Policies of Democratic Kampuchea on the issues raised in the indictment”  
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(insofar as they pertain to the movement of population phases 1 and 2).<sup>5</sup> Facts relevant to “cooperatives, worksites, security centers or execution centers or facts relevant to the third phase of population movements” are excluded from the first trial, as well as “all allegations of the crimes of genocide, persecution on religious grounds as a crime against humanity and Grave Breaches of the Geneva Conventions of 1949” which are “deferred to later phases of the proceedings in Case 002.”<sup>6</sup>

3. On 3 October 2011 the Co-Prosecutors notified the Chamber of a “Request for reconsideration of “Severance order pursuant to internal rule 89ter”<sup>7</sup>. This was followed by Ieng Sary<sup>8</sup> and Nuon Chea<sup>9</sup> who respectively filed responses to the Co-Prosecutors’ submission.

### III - INTERPRETATION OF THE SEVERANCE ORDER

4. At the outset, it is important to ensure that all parties have a correct and clear understanding of what the Severance Order includes and excludes from the first trial. The Civil Parties set out below their understanding of the Severance Order, and highlight issues that require the Chamber’s clarification<sup>10</sup>.
5. With regard to the exclusion from the first trial of genocide, the crime against humanity of persecution on religious grounds, and Grave Breaches of the Geneva Conventions, the Severance Order appears to exclude only *legal* allegations and findings in respect of the said crimes, but not *factual* allegations and findings that would *lead* to establishing the existence of these crimes insofar as they are relevant to the factual topics expressly included by the Severance Order (see below paragraphs 34-40).

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<sup>5</sup> See supra footnote 2 at para. 5

<sup>6</sup> See supra footnote 2 at para 7

<sup>7</sup> E124/2, Co-Prosecutors Request for reconsideration of “Severance order pursuant to internal rule 89ter, 3 October 2011

<sup>8</sup> E124/3, Conditional Support to the Co-Prosecutors and E124/6 Ieng Sary’s Response to the Co-Prosecutors’ request for reconsideration of “Severance Order Pursuant To Internal Rule 89ter

<sup>9</sup> E124/5, Response to Co-prosecutors’ request for reconsideration of the severance order

<sup>10</sup> This is particularly necessary in light of the 17 October 2011 email “Communication to parties in Case 002 regarding scheduling of opening statements and the hearing of the substance in Case 002, and information in advance of hearing on 19-20 October 2011” which reads that : “*the Accused must confront all allegations contained in the Indictment in Case 002. (...) 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.*”

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#### IV – LEGAL AND PROCEDURAL CONSEQUENCES OF THE SEVERANCE ORDER FOR THE CIVIL PARTIES

6. The Civil Parties oppose the expressed view of the Chamber in paragraph 8 of the Severance Order which provides that *“limiting the scope of facts to be tried during the first trial accordingly has no impact on the nature of Civil Party participation at trial, and their formulation of reparations claims made on their behalf by the Lead Co-Lawyers should take account of Internal Rule 23quinquies (l) (a)”*<sup>11</sup> (emphasis added). The Civil Parties consider, to the contrary, that the Severance Order, as it stands, has critical legal and procedural consequences on civil party participation and the formulation of their civil party claim.

##### **A - Impact of the Severance Order on the nature of civil party participation**

7. The Civil Parties consider that the Severance Order has immediate impact on the rights of Civil Parties in the first trial as their participation is based on a demonstration that *“as a direct consequence of at least one of the crimes alleged against the Charged Person, he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based”*<sup>12</sup>.
8. The Chamber will recall that the Severance of the first Introductory Submission into two distinct Case Files<sup>13</sup> had immediate incidence on the victims that could be admitted as Civil Parties at the pre-trial and trial stage. The Case 001 Judgment<sup>14</sup>, which is still pending a decision of the Supreme Court Chamber clearly stated that – to be admissible - Civil Parties need to substantiate that their sufferings were the direct results of the criminal conduct of the Accused.
9. According to the Internal Rules, at the trial stage Civil Parties form part of a single consolidated group. Currently this group is composed of 3866 victims whose applications

<sup>11</sup> Internal Rule 23quinquies (l)(a) reads that *“if an Accused is convicted, the Chambers may award only collective and moral reparations to Civil Parties. Collective and moral reparations for the purpose of these Rules are measures that: a) acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted and b) provide benefits to the Civil Parties which address this harm*

<sup>12</sup> Internal rule 23bis (1)b

<sup>13</sup> **D18**, Separation Order, 19 September 2007: separate the case file of Duch for *“those facts committed inside the framework of S-21”* under Case File Number 001/18-07-2007 and announced that *“those facts related to Duch or other persons mentioned in the Introductory submission will be investigated under Case File Number 002/19-09-2007”*.

<sup>14</sup> **E188**, Judgment Case File/Dossier No. 001/18-07-2007/ECCC/TC  
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have been individually declared admissible by the Co-investigating judges<sup>15</sup> or, on appeal by the Pre-Trial Chamber<sup>16</sup>, on the basis that their alleged crimes were considered as being more likely than not to be true, pursuant to Internal Rule 23 bis (4) and that they had provided sufficient elements tending to establish *prima facie* personal harm as a direct consequence of the crimes committed. Notwithstanding the difference of interpretation between the Trial Chamber in Case 001, the Co-investigating judges and the Pre-Trial Chamber, all required some nexus between the alleged harm and the facts or the crimes against the accused.

10. Therefore, it is indisputable that by “*limiting the scope of facts to be tried during the first trial*”, the Severance Order has procedural and legal consequences on the single consolidated group, the first of these being the exclusion, at least temporarily and until further notice<sup>17</sup>, of civil parties who cannot demonstrate harm as a result of the commission of the crimes linked to the scope of the severed first case.
11. Out of the 3,866 Civil Parties only a small number have been admitted in relation to the first two phases of forced transfer (see Annex). The Civil Parties note that approximately 750 Civil Parties were admitted in relation to facts set forth in the Severance Order. Therefore by severing the case, only those Civil Parties in relation to the first two phases of forced transfer have legal standing as parties to the proceedings.
12. Furthermore, amongst these Civil Parties more than 300 have been admitted on the basis of their suffering multiple crimes. For example, out of the 374 Civil Parties who have been forcibly transferred from Phnom Penh, 15 have lost family members at S-21 and 46 were forcibly married. This illustrates the reality of the sufferings of victims during the Khmer Rouge regime and how these criminal events are inter-related.

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<sup>15</sup> See the following orders on admissibility of civil parties D392, D393, D394, D395, D396, D397, D398, D399, D401, D403, D406, D408, D409, D410, D411, D414, D415, D416, D417, D418, D419, D423, D424, D426 and D404

<sup>16</sup> **D411/3/6** and **D404/2/4**, Decision on appeals against orders of the co-investigating judges on the admissibility of civil party applications, 24 June 2011. The PTC took a broader approach to the admissibility criteria by interpreting rule 23bis(1)(b) as not requiring a causal link between the harm and the facts investigated, but between the harm and any if the crimes alleged. See **D411/3/6**, para 77

<sup>17</sup> **E125**, Initial Specification of the substance of reparations awards sought by the Civil Party Lead Co-Lawyers pursuant to Internal Rule 23quinquies(3) refers to the inclusion of other crimes and factual scenarios “*to later phases of the proceedings in Case 002*”

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13. If the civil parties admitted as victims of forced transfer were to testify before the Chamber, it would be difficult to be strictly confined to these facts and not to mention all the crimes they suffered. Principle 10 of the Van Boven/ Bassiouni principles require that “*victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal or administrative proceedings designed to provide justice and reparation*”. Restricting their testimony to part of their memories, while artificial and counterproductive in terms of trial management, may also risk serious re-traumatizing in suggesting that highly sensitive aspects of their martyrdom would be considered irrelevant.
14. The Severance Order results in the exclusion, until further notice of the Chamber of 3112 Civil Parties and fundamentally modifies the single consolidated group as it creates de facto sub-consolidated groups of Civil Parties which will be difficult or impossible to reconcile with the need to ensure that the collective interest of the consolidated group is respected, provided that this collective interest is made up of individual or sub-group interests.
15. Even where the Chamber restricts Civil Parties’ testimonies to only the facts relevant to the particular ongoing trial, we reiterate that the Chamber should adopt a practical approach in doing so.

#### **B - Consequence of the Severance Order on civil party reparations claims**

16. It is customary in international law that before reparations are awarded, the party seeking redress must prove that his/her harm is linked to the conduct of the accused. Rule 23 *quinquies* (1) (a) and (2)(b) recalls this principle. Civil Parties observe that the reference to Rule 23 *quinquies* is irrelevant at this stage of the proceedings since it relates to the modalities of reparations regarding civil claims.
17. The same Trial Chamber in Case 001 held that “*Civil Parties must satisfy the Chamber of the existence of wrongdoing attributable to the Accused which has a direct casual connection to a demonstrable injury personally suffered by the Civil Party.*”<sup>18</sup> Although there was no nexus requirement in the rules at that time, the Chamber held that “*a prerequisite to the grant of an award is the clear specification of the nature of the relief*

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*sought, its link to the harm caused by the Accused that it seeks to remedy, and the quantum of the indemnity or amount of reparation sought from the Accused to give effect to it.”*<sup>19</sup>

18. Accordingly, the Internal Rules have been amended to include a nexus requirement in Rule 23*quinqüies*(1)(a)<sup>20</sup> and 2(b).<sup>21</sup> Sub-part 1(a) requires that reparations requests must “acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted; and 1(b) requires that they “provide benefits to the Civil Parties which address this harm.”
19. Even though the rules do allow for reparations requests tailored to sub-sets of the “consolidated group” of Civil Parties, the pre-requisite nexus will still need to be met. Therefore it is mistaken to presume that the Severance Order does not impact on the consolidated group’s single claim for reparation as any reparation request **must** be linked to a crime for which an Accused is convicted. If Civil Parties would maintain claims that are related to crimes which are not parts of the first (and probably last) trial, it will and must be consequently rejected by the Trial Chamber. This would cause more harm to the Civil Parties.
20. In a memorandum regarding the *Civil Party Lead Co-Lawyers’ request to reschedule the 19 October 2011 hearing on initial specifications on the substance of reparation* (E 125/1) dated 12 October 2011 the Chamber finally “*acknowledges the potential impact of the Severance Order (E124) on reparations.*”
21. The Civil Parties urge the Chamber to provide clear reasoning in support of their Severance Order which is responsive to the parties' numerous concerns raised through their submissions and which takes into account all relevant criteria. Only in doing so can the Chamber “prevent injustice” to the vast majority of Civil Parties.

#### **V – « INTEREST OF JUSTICE » AND PARTICIPATION OF CIVIL PARTIES**

22. According to Rule 89ter. “*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*

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<sup>19</sup> Judgment Case 001, para. 665

<sup>20</sup> See supra footnote 10

<sup>21</sup> Which reads “*reasoned argument as to how [the awards] address the harm suffered and specify, where applicable, the Civil Party group within the consolidated group to which they pertain*”  
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*concerning part or the entirety of the charges contained in an Indictment (...)*". The Civil Parties are not opposed to the principle of a Severance Order as long as, in the "interest of justice," such order takes into account the scope of victims, the scale, gravity and representative nature of the crimes to be tried and does not have the potential effect of excluding Civil Parties, hence terminating proceedings in which the Civil Parties have substantive claims.

#### **A - Lack of Reasoning on "interest of justice" ground for Severance Order**

23. The Civil Parties are concerned about the absence of legal reasoning to justify the Severance of Case 002. Indeed the Chamber simply notes that it has "*determined separation of proceedings to be in the interests of justice*" without further substantiating the criteria to be met and the legal basis for such criteria. The Civil Parties recall that the Pre-Trial Chamber has reaffirmed the requirement for judicial bodies to provide reasoned decisions as an international standard<sup>22</sup> as all parties have a "*right to know the reasons of a decision so that a proper and pertinent response may be considered*".<sup>23</sup> This is particularly true for decisions that impact on the rights of all parties including of Civil Parties to have an effective remedy.

24. The Civil Parties support and adopt the arguments made by the Co-Prosecutors in their 3 October 2011 submission regarding the criteria developed by the international practice on the severance of indictments. Accordingly, the criteria to take into account when considering the severing of cases include (1) the interests of a fair and expeditious trial and (2) the representative scope of the crimes to be tried including their classification and nature, the places where they are alleged to have been committed, their scale and gravity, and the scope of the victims.

#### **B – The Severance Order will not necessarily ensure the expeditiousness of the trial**

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<sup>22</sup> See **D55/I/8**, Decision on Nuon Chea's Appeal against Order Refusing Request for Annulment, 26 August 2008, para. 21; **C22/I/73**, Decision on Appeal against Provisional Detention Order of Ieng Sary, 17 October 2008, para. 66.

<sup>23</sup> **D365/2/10**, Decision On Co-Prosecutors' Appeal Against The Co-Investigating Judges Order On Request To Place Additional Evidentiary Material On The Case File Which Assists In Proving The Charged Persons' Knowledge Of The Crimes, 15 June 2010, para. 24.

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25. In its memorandum<sup>24</sup> dated 12 October 2011 the Chamber appeared to indicate that the Severance Order is solely based on the necessity to “*ensure the expeditiousness of the trial*”. If such is the case, it is our view that the Chamber erred to apply the other legal criteria to assess whether a decision would be in the “interest of justice” pursuant to 89<sup>ter</sup>.
26. The Civil Parties are concerned that the proposed severance will not lead to the desired result of expeditious proceedings. The example of Case 001 is illustrative as it concerned one (quite cooperative) accused person and two crime sites and still lasted 9 months from the initial hearing to the closing statements. The Civil Parties recall that the ECCC is based on a civil law system and includes an investigation stage aimed at preparing the trial phase and should save time during the trial phase.
27. Like the Prosecution, the Civil Parties believe that it is very unlikely that there could be a series of “mini-trials” based on specific factual charges. They are concerned about the feasibility of the scenario whereby “mini-trials” could be held in succession given the complexity of the case, the advanced age of the accused and of the Civil Parties and the potentially complex legal and procedural issues which might come out of the Severance Order such as *res judicata*.
28. In any case, they consider that it is essential for the Trial Chamber to provide the civil parties with the precise contents of any intended future segmented trials and the order of trials in order for the parties to fully appreciate the current severance.

**C – Fair trial rights include the right of Civil Parties to be heard in a reasonable time**

29. Rule 21 (4) provides that “*proceedings before the ECCC shall be brought to a conclusion within a reasonable time*”. While the advanced age of the accused is one of the criteria that Chamber should use to sever the case, the Civil Parties consider that in the “interest of justice”, the right of the Civil Parties to have their case heard within a reasonable time must be preserved.<sup>25</sup>

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<sup>24</sup> E 125/1 Civil Party Lead Co-Lawyers’ request to reschedule the 19 October 2011 hearing on initial specifications on the substance of reparation

<sup>25</sup> See for e.g. the decision of the ECtHR in *Frydlender v. France* (27 June 2000),»)  
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30. The reasonableness of the duration of the procedure<sup>26</sup> is to be considered with regard to the matter at issue for those concerned. For the Civil Parties, taking into account the gravity and the scale of the charges against the accused (genocide, crimes against humanity and war crimes) the hypothetical nature of the severance may result in a violation of the Civil Parties' right to be heard within a reasonable time or at all. For reference, the European Court on Human Rights requires that judicial authorities, in such cases, to show an exceptional diligence «given the very short life expectancy of the victims».<sup>27</sup>
31. The Civil Parties inform the Chamber that « *half of the applicants were between the ages of 18 and 35 on 17 April 1975* » meaning that they are between 54 and 71 years today.<sup>28</sup> Many applicants have passed away since they have filed their civil party applications. Mr. Vann Nath<sup>29</sup>, one of the few surviving victims of S-21, who fought all his life for justice to be done, and who testified in case 001, died on the 5 September 2011 without having known the decision of the Supreme Court. Similarly, we have just learnt of the passing away of Mr Le Yang Sour, a civil party who was proposed as a witness to key facts pertaining to the persecution and genocide of the Vietnamese minority.
32. The right to an effective remedy for the Civil Parties is a pressing need in the Cambodian context, especially for the victims who have demonstrated much courage to come before the Court as civil parties. Any severance must take this criterion into account.

#### **D – Representative scope of the crimes**

33. The Civil Parties note that as a stand-alone trial, the first trial envisioned by the Chamber is neither representative of the crimes contained in the Closing Order nor does it take into account the scale, gravity of the crimes and the number of victims which are criteria that necessarily need to be taken into account when considering the severance. The current

<sup>26</sup> Article 6 paragraph 1 of the ECHR provides « In the determination of his civil rights and obligations (...) everyone is entitled . hearing within a reasonable time».

<sup>27</sup> See in particular: Pailot & Richard v. France (22 April 1998), Henra & Leterme v. France (29 April 1998) and F.E. v. France (30 October 1998).

<sup>28</sup> **D427**, Closing order para 11 « The age distribution is as follows: 0.6% (or 23 persons) of the Civil Parties were over 50 at 17 April 1975, 12.4% (or 495 persons) were between 35 and 50 years of age, 51.2% (or 2041 persons) were between 18 and 35 years of age, 21,1% (or 843 persons) were between 10 and 18 years of age, 13% (or 519 persons) were between 5 and 10 years of age, 0,8% were born during the regime, and, lastly 0.6% were born after the fall of the regime (no information available for the remaining 0,3%)»

<sup>29</sup> See the Press communication of the civil parties Lead co-lawyers on the death of Vann Nath, 6 September 2011  
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proposed Severance Order creates inequality of treatment and effective discrimination between Civil Parties who will be excluded from the first trial (see Annex).

**VI – THE CURRENT SEVERANCE PROPOSAL IS NOT ACCEPTABLE**

34. The Chamber will understand that, given the above complexity of the consolidated group of civil parties, the Civil Parties are not in a position to propose an alternative Severance order. However the Civil Parties would like the Chamber to take the following observations into account:

**A. The Severance Order should not contain limitation on legal characterization but should reflect all significant factual findings against the accused**

35. The Chamber shall not prejudge its determination on the legal characterization of crimes committed during the first two phases of forced transfer. If the Chamber proceeds with the current severance it should, as a minimum, include all charges contained in the Closing order against the accused. Legal characterization of crimes is a matter for the Trial Chamber once all the evidence is heard. Any severance should guarantee that all significant factual findings contained in the closing order are included to allow civil parties, even if not directly involved to hear the mention of similar sufferings.

**B. Regarding the exclusion of the charge of genocide**

36. It is unthinkable to exclude the charge of genocide given the importance - both in terms of reparation and national reconciliation - it represents for the Civil Parties, the victims of the Khmer Rouge and the international community. Postponing the charge of genocide is in violation of the victims' rights unless the Chamber clarifies immediately when and how it will deal with this charge. The Civil Parties are opposed to such a severance which would result in the exclusion of the crime of genocide and risk of never seeing the facts of genocide being tried which they now consider themselves victims. The mere reference to this charge and the facts which constitute constitutes of recognition of their status as victims but also an important part of the reparation process and national reconciliation.

**C. Regarding the exclusion of the charge of religious persecution**

37. With regards to the clear exclusion of victims of religious persecutions and genocide, the Civil Parties consider that the Court will deprive the trial from an essential part of the arguments related to the first two phases of forced movement. One of the first

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implemented policy of the CPK on 17 April 1975 was the abolition of religion and the disrobing and persecution of monks. Moreover, the evidence shows that during the second phase of forced transfer the Khmer Rouge ethnically identified the Cham people through religious practices. The Closing order in relation to the CPK policy of repeated movements of the population from towns and cities to rural areas charges the accused for crimes against humanity of “murder, persecution on political grounds and other inhumane acts through “attacks against human dignity” and forced transfer”. However that it is inconsistent with the legal findings in paragraphs 1419-1421 which clearly indicates that the elements of religious persecution of the Cham have been established in relation to the Treatment of Cham, phase 2 of the movement of population (..) Similarly the closing order states that “with respect to Buddhists, religious persecution has been established throughout every zone in Cambodia” Therefore religious persecution should necessarily be included in relation to both Phase 1 and 2.

**D. Regarding the exclusion of forced marriage and rape**

38. The Chamber is silent on the crime of forced marriage which seems to indicate that all facts relevant to the crime of forced marriage are excluded. In its memorandum, the Chamber considered that all pending requests in relation to forced marriage and rape were premature. As the Chamber will note 780 civil parties have been admitted as victims of forced marriage while 781 are admitted for the first forced transfer. The practice of forced marriage was implemented in the very first days of the regime and even started in the so-called liberated zones already before 1975. Therefore, in addition to its highly representative nature and gravity of the crime(s) such as rape and enslavement as crimes against humanity and forced marriage and forced pregnancy as other inhumane acts, its exclusion is neither sound nor justified. The estimated time to include forced marriage is only seven hearing days.

**E. Related crimes**

39. Some crime sites are linked to the first and second phases of forced transfer particularly in the context of the political persecution against former Lon Nol official. These include District 12 execution sites and Tuol Po Chrey in Pursat province. The Chamber should also consider looking into the chronological and linked events that “pertain to *pertain to*

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*the movement of population phases 1 and 2 including the political and racial persecution against the “17 april people” and the Vietnamese and those associated with the Vietnamese and other perceived ‘enemies and the deportation of the almost entire Vietnamese population from Cambodia to Vietnam in 1975 and 1976.*

**F. The CPK policy of forced movement of population includes all three phases**

40. The CPK policy of forced movement of population includes the forcible transfer of Phnom Penh (Phase I), the Central, Southwest, West and East Zones (Phase 2) and the East Zone (Phase 3). The Closing order charges the accused for crimes against humanity of murder, persecution on political grounds and other inhumane acts through “attacks against human dignity” and forced transfer in relation to this policy therefore the Chamber should look at all three phases during the same trial. In any case, the Chamber should recognize evidence relating to the Phase 3 population movement, where such evidence also relates to the Phase 1 and 2 population movements. In this regard, there exists evidence that crimes in respect of the Phase 2 movement and crimes in respect of the Phase 3 movement occurred as part of the same events. These crimes were committed against victims accused of having “Khmer bodies and Vietnamese minds.” Full and complete evidence of these events should be allowed in the first trial. Notably, such evidence has direct implications for establishing the DK policies and roles of the Accused, particularly the policy of persecution and eradication of all “enemies” of the CPK, topics which are undoubtedly within the scope of the first trial according to the Severance Order. Similarly, these matters are linked to expert evidence likely to be called during the first trial, for example, from proposed expert witness Ben Kiernan.

**VII – TO “PREVENT INJUSTICE” THE CHAMBER SHOULD RECONSIDER ITS SEVERANCE ORDER AND ALLOW FOR A PUBLIC HEARING**

**A. Request for reconsideration of the Severance Order**

41. The civil parties have filed applications since 2007 in the hope that justice will be rendered and that they can finally heal their wounds. These persons believe deeply in the process of justice. The ECCC and the Chamber, by proceeding with their Severance Order, will extinguish their hopes. The effects of the severance are not likely to achieve the objectives of the ECCC, and do not meet the needs of the victims.

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42. The Severance Order does not fully take into account the gravity of the crimes committed during the regime and the damage done to the victims and people of Cambodia. Civil parties reiterate their deep concerns on what appears to be an approach which would make their participation in the proceedings before the ECCC meaningless. Such an approach would undermine the main purpose of these trials which, in light of the agreement between the United Nations and the Government of the Kingdom of Cambodia, is national reconciliation and justice for the victims.
43. The Civil Parties support and adopt the arguments made by the Co-Prosecutors in their 3 October 2011 submission regarding Trial Chamber's discretion to reconsider or modify its Order on a change of circumstances, when it finds that the previous decision was erroneous or when the previous decision had caused an injustice<sup>30</sup>. As argued by the Co-Prosecutors, one of the standards to apply in reconsidering decisions on the substance of the facts or law is "(...) if it is necessary to do so to prevent injustice"<sup>31</sup> or when "*an unexpected result leading to an injustice has been caused.*"<sup>32</sup>
44. Given the fact that the Chamber has not given any details about the substance and the timing of the subsequent envisaged trials, and taking into account the extremely limited scope of the first trial, the primary consequence of the Severance Order is that it prevents more than 3000 Civil Parties from participating and seeking reparations, as their suffering is not directly related to the charges against the Accused. This exclusion could lead, in the absence of subsequent trials to a *de facto* discontinuation of the proceedings which would violate their right to an effective remedy.
45. The right to an effective remedy is recognized by all international and regional human rights instruments<sup>33</sup> and includes or has been interpreted<sup>33</sup> as including investigating,

<sup>30</sup> **C22/I/68** 'Decision on Application for Reconsideration of Civil Party's Rights to Address the Pre-Trial Chamber in Person', 28 August 2008, para. 25; **D164/4/9** 'Decision on Request to Reconsider the Decision on Request for an Oral Hearing on the Appeals PTC 24 and PTC 25', 20 October 2009, para. 12

<sup>31</sup> See supra footnote 7 at paras 9-10

<sup>32</sup> **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, note 8 at para 6

<sup>33</sup> According to article 8 of the *Universal Declaration of Human Rights 1948* "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". See also Article 2 (3) b) of the International Covenant on Civil and Political Rights ratified by the Cambodia provides that State Parties undertake to "*ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial (...) authorities (...) and to develop the possibilities of judicial Lead co-lawyers and civil party lawyers request for reconsideration*

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prosecuting and punishing those responsible for human rights violations, and receiving reparations.

**B. The Chamber should allow for a public hearing on the Severance Order**

46. The communication received on 17 October 2001 from the Trial Chamber's Senior Legal Officer indicates that "*the Co-Prosecutors' request for reconsideration on this order and for a hearing on this matter will be rejected*"<sup>34</sup>. This not acceptable. The Severance Order should be opened to review as none of the parties were consulted nor given the opportunity to be heard<sup>35</sup>. The Trial Chambers' failure to consult the Civil Parties prior to severing the case has prevented a discussion about how severance could impact their rights.
47. While the Chamber has been seized of the Closing Order for nearly a year, the Severance Order comes at a very late stage and the Chamber has not referred to a possible severance of the case during any of the past hearings. To the contrary, all the directives given by the Chamber concerning the identification of witnesses, experts and Civil Parties and relevant evidence from the Case File indicated that the trial will cover all factual scenarios and charges contained in the Closing Order.
48. Consequently, the ECCC organs in charge of outreach to the Civil Parties have conducted numerous activities in the last year in order to inform civil parties about the scope of the upcoming trial. The Civil Parties have also organized their client's participation in the hearings and gathered their views and concerns on the nature of collective and moral reparations. The lack of consultation is in breach of Internal Rule 21 c) which provides that "*the ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings*". The UN Declaration on Justice for Victims provides that "*(...) treating victims with respect involves ensuring that they are kept*

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*remedy*". See also the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (article 1), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment of 1984 (articles 4, 12-14), the Convention on the Elimination of all forms of Racial Discrimination (article 6), and the Convention for the Protection of all Persons from Enforced Disappearance (articles 8, 12)

<sup>34</sup> "Communication to parties in Case 002 regarding scheduling of opening statements and the hearing of the substance in Case 002, and information in advance of hearing on 19-20 October 2011"

<sup>35</sup> See E124/4 Lead co-lawyers notice of request for reconsideration of the terms of "severance order pursuant to internal rule 89ter"

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*informed at all stages of the proceedings of the developments in the case that concerns them<sup>36</sup>".*

### **THE LEAD CO-LAWYERS AND THE CIVIL PARTY LAWYERS REQUEST**

- That the Trial Chamber reconsiders its Severance Order taking into consideration the representative scope of the crimes to be tried including their classification and nature, the places where they are alleged to have been committed, their scale and gravity and the scope of the victims and their observations on the representative nature of the crimes
- That the Chambers grant an opportunity to debate the issue in a public hearing
- The provision of a precise schedule for upcoming trials, including content and order of proceedings
- That any severance should not contain limitation on legal characterization but should reflect all significant factual findings against the accused.

Respectfully submitted,

Date	Name	Location	Signatures
18 October 2011	PICH Ang <b>National Lead Co-Lawyer</b>	Phnom Penh	
	Elisabeth SIMONNEAU FORT <b>International Lead Co-Lawyer</b>	Phnom Penh	
	Hervé DIAKIESE <b>International Civil Party Lawyer</b>	Phnom Penh	

<sup>36</sup> See UN Handbook on Justice for Victims, at p. 35  
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