

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



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**LEAD CO-LAWYERS URGENT REQUEST ON THE 19 OCTOBER 2011 HEARING
FOLLOWING THE CHAMBERS' MEMORANDUM E125**

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I – PROCEDURAL BACKGROUND

1. On 24 June 2011, the Pre-Trial Chamber issued two decisions¹ on appeals filed by the Civil Party Lawyers against the orders of the Co-Investigating judges regarding admissibility of Civil Parties. The Pre-Trial Chamber partly overturned the Co-Investigating Judges' decisions and admitted 1,728 additional civil party applicants.
2. On 29 June 2011, only five days after the Pre-Trial Chamber's above decisions and during the initial hearing before the Trial Chamber ("the Chamber"), the Lead Co-Lawyers for the Civil Parties indicated their initial specifications on the substance of reparations pursuant to Internal Rule 23^{quinq}ies(3).² Accordingly, these initial specifications only related to reparations requests concerning the 2,122 Civil Parties initially declared admissible during the investigative phase.³
3. On 22 September 2011, the Chamber issued a "Severance Order Pursuant to Rule 89ter"⁴ ("Severance Order") which severs the proceedings into several distinct trials "that incorporate particular factual allegations and legal issues."⁵
4. The Chamber consequently indicated that, in addition to the four first "segments" identified during the Trial Management Meeting and the Initial Hearing⁶ (held

¹ **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

² **E1/6.I**, Transcript of Initial Hearing, 29 June 2011, p. 93

³ See the following orders on admissibility of civil parties residing in the provinces of Kep (D392), Oddar Meanchey (D393), Ratanakiri (D394), Mondulkiri (D395), Preah Vihear (D396), Koh Kong (D397), Stung Treng (D398), Takeo (D399), Preah Sihanouk (D401), Kandal (D403), Phnom Penh (D406), Pailin (D408), Svay Rieng (D409), Prey Veng (410), Kampong Speu (D411), Kratie (D414), Battambang (D415), Banteay Meanchey (D416), Kampong Chhnang (D417), Kampong Thom (D418), Kampot (D419), Pursat (D423), Siem Reap (D424) and Kampong Cham (D426) and Outside the Kingdom of Cambodia (D404)

⁴ **E124**, Severance Order pursuant to Rule 89ter, 22 September 2011

⁵ **E124**, Severance Order pursuant to Internal Rule 89ter, paragraph 2

⁶ Namely "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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respectively on 5 April and 27 June 2011), the first trial will deal with the following points :

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).⁷

5. The Chamber also clarified that the first case will not include “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,” nor will it look into any specific cooperatives, worksites, security centers or execution centers. Lastly, it excludes all facts relevant to the forced movement of population from the East Zone (phase 3), the persecution of specific groups, notably Buddhists, the Vietnamese and the Cham and the crime of forced marriage altogether.
6. On 3 October 2011, the Co-Prosecutors notified the Chamber of a “Request for reconsideration of ‘Severance Order pursuant to Internal Rule 89ter.’”⁸
7. On 23 September 2011, the day following the Severance Order, the Chamber informed the Lead Co-Lawyers through a memorandum⁹ that a hearing will take place on 19 October 2011 in order to “supplement, update and, where necessary, remedy” the initial specifications given at the Initial Hearing of 29 June 2011, “in view of the (..) guidelines” detailed by the Chamber in the memorandum in question.¹⁰
8. The Lead Co-Lawyers informed the Chamber through a Notice filed today, 6 October 2011, of its intention to file a request for reconsideration of the Severance Order¹¹.

⁷ E124, *Severance Order Pursuant to Internal Rule 89ter*, para. 5.

⁸ E124/2, *Co-Prosecutors Request for reconsideration of “Severance order pursuant to internal rule 89ter*, 3 October 2011

⁹ E125, *Initial Specification of the substance of reparations awards sought by the Civil Party Lead Co-Lawyers pursuant to Internal Rule 23quinquies(3)*

¹⁰ E125, final paragraph.

¹¹ 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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II –REASONS IN SUPPORT OF POSTPONEMENT: PRIOR DETERMINATION OF CRITICAL ISSUES IS ESSENTIAL

9. The Lead Co-Lawyers and Civil Party Lawyers consider that the Chamber's scheduling of a hearing on initial specifications on the substance of reparation on 19 October 2011 is premature for the following reasons:

Necessity to wait for the Supreme Court Chamber's decision in Case 001

10. The Lead Co-Lawyers and Civil Party Lawyers stress that the appeals against the reparation order in Case 001 are still pending before the Supreme Court Chamber and that submitting further specifications on reparations before such decision is issued is untimely as this decision are likely to have an important impact on the substance of the reparations requested in Case 002. The Lead Co-Lawyers and the Civil Party Lawyers therefore respectfully submit that any hearing relating to reparations should be scheduled only after the Supreme Court decision is issued.

Impact of the Severance Order on reparation claims

11. The Lead Co-Lawyers and the Civil Party Lawyers fundamentally disagree with the expressed view of the Chamber in paragraph eight of the Severance Order which indicates 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 (I)(a)*" according to which "*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.*"¹²

¹² [need citation here]

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12. It is indisputable that the separation of Case 002 into several distinct trials “will necessarily have procedural and legal consequences on the nature of the consolidated group of civil parties, the first of these being the exclusion, at least temporarily and until further notice¹³, 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.
13. Out of 3,872 admissible Civil Parties, who form the consolidated group at the trial stage, only a small number of them have been admitted in relation to the first two phases of population movement. The Civil Party Lead Co-Lawyers note that approximately 750 Civil Parties are related to the facts set forth in the severance order.
14. Furthermore, as reflected in the Internal Rules, Civil Parties enjoy the status of full-rights participants in these trial proceedings. Although we do not oppose severance in principle, we believe it should take full account of the interests of Civil Parties and maximize their inclusion in the first trial to the extent possible, taking into considerations the need for fair and efficient administration of the proceedings in Case 002. Moreover, in light of the advanced age of the Accused and the perpetual problems of the Court in securing adequate funding, we believe that it is plausible that this trial could be the last. Were this is the case, severance would represent a de facto termination of proceedings for a large number of Civil Parties.
15. In the light of the above context and given that substantive decisions are pending before the Chamber which will affect both the nature of civil party participation and potentially the type of reparation sought, the 19 October 2011 hearing relating to the initial specification on reparations is premature. Therefore, it is unrealistic to require the Civil Party Lead Co-Lawyers to supplement their “initial specifications” at the present time.

On-going Consultation of Civil Parties on reparations

¹³ See E125 reference to the inclusion of other crimes and factual scenarios “to later phases of the proceedings in Case 002”
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16. Additionally, the Lead Co-Lawyers submit that the Civil Party Lawyers are currently in the process of consulting the 1,750 civil parties admitted by the Pre-Trial Chamber in June 2011 regarding reparation requests. Hence, before any hearing takes place it is vital that these consultations are completed. Indeed, if the Lead Co-Lawyers and Civil Party Lawyers had to make further specifications on reparation during the hearing scheduled on 19 October 2011, as requested by the Chamber, there is a high risk that their submissions would not reflect accurately the views of all civil parties.
17. Furthermore, the Lead Co-Lawyers and Civil Party Lawyers submit that they were notified of such hearing on 23 of September 2011, on the eve of the Pchum Ben recess, giving them little more than two weeks to complete the consultation process, compile this information and prepare the hearing. Consulting 1,750 Civil Parties, the majority of which reside in the provinces and merging these new details into an already complex reparation scheme is a long process which cannot be completed in just a few weeks time. In this respect, the Lead Co-Lawyers note that the Victims Support Section is organizing two final forums for the Lawyers to consult with the Civil Parties on reparation issue. The next one will take place on 14 October 2011 in Pursat and the other will be organized soon in Phnom Penh.



18. The Civil Party Lead Co-Lawyers and Civil Party Lawyers are by no means opposed, to be given the opportunity to express the views and concerns of the Civil Parties in such a public hearing. Additionally, we look forward to the opportunity to clarify our position on the initial specification on reparations.
19. However, as described above and notwithstanding the date of the hearing that the Chamber will decide, the Lead Co-Lawyers and the Civil Party Lawyers consider that the agenda of the hearing acknowledge the critical effect of the Chamber's final decision on the severance of Case 002 both on the right of civil parties to an effective remedy and on their reparation claims.

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THE LEAD CO-LAWYERS AND THE CIVIL PARTY LAWYERS REQUEST THE TRIAL CHAMBER

- To take into considerations their concerns for all the above, pending the Trial Chamber decision on the severance of Case 002 and decision of the Supreme Court Chamber in Case 001
- To reschedule the 19 October 2011 hearing

Date	Name	Location	Signatures
October 07, 2011	PICH Ang National Lead Co-Lawyer	Phnom Penh	
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