

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

FILING DETAILS

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Response to “Demande des co-avocats principaux pour les parties civiles afin de définir l'étendue de la déclaration sur la souffrance des parties civiles déposantes”

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To:

The Trial Chamber

Judge NIL Nonn

Judge Silvia CARTWRIGHT

Judge YOU Ottara

Judge Jean-Marc LAVERGNE

Judge YA Sokhan

Co-Prosecutors

CHEA Leang

Andrew CAYLEY

All Civil Party Lawyers

All Defence Teams

MAY IT PLEASE THE TRIAL CHAMBER**I. Procedural history**

1. On 22 September 2011, the Trial Chamber (“the Chamber”) ordered the separation of proceedings in the case before it. By that decision, the Chamber limited the scope of the present trial to consideration of the charges pertaining to movement of population phases 1 and 2 and to crimes against humanity, including murder, extermination, persecution (except on religious grounds), forced transfer and enforced disappearances (insofar as they pertain to movement of population phases 1 and 2).¹
2. The Civil Party Co-Lawyers and the Co-Prosecutors requested reconsideration of the Severance Order; their requests were denied on 18 October 2011.²
3. On 22 October 2012, the 121st sitting day, the fifth Civil Party by the name of YIM Sovann appeared. He was authorized to read from a text purported to be a description of the harm he suffered. However, from the outset, the Civil Party proceeded to talk about the forced labour he was made to perform well after the evacuation of Phnom Penh, and about the execution of his family members in 1978.³
4. The facts relied upon by YIM Sovann in describing the harm he suffered fall squarely outside the scope of the present trial.
5. As part of the parties’ comments before and after Witness YIM Sovann’s statement, his lawyer requested the Chamber to allow Civil Parties “[TRANSLATION] *to make statements concerning their suffering without being confined to Case 002/01, but in relation to the entire Case 002*”.⁴

¹ Severance Order Pursuant to Internal Rule 89^{ter}, 22 September 2011, E124. This Order was recently amended to include the execution of former Lon Nol soldiers and officials at Tuol Po Chrey which occurred immediately after the evacuation of Phnom Penh, Memorandum – Trial Chamber, 8 October 2012, E163/5.

² 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, E124/7.

³ Transcript of Trial Proceedings, 22 October 2012, E1/136.1, p. 19, lines 3-5, and p. 20, lines 9-11.

⁴ Transcript of Trial Proceedings, 22 October 2012, E1/136.1, p. 2, lines 8-10.

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6. In response to this request, the Chamber observed: “[TRANSLATION] *the problem is raised in rather broad terms, and may concern all the Civil Parties*” and invited the Civil Party Co-Lawyers to “*file a submission in writing to present their position*”.⁵

7. On 30 October 2012, the Civil Party Lawyers filed a submission on this matter.⁶

II. Critical Analysis of the Civil Parties’ Arguments

8. The arguments raised hereinafter are in addition to those raised in Court by Mr KHIEU Samphan’s counsel on 22 October 2012.

9. At this time, the Civil Party Lawyers find themselves in a situation which can only be described as rather delicate.

10. Their clients claim to be the victims of a series of crimes that were committed between 1975 and 1979, but, in some instances, such crimes fall outside the case before the Chamber and the scope of the present trial.

11. For this reason, and given that the Civil Party Lawyers claim to spare their clients the task of distinguishing between the various harms they suffered, they are now attempting to obtain that the Chamber authorise their clients to describe the totality of the consequences of the crimes they allegedly suffered, including consequences stemming from crimes that are not at issue in this trial.

12. In a bid to further their case, the Civil Party Lawyers attempt to spin some notions to their advantage.

13. For instance, they make an entirely contrived distinction between the suffering and the harm alleged by their clients.⁷

⁵ *Ibid*, p. 18, lines 3 to 8.

⁶ *Demande des co-avocats principaux pour les parties civiles afin de définir l’étendue de la déclaration sur les souffrances des parties civiles déposantes*, 30 October 2012, E240.

⁷ Request, para. 11.

14. The Civil Party Lawyers base this contrived dichotomy on what the President said when inviting one Civil Party to talk about the “[TRANSLATION] *harm and suffering you endured as a result of the alleged facts and the alleged crimes.*”⁸

15. In so doing, the Civil Party Lawyers spin to their advantage something that was said by a judge, but they fail to show proof that the suffering endured does not form part of the harm. Indeed, it is obvious that the notion of harm includes that of suffering. Accordingly, harm alleged by a Civil Party may, inter alia, include mental and physical suffering, and the material consequences of the crimes of which the Civil Party claims to be a victim.

16. A plain reading of the Civil Party’s statement negates the Civil Party Lawyers’ claims. The reason is because, in describing the harm he suffered, the victim introduced facts that are outside the scope of the trial. That must not be allowed.

17. There is no denying that the mental suffering alleged by a Civil Party may be difficult to divide into segments, since it is cumulative. Nonetheless, in relation to physical suffering, this is not an insurmountable challenge, given that physical suffering is necessarily the result of a specific event. The point we are making here is that statements about suffering must not be used as an opportunity to introduce facts that are outside the scope of the present trial. That would be a serious breach of the rights of the Defence. Indeed, the Civil Party Lawyers ought to remind their clients about this.⁹

18. Further in their submission, the Civil Party Lawyers go on to use some extremely fuzzy language in describing the exact legal status of their clients. Indeed, they even go as far as claiming that the status of victim derives automatically from that of civil party, or that since they were granted *prima facie* civil party status during the judicial investigation, their clients need not prove the harm they suffered. That is clearly not the case.

19. It should be noted that simply because a person has been granted civil party status does not mean that her or she is recognised as a victim before the Court. The legal status of

⁸ Transcript of Proceedings, 29 August 2012, E1/117.1, p. 27, line 25 and p. 28 lines 1 and 2.

⁹ “The Chamber relies on the Lead Co-Lawyers to ensure that Civil Parties, in the interests of the expeditiousness of proceedings, limit the information they provide to the Chamber to that which is relevant to Case 002/01.” Memorandum entitled: “Response to issues raised by parties in advance of trial and scheduling of informal meeting with Senior Legal Officer on 18 November 2011”, 17 November 2011, E141, p. 6.

victim can only derive from the final judgement on the merits. It is also noteworthy that in the DUCH case some civil parties were turned down. The Judgement in Case 001 correctly states that:

Once declared admissible in the early stages of the proceedings, Civil Parties must satisfy the Chamber of the existence of wrongdoing attributable to the Accused which has a direct causal connection to a demonstrable injury personally suffered by the Civil Party.¹⁰

20. So this begs the question as to whether it is permissible for Civil Parties to testify about facts that are not part of the case before the Chamber in Trial 002/01, facts that will not be debated or subjected to examination by all parties to the proceedings, and which will neither be relied upon for the Chamber's decision on reparations nor admitted into evidence in subsequent trials. Such statements can only compromise the fairness of the proceedings.

21. In addition to the confusion created by the Civil Party Lawyers between victims and civil parties (with help from the sometimes questionable wording of the Internal Rules, which use the term "victim" instead of "civil party"), the Civil Party Lawyers also voice concern about national reconciliation!¹¹

22. In reality, this is a case of reversal of priorities. While it is possible for a properly conducted and fair trial to have some impact on what is commonly referred to as "National Reconciliation", this cannot be used as an excuse for violating basic principles of law... Yet that is precisely what is happening in this instance. For that reason, the argument relating to national reconciliation is far-fetched and invalid. It should not be taken into account.

FOR THESE REASONS, Mr KHIEU Samphân requests that the Trial Chamber:

- **REJECT** the Civil Party Co-Lawyers' Request, and,
- **ORDER** the parties to strictly abide by the framework of the Severance Order as defined by the Chamber.

¹⁰ Judgement in Case 001, 26 July 2010, E188, para. 639.

¹¹ Request, paras. 19-20.

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	KONG Sam Omn	Phnom Penh	[signed]
	Anta GUISSÉ	Phnom Penh	[signed]
	Arthur VERCKEN	Paris	[signed]
	Jacques VERGÈS	Paris	[signed]
Date	Name	Place	Signature

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