

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

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**CO-PROSECUTORS' REQUEST FOR CLARIFICATION OF FINDINGS  
REGARDING THE JOINT CRIMINAL ENTERPRISE ALLEGED IN CASE 002/01**

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## I. INTRODUCTION

1. During the last month of trial, the parties and the Trial Chamber engaged in a number of exchanges regarding the purposes for which evidence of the alleged joint criminal enterprise (“JCE”) policies not directly related to charges in Case 002/01 may be admitted. Prompted by these exchanges, the Co-Prosecutors submit this Request for Clarification regarding the factual findings and legal conclusions that will be made by the Trial Chamber on JCE policies that are not related to the charges included in Case 002/01.

## II. PROCEDURAL HISTORY

2. At the April 2011 Trial Management Meeting and the June 2011 Initial Hearing held prior to the severance of Case 002 and commencement of evidentiary proceedings, the Trial Chamber advised the parties that the initial phase of the Case 002 trial would address: the structure of Democratic Kampuchea; the roles of the Accused (both prior to and during the DK period), including “the extent of their authority and the lines of communication;” and “[the five] policies of Democratic Kampuchea on the issues raised in the Indictment.”<sup>1</sup> In September 2011 the Chamber ordered the severance of the case into a series of trials, the first of which would still encompass an examination of the above initial phase issues, but otherwise be limited in its consideration of the crime base to two forced movements of populations.<sup>2</sup> The Chamber also advised the parties that additional Case 002 crime sites may be added to the first trial subject to the defence having a sufficient opportunity to prepare and all parties being given sufficient notice.<sup>3</sup>
3. Prior to the start of the first trial, the Chamber provided the following additional clarification of the extent to which policies not immediately concerned with the crime sites in Case 002/01 would be examined in this trial:

*Regarding the examination of policies other than those relating to forced evacuation, the purpose of including reference to them in the first trial is to enable the manner in which policy was developed to be established. What is therefore envisaged is presentation in general terms of the five policies,*

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<sup>1</sup> **E1/2.1** Transcript of Trial Management Meeting, 5 April 2011, 11.34.50 to 11.37.10; **E1/4.1** Transcript of Initial Hearing, 27 June 2011, 09.18.25 to 09.22.10; **E124** Severance Order Pursuant to Internal Rule 89ter, 22 September 2011, para. 1.

<sup>2</sup> **E124** Severance Order Pursuant to Internal Rule 89ter, 22 September 2011, paras. 1 and 5.

<sup>3</sup> **E124** Severance Order Pursuant to Internal Rule 89ter, 22 September 2011, para. 6.

*although the material issue for examination in the first trial is limited to the forced movement of the population (phases one and two). It follows that there will be no examination of the implementation of policies other than those pertaining to the forced movement of the population (phases one and two).*<sup>4</sup>

4. The Trial Chamber later expanded the scope of Case 002/01 to include executions at the Tuol Po Chrey crime site that occurred immediately after the evacuation of Phnom Penh.<sup>5</sup> These crimes necessarily require consideration of the JCE policy relating to enemies and, in particular, the targeting of former Lon Nol soldiers and officials.
5. On 18 October 2011, the Trial Chamber stated that it would “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 the included policies.<sup>6</sup>
6. In its second severance decision, the Trial Chamber reaffirmed that “all parties may lead evidence in relation to the roles and responsibilities of all Accused in relation to all policies of the DK era.”<sup>7</sup> In that regard, the second severance decision cited paragraphs of the Closing Order relating to all five JCE policies,<sup>8</sup> even though the paragraphs on which the Trial Chamber has indicated it will make *findings* only relate to the policies relevant to the charges or crime sites in Case 002/01.<sup>9</sup> The Trial Chamber noted that, based on the charges included in Case 002/01, it would only be able to examine “two of the five main themes of the Case 002 Closing Order, *i.e.* forced movement and execution of purported enemies of the regime,” but that the defined scope of trial would nevertheless “enable the

<sup>4</sup> **E141** Trial Chamber Memorandum titled “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, p. 2.

<sup>5</sup> **E163/5** Trial Chamber Memorandum titled “Notification of Decision on Co-Prosecutors’ Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163) and deadline for submission of applicable law portion of Closing Briefs,” 8 October 2012, para. 3.

<sup>6</sup> **E124/7** 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, para. 11.

<sup>7</sup> **E284** Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, para. 117.

<sup>8</sup> *Ibid.* at fn. 215.

<sup>9</sup> **E124/7.3** Annex: List of Paragraphs and Portions of the Closing Order Relevant to Case 002/01.

Co-Prosecutors to place these offences within the broader context of the joint criminal enterprise in which all Accused are alleged to have participated.”<sup>10</sup>

7. On 25 June 2013, the Trial Chamber again ruled that evidence regarding the policies not directly related to charges in Case 002/01 may be admitted, but that “[i]t is indeed implementation on the ground – or in the field that should not be part of the presentation of key documents as part of this trial.”<sup>11</sup> During presentations the following day, the Co-Prosecutors emphasized that some documentary evidence demonstrates both the existence and implementation of the other JCE policies, and that such evidence was admissible and could be properly considered by the Chamber.<sup>12</sup> The Trial Chamber acknowledged that the parties could refer to documents that “contain information that tends to point both to the existence or development of a policy and to its implementation,” but also confirmed that the relevance of such evidence was limited to the existence or development of the policy.<sup>13</sup>

### III. REQUEST

8. From the outset of this trial, the Trial Chamber has made clear that it would hear a wide scope of evidence relating to the structure of the DK regime, the role of the Accused and all CPK policies, so that (a) such evidence could “provide a general foundation for all the charges, including those which will be examined in later trials”<sup>14</sup> and (b) the specific crimes with which the Accused are charged could be understood “within the broader context of the joint criminal enterprise in which all Accused are alleged to have participated.”<sup>15</sup> At the same time, as noted above, the Chamber has made clear that its judgment in this case would be limited to the specific issues that are relevant to Case 002/01.

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<sup>10</sup> **E284** Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, para. 118.

<sup>11</sup> **E1/212.1** Transcript of Trial Proceedings, 25 June 2013, 09.22.10 to 09.23.43.

<sup>12</sup> **E1/213.1** Transcript of Trial Proceedings, 26 June 2013, 11.15.35 to 11.21.44.

<sup>13</sup> **E1/213.1** Transcript of Trial Proceedings, 26 June 2013, 11.38.25 to 11.40.42.

<sup>14</sup> **E131** Scheduling Order for Opening Statements and Hearing on the Substance in Case in Case 002, 18 October 2011.

<sup>15</sup> **E284** Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, para. 118.

9. The Co-Prosecutors understand the various statements and rulings of the Trial Chamber to mean that the Chamber will decide in its judgment only the JCE policies that are relevant to the forced movements of the population (Phases One and Two) and the post-evacuation executions at Tuol Po Chrey. This necessarily includes the JCE policies relating to forced movements, enemies and the targeting of former Khmer Republic officials and soldiers. The Co-Prosecutors further submit that, at least for the purposes of context to understand the forced movements, it will also be necessary for the Trial Chamber to consider the CPK policy establishing cooperatives. The Second Forced Movement, in particular, is directly related to the CPK policy on cooperatives, agricultural production and enslavement of the civilian population.
10. The Co-Prosecutors submit that the Trial Chamber should not make conclusive factual or legal findings on the other JCE policies that are not directly relevant to the crimes charged in Case 002/01, such as the policies relating to forced marriage and the targeting of the Buddhists, Cham and Vietnamese. The Trial Chamber has not heard all the relevant evidence relating to those subject matters. For example, the Chamber did not hear from the numerous witnesses proposed in the Co-Prosecutors' trial witness list relating to forced marriage and the treatment of the Cham, Vietnamese and Buddhists,<sup>16</sup> and the Defence thus have not had the opportunity to confront and cross-examine the key witnesses on those subjects. At the same time, to the extent evidence relating to the existence of these other policies provides context to relevant issues in Case 002/01, the parties should be allowed to reference such evidence as has been presented in this trial in their closing briefs and arguments, and the Trial Chamber may consider such evidence in its deliberations.
11. The Trial Chamber should also specifically exclude from consideration the allegations relating to the Cham that are included in some of the paragraphs discussing the 2<sup>nd</sup> Forced Movement.<sup>17</sup> No witnesses were heard in this trial relating to the forced movement of the

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<sup>16</sup> **E9/4.1** Annex 1: Proposed Order of Witness Appearance at Trial (to "Direction Requesting Written Submissions on Preliminary Objection" (E9/4)), 20 April 2009 [proposing 21 witnesses regarding Treatment of the Cham, 21 witnesses relating to the Treatment of the Vietnamese, 8 witnesses relating to Treatment of Buddhists and at least 7 witnesses relating to the Regulation of Marriage].

<sup>17</sup> **D427** Closing Order, 15 September 2010, para. 266, 268 and 281.

Cham population. The allegations regarding the forced movement of the Cham should instead be heard and decided as part of the broader allegations relating to the persecution and targeting of the Cham people in possible future trials. This is presumably why the Trial Chamber denied the Co-Prosecutors' request to hear two Cham witnesses relating to the forced movement of that group.<sup>18</sup>

12. The Co-Prosecutors thus respectfully request the Trial Chamber to confirm that it does not intend to make definitive factual findings or legal conclusions in the Case 002/01 judgment on the JCE policies that are not relevant to the crimes charged in this case – specifically, the policies relating to forced marriage and the targeting of the Buddhist, Cham and Vietnamese groups.

Respectfully submitted,

Date	Name	Place	Signature
7 August 2013	CHEA Leang Co-Prosecutor	Phnom Penh	
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<sup>18</sup> **E279** Co-Prosecutors' Request to Clarify Closing Order Paragraphs Included Following 29 March 2013 Severance Announcement, 8 April 2013, para. 5; **E288/3** Co-Prosecutors' Notification in Response to the Senior Legal Officer's Request to Provide Information Prior to the Trial Management Meeting, 10 June 2013, para. 5, 8-10.