

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

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**CIVIL PARTY LEAD CO-LAWYERS' URGENT REQUEST FOR
CLARIFICATION AND FOR EXTENSION OF TIME TO RESPOND TO TRIAL
CHAMBER DIRECTIVE E93**

Filed by:

Civil Party Lead Co-Lawyers
PICH Ang
Elisabeth SIMONNEAU-FORT

Civil Party Co-Lawyers

CHET Vanly
HONG Kim Suon
KIM Mengkhy
LOR Chunthy
MOCH Sovannary
SIN Soworn
KONG Pisey
YUNG Phanith
SAM Sokong
VEN Pov
TY Srinna

Before:

The Trial Chamber
Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sakhan
Judge Jean-Marc LAVERGNE
Judge THOU Mony

Distribution to:

The Office of the Co-Prosecutors:
CHEA Leang
Andrew CAYLEY
YET Chakriya
William SMITH

The Charged Persons:

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Emmanuel ALTIT
Pascal AUBOIN
Olivier BAHOUAGNE
Patrick BAUDOIN
Evelyne BOILEAU-BRANDOMIR
Philippe CANONNE
Annie DELAHAIE
Laure DESFORGES
Ferdinand DJAMMEN NZEPA
Nicole DUMAS
Isabelle DURAND
Françoise GAUTRY
Marie GUIRAUD
Emmanuel JACOMY
Martine JACQUIN
Daniel LOSQ
Christine MARTINEAU
Mahdev MOHAN
Barnabé NEKUIE
Lyma NGUYEN
Élisabeth RABESANDRATANA
Julien RIVET
Fabienne TRUSSES NAPROUS
Nushin SARKARATI
Silke STUDZINSKY
Philippine SUTZ

KHIEU Samphan
IENG Sary
IENG Thirith
NUON Chea

The Co-Lawyers for the Defence

SON Arun
Michiel PESTMAN
Victor KOPPE
ANG Udom
Michael G. KARNAVAS
PHAT Pouv Seang
Diana ELLIS
SA Sovan
Jacques VERGÈS

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I – PROCEDURAL BACKGROUND

1. On 17 January 2011, the Trial Chamber filed an “Order to file material in preparation for Trial” (E9) in which the parties were requested to file amongst other documents a “list of proposed witnesses, experts and Civil Parties who do not seek protective measures”; a “list of proposed new witnesses or civil parties who seek protective measures” and “information required in relation to all proposed witnesses, Civil Parties and experts”.
2. Accordingly, on 28 January 2011, the Office of the Co-Prosecutors filed “Co-Prosecutors’ Rule 80 Expert, Witness and Civil Party Lists, Including confidential Annexes 1, 2, 3, 3A, 4 and 5” (E9/13).
3. On 15 February 2011, the Civil Party Lead Co-Lawyers submitted their “Rule 80 Witness, expert and civil party lists, including confidential Annexes 1, 2a, 2b, 3a, 3b and 4”(E9/4/3). The same day, the four Defense Teams filed their lists of proposed witnesses, experts and civil parties¹.
4. On 11 May 2011, the Trial Chamber issued a document entitled “Scheduling of Initial Hearing” (E86)
5. On 3 June 2011, the Trial Chamber issued a “Directive in advance of Initial Hearing concerning proposed witnesses” (E93)
6. On 14 June 2011, the Trial Chamber issued the “Agenda for Initial Hearing” (E86/1)

II - REQUEST FOR URGENT CLARIFICATION

¹ Respectively Nuon Chea Defense Team E9/10, Ieng Tirth Defense Team E9/4/5, Ieng Sary Defense Team E9/4/2, and Khieu Samphan Defense Team E9/4/4

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7. It is respectfully submitted that at no time did the Trial Chamber issue any directive in advance of the Initial Hearing concerning proposed civil parties. On the contrary, the Trial Chamber only ever referred to witnesses and experts².
8. On 11 May 2011, the Trial Chamber issued a document entitled "Scheduling of Initial Hearing" (E86) in which it informed the Parties of the issues that shall be considered at the Initial Hearing. Such issues included the "lists of potential **witnesses** and experts submitted by the parties in accordance with the Internal Rules".
9. On 3 June 2011, the Trial Chamber issued a "Directive in advance of Initial Hearing concerning proposed **witnesses**" (E93) in which it informed the parties that, during the upcoming Initial Hearing, the Chamber will limit discussion of proposed "**witnesses and experts.**" After having "analyzed the **witness lists**" the Trial Chamber requested all parties to provide by 20 June 2011 a revised list of **witnesses** relevant to the four segments listed in the above mentioned directive and indicated that only these relevant "**witnesses and experts**" will be discussed. Finally, the Chamber indicated that, "following the Initial Hearing and having heard the parties' submissions, the Chamber will announce the list of primary **witnesses** for these early trial segments in due course (other relevant **witnesses** may be included on a reserve list and be called by the Chamber should **witnesses** on the primary list be unavailable)."
10. On 14 June 2011, the Trial Chamber issued the "Agenda for Initial Hearing" (E86/1) in which it provided that time will be allocated inter alia for "*Point 1* Announcement of tentative list of **witnesses** for the first phases of the trial (...) *Point 8* Oral argument in relation to objections, if any, to the proposed **witness** list for the early segments of trial"

² Scheduling of Initial Hearing E86, Directive in advance of Initial Hearing E93, Agenda for Initial Hearing E86/1.

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11. On 15 June 2011, the Lead Co-Lawyer Section requested clarification by email to Ms. Susan Lamb, Trial Chamber Senior Legal Officer *‘whether the Chamber will issue further directives in relation specifically to civil parties proposed by the parties pursuant to TC order E9 or if it is to be understood that E93 and consequently E86/1 point 1 and 8 of the agenda also include Civil Parties (for e.g. Annexes 2a and b of the Civil Party lead co lawyers Rule 80 submission)’*. In a response received on the same day Ms. Lamb indicated that the Chamber will not be *“issuing further directives on this area. You may read these orders as requiring the parties to provide supplementary lists of all individuals who are proposed to give testimony on the early trial segments (including civil parties, if they are relevant) (...)”*.
12. Responding to that email, the Lead Co-lawyers requested further clarification as follows: *“1. Does the E93 Directive refer ALSO to civil parties and if so what is the Chamber requesting for June 20 in relation to the list of Civil Parties Annexes 2a and b? 2. To facilitate the preparation for the hearing, are the parties to provide information about those civil parties in order of relevance and probative value regarding the four segments indicated by the TC?”*. The response from Ms. Lamb read: *“1. Yes and the LCLs (like the other parties) may submit lists of relevant CPs if there are any. If no CPs' testimony is relevant to these early segments, no list is required. 2. If a list is filed, yes in descending order of relevance/probative value (with very limited explanatory description, if it is needed).”*
13. The Civil Party Lead Co-Lawyers consider that the June 3 Directive and the Agenda for the Initial Hearing create uncertainty for the Civil Parties. It is unclear whether an additional directive might be issued since the direction refers only to **witnesses and experts** or whether the Trial Chamber intended for civil parties to be subsumed under the group of “witnesses and experts”.

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14. However, since it is expected that the Trial Chamber is clear in the use of legal terms, the Civil Party Lead Co-Lawyers cannot reasonably expect that the Directive also refers to proposed civil parties without their explicit mention. Thus, the Directive raises concerns that the Trial Chamber did not review the submitted civil party lists and their relevance to contribute factual evidence since it is stated that the Trial Chamber only “analyzed the **witness** lists”.
15. Therefore, until such time as the Civil Party Lead Co-Lawyers receive clarification from the Trial Chamber on this issue, it is limited to preparation of the witness and expert lists in accordance with the E93 Trial Chamber Directive.
16. Should the Trial Chamber confirm the interpretation suggested in Susan Lamb’s emails of 15 June 2011, an extension of the original deadline of 20 June 2011 (which is also a national holiday) is requested in order to allow the Civil Party Co-Lawyers to file the list of those civil parties who are suggested to testify on the first segments of the trial.

III – CIVIL PARTIES ARE DISTINCT FROM WITNESSES

17. According to the ECCC Internal Rules, Civil Parties have the right “[to] participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution”³ in all stages of the criminal proceedings before the ECCC.
18. Participation in the ECCC context means, performing their rights, such as *inter alia* (i) submitting their lists of witnesses, experts, civil parties and documents; (ii) questioning witnesses, experts, civil parties and the accused; (iii) requesting investigative actions; (iv) being legally heard; (v) putting evidence before the TC; and (vi) giving oral and written statements on adduced evidence.

³ Rule 23(1) of the Internal Rules confirms that the Civil Parties have the right “[to] participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution.”

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19. In addition to their active right to participate in the proceedings, Civil Parties can also be summoned by any party to give testimony during trial. According to Rule 91(1) of the Internal Rules, “[t]he Chamber shall hear the Civil Parties, witnesses and experts in the order it considers useful.”
20. The Internal Rules make a clear distinction between Civil Parties, witnesses and experts.⁴ This fundamental difference is based on the legal status conferred to a Civil Party in the criminal proceedings: a Civil Party is not and cannot be considered as a witness.⁵
21. The Lead Co-Lawyers and Civil Party Lawyers reiterate the importance of maintaining such a distinction in order to preserve the legal status of the Civil Parties before the ECCC.

IV. CIVIL PARTIES PROVIDING EVIDENCE

22. A total of one hundred and eighty three (183) Civil Parties have been proposed by all parties with one hundred forty six (146) Civil Parties proposed solely by the Civil Party Lead Co-Lawyers and Civil Party Lawyers. A certain number of these Civil Parties can give evidence in relation to the first segments of the trial.
23. Additionally and as indicated in prior submissions, the Civil Party Lead Co-Lawyers reserve their right to amend the list once the Pre-Trial Chamber decisions against the Orders of the Co-Investigating Judges regarding the admissibility of civil party applicants have been notified.

⁴ Rule 91(1). See also : Civil Parties and Witnesses have two clearly separated and distinct set of rules, for example rules 12ter, 23, 23bis, 23ter, 23 quarter, 23 quinquies, 59, 91, 100, 101 refer specifically to civil parties whereas internal rules 24, 25, 26, 27, 28, 60, 84 deal specifically and solely with witnesses appearing before the Court at different stages of the proceedings

⁵ The distinction is further supported by the fact that a Civil Party may make a statement before the Chamber without the requirement to take an oath, See IR 24(2), see Observation des parties civiles sur la motion présentée par leng Sary aux fins de prestation de serment par les parties civiles préalablement à leur témoignage, 17 mars 2010, Doc n° E57/1. See also as provided for in Article 312 of the CPC which states that “[a] civil party may never be heard as a witness”

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24. It is of the utmost importance that the Civil Party Lead Co-Lawyers and the Civil Party Lawyers be given urgent directives regarding the testimony of civil parties during the first phase of the substantive hearing in relation to the four segments identified by the Chamber

V – “REDUCTION” OF CIVIL PARTY LISTS

25. If the Trial Chamber considers that the Civil Party lists need to be reduced, the Civil Party Lead Co-Lawyers insist that the Civil Party Lawyers should maintain the right to reduce the lists themselves. While the Civil Party Lead Co-Lawyers are aware of the time constraints facing the Trial Chamber and appreciate the practical reasons for reducing the lists, they submit that the Civil Party Lawyers are in the best position to reduce their lists in a manner which is conducive to ensuring that the most relevant and probative Civil Parties are heard by the Trial Chamber.


REQUEST

The Civil Party Lead Co-Lawyers request that :

- The Trial Chamber clarifies the scope of its “Directive in advance of Initial Hearing concerning proposed witnesses” (E93); and
- Should the the Trial Chamber find that E93 includes proposed civil parties, an extension of time be granted to file revised lists and supplemental explanations.

Respectfully submitted,

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Date	Name	Location	Signatures
June 17, 2011	PICH Ang Lead Co-Lawyer	Phnom Penh	
	Elisabeth SIMONNEAU FORT Lead Co-Lawyer	Phnom Penh	