

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

Filing details

File No.: 002/19-09-2007-ECCC/TC

Party Filing: Lead Co-Lawyers for Civil Parties

Before: Trial Chamber

Original language: English

Date of document: 14 March 2012



CLASSIFICATION

Classification of document suggested by the filing party: Public

Classification by the Co-Investigating Judges or the Chamber: សម្ងាត់/Confidential

Classification Status:

Review of interim Classification:

Records Officer Name:

Signature:

**LEAD CO-LAWYERS OBSERVATIONS ON THE CO-PROSECUTORS NOTICE
TO THE TRIAL CHAMBER AND PARTIES REGARDING TESTIMONY OF TCE-**

38

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I-Background

1. We refer to the Trial Chamber's Memorandum: Hearing of TCE-38 and TCE-44 **E166** dated 6 February 2012, the Co-Prosecutors' Notice to the Trial Chamber and Parties Regarding Testimony of TCE-38 and TCE-44 **E166/1** dated 27 February 2012, and the Trial Chamber's Memorandum **E172/5** dated 2 March 2012 regarding the document hearing ("the Hearing") commencing on 12 March 2012.

2. We take this opportunity to reiterate our position regarding TCE-38's testimony, in keeping with the Co-Prosecutors' recommendation in E166/1 that topics and documents that the parties intend to discuss be provided to the Co-Prosecutors or the Trial Chamber for forwarding to TCE-38.

II-Request

On the topics on which TCW-38 will be questioned

3. We agree with and support the list of topics identified by the Co-Prosecutors in E166/1 (Annex) in response to TCE-38's request that he would benefit from notification of the topics on which he will be expected to testify. In addition to these topics, we request that TCE-38 be notified that he will be expected to testify on matters related to the particular groups (and those associated with them) specified in paragraph 4f(iv) of E166/1(Annex) and their treatment with specific reference to the displacements of population (Phases 1 and 2) specified in paragraph 6 of the same document, consistent with the portions of the Closing Order **D427** deemed relevant to Trial One in Case 002 (**E 124/7.2**).

Additional documents to be given to TCW-38

4. In addition to the books identified in paragraph 1 of E166/1(Annex), we request the Trial Chamber forward the following documents to TCE-38 for his immediate review, or authorize the Civil Party Lead Co-Lawyers to forward the same:

- a. **D250/3.22** entitled "The Survival of Cambodia's Ethnic Minorities," published by Cultural Survival, dated 31 July 1990.

b. **D366/7.1.76** entitled “The Samlaut Rebellion and its Aftermath 1967-1970, The Origins of Cambodia’s Liberation Movement, Part 1” published by the Centre of Southeast Asian Studies of Monash University.

5. This is not a fresh request. Both of these documents are among the ten documents contained in Annex 7(a)(i) of E109/2.1 to which the Lead Co Lawyers referred in their letter to the Trial Chamber dated 8 March 2012.

6. Contrary to the objections raised by the Defense during the document hearing on the 12 of March 2012,¹ research publications are clearly admissible, especially where the author, like TCE-38, will be called to give expert testimony and can be “confront(ed)”, as the Defense would like to do, on the documents in question. Any questions regarding such documents can and should be asked during the course of the expert’s testimony, not ahead of it at this Hearing.

7. As TCE-38 has been scheduled by the Trial Chamber to testify in three short weeks, the Defense can inquire about this and other documents. In the light of E/166 and E166/1, any doubt as to whether or not TCE-38 will testify should be resolved in favor of the current trial schedule and not on the basis of the Defense’s very own objections to the fact of TCE-38’s testimony. Put simply, the Defence cannot directly or indirectly rely on its own objection to TCE-38 testifying to say that it should not be denied the right to test the contents of a document authored by TCE-38 through cross-examination.

8. Finally, we find it odd and wholly inconsistent that the Defense has itself requested the Trial Chamber obtain further documentation from TCE-38, yet objects to the admission of a publication authored by this very expert witness. Such a contention runs counter to the Defense’s compelling argument made earlier that that, since TCE-38 has been called as an expert witness, the Parties are entitled to review any and all material produced by him that may touch on any of the areas on which he may provide evidence.

¹ See Draft Transcript of Trial Proceedings, Trial Day 34, 12 March 2012 page 62ff.
LEAD CO-LAWYERS SUPPORT TO THE CO-PROSECUTORS NOTICE TO THE TRIAL CHAMBER AND PARTIES REGARDING TESTIMONY OF TCE-38

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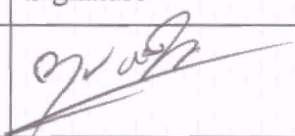

On TCW-38 video link questioning

9. In terms of the particularity and importance of having TCW-38 questioned as an Expert Witness, it is our position that TCW-38 is a leading authority on trial segments relating to Trial One in Case 002 and, in particular, has firsthand knowledge or has conducted extensive research of topics and issues crucial to E166/1 Annex A and paragraph 3 herein, which concerns, *inter alia*, specific measures taken against particular groups (and those associated with them) as identified in the Closing Order D427. Given that TCE-38 is unavailable to travel to Cambodia in 2012 to give evidence, every effort should be undertaken to secure his oral testimony via video-link as otherwise the Trial Chamber would be deprived of hearing and testing critical expert evidence testimony that would assist it in its determinations and are critically important for the ECCC's judicial and historical record.

Therefore, the Lead-co Lawyers respectfully request the Trial Chamber to:

1. Question if necessary TCW-38 through video- link
2. Notify TCW-38 that he will be expected to testify on people related to the "particular groups" specified in paragraph 4f(iv) of E166/1(Annex)
3. Forward documents D250/3.22 and D366/7.1.76 to TCW-38.

Respectfully submitted,

| Date | Name | Place | Signature |
|------------------|--|------------|---|
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