

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

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**CIVIL PARTY LEAD CO-LAWYERS' RESPONSE TO THE DECISION ON THE CO-PROSECUTORS' RULE 92 SUBMISSION REGARDING THE ADMISSION OF WRITTEN STATEMENTS AND OTHER DOCUMENTS BEFORE THE TRIAL CHAMBER (E96/7), AND TO MEMORANDUM E208/3, INCLUDING CONFIDENTIAL ANNEXES 1 AND 2**

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*Civil Party Lead Co-Lawyers' Response to the Decision on the Co-Prosecutors' Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber (E96/7), and to Memorandum E208/3, Including Confidential Annexes 1 and 2*

## I. PRELIMINARY OBSERVATIONS

1. The Civil Parties wish to begin by emphasizing that Trial Chamber Decision E96/7 and its Memorandum E208/3 concern the issue of whether the documents contained in the civil party applications may be put before the Chamber, but not the admissibility of Civil Parties to the proceedings, since, as Judge Lavergne recalled in court on 15 February 2012, “we are not challenging the admissibility of the Civil Parties, because a decision has already been made”.<sup>1</sup>
2. Further, as the Civil Parties pointed out in an earlier submission, “*in the case of Victim Information Forms, Civil Party Lawyers note that the evidentiary standards as well as the procedures carried out by the Co-Investigating Judges for vetting Civil Party applications incorporate numerous indicia of reliability. For example, Civil Party Applicants must provide evidence of the facts of the crime, the harm experienced and the link between the two. Such evidence must meet the standard of “more likely than not to be true”. Additional indicia of reliability in this process include the fact that Civil Party applications are signed and dated by the Civil Party Applicant as well as a witness; that the application includes a sworn declaration that the statements are, to the best of the applicant’s knowledge and belief, true and correct; and that the applicant understands that he/she may be subject to legal sanction if he/she is found to have provided false testimony.*”<sup>2</sup>
3. Civil party statements must be read in light of the foregoing considerations, while taking into account the degree of reliability accorded to them by the Co-Investigating Judges and then by Pre-Trial Chamber. The Civil Party documents dealt with in Decision E96/7

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<sup>1</sup> E1/44.1, Transcript of Trial Proceedings, 15 February 2012, page 9, lines 3-4.

<sup>2</sup> E96/5, Civil Party Lead Co-Lawyers’ Response in Support of the Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Written Statements Before the Trial Chamber, 22 July 2011, para. 33.

were the documents upon which the decisions on the admissibility of the Civil Parties were based.

## II-PROCEDURAL HISTORY

4. On 17 January 2011, the Trial Chamber directed the parties “to file material in preparation for trial”.<sup>3</sup> Following this, on 19 April 2011, the Civil Parties filed a list of documents and exhibits<sup>4</sup> to be put before the Chamber under Internal Rule 87. Annexes to this list include (*inter alia*) Annex 7(a)(iii) which contains a full catalogue of victim information forms and related documents.
5. On 24 June 2011, following the Pre-Trial Chamber’s final decisions by which it admitted some civil party applicants, the Civil Parties filed a revised version of Annex 7 (a)(iii), which includes all the *admissible* civil party applications in Case 002.<sup>5</sup>
6. On 20 June 2012, the Trial Chamber issued the “Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber”<sup>6</sup> (the “Decision”). In the Decision, the Trial Chamber directed the parties proposing to put written statements or transcripts before the Chamber to, *inter alia*, review the documents contained in their relevant lists for compatibility with the admissibility criteria set out by the Chamber in its Decision, and to consider proposing to put before the Chamber only a representative sample of the entirety of the evidence requested.<sup>7</sup>

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<sup>3</sup> E9, Order to File Material in Preparation for Trial, 17 January 2011.

<sup>4</sup> E9/32, Civil Party Lead Co-Lawyers Lists of Documents and Exhibit (7 and 8), 19 April 2011.

<sup>5</sup> E131/1/2, Civil Parties List of Documents relevant to the Initial Trial session (28 November- 16 December 2011), 28 October 2011.

<sup>6</sup> E96/7, Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, 20 June 2012.

<sup>7</sup> E96/7, para. 35.

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7. On 19 July, by Memorandum E208/3,<sup>8</sup> the Chamber directed the parties to indicate, in light of the criteria and modalities outlined in the Decision, those written statements from their document lists filed in April 2011 they propose to tender in relation to population movement phases 1 and 2.
8. The Civil Parties wish to emphasize that the civil party applications (Civil Party Lead Co-Lawyers' Annex 7(a)(iii)) cannot be equated to witness written statements or complaints. They form an *autonomous category* of documentary evidence falling under the general category of written statements. Owing to its specificity, evidence in this category cannot be put before the Chamber in the form of a "representative sample". Moreover, the Civil Parties will demonstrate that this category of evidence satisfies the legal criteria for admissibility set out in Internal Rule 87(3), as well as those set out in paragraph 24 of the Decision. Finally, the Civil Parties hereby confirm that they will select the relevant statements as the trial progresses.

### III – DISCUSSION

#### **A – Civil party applications fall into an autonomous category of evidence which cannot be put before the Chamber in the form of a representative sample**

##### *a. Specificity of civil party applications*

9. As a preliminary remark, the Civil Parties wish to make it clear that the documents referred to as "civil party statements" are simply civil party applications also described as victim information forms (VIF). These terms refer to the same documents. For the sake of

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<sup>8</sup> E208/3, Trial Chamber Response to "Co-Prosecutors' Request to Admit Witness Statements Relevant to Population Movement Phases 1 and 2 (E208 and E208/2) and Ieng Sary Response (E208/1)", 19 July 2012.

clarity, the Civil Parties wish to point out that these terms are used interchangeably in the present submission to refer to the documents contained in Annex 7(a)(iii).

10. Civil party applications are above all statements made by **parties to the proceedings**. As a consequence, they do not have the same legal status as witness statements, as witnesses are not parties to the proceedings.
11. Each individual civil party application consists of various documents – some longer than 100 pages – in support of the allegations of victims or their next-of-kin. A civil party application<sup>9</sup> comprises:
  - a victim information form, which the Chamber seems to call a “statement”;
  - an individual report in English by the Victims Support Section comprising a summary in English of the information contained in the civil party application and, in some instances,
  - a supplementary information form, as well as
  - a number of annexes (books, photographs, Tuol Sleng confessions) or other material dating from the Democratic Kampuchea period.
12. These documents cannot be read separately, and form what is known as a *civil party application*, which is therefore a specific type of source document.
13. The Civil Parties wish to once again recall that Civil Parties are not witnesses, and that the heading of sub-section 4.3.2 in the English version of the Decision is legally inaccurate. As parties to the proceedings, Civil Parties, like the Accused, do not swear an oath, but this does not undermine their position.

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<sup>9</sup> Reference to “civil party application” in the present submission also includes all the related documents.

14. Further, the facts alleged by a victim in a given civil party application have already been reviewed by the judges, pursuant to Internal Rule 23(1), as specified in paragraphs 1 to 3 *supra*.
15. Also, like the Accused, Civil Parties have a right to address the court, a right which cannot be curtailed unless they abuse it.

**b. *Number of Civil Parties admitted in Case 002***

16. With respect to their document lists, the Civil Parties wish to point out that the Chamber should use the revised version thereof (Annex 7 (a)(iii)),<sup>10</sup> as it contains a full list of *admissible* civil party applications declared *admissible* in Case 002. When the initial list was filed in April 2011, the definitive number of admitted Civil Parties was uncertain, because by then the Pre-Trial Chamber had not rendered its decisions. The Civil Parties revised their lists and proposed to tender only those civil party applications which were found definitively *admissible*.
17. Having consulted with the Civil Party Lawyers and the Victims Support Section, the Civil Parties hereby inform the Chamber that the number of Civil Parties admitted to the proceedings now stands at 3,866. Annex 1 hereto contains a full list of Civil Parties who have been declared *admissible*.

**B. Analysis of the document list (Annex 7(a)(iii) in light of the criteria contained in Internal Rule 87(3)**

18. Internal Rule 87 gives the Chamber discretion to consider *admissible* all evidence the parties intend to put before it when relevant and probative. This principle is qualified at sub-rule 87(3), according to which, among other criteria that are not relevant in this

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<sup>10</sup> E109/2.2, Annex 7a(iii) Civil Party Applications.

instance, that the Chamber may reject a request for evidence where it finds that such evidence is irrelevant or repetitious, or unsuitable to prove the facts it purports to prove.

**a. *Relevance of civil party applications***

19. As indicted in an earlier submission of the Civil Parties, as a whole, civil party applications contain a large body of evidence concerning the structures of Democratic Kampuchea.
20. Moreover, the Civil Parties are convinced that the civil party applications will be conducive to highlighting “the policies of Democratic Kampuchea”. It is clear that civil party applications contain key evidence and will be crucial to establishing the crimes specified in the Closing Order and the context in which they were committed.
21. To the extent many civil party applications are consistent in their account of the facts, the description of events, the explanations provided to the Civil Parties, the means used, and the suffering endured, their statements are such as will constitute, by reason of their repetitiousness, proof of a widespread, organised and systematic policy.
22. Civil party application documents are key elements of proof to be relied upon in assessing the guilt of the Accused. They make it possible to establish the context in which the crimes were committed. They are crucial supplements to the objective elements of proof.
23. For these reasons, civil party applications are relevant evidence within the meaning of Internal Rule 87.

**b. *Reliability of civil party applications***

24. The Civil Parties wish to call the Chamber’s attention to the fact that, contrary to its assertion at paragraph 29 of the Decision, not all the civil party applications were prepared in the same manner. While it is true that many *victim information forms* were

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prepared with the assistance of intermediary organisations, each civil party application was signed by the person concerned.

25. Also, a large portion of the civil party applications was prepared by the Civil Parties with the assistance of their lawyers or that of the Victims Support Section. An estimated 3,076 documents containing additional information were placed on the case file, thereby corroborating and substantiating the initial statements recorded by the Civil Parties in their *victim information forms*. The supplementary information forms an integral part of the civil party applications, and was mainly recorded by the Civil Party Lawyers themselves in continuous contact with their clients.
26. Further, the reliability of civil party applications must also be assessed in light of the reliability accorded to them by the Co-Investigating Judges and the Pre-Trial Chamber. As explained in paragraph 2 *supra*, the Co-Investigating Judges and the Pre-Trial Chamber judges accorded these documents a degree of reliability and relevance that the Trial Chamber cannot ignore.
27. Accordingly, civil party applications in their entirety possess the necessary indicia of reliability to justify being put before the Trial Chamber.

***c. Repetitiousness of civil party applications***

28. The Trial Chamber invites the parties to present representative samples of their evidence if it is repetitious. Yet, the Chamber recalls in paragraph 24 of the Decision that the cumulative nature of evidence is among the factors to be considered in assessing its admissibility. This is precisely one of the main reasons why civil party applications cannot be limited to a few examples. It is their repetitiousness, or rather cumulative nature, which gives them probative value and significant weight. They are a means of proving that policies were implemented consistently all around the country, that directives were followed at various levels, and this was all part of a grand scheme.

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*d. Probative value of civil party applications*

29. The Civil Parties are aware that the probative value of any documents put before the Chamber will be assessed at the conclusion of the proceedings at which time the Trial Chamber will be in position to assess the entire body of evidence adduced. Undoubtedly, it will not be possible to accord the same probative value to all civil party applications. Civil party applications ought to be assessed on a case-by-case basis, because each is unique and comprises a miscellany of documents. The Chamber will thus be at liberty to accord whatever probative value it deems appropriate.
30. The Civil Parties consider that the Chamber cannot make a preconceived, wholesale judgement about the probative value of statements recorded by Civil Parties in their civil party applications, and which are therefore legal documents. Needless to say, if the Chamber were to declare at this time that the statements made by the Accused before the Chamber have little or no probative value, this would provoke a very strong reaction – and understandably so – having regard to the rights of the Defence and to the presumption of innocence. Likewise, Civil Party status prohibits such a preconceived, wholesale assessment, because it runs counter to their rights as parties to the proceedings.
31. Further, civil party applications are conducive to ascertaining the truth in that they were prepared by persons who were involved in the facts or whose next of kin were. For that reason, civil party applications are conducive to ascertaining the facts.
32. Wherefore, the Civil Parties submit that civil party applications are sufficiently probative to be put before the Trial Chamber.
33. In light of the foregoing, the Civil Parties submit that the civil party applications satisfy all the criteria set out in Internal Rule 87 and may therefore be put before the Trial Chamber.

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**C. Revision of the list of documents filed by the Civil Parties in light of the criteria set out in paragraph 24 of the Decision**

34. In its Decision,<sup>11</sup> the Chamber lays down new criteria for the admission of documents attached to civil party applications which will be put before the Chamber, and more generally, to be satisfied by all the written statements referred to by the Chamber. The Chamber has introduced criteria established at the international level for putting before the Chamber evidence in the form of written statements, such as civil party applications. Such documents must cumulatively:

- *be cumulative in nature*, in that other witnesses will give or have given oral testimony of similar facts;
- *relate to relevant historical, political or military background*;
- *consist of an analysis of the ethnic composition of the population*;
- *concern the impact of crimes upon victims*;
- *are impossible to subject to confrontation*.

35. These criteria seem to be precisely the ones which characterise all the civil party applications.

36. As indicated in paragraph 28, it is also the repetitiousness of the facts contained in the civil party applications which affords them probative value. Those documents are of a cumulative *nature* which will be corroborated by the oral testimonies of the witnesses who will appear before the Chamber.

37. The *relevance to the historical background* and to the scope of the investigation has already been recognized by the Co-Investigating Judges and the Pre-Trial Chamber. As

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<sup>11</sup> E96/7, para. 24.

stated in paragraphs 19 to 23 *supra*, civil party applications are relevant to the historical, political and military background of Democratic Kampuchea.

38. Further, the Civil Parties involved in the proceedings and their statements constitute a representative sample (age, sex, minorities, social background) of all the victims of the crimes committed by the Khmer Rouge, and thereby provide an *overall analysis* of the *ethnic composition of Cambodia's population*.
39. The Civil Parties recall further that the bulk of the evidence contained in the civil party applications goes to proof of the suffering and the crimes perpetrated during the Khmer Rouge regime. The *impact of crimes on victims* is one of the key points in a civil party application.
40. Finally, the Civil Parties wish to point out that some *civil party* applications were transferred to next of kin where the actual civil party is *deceased*. The voices of the deceased remain part of the proceedings through the written statements they provided when submitting their civil party application, and are a key element of proof.
41. As a consequence, civil party applications satisfy all the criteria laid down by the Chamber in its Decision, and should therefore be admitted to be put before the Chamber.

#### **D. Trial Chamber's directives: paragraph 35 of the Decision**

##### ***a. General remark***

42. The Civil Parties are aware of the challenges involved in dealing with such a large number of Civil Parties. However, they cannot countenance that Civil Parties' right to address the court be breached and curtailed in the name of ensuring the expeditiousness of the proceedings. Taking into consideration the statements of a party to the proceedings is a basic legal requirement. The Civil Parties will be keen to put before the Chamber representative samples of those elements which they consider essential, depending on how the trial proceeds. They do not intend to put all the civil party applications before the Chamber; nonetheless, a priori restrictions may not be imposed upon them and neither do

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they want to impose restrictions upon themselves at this stage, as that would amount to a serious breach of the rights of the Civil Parties.

43. Further, the Civil Parties wish to re-emphasize that the civil party applications referred to in E96/7 are **statements by a party to the trial and, as such, they cannot be excluded from the proceedings**. It is to no surprise that there is such a large number of Civil Parties, given that we are dealing with mass crimes. The large number of documents concerning the Civil Parties is no justification for excluding them .

*b. Use of civil party applications in the trial thus far*

44. The Civil Parties have consistently followed the Chamber's procedures for putting documents before the Trial Chamber. The Civil Parties have consistently uploaded into the document interface at least 24 hours prior to their starting of questioning any material they intend to put before the Chamber, and they will continue to proceed in this manner. On several occasions, the Civil Parties have questioned witnesses using documents or depositions taken from civil party applications. It is only when the Civil Parties know the identity of the witness and the scope of the questioning allowed by the Chamber that they can decide whether a given civil party application is relevant to the proceedings.
45. To date, there have been no serious objections from the Defence regarding the relevance of the documents put before the Chamber. The Civil Party Lawyers have kept to the time allocated to them by the Chamber and production of the civil party applications has not unnecessarily or frivolously delayed the proceedings.
46. Thus far, the Civil Parties have put before the Chamber representative samples of civil party applications containing information about the issues, and have thereby contributed to the manifestation of the truth. The Civil Parties will continue to proceed in this manner. As a matter of fact, at paragraph 29 of its Decision, the Chamber confirms that

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the parties may propose to put such evidence before the Chamber pursuant to Internal Rule 87(1).<sup>12</sup>

*c. Further details about certain sub-categories*

**Complaints**

47. On 28 October 2011,<sup>13</sup> the Civil Parties filed a list of documents in relation to the first four trial segments, thereby revising the list they filed in April 2011. Since then, the Civil Parties had excluded complaints from their list, because they were unable to analyse them (lack of human resources, and the impossibility to have the complaints translated). The Civil Parties have realised that it is impossible to undertake a proper analysis of the complainants. This is why they have not included complaints in their lists of documents to be put before the Chamber.

**Civil party applications which go to proof of acts and conduct the Accused**

48. The Civil Parties have prepared an inventory of civil party applications containing testimonies relating to the acts and conduct of the Accused. They propose that the Chamber call these civil parties should one of the parties so request, so as to uphold the right of the Accused to confront such individuals, in accordance with jurisprudence established at the international level.<sup>14</sup>

**Civil party applications which go to proof of population movement phases 1 and 2**

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<sup>12</sup> E96/7, para. 29.

<sup>13</sup> E131/1/2, Civil Parties List of Documents relevant to the Initial Trial session (28 November-16 December 2011), 28 October 2011.

<sup>14</sup> As indicated in the Decision, see Rules 92 *bis*, *ter* and *quarter* of the ICTY and the SCSL Rules of Procedure and Evidence, as well as Rule 92*bis* (A) to (E) of the ICTR Rules of Procedure and Evidence.

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49. In Memorandum E208/3, the Chamber requests the parties to indicate “those written statements from their document lists filed in April 2011 they propose to tender in relation to population movement phases 1 and 2.”<sup>15</sup>
50. The Civil Parties will soon file a submission on civil party applications which go to proof of population movement phases 1 and 2. As suggested by the Chamber in its Memorandum,<sup>16</sup> the Civil Parties believe that it is necessary to request an extension of the time limit stipulated in the Memorandum. The request for an extension is necessary for the preparation of the aforementioned submission, given the large number of documents involved, the analytical work required and the need to liaise with the various teams of Civil Party Lawyers

### III-Conclusion

Accordingly, for all the foregoing reasons, the Civil Parties request the Trial Chamber:

- a. to note that civil party applications form a distinct category of written statements which cannot be treated as witness statements and which, by their nature, cannot be subject to an a priori restriction to a representative sample, as this is necessarily reductionist;
- b. to note that documents in this category as contained in Annex 1 satisfy the admissibility criteria set out in Internal Rule 87(3), as well as the criteria contained in paragraph 24 of the Decision;

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<sup>15</sup> E208/3, Trial Chamber Response to “Co-Prosecutors’ Request to Admit Witness Statements Relevant to Population Movement Phases 1 and 2 (E208 and E208/2) and Ieng Sary Response (E208/1)”, 19 July 2012, para. 3, 19 July 2012.

<sup>16</sup> E208/3, para. 3.

- c. to rule that should a party so request, the Chamber shall call the Civil Parties concerned in civil party applications listed in Annex 2 which go to proof of the acts or conduct of the Accused;
- d. to note for the record that the Civil Parties reserve the right to put before the Chamber a representative sample of civil party applications;
- e. to grant the Civil Parties a two-month extension for filing a submission about the civil party applications relating to population movements phases 1 and 2 that they intend to tender into evidence;
- f. to note for the record that the Civil Parties will leave it to the discretion of the Chamber to decide whether to schedule a public hearing on the issue of written statements.

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