



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០១/១៨ កក្កដា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 001/18-07-2007/ECCC/TC

Before: Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge THOU Mony

Date: 9 October 2009

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DECISION ON CIVIL PARTY CO-LAWYERS' JOINT REQUEST FOR A RULING ON THE STANDING OF CIVIL PARTY LAWYERS TO MAKE SUBMISSIONS ON SENTENCING AND DIRECTIONS CONCERNING THE QUESTIONING OF THE ACCUSED, EXPERTS AND WITNESSES TESTIFYING ON CHARACTER

Co-Prosecutors

CHEA Leang
William SMITH (acting)

Accused

KAING Guek Eav alias "DUCH"

Lawyers for the Civil Parties

KONG Pisey	TY Srinna
HONG Kimsuon	Pierre Olivier SUR
YUNG Panith	Alain WERNER
KIM Mengkhy	Brianne McGONIGLE
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I. INTRODUCTION

1. On 9 June 2009, the Civil Party Lawyers of Groups 1 and 2 filed a joint request to the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) requesting the Trial Chamber to “[d]ecide that Civil Party lawyers will be heard on the sentencing of the accused”. Prior oral and written statements of the Defence had opposed any such involvement, contending that the Civil Parties have no role to play in sentencing.¹ In its response of 30 June 2009, the Office of the Co-Prosecutors took no position on the Civil Party lawyers’ right to make submissions on sentencing, observing merely that no such prohibition exists in the law applicable before the ECCC.² In its response of 19 August 2009, the Defence renewed its objection to Civil Parties submissions in relation to sentencing.³ The Trial Chamber gave the following decision on these motions on 27 August 2009:

The Trial Chamber, by majority, Judge Lavergne partly dissenting, issues the following decision:

1. The Joint Request by Civil Party Lawyers of Groups 1 and 2 is rejected.
2. The Civil Parties are directed not to make submissions relevant to sentencing, including
 - a) Submissions on a sentence to be imposed;
 - b) Legal submissions relevant to sentencing; and
 - c) Submissions on, or an evaluation of, factors underlying a decision on sentencing. They are permitted to refer to such factors only when they also refer to the guilt or innocence of the accused or a claim of the Civil Party in question for reparations.⁴

2. During the same hearing, the Trial Chamber requested the Parties to make oral submissions with respect to the following question:

Are Civil Parties allowed to question the accused and the witnesses called to testify at the part of the hearing that is entitled, according to the scheduling order of the Trial Chamber of [13] August 2009, “Questioning the witnesses and expert on the issues relating to the character of the accused”?⁵

3. Having heard the Prosecution and the Defence, the Trial Chamber, by majority, Judge Lavergne dissenting, issued the following oral directions:

Civil Parties may not ask questions concerning character of the Accused or of the following witnesses and experts appearing under the pseudonyms or names: KW-34 and Françoise Sironi-Guilbaud, D1, D2, D3, D4, D5, D6, Christopher Lapel, D8 and D14.⁶

¹ “Groups 1 and 2 – Civil Parties’ Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to make Submission on Sentencing” (Document E72), (hereinafter the “Joint Request”), paras 1, 3 and 4 and footnotes 1, 2, 5-12.

² “Co-Prosecutors’ Response to Certain Civil Parties’ Request on the Standing of Civil Party Lawyers to make Submissions on Sentencing”, 30 June 2009 (Document E72/1).

³ “Defence Response to Groups 1 and 2 - Civil Parties’ Co-Lawyers Joint Request for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing” (Document E72/2), para. 7 (“Defence Response”).

⁴ Transcript (“T.”), 27 August 2009, page 42.

⁵ T., 27 August 2009, pages 42 to 43; “Order Scheduling the Trial Proceedings (Topics and Order of Call of Witnesses for the period of 17 August to 17 September 2009”, 13 August 2009 (Document E138).

⁶ T., 27 August 2009, page 74.



II. SUBMISSIONS

A. THE PARTICIPATION OF CIVIL PARTIES IN SENTENCING

4. In support of their request, the Civil Party Lawyers of Groups 1 and 2 contended that facts relevant to the guilt and innocence of the accused cannot logically be separated from those relevant to sentencing. Evaluation of these considerations would therefore impact not only on guilt but necessarily also on the sentence to be imposed.⁷ Submissions on sentence are not prohibited by any provision within the ECCC's legal framework. To the contrary, certain provisions pertaining to Civil Parties impliedly permit them to make submissions on sentencing. For instance, Internal Rule 23(1)(a) lists support to the Prosecution as a purpose of Civil Party participation. Proceedings before the ECCC do not envisage a separate sentencing hearing, and the ECCC Internal Rules provide no express limitation on the rights of the Civil Parties in this area. They submit that Cambodian law also permits Civil Parties to make statements relevant to sentencing.⁸

5. In the alternative, procedural rules established on the international level allow for such participation. Reference is made to a decision of a Pre-Trial Chamber of the International Criminal Court ("ICC") which they submit envisages victim participation in sentencing.⁹

6. Finally, it was noted that, as their Civil Party status is based upon the loss of a relative as a result of the alleged crimes, the majority of the Civil Parties in Case 001 have no knowledge of facts relevant to the guilt or innocence of the accused. Accordingly, their statements could only impact on sentencing and not on the guilt or innocence of the Accused.¹⁰ They also disputed the Defence submission that in French courts, civil parties are not allowed to make submissions with respect to sentence, and questioned the relevance of French precedent.¹¹ Further, other jurisdictions permit victim participation in relation to sentencing, and permit appeals against the sentence imposed.¹²

7. In response, the Defence submitted that within the framework of both Cambodian law and the ECCC Internal Rules, matters relevant to sentencing fall within the exclusive domain of the Prosecution. This conclusion is reinforced by Internal Rule 105, which permits Civil Parties a right

⁷ Joint Request, paras 6-8.

⁸ Joint Request, paras 9-14.

⁹ Joint Request, paras. 16, 17.

¹⁰ Joint Request, paras 22 to 25.

¹¹ "Defence Response concerning the Lists of Witnesses and Documents Filed by the Co-Lawyer Parties" 24 March 2009 (Document E28/1), paras. 9-17.

¹² Joint Request, paras 32, 33.



of appeal only where their “civil interests” are concerned.¹³ The principle that only the Prosecution can pronounce on sentence is a feature of some Romano-Germanic legal systems, as illustrated by French commentaries on the law pertaining to civil parties.¹⁴

B. THE RIGHT OF CIVIL PARTIES TO QUESTION THE ACCUSED, EXPERTS AND WITNESSES ON SENTENCING

8. The Co-Prosecutors and the Civil Parties submitted that the legal background and the practice of other states implementing a civil party system clearly allow Civil Parties to question the Accused, experts and witnesses on the character of the Accused. The Civil Parties submitted further that no other course of action is possible based upon the prior practice of the Trial Chamber.¹⁵

9. The Defence submitted that if the Civil Parties have no right to make submissions on sentencing, then they ought not be permitted to put questions on character. In its view, the focus of Civil Parties should be on the injury suffered by them. The Defence did not oppose the Civil Parties’ questioning of experts.¹⁶

III. FINDINGS

A. DECISION ON THE PARTICIPATION OF CIVIL PARTIES IN SENTENCING

1. *Background*

10. The role of Civil Parties in proceedings before the ECCC must be understood in the context of the history of its development. Article 36 new of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (“ECCC Law”) empowers the Supreme Court to “[...] decide appeals made by the accused, the victims, or the Co-Prosecutors [...]”. While other provisions in the ECCC Law refer to victims,¹⁷ the ECCC Law did not envisage victim participation by means of a Civil Party procedure, nor did it create an appeal mechanism pursuant to Article 36 new of the ECCC Law.

11. It was therefore left to the ECCC to give effect to Article 36 new. Article 12 of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes committed during the Period of Democratic

¹³ Defence Response, para. 4.

¹⁴ Defence Response, para. 5.

¹⁵ T., 27 August 2009, pages 43 to 49 (Co-Prosecutors), pages 49 to 63 (Civil Parties).

¹⁶ T., 27 August 2009, pages 63 to 73.

¹⁷ See Article 23 of the Agreement, Articles 23 new, 33 new of the ECCC Law.



Kampuchea (“Agreement”) and Article 33 of the ECCC Law provide that Cambodian criminal procedure is applicable in proceedings before the ECCC. The Internal Rules, which constructed a Civil Party scheme reflecting Cambodian law and procedure, allows Civil Parties to seek collective and moral reparations.¹⁸ In order to pursue reparation claims, Civil Parties have the right to participate in proceedings against those responsible for crimes within the jurisdiction of the ECCC, by supporting the Prosecution.¹⁹ For completeness, it is necessary to note that neither the Agreement nor the ECCC Law provide for the Trial Chamber to award reparations against the convicted person.

12. The Civil Party model developed in the ECCC Internal Rules is based upon, but is not identical to, Cambodian criminal procedure.²⁰ It must be consistent with the specific nature of criminal proceedings before the ECCC, namely, the trial of persons who were senior leaders and were most responsible for the national and international crimes committed against millions of people between 17 April 1975 and 6 January 1979 in Cambodia. In this context, features of more traditional Civil Party models, devised for less complex proceedings with fewer victims, required adaptation.

13. As the ECCC Law and the nature of the criminal proceedings are limitations which the Trial Chamber must acknowledge, a restrictive interpretation of rights of Civil Parties in proceedings before the ECCC is required.

14. Against this background, the Trial Chamber now examines the sequence of the trial, the right of Civil Parties to seek reparations and the role of all parties, including Civil Parties, in proceedings before the ECCC.

2. *Sequence of the trial*

15. The trial before the ECCC is not, as in some jurisdictions, divided into separate trial and sentencing phases.²¹ All relevant testimony and material put before the Chamber, whether it concerns the question of guilt or innocence or any eventual sentence, is considered during trial.

16. Nonetheless, in the present trial, allegations tending to support the guilt or innocence of the Accused have generally been considered during the early weeks of trial. These have been presented in sequence, following chronological and other patterns, such as subject-matter, to ensure a logical

¹⁸ See Articles 21 to 26 of the Cambodian Code of Criminal Procedure of 2007.

¹⁹ See Internal Rule 23(1).

²⁰ Collective and moral reparations are not provided for in the Cambodian Code of Criminal Procedure.

²¹ The separation of trial phases relating to the guilt or innocence of an Accused on the one hand, and of the issues related to sentence (where the Accused is convicted) is often referred to as a bifurcated trial.



presentation of evidence. The trial has now reached the final stage, and material concerning sentence is being considered as part of that natural sequence.

17. Whatever sequence a court selects as most conducive to a fair and efficient trial, it is fundamental that guilt must be proved before sentence is imposed, even where, as in the present case, all testimony concerning both guilt or innocence and sentencing is considered by the Trial Chamber during one hearing. The verdict will contain both a finding on guilt or innocence and, if the Accused is found guilty, the determination of a sentence.

3. *Civil Parties' right to seek reparation during a criminal trial*

18. In many jurisdictions following the French civil party system, victims have the right to participate in criminal trials in order to provide a timely and cost-effective vehicle to seek reparation from an Accused. In effect there are two goals of the trial: one to determine the guilt or innocence of the Accused and in case of proven guilt to pronounce on sentence and the other to secure reparation as a civil claim if the Accused is convicted. The Cambodian Code of Criminal Procedure ("the 2007 Code") clearly contemplates the possibility of having two proceedings – one for a civil claim and the other for a criminal procedure – in one.

4. *The roles of the parties to criminal proceedings*

a) The Co-Prosecutors

19. Article 4 of the 2007 Code provides:

The Prosecution brings charges of criminal offenses against charged persons and asks for application of laws by the Court.

20. The prosecutorial authority also represents the "interests of justice" and is entrusted to bring criminal actions in the "general interests of the society".²² The interests of society as a whole and of justice necessarily include the general interests of victims of the alleged crimes. According to Cambodian criminal procedure, the prosecutorial authority must also assist in ascertaining the truth and must plead objectively, taking into account all relevant facts and circumstances.

21. As in most jurisdictions, the prosecution's role includes the duty to assist the court in arriving at the truth and to serve the interests of justice in relation to both the community and the Accused, according to law and the dictates of fairness. A Prosecutor represents the community, not individual or sectional interests, such as those related to claims for reparations.

²² Article 4 of the 2007 Code; *see further* Article 336 of the 2007 Code (stipulating that the prosecutorial authority make the closing arguments in "the interests of justice").



22. The Co-Prosecutors accordingly have a duty, as representatives of the public interest, to assist the Court in finding an appropriate sentence which weighs the interests of the community and the gravity of the crimes. The latter includes the elements of punishment and deterrence, and also considers the prospect of rehabilitation. All of these factors are balanced in view of the principles of fairness and the interests of justice generally.

23. The Prosecution, which has no interest in individual civil claims, may normally not intervene in a civil action which is based on adversarial proceedings between the Civil Parties and the Accused, and which is brought in conjunction with criminal proceedings.

b) The Defence

24. The role of the Defence is to represent the Accused throughout the trial, including at sentencing. The Defence has the responsibility to assist in ensuring a fair trial for the Accused, as well as to assist the court in ascertaining the truth.

c) Civil Parties

25. The role of the Civil Parties in proceedings before the ECCC includes according to Rule 23(1) “to participate in proceedings [...] by supporting the prosecution”. The clear policy reason for this right of participation is that it is in the interests both of the Cambodian community, as represented by the Co-Prosecutors, and of the Civil Parties themselves to obtain a decision on the criminality of the actions of the Accused. Civil Parties have the right to seek reparations upon a conviction of the Accused. As previously noted, this provision must be interpreted restrictively, and does not confer a general right of equal participation with the Co-Prosecutors.

26. Repeatedly in the course of the trial, the Defence has raised the issue of equality of arms in relation to the 93, now 90, Civil Parties to Case 001. The Trial Chamber accepts that this is a matter which can affect the fairness of the proceedings. The Chamber considers that the Accused’s right to a fair trial in criminal proceedings includes the right to face one prosecuting authority only. Accordingly, and while the Civil Parties have the right to support or assist the Prosecution, their role within the trial must not, in effect, transform them into additional prosecutors.

27. Each party has a distinct role, in keeping with their particular interests and responsibilities at trial.



5. *Do Civil Parties have the right to comment on sentencing in their closing arguments?*

28. In deciding whether the scope of Civil Party participation before the ECCC extends to submissions and recommendations on sentencing, the Trial Chamber first notes that the ECCC Internal Rules contain no express rights or limitations for Civil Parties in relation to sentencing. Internal Rule 105(1)(d), however, limits their right of appeal to instances where “their other civil interests” are concerned.

29. The 2007 Code lists several areas of the criminal process in which Civil Parties may participate.²³ Before 2007, the Law on Criminal Procedure of 1993 permitted Civil Parties full rights of appeal against a judgment at first instance. In enacting the 2007 Code, however, the Cambodian legislature has limited these rights.²⁴ The rights of Civil Parties in Cambodian criminal procedure are now more narrowly focussed on their interests in reparations. It can be concluded that Internal Rule 105(1)(d) mirrors Article 375 of the 2007 Code of Criminal Procedure, and must be read in this light.

30. In addition, the 2007 Code describes certain core principles which distinguish between criminal and civil actions. Article 2 provides:

Criminal and civil actions are two separate kinds of legal actions.

The purpose of a criminal action is to examine the existence of criminal offences, to prove the guilt of an offender, and to punish this person according to the law.

The purpose of a civil action is to seek compensation for injuries to victims of an offense and with this purpose to allow victims to receive reparation corresponding with the injuries they suffered.

31. Although the changes to the appeals scheme are recent, these principles suggest a basis for the change in Cambodian legal practice, which focuses with greater clarity on two distinct legal actions and on the distinct rights of the parties.

32. Rule 23(1)(a) stipulating the seemingly unlimited right to support the prosecution must accordingly be read subject to two principles:

33. First, the interests of Civil Parties are principally the pursuit of reparations. However, a prerequisite for reparations is a criminal conviction. The Civil Parties accordingly have an interest in the Trial Chamber determining the elements of the crime which, if proved, form the basis for their civil claims. For this reason they are entitled to support the prosecution in establishing the

²³ See *inter alia* Articles 334 and 335 of the 2007 Code.

²⁴ See Articles 161 and 170 of the Law on Criminal Procedure of 1993.



criminality of the actions of the accused which affect them and which create the foundation for a claim for reparation.

34. Second, the overall goal of Cambodian criminal procedure is to establish the truth. All Parties may assist in achieving this goal.²⁵ For the Civil Parties, in light of their fundamental interest in securing reparation, establishing the truth is limited to facts or factors relevant to the determination of the guilt or innocence of the Accused. This principle is valid, even where a Civil Party is not the direct victim of the offence, but is only related to such a victim.²⁶ Such Civil Parties cannot contribute to the establishment of the truth by providing direct information concerning the crime alleged. They may, however, possess background information which is helpful in ascertaining the truth.

35. Internal Rule 23(1)(a) therefore does not provide, as argued in the Joint Request, a legal basis for the alleged right of Civil Parties to make submissions on sentencing.

36. Finally, the criminal process before the ECCC, as previously noted, is not separated into two distinct trial and sentencing phases. As a result, evidence relevant to conviction, sentencing and to reparations is produced simultaneously. This has resulted occasionally in uncertainty concerning the purpose of the evidence, particularly where facts relate simultaneously to conviction and to sentence. This ambiguity, however, does not permit Civil Parties to evaluate all facts adduced during the criminal process. The Civil Parties' evaluation of such facts is limited to assisting the Co-Prosecutors in establishing the guilt or innocence of the Accused and to reparation proceedings. Where facts relate exclusively to sentencing, Civil Parties may not evaluate such facts or make submissions in relation to them.

37. Article 33 new of the ECCC Law, which permits reference to "rules established at the international level", does not allow a different reading of the rights of Civil Parties concerning sentencing. There is no uncertainty in interpreting the ECCC Internal Rules to justify such a recourse. Even were that appropriate, the Romano-Germanic systems of law allowing victims to appear as civil parties or to support the prosecution cannot be understood as "rules established at the international level". Moreover, rules concerning the respective roles of the prosecution and civil parties, established at the national level, differ from state to state.

38. The majority of the Trial Chamber accepts the submission made in the Joint Request that French precedent concerning Civil Party participation in sentencing has limited value where the

²⁵ See Article 334 of the Cambodian Code of Criminal Procedure.

²⁶ Joint Request, paras 22 to 25.



ECCC is required to base its law and procedure on Cambodian law or on international standards.²⁷ It further notes that the only criminal court at the international level providing for victim participation is the International Criminal Court (“ICC”). Under the scheme established by the ICC’s Rome Statute, however, there is no necessary connection between victim participation in criminal proceedings and their participation in relation to reparations: a civil action is not a prerequisite for victim participation in criminal proceedings before the ICC.

39. Article 68(3) of the ICC’s Rome Statute provides for participation where victims’ “personal interests” are affected. Victims participating in proceedings before the ICC are therefore not “civil parties” and no guidance can be derived from the Rome Statute concerning the specific rights of civil parties. In addition, the emerging jurisprudence of the ICC Appeals Chamber has imposed significant restrictions upon the right of victims to express their views during the trial.²⁸

40. Consequently, Civil Parties may not make submissions on or recommendations concerning sentencing, including legal submissions on or the evaluation of facts or factors relevant only to sentencing.

6. *Summary*

41. The majority of the Trial Chamber notes that each party to ECCC proceedings has a distinct role. It is for the Co-Prosecutors to prove the guilt of the Accused,²⁹ while the Civil Parties, who have an interest in securing a decision on the criminality of the actions of the Accused, upon which to found a claim for reparation, have the right during trial to assist the Prosecution in establishing the truth.

42. With respect to sentencing, however, these respective roles diverge. The Co-Prosecutors’ responsibility is to ensure an appropriate sentence and the Civil Parties’ is to seek reparation as provided in the Internal Rules. The Co-Prosecutors have no role in seeking reparation, and the Civil Parties none in relation to sentencing. The latter is the sole preserve of the prosecution, in the public interest and in the interests of justice. The fact that the trial is not separated into different phases and that the Civil Parties have the right to participate in a criminal trial does not provide reason for a departure from this core principle.

²⁷ See also “Defence Response concerning the Lists of Witnesses and Documents Filed by the Co-Lawyers for the Group 1 Civil Parties” 24 March 2009 (Document E28/1), paras. 9-17.

²⁸ See *Prosecutor v. Lubanga Dyilo* “Judgment on the Appeals of The Prosecutor and The Defence Chamber I’s Decision on Victim’s Participation of 18 January 2008” 11 July 2008 (ICC-01/04-01/09-2007-2008-10-11) a majority judgment with two dissenting opinions that did not allow victims to lead evidence with respect to guilt or innocence.

²⁹ Internal Rule 87(1).



43. This decision of the Trial Chamber is by majority, in accordance with Article 14(1)(a) new of the ECCC Law. Judge Jean-Marc Lavergne appends a partially dissenting opinion.

B. DIRECTIONS ON QUESTIONING BY CIVIL PARTIES OF THE ACCUSED, EXPERTS AND WITNESSES ON CHARACTER

44. Having found that Civil Parties may evaluate evidence produced before the Trial Chamber only in relation to the determination of guilt or innocence of the Accused and to support their reparations claims, the Chamber must determine whether, consequently, Civil Parties are precluded from questioning the Accused or any witnesses concerning character.

45. “Character”, by definition, includes the personality, temperament, integrity and reputation of a person. Unless there is clear evidence of mental disability which may impact on the actions of an Accused or bear on his ability to form the intent necessary to be convicted of an offence, none of these features are relevant to an enquiry into the guilt or innocence of an Accused.

46. In the present case, the portion of the trial proceedings described in the Scheduling Order of 13 August 2009 as “Questioning the witnesses and expert on the issues relating to the character of the accused” relates solely to issues of character of the Accused. These are considerations for determining aggravating or mitigating circumstances in relation to any eventual sentence, and have no bearing on the guilt or innocence of the Accused.³⁰ The sole purpose of this evidence is to enable the Trial Chamber to determine matters relevant to sentencing, if applicable.

47. The majority of the Trial Chamber therefore decided that the questioning on character either of the Accused or of witnesses called to testify on this issue related solely to sentencing. The Trial Chamber, recognised however, that some of the witnesses and experts called to testify would address issues which concern reparation, such as the prospect of reconciliation with victims and/or Civil Parties.

48. The Trial Chamber accordingly determined that Civil Parties may not in general question the Accused concerning his character. It also decided that Civil Parties may not question the following experts and witnesses who will testify exclusively on the character of the Accused: KW-34, Françoise Sironi-Guilbaud, D1, D2, D3, D4, D5, D6, Christopher Lapel, D8 and D14. The request to hear witnesses D8 and D14 was then withdrawn by the Defence and the Trial Chamber did thus not call those witnesses.

³⁰ See also Article 78 of the ICC’s Rome Statute and rule 145 of the ICC’s Rules of Procedure and Evidence.



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49. This decision is also by majority, as provided in Article 14(1)(a) new of the ECCC Law. Judge Jean-Marc Lavergne appends a dissenting opinion. *MVR. gf*

Phnom Penh, 9 October 2009
President of the Trial Chamber



[Handwritten signature]

Nil Nonn

DISSENTING OPINIONS OF JUDGE LAVERGNE, JUDGE OF THE TRIAL CHAMBER

INTRODUCTION

1. The Agreement between the United Nations and the Royal Government of Cambodia¹ on the Establishment of the Extraordinary Chambers in the Courts of Cambodia² instituted a set of entirely unique judicial institutions. They have both a national and international dimension. While they form part of the Cambodian court structure, they are fully independent and separate from the other Cambodian courts with which they have no hierarchical relationship. They are unique in how they operate by reason of their status, and have sole jurisdiction over a very narrowly-defined category of persons who are charged with specific crimes that were committed within a specific period.³ Their other very unique feature, compared to other international tribunals, is the specificity of the rules in relation to victim participation in the proceedings.

2. The ECCC Law – both in the 2001 version, which is referred to in the Agreement, and in the 2004 version – explicitly offers victims the possibility to participate in the proceedings before the ECCC. Article 36 of the Law grants “victims” the right to appeal Trial Chamber⁴ decisions. However, this possibility of appeal can only exist if they are parties to the proceedings. In determining the procedural framework to be relied on when regulating such participation, it seems logical, having regard to the provisions of Article 12 of the Agreement, to seek guidance first and foremost from the rules of procedure under Cambodian law. Cambodian law allows victims, upon application, to participate in proceedings as “civil parties” if they can show that they suffered personal injury as a direct consequence of the offences under prosecution.⁵ However, such guidance is necessarily limited, in that Cambodian procedural rules must be adapted wherever they are inconsistent with international standards.⁶

3. There is indeed no doubt that the Chambers are empowered to adapt their own Internal Rules so as to ensure that the procedure is consistent with international standards and that they

¹ “Agreement between the United Nations and the Royal Government of Cambodia Concerning Prosecution under Cambodian Law of Crimes Committed during the period of Democratic Kampuchea” (“the Agreement”), which entered into force on 29 April 2005, UN Doc. A/RES/57/228B (Annex).

² The “ECCC” or “the Chambers”.

³ “Decision on Request for Release”, 15 June 2009 (Document No. E39/5), para. 10.

⁴ The “Chamber”.

⁵ See Article 13 of the Cambodian Code of Criminal Procedure (“the 2007 Code”) and Internal Rules.

⁶ Article 12(1) of the Agreement provides that “[t]he procedure shall be in accordance with Cambodian law, unless such law is inconsistent with international standards. Where a question arises as to the consistency of such a rule with international standards, guidance may also be sought in international law at the international level.”



institute mechanisms necessary to prosecute and try mass crimes falling within their jurisdiction. In this regard, it is incumbent upon the Chambers to maintain a balance between, on the one hand, the necessities of a fair and expeditious trial with respect for the rights of the Defence, and, on the other hand, the right of victims to participate in such a trial and, *inter alia*, to contribute to the fight against impunity for the perpetrators of the most serious crimes.⁷ Clearly, one of the main difficulties involved in the civil party system under Cambodian law is that it was not originally designed for the trial of mass crimes and that it undeniably raises a number of specific issues, including the following:

- the ECCC mandate is necessarily limited in time and is ill-suited to deal with large numbers of individual applications for reparation,
- the Chambers do not have a trust fund, and multiple financial awards potentially involving large sums are pointless if imposed against ordinary individuals whose indigence makes enforcement difficult, if not illusory;
- proof of mass crimes is different from proof of thousands of individual crimes especially in a context where the crimes date back a long time and where the State administrations no longer existed or were in disorder. Indeed, it is one thing to prove that a mountain was flattened and yet another to prove that a given stone was part of that mountain;
- completing a trial within a reasonable time is inconsistent with the involvement of large numbers of individual civil parties that are not represented by a lawyer, and even where civil parties are represented by a lawyer, it requires them to be organized collectively;
- the rights granted to a Civil Party are very important, and it is necessary to ensure that every person claiming those rights in a trial is duly qualified to do so. This means ascertaining the admissibility of a potentially considerable amount of applications.

4. For these reasons, which are not exhaustive, the Chambers, through their IRs, adapted the rules originally applicable under Cambodian law. Further amendments are undoubtedly necessary and could be made. However, the question is whether these difficulties warrant radical changes or

⁷ See, *inter alia*, Resolution 60/147 adopted on 16 December 2005 by the United Nations General Assembly, and the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”.



the negation of the role played by Civil Parties. How far can one go without breaching the spirit of the law, or fundamentally distorting the meaning of the involvement of Civil Parties before the ECCC and the purpose of the trial as a whole, characterised by the coexistence of two interrelated actions, namely criminal and civil actions.

5. Under Cambodian law, criminal action refers to prosecution brought in the name of society by the Prosecutors for the purpose of applying criminal law to the perpetrator of a criminal offence, and repairing the harm caused to society. The purpose of civil action is to enable the direct victims of an offence to obtain reparation by being joined as civil parties.⁸

6. In legal systems which recognize the right of victims to be joined as civil parties, being joined as a civil party is among the most advanced forms of victim participation allowed by criminal procedure. Indeed, it affords anyone claiming to have suffered harm as a result of acts that may constitute crimes the opportunity to intervene as a party in the legal proceedings aimed, *inter alia*, at establishing the criminality of the alleged acts, deemed to be the cause of the harm that such a person claims to have suffered, and to identify and prosecute the perpetrators of such acts. It is in this general framework, after a decision has been taken on the criminal action and the accused has been found guilty, that civil parties may seek reparation for their harm through civil action, in the course of the same trial and before the same judges as those hearing the criminal case. It is therefore not only during the consideration of the admissibility and merits of their civil action that civil parties may intervene. Rather, they may participate throughout the legal proceedings, the common purpose of which is to ascertain the truth concerning the accused's criminal responsibility, which might also be the basis of his or her civil responsibility.

7. While criminal and civil actions differ in purpose, they have much in common from a procedural standpoint, in particular, because Civil Parties are themselves parties in both types of proceedings. They have a stake in the outcome of the criminal case in that they obviously have an interest in a finding of guilt against the Accused since the alleged offences may also be the cause of the harm they suffered. The law grants them rights that enable them to intervene directly in the criminal proceedings. Through their complaints and denunciations, they can trigger a criminal action. Through their requests for investigative action during the judicial investigation, they can influence the investigations undertaken and even move the proceedings in a different direction. By their attendance at the trial, they participate, *inter alia*, in the oral arguments concerning the Accused's criminal responsibility. In this context, they participate in the adversarial discussion on

⁸ See Articles 2 and 4 of the 2007 Code.



evidence produced in court. They can lead additional evidence and contribute to the proceedings, notably by giving a concrete picture of the harmful consequences of the alleged offences.

8. The Chamber was seized of a joint Request by the Co-lawyers of the Groups 1 and 2 Civil Parties for a ruling on the standing of the Civil Party lawyers to make submissions on sentencing.⁹ The Chamber raised, *proprio motu*, the question as to whether Civil Party lawyers may ask questions relating to the character of the Accused. In response, the Chamber rendered two oral decisions¹⁰ from which I partly or fully dissent. I consider them inconsistent with the law currently applicable before the Chambers. In addition in my view, they misrepresent, for no valid reason, both the role and the meaning of Civil Party participation. Finally, in addition to being somewhat inconsistent, these decisions create a particularly detrimental legal uncertainty.

I- FUNDAMENTAL PRINCIPLES AND STATUS OF CIVIL PARTIES BEFORE THE ECCC

9. Rule 21(1) of the Internal Rules sets forth principles which the Chambers have themselves characterised as fundamental, including the following:

“(a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties [...]

(c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings”.

10. Rule 21 further provides that the legal instruments applicable before the ECCC must be interpreted so “as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so to ensure legal certainty and transparency of proceedings (...)”.

11. Not all victims are Civil Parties and it may turn out at the conclusion of the proceedings that some Civil Parties are not direct victims of the events covered by the Indictment. However, as the situation now stands, being joined as a Civil Party is, legally speaking, still the only means for victims to participate in the proceedings. In order to ensure respect for the rights of victims, the Chamber must therefore, *inter alia*, ensure effective exercise of the rights afforded to the Civil Parties by virtue of their status, as well as fair and adversarial proceedings for all the parties without exception.

⁹ Groups 1 and 2 – Civil Parties’ Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Parties to Make Submissions on Sentencing, 9 June 2009 (Document No. E72).

¹⁰ Transcript (“T.”), 27 August 2009, pp. 41-43 and 74.



12. Rules 23(1) and (6) very clearly state that any victim who is joined as a Civil Party becomes a party to the criminal proceedings, and brings a Civil Party action in order to:

“(a) participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution, and;

(b) allow victims to seek collective and moral reparation [...]”.

13. The participation of Civil Parties is allowed at all stages of the proceedings. The Internal Rules identify the parties' rights at each of these stages. In some instances, these rights are explicitly afforded to Civil Parties, and in others, to “parties” without distinction. It must therefore be assumed that these provisions are necessarily also applicable to Civil Parties.¹¹ Accordingly, unless the Rules explicitly exclude Civil Parties from participating or explicitly restrict their rights, logically, it must be assumed that Civil Parties have the same rights and obligations as all the other parties. Any other interpretation can only be contrary to the law.

14. Rule 89 *bis* provides an example of an explicit restriction in the Internal Rules. According to this Rule, only the Co-Prosecutors and the Accused or his or her lawyer are entitled to make a brief statement at the opening of the substantive hearing. Also, under rule 82(3), the Civil Parties may not intervene before the Trial Chamber in regard to the examination of a request by the Accused for his or her release, as only the Defence and the Co-Prosecutors are specifically empowered to do so.

15. Other explicit restrictions relate to the right to appeal:

- on the one hand, regarding Co-Investigating Judges' decisions, Rule 74(3)¹² clearly limits the decisions that Civil Parties may appeal and, in the event of a “dismissal order”, they may only appeal where the Co-Prosecutors have appealed;¹³

- on the other hand, under Rules 105(1)(c) and (d),¹⁴ Civil Parties may appeal Trial Chamber decisions only in respect of their civil interests and on the condition that the Co-Prosecutors have also appealed;¹⁵

16. For the rest, the Internal Rules grant the following rights either explicitly to Civil Parties or to “parties”, which necessarily implies Civil Parties:

- At the judicial investigation stage,¹⁶ Civil Parties are entitled to exactly the same rights as the other parties to ask questions, either directly or through their lawyers, in case of

¹¹ See definition of “party” in the glossary in the Internal Rules: “party” refers to the Co-Prosecutors, the Charged Person/Accused and Civil Parties” (Emphasis added).

¹² See article 268 of the 2007 Code.

¹³ A decision for release of a charged person is not open to appeal by a Civil Party.

¹⁴ See article 375 of the 2007 Code.

¹⁵ This means that it is not open to Civil Parties alone to challenge a decision for release of a charged person or a sentence imposed on the Accused.



confrontation (Rule 58(4)); to request investigative action (Rule 59)¹⁷ and to appeal decisions refusing investigative action, including those concerning requests for expert reports and further expert reports (Rule 74(4)).¹⁸

At this stage, the assessment of the Charged Person's character is part and parcel of the work of the Co-Investigating Judges¹⁹ in that it is part of the inculpatory and exculpatory²⁰ material that may be gathered in relation to the Charged Person. The Rules do not draw any distinction between Civil Parties' requests relating only to evidence of the facts set forth in the Introductory Submission and requests relating to the Charged Person's character. It is permissible for Civil Parties to request the summoning of any character witness whose testimony may be helpful, and, where necessary, to request psychological or psychiatric expert or further expert reports. Also in some instances, due to their personal knowledge of the accused, they may offer crucial information and are often best placed to describe his personality, his character and even his conduct before and after the crimes charged.

- Civil Parties are also entitled to the same rights as the other parties during the trial stage.²¹ They may submit a list of witnesses before the initial hearing (Rule 80),²² as well as a list of new documents (Rule 79(9)(d)) or request the Chamber to summon new witnesses during the trial (Rule 87(4)). They may also examine the case file through their lawyers (Rule 86). More generally, they may request to put any evidence before the Chamber.²³ They have the right to be heard (Rule 91)²⁴ and the right to question any person testifying before the Chamber, including the Accused, witnesses and experts (Rules 90(2) and 91).²⁵ They also have the right to make written submissions (Rule 92) and to make a Closing Statement after examination of all the evidence and, if necessary, may make rebuttal statements (Rule 94)²⁶. The Internal Rules do not contain any other restrictions whatsoever

¹⁶ It is worth emphasising that the purpose of the judicial investigation is to perform – on the basis of the Introductory Submission – any and all acts necessary for “ascertaining the truth” and to enable the Co-Investigating Judges, in reliance thereupon, to collect all the evidence, whether inculpatory and exculpatory, in respect of the Charged Person.

¹⁷ Article 134 of the 2007 Code contains similar provisions to the ones in Rules 58(4) and 59 of the Internal Rules.

¹⁸ See article 268 of the 2007 Code.

¹⁹ It is worth mentioning that the 2007 Code provides for the possibility of ordering medical or psychological expert reports (Article 167(3)) and of notifying such reports to the civil parties and for the latter to request further expert reports (Article 170(4) and (5)).

²⁰ French law uses the expression “éléments à charge et à décharge”. This is not limited to material concerning the guilt or innocence of the Charged Person. It also refers to any material which could aggravate or mitigate his or her possible criminal responsibility.

²¹ T., 27 August 2009, Vincent de Wilde d'Estmael, the international representative of the Co-Prosecutor, argued that “[i]n the Internal Rules no distinction is made that could justify the fact that the Civil Parties were, as it may be, discounted or second-rate parties” (p.45).

²² See article 298 of the 2007 Code.

²³ See article 334 of the 2007 Code.

²⁴ See article 326 of the 2007 Code.

²⁵ See article 325 of the 2007 Code.

²⁶ Article 335 of the 2007 Code contains provisions similar to the ones in Internal Rules 92 and 94.



pertaining to these rights besides those referred to *supra*. In particular, they impose no restrictions based on the subject-matter of the evidence to be presented or examined.

17. In fact, the exercise of these rights must be viewed in relation to a fundamental principle, namely the principle of adversarial proceedings stated in Rule 21, which is binding for both the judges and the parties in relation to the examination of all the evidence. Rule 87(2)²⁷ provides: “Any decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination”. This refers to all evidence that has been put before the Chamber irrespective of whether it relates to the character of the Accused or the charges *per se*. It also refers to the decision of the Chamber as a whole. It refers not only to the part of its decision relating to guilt, but also where relevant, to the part of its decision relating to sentencing.²⁸ In addition, the adversarial principle does not apply solely to the examination of documents put before the Chamber, but also to all evidence, including testimonies, of course, on the premise that all parties are entitled to question the witnesses. The decision denying Civil Parties the right to question certain witnesses and experts is therefore manifestly inconsistent with the adversarial principle according to which all evidence must be subjected to examination by all parties, as set forth in the Internal Rules.

18. Moreover, none of the parties have argued that Cambodian law prohibits Civil Parties from questioning witnesses, experts or the Accused about the character of the accused or even from discussing the probative value of evidence on the premise that it may relate to the character of the accused. In fact, the Cambodian Code of Criminal Procedure and the Internal Rules make no such distinction based on the subject matter of the evidence, of the expert testimony or of any other evidence subjected to adversarial discussion by the parties. So how else is one to understand the Chamber’s decisions except to say that they rely on a questionable interpretation of the role of Civil Parties, based on which the Chamber made inferences which are inconsistent with the law?

II- THE ROLE OF CIVIL PARTIES

19. In a first decision, the Civil Parties were “directed” by the Chamber “not to make submissions relevant to sentencing, including

- (a) Submissions on a sentence to be imposed;
- (b) Legal submissions relevant to sentencing; and

²⁷ See Article 321 of the 2007 Code.

²⁸ It is worth emphasising the ECCC does not distinguish between hearings on guilt and hearings on sentencing and that it is permissible for Civil Parties to participate in the entirety of the proceedings.



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(c) Submissions on, or an evaluation of, factors underlying a decision on sentencing. They are permitted to refer to such factors only when they also refer to the guilt or innocence of the accused or a claim of the Civil Party in question for reparations”.²⁹

I agree with the decision of the Chamber concerning points (a) and (b), but I part company with the Chamber on point (c).

20. In a second decision, the Chamber decided not to allow the Civil Parties to question the Accused concerning his character; it also decided not to allow them to question the witnesses and experts who would be testifying on the same matter.³⁰ I disagree with this restriction.

21. Given the links between the issues raised by these two decisions which were issued in a single written decision, it seems preferable to include these different dissenting opinions in a single reasoned opinion.

22. By reason of its ambiguous wording, the Joint Request of the Civil Parties of Groups 1 and 2 focused attention on a single aspect of the issue of the participation of the parties in evidentiary proceedings and suggested that the Civil Parties were claiming the right to participate essentially as a means of influencing the Chamber on the sentence which may be imposed on the Accused. In response, the two decisions considered, *inter alia*, that the discussion on the character of the Accused relates to the factors that have to be taken into consideration for sentencing. It concluded that this debate was beyond the scope of Civil Party participation, given that only the Co-Prosecutors are tasked, on behalf of the general interest, to request a sentence. The role of Civil Parties, on the other hand, was strictly limited to making submissions only on matters in which they demonstrate a personal interest, i.e. consideration of the proof of guilt of the Accused for the crimes which caused their harm and the issue of reparations.

23. Clearly, there is a commonality of interest between the Civil Parties and the Co-Prosecutors with respect to proving the guilt of an Accused. Beyond that, however, there is a major difference between them, because, in actual fact, only the Prosecutors have standing to request a sentence. Indeed, it is not the function of the Civil Parties to make submissions on what they may consider to be a just or unjust sentence, or on legal problems that are likely to affect the sentence, such as concurrent or cumulative charges.³¹

24. It is dangerous to mix the role of prosecuting authorities who are tasked with representing the community – be it national or international – and the role of Civil Parties. It is eminently fair to

²⁹ See para. 1 of the Chamber’s majority decision and T., 27 August 2009, pp. 41-42.

³⁰ T., 27 August 2009, p. 74.

³¹ The State has sole jurisdiction over the enforcement of sentences and the interpretation of the law; the role of law givers in this matter is of no concern to Civil Parties.



say that the Co-Prosecutors – in their capacity as representatives of the State or the International Community – have the exclusive competence to speak in the interest of justice,³² i.e. in the general interest. It must be unequivocally asserted that it is not the function of Civil Parties to turn themselves into auxiliaries of the prosecuting authority, vested with the duty to prosecute offences and, even less, into private prosecutors tasked with exacting private vengeance.

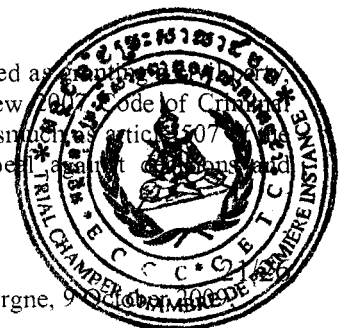
25. Moreover, it will be well to note that in Cambodia, Prosecutors are members of the judiciary, who are vested with the duty to enforce criminal law. They are not parties in the ordinary sense, but must place themselves above “partisan” litigation and, if they consider that requisite legal requirements are not satisfied, it is their duty to ask for the acquittal of the accused. In any event, the notions of the interest of justice and of procedural fairness leave no room for any notion of vengeance, which must thus be excluded from any considerations relating to sentence.

26. By limiting civil parties’ right of appeal to only that part of judgements concerning their civil interests, the Cambodian Code of Criminal Procedure, enacted in 2007, confined civil parties to their proper role. However, it only brought an end to an exceptional and unique provision in Cambodian criminal procedure, according to which a civil party could seek variation of a sentence on appeal on grounds of inappropriateness (either because the sentence was too severe or too lenient).³³ Nevertheless, the contours of the discussion pertaining to guilt remain to be determined just like the role of civil parties in that discussion.

27. Civil Parties have the right to participate in proceedings pertaining to the criminal and civil responsibility of an Accused both during the evidentiary phase itself and in their closing statements. Yet, in these proceedings, it is very often impossible to distinguish between what should exclusively be taken into consideration in pronouncing, on the one hand, on guilt or on the right to reparation and, on the other hand, on what should, if necessary, determine the appropriate punishment. This is particularly true concerning crimes whose gravity, including the consequences for victims, is a factor that is taken into consideration when determining punishment. In addition, it is obvious that the guilt of an accused is not ascertained in the abstract or in a disembodied manner and that, during the trial, it is impossible to separate matters that go to knowledge of the crimes and matters that go to knowledge of the character of the perpetrator. These matters may be inculpatory

³² See articles 4 and 338 of the 2007 Code.

³³ In fact, article 161 of the Law of 8 March 1993 on Criminal Procedure has been interpreted as *inter alia*, the right to appeal against sentence. However, the reform introduced by the new Code of Criminal Procedure has simply reinstated civil parties’ right to appeal to what it was in the past, inasmuch as the 1964 Code of Criminal Procedure already provided that “a civil party may only appeal against judgements which affect his or her civil interests [...]” [TRANSLATION].



or exculpatory³⁴. Generally, they are already part of the judicial investigation case file to which all parties have had the opportunity to contribute. They may concern an exploration of the accused's mental capacity to reason or of an allegation of "mental coercion" and have a direct impact on his or her criminal responsibility.

28. In a trial, the interest of justice is to bring about an understanding, not only of what crimes were actually committed, but also whether they were committed wilfully and why. In reality, legal proceedings are more than concerned with the answer to the sole question "what did he or she do?"; they are also concerned with the answer to the question "why did he or she do that?". This is a legitimate concern for all parties, including Civil Parties whose participation cannot be reduced to a simple discussion pertaining to the objective culpability of the accused. It is necessary to be able to understand what motivated criminal conduct, in particular for the purpose of avoiding its repetition. Also, this need to understand is even more crucial where the crimes involved were too long left without answer, if not concealed.³⁵

29. It may well seem presumptuous to believe that a criminal trial, especially a trial concerning mass crimes, would lead to satisfactory or relevant answers to all matters of concern to the parties, in particular those of concern to the victims. However, this task is part of an effort to ascertain the truth, in which an assessment of the personality of the accused, his possible motivations, his character traits or psychological features is intended to facilitate an understanding of the case file. The opportunity for victims to contribute to the process by their questions and their comments, in order to be able to answer the question "why?" is clearly one of the fundamental benefits of victim participation.³⁶

30. It is however important for these matters to be debated and that the debate be conducted in the serenity of a court of justice. It may also be true that some of the Civil Parties have a personal knowledge of the background or character of the Accused and the process of justice benefits from the sharing of this knowledge. Furthermore, where the victims do not know who caused their suffering, the legal proceedings may give them the opportunity to express their views concerning the criminal responsibility of the Accused, including their misapprehension and their uncertainties, their questions, and potentially their fears, which are also largely facilitated by lack of knowledge of the other.

³⁴ See Footnote 20 above.

³⁵ See the account of the expert Dr Chhim Sotheara, T., 25 August 2009, in particular, from page 57.

³⁶ This would however not be grounds for posing whatever question. It is obvious that in proceedings, it is incumbent upon the President and the Chamber, and even the parties themselves, to reject or put an end to any matters that are irrelevant or repetitious. Rules 85(1) and 91(3) empower the President to reject proceedings that unnecessarily delay the trial, and are not conducive to ascertaining the truth".



31. Moreover, punishment is, above all, a tool designed to put an end to and facilitate the repair of a disruption of the social order, and it is often the requisite pre-condition for reconciliation. One of the fundamental goals of this court is reconciliation. And one of the purposes of punishment is to help victims reach this goal, particularly where their bereavement may be difficult to bear.³⁷ In fact, the Chamber considered that the Civil Parties were clearly concerned with such a process, since it authorised them to question several witnesses called by the Defence, including a former Prosecutor of the International Criminal Tribunals for Rwanda and the former Yugoslavia³⁸ and a former author of the Universal Declaration of Human Rights.³⁹ These experts were called to testify, on the one hand, on the practice of guilty pleas and their impact in terms of national reconciliation and, on the other hand, on the notion of forgiveness. However, such a process is only possible if it takes place in the open and assumes that the victims may have known and understood the character of the person whom they consider as the author of their suffering. This problem is particularly crucial in the context of the ECCC, as a large number of those involved insist that the trauma suffered by the victims has been exacerbated by the dehumanising effect of the crimes ascribed to an abstract entity known as Angkar that can thus be used to veil any search for individual responsibility.⁴⁰

32. Thus, fundamentally, my disagreement pertains to the role of the Civil Parties, to the possibility for them to participate in the proceedings concerning the character of the Accused and, beyond that, to how the trial is viewed. In my opinion, the decision taken by the Chamber tilts towards a view that is far removed both from Cambodian law and the Internal Rules of the ECCC and which, traditionally, on the one hand, establishes a distinction between proceedings pertaining to guilt and proceedings pertaining to sentence and, on the other hand, does not grant victims standing as parties to the trial. To claim that, after having examined the allegations concerning the guilt or innocence of the Accused, this trial has now reached a “final stage” in which the sole issue for consideration is the merit of the factors to be taken into account for eventual sentencing is in fact to introduce a distinction between trial and sentencing hearings. Yet, the Chamber itself, by its majority decision, acknowledged that no such distinction exists under the Internal Rules or under Cambodian criminal procedural rules.⁴¹ In addition, this may be dangerous given that by holding several days of hearings dealing exclusively with factors that are likely to be taken into account in sentencing, one may wonder whether the Chamber has not, in fact, already made up its mind about the guilt of the Accused. Such concern would obviously be unwarranted if the testimony of the

³⁷ See the text of the preamble of the Agreement, incorporated in the Internal Rules, which acknowledges, *inter alia*, that the pursuit of national reconciliation is a legitimate concern of the Government and the people of Cambodia.

³⁸ Account of Judge Richard Goldstone, who appeared as an expert witness, T., 14 September 2009.

³⁹ Account of Stéphane Hessel, who appeared as an expert witness, T., 15 September 2009.

⁴⁰ See also account of expert witness, Dr. Chhim Sotheara, T., 25 August 2009, in particular, see paragraph 18.

⁴¹ See para. 15 of the Chamber’s majority decision.



character witnesses and psychological and psychiatric experts is considered to be part of a larger debate concerning the Accused's criminal responsibility, encompassing the search for the truth both about the crimes charged and the personality of the individual who is alleged to have committed them.

33. It should also be noted that civil party participation in the review of all evidence, including evidence pertaining to character, as it exists in many Romano-Germanic countries, has, to date, never been considered a violation of the equality of arms or as likely to affect, as a matter of principle, the fairness of the trial: quite the contrary. Moreover, in a difficult context in which the credibility of the Chambers is scrutinised and in which the administration of justice by the ECCC is supposed to serve as an example for the other Cambodian courts, it is important to be able to maintain public trust; a goal which would be more easily attained if the Chambers ensure respect for the rights of victims who have applied to be joined as Civil Parties.

34. To date, international or internationalised criminal courts have hardly had occasion to develop case law on victim participation, either because the role of victims before such courts is more often reduced to that of witnesses, or because proceedings before these courts are too recent.⁴² Accordingly, it is difficult to claim that there is a relevant international norm. However, in view of the wording of article 68(3) of the *Rome Statute of the International Criminal Court*, it will be interesting to see if the International Criminal Court considers that the participation of victims in such a discussion is consistent with their interest and whether such participation can be achieved in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.⁴³ As the jurisprudence now stands, it may simply be noted that the Appeals Chamber of the International Criminal Court has already stated that, while participating victims are not "parties", they could, subject to a certain number of important safeguards, in particular, a demonstration that their personal interests are affected, be authorised to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence during the trial proceedings. It also acknowledged that granting these rights to victims was not

⁴² See, however, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I (Single Judge) of the International Criminal Court, 13 May 2008, Case No. ICC-01/04-01/07-474, para. 38.

⁴³ Article 68(3) provides "Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where it is appropriate, in accordance with the Rules of Procedure and Evidence".



inconsistent with the principle that the onus is on the Prosecutor to prove the guilt of the accused nor was it inconsistent with the rights of the accused and a fair trial.⁴⁴

35. Finally, my disagreement is also prompted by the problems of consistency raised by these decisions that are issued close to the end of the evidentiary hearings. In practice, the Civil Parties have indeed, on numerous occasions,⁴⁵ been allowed, up to now, to put questions on character both to the Accused and to witnesses and experts, be they direct witnesses to the events included in the Indictment or witnesses who were expected to help put these events in their historical and personal context. The prohibition at this stage is thus wholly inconsistent with the manner in which the proceedings have been hitherto conducted, in particular during the examination of events or the conduct of the Accused that have no direct bearing on the discussion pertaining to his innocence or his guilt as they predated the events covered by the charges.⁴⁶

36. Moreover, it is obvious that the psychological or psychiatric analysis of the personality of an accused, as well as the particulars of his or her background and his or her conduct both before and after the events, are of interest only to the extent that they can be helpful in better understanding the commission of the alleged crimes. To contend that an investigation conducted by a psychiatric or psychological expert is only relevant in assessing the mitigating or aggravating factors to be taken into consideration for sentencing and that its sole purpose is to have a better understanding of the “character” of the accused, which, by definition, includes his or her personality, temperament, integrity and even his reputation⁴⁷ is not only to particularly oversimplify the expert witness process but, above all, contrary to reality inasmuch as their task is expressly to determine whether the accused might be suffering from any afflictions that may have a bearing on his or her criminal responsibility. However, the Chamber prejudged the content of the proceedings and, without waiting for the oral testimony of the experts, unilaterally decided that their report would have no bearing on the issue of the Accused’s criminal responsibility and that it could only relate to the discussion concerning a possible sentence.

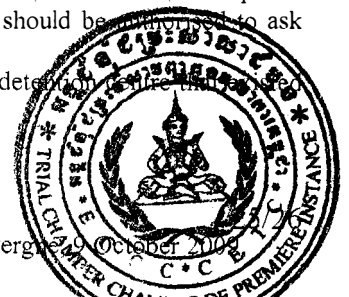
37. It has been noted that amongst the fundamental principles applicable before the Chambers, the Chambers must endeavour to interpret “the applicable ECCC Law, Internal Rules, Practice

⁴⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber of the International Criminal Court (ICC), 11 July 2008, Case No. ICC-01/04-1/06 OA9 OA 10. It should be noted that there is a fundamental difference between the status of Civil Parties before the ECCC and the status of “victims participating” before the ICC inasmuch as the latter, contrary to civil parties, do not have standing as parties to the trial.

⁴⁵ See, in this regard, the arguments made by the international Co-Lawyer for the Civil Parties, Mr Werner, in response to the Chamber’s invitation to the parties to state their position on whether Civil Parties should be allowed to ask questions concerning the character of the Accused, T., 27 August 2009, pp. 60-62.

⁴⁶ See, in particular, the discussion of the Accused’s involvement in the management of a detention facility before 17 April 1975 and known as M13.

⁴⁷ See para. 44 of the Chamber’s majority decision.

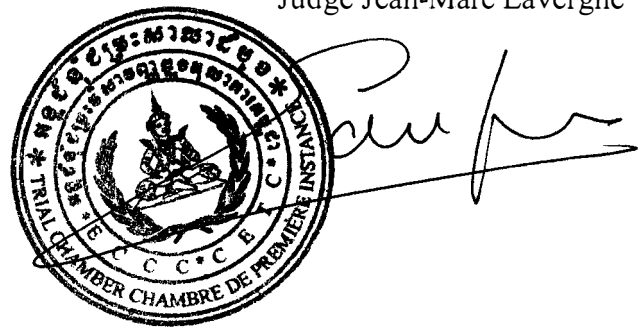


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Directions and Administrative Regulations (...) so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings (...)."⁴⁸ In my opinion, the decisions rendered by the Chamber create a certain confusion that is likely to affect the legal certainty of the proceedings, not only in view of the advanced stage of the proceedings in Case File No. 001, but also on account of their possible implications for other case files currently pending before the Co-Investigating Judges.⁴⁹ Undoubtedly, a clarification of the Internal Rules would be desirable. *MW*

Phnom Penh, 9 October 2009

Judge Jean-Marc Lavergne



⁴⁸ Rule 21(1) of the Internal Rules of the ECCC.

⁴⁹ It should be noted that at this stage, the Civil Parties are likely to request investigative action or to ask questions at confrontations that may concern the character of the Charged Person.