



TRIAL CHAMBER RESTRICTS SUBSTANTIVE PARTICIPATION OF CIVIL PARTIES

August 27, 2009

By Michael Saliba, J.D. (Northwestern Law '09), Consultant to the Center for International Human Rights, Northwestern University School of Law

The court in the trial of Kaing Guek Eav (alias Duch) issued two procedural rulings that severely restricted the substantive roles of the civil parties. First, it pronounced that civil parties would not be permitted to make submissions to the court on the issue of sentencing. Only submissions relating to guilt or civil party reparations would be accepted. Second, it ruled that civil parties would not be permitted to question many of the remaining witnesses because those testimonies will address exclusively the character of the accused. However, before delving into these important procedural issues, the court concluded yesterday's process of hearing challenges to civil party applications.

Conclusion of challenges to civil party applications

The five remaining challenges were all related to group three civil parties. The two sides agreed to present their arguments at once rather than on a case-by-case basis as was done yesterday. The defense argued that the civil party applications were not admissible because no documents were provided in the case files of any of these witnesses. Specifically, there were no photographs, biographies, confessions or names on the prisoner's list.

Civil party lawyer Alain Werner responded with several general observations that were not raised yesterday. First, he argued that the jurisprudence of international criminal law tended to favor accepting indirect evidence to support civil party applications. He stressed that accepting these civil party applications would not prejudice the accused because the civil parties were not providing any incriminating evidence and Duch would not be required to pay individual monetary reparations. Werner also argued that just as Duch benefits from the presumption of innocence so too should civil parties benefit from a presumption of good faith. Finally, Werner stressed the importance of the trial chamber's decision on this matter by noting that it will have a big impact on the civil parties in the subsequent case at the ECCC (case 002). In that case, many civil parties will be claiming a kinship link to family members detained in Khmer Rouge facilities other than S-21. It will be even more difficult to obtain relevant documents from those detention centers because they maintained even fewer records of victims than did Tuol

Sleng prison. (However, proof of an injury should be easier to demonstrate in case 002 because the scope of the crimes of the accused persons is much broader than in the Duch case.)

The trial chamber informed the parties that all additional evidence relating to civil party applications must be submitted to the court by Thursday, September 03.

Trial chamber rules that civil parties may not question character witnesses

The trial chamber then asked the parties for submissions with regard to whether civil parties were permitted to question character witnesses. However, before opening the floor for the debate, the trial chamber read aloud its decision on a related procedural matter. Responding to a request from two civil party groups, the trial chamber ruled that civil parties were not permitted to make submissions relating to sentencing. The timing of this oral decision was a very ominous sign for the prosecution and civil parties and proved to be highly suggestive of the court's eventual ruling on the issue of civil party questioning of character witnesses.

The prosecution argued that the civil parties should be permitted to participate in the questioning of character witnesses. It cited numerous articles of the Internal Rules which made reference to civil parties as "parties to the criminal proceedings" whose purpose was, in part, to "support the prosecution." The prosecution emphasized that the civil parties had been participating in all stages of the proceedings and no rule prohibited them from questioning character witnesses. Indeed no distinction is made in the Internal Rules between normal witnesses and character witnesses. The prosecution argued that the voice of the civil parties is essential and distinct from the prosecution, and would aid the chamber in rendering an informed and just verdict.

The civil parties supported the submissions of the prosecution and added several unique observations. First, they invoked article 90 which states that "all parties and their lawyers shall have the right to question the Accused." They noted that throughout the entire proceedings witnesses had been questioned about the character of the accused and it would untenable were the trial chamber to restrict this practice at such a late stage. They also stressed that Cambodian criminal procedure, much like its counter-part in all other national civil law jurisdictions, permitted civil parties to question all witnesses, including those who testify to the character of the accused.

The defense countered that given the court's ruling that civil parties were not permitted to make submissions relating to sentencing, it followed logically that they should not be permitted to question character witnesses. Character evidence, the defense argued, goes directly to sentencing and has no relevance with the issue of guilt, pain and suffering of the civil parties, or the reparations they seek. The defense conceded the fact that under pure national civil law systems, civil parties could question character witnesses, but, they argued, national rules could not be transposed to international proceedings such as these that deal with trials of mass crimes. The defense also explained that when a defendant

pleads guilty in other international tribunals, the prosecutor agrees not to challenge any defense character witnesses.

After an extended adjournment, the trial chamber reconvened and pronounced its decision. By majority vote, with Judge Lavergne dissenting (as he did with the earlier procedural ruling), the trial chamber ruled that it would not allow civil parties to question character witnesses.

Trial chamber calls Duch to the stand

The trial chamber, displaying a renewed sense of urgency, decided to call Duch to the stand, late in the afternoon, to begin questioning him on his character. He only had time to answer several questions from the judges before the court was adjourned. He provided a brief preliminary background of his life, explaining that he was born to a relatively poor family and became interested in political activism at a very early age. He joined the revolution because he believed that it was a just cause that would help liberate the Cambodian people. It was only later, and little by little, that he discovered the criminal nature of the regime. By that point it was too late. To leave the movement, he explained, was to lose his life.