

**Declassified to Public**  
**06 September 2012**

E28/1

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

**Case File No:** 001/18-07-2007- ECCC/TC  
**Filed to:** Trial Chamber  
**Document Date:** 24 March 2009  
**Filing Party:** Lawyers for KAING Guek Eav  
**Original Language:** FRENCH  
**Type of Document:** PUBLIC

**DEFENCE RESPONSE CONCERNING THE LISTS OF WITNESSES AND**  
**DOCUMENTS FILED BY THE CO-LAWYERS FOR THE GROUP 1 CIVIL**  
**PARTIES**

<b><u>Filed by:</u></b>	<b><u>Filed to:</u></b>
<b>Co-Lawyers for</b>	<b>Trial Chamber</b>
<b>KAING Guek Eav</b>	Judge NIL Nonn, President
<b>KAR Savuth</b>	Judge Silvia CARTWRIGHT
<b>François ROUX</b>	Judge YA Sokhan
	Judge Jean-Marc LAVERGNE
	Judge THOU Mony

**Copied to:**  
**Office of the Co-Prosecutors**  
CHEA Leang  
Robert PETIT

<b><u>Copied to:</u></b>	
<b>Co-Lawyers for Civil Parties</b>	
<b>KONG Pisey</b>	Ty Srinna
<b>HONG Kimsuon</b>	Pierre Olivier SUR
<b>YUNG Panith</b>	Alain WERER
<b>KIM Mengkhy</b>	Brianne McGONIGLE
<b>MOCH Sovannary</b>	Annie DELAHAIE
<b>Silke STUDZINSKY</b>	Elizabeth RABESANDRATANA
<b>Martine JACQUIN</b>	Karim KHAN
<b>Philippe CANNONE</b>	

<b>ឯកសារទទួលបាន</b>
DOCUMENT RECEIVED/DOCUMENT REÇU
ថ្ងៃ ខែ ឆ្នាំ (Date of receipt/Date de réception): ..... 03, APR, 2009 .....
ពេលវេលា (Time/Heure): ..... 16:00 .....
ឈ្មោះមន្ត្រីបម្រើការងារ/Case File Officer/L'agent chargé du dossier: ..... C.A. Fey .....

<b>ឯកសារចម្លងត្រឹមត្រូវតាមច្បាប់</b>
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME
ថ្ងៃ ខែ ឆ្នាំ បញ្ជាក់ (Certified Date/Date de certification): ..... 06, APR, 2009 .....
ឈ្មោះមន្ត្រីបម្រើការងារ/Case File Officer/L'agent chargé du dossier: ..... C.A. Fey .....

[001/18-07-2007-ECCC/TC]

**MAY IT PLEASE THE TRIAL CHAMBER****I. PROCEDURAL BACKGROUND AND PURPOSE OF THE REQUEST**

1. On 17 February 2009, the Defence received service in Khmer and English of the lists of witnesses and documents filed by the Co-Lawyers for the Group 1 Civil Parties Group 1.
2. At the initial hearing, on 18 February 2009, the Defence made its preliminary objection concerning the request by the Co-Lawyers for the Group 1 Civil Parties to summon a witness *“to assist the Court in the determination of the appropriate sentence”*.<sup>1</sup>
3. The Defence indicated that it would strongly oppose allowing the civil parties to address the court regarding the issue of sentencing, and briefly stated the reasons for such opposition. The Lawyer for the Group 4 Civil Parties concurred with the Defence’s position.<sup>2</sup>
4. At the hearing, the Trial Chamber indicated that it would make a decision at a later date concerning the witnesses named on the list filed by the Group 1 Civil Parties.<sup>3</sup>
5. On 10 March 2009, the Defence received service in French of the list of witnesses and documents filed by the Co-Lawyers for the Group 1 Civil Parties.
6. Having now reviewed all the requests by the Lawyers for the Group 1 Civil Parties, the Defence hereby makes its submissions concerning the lists of witnesses and documents.

**II. DEFENCE SUBMISSIONS**

7. The Defence would like to reiterate that it is not opposed to civil parties actively participating in the proceedings relating to the trial of Mr. Kaing.

---

<sup>1</sup> See Transcript of Proceedings, 18 February 2009, Public, pp. 5-7 (E1/4.1) [Fr.]. See also Transcript of Proceedings, 18 February 2009, Closed, pp. 8 and 9 (E1/4.2) and Transcript of Proceedings, 17 February 2009, Public, p. 54 (E1/3.1) [Fr.].

<sup>2</sup> Transcript of Proceedings, 18 February 2009, Public, pp. 8-10 (E1/4.1) and, Closed, pp. 10 and 11 (E1/4.2) [Fr.].

<sup>3</sup> Transcript of Proceedings, 18 February 2009, Public, pp. 3 and 21 (E1/4.1) [Fr.].

[001/18-07-2007-ECCC/TC]

8. It nonetheless requests the Trial Chamber to determine the role of civil parties in this trial, while being mindful of the exceptional nature and limits of the right to bring civil action before the ECCC,<sup>4</sup> and upholding the rights of defence, notably the right to a fair trial.

**A. Limited right to bring civil action before the ECCC**

9. The Defence considers that in the light of Cambodian law, which is applicable within the ECCC:

- First, the Co-Prosecutors and the civil parties bring quite different actions and pursue different objectives within the ECCC, namely initiating criminal proceedings and protecting the interests of the society, for the former, and bringing civil action and protecting the civil interests of individuals, for the latter; and
- Second, matters relating to sentencing are under the ambit of criminal procedure and are thus strictly for the Co-Prosecutors to address.

10. Accordingly, the Defence submits that within the ECCC, civil parties are not permitted to address the court concerning sentencing and should therefore not be allowed to summon witnesses in relation thereto.

11. This emerges from an analysis of the relevant provisions of the ECCC Internal Rules, which provide that:

(i) Victims may only bring a *civil* action.<sup>5</sup> Prosecution of crimes may be initiated only by the Co-Prosecutors.<sup>6</sup>

(ii) The onus is on the Co-Prosecutors to prove the guilt of the accused.<sup>7</sup>

(iii) Only the Co-Prosecutors may make closing arguments;<sup>8</sup> this includes the right to request a specific sentence and to specify its length.

(iv) Civil parties may appeal the judgement only in respect of their *civil* interests and only where the Co-Prosecutors have appealed.<sup>9</sup>

---

<sup>4</sup> See “*Decision Regarding Motion by Deceased Civil Party*”, ECCC Trial Chamber, 13 March 2009 (E2/5/3), para. 8.

<sup>5</sup> Rule 23 of the Internal Rules: “Civil Party Action by Victims”.

<sup>6</sup> Rule 49 of the Internal Rules: “Exercising Public Action”.

<sup>7</sup> Rule 87(1) of the Internal Rules.

<sup>8</sup> Rule 94(1) of the Internal Rules.

[001/18-07-2007-ECCC/TC]

This means that civil parties may not appeal the sentence if they are not satisfied with it. Only the Co-Prosecutors may file such an appeal.

12. The Defence considers that the relevant provisions of the ECCC Internal Rules offer specific guidance on the role of civil parties within the ECCC. Nonetheless, where necessary, the Trial Chamber may also seek guidance from the Cambodia Criminal Procedure Code, which contains provisions that are similar to the ones in the ECCC Internal Rules in respect of the right of civil parties to address the court and the limited right of civil parties to appeal the judgement,<sup>10</sup> and also defines in clear and specific terms what is meant by criminal action and civil action in Cambodian criminal procedure. In point of fact, Article 2 of the Cambodian Criminal Procedure Code states: *“The purpose of a criminal action is (...) to punish [the offender] according to the law”*,<sup>11</sup> and Article 4 states: *“Criminal actions are brought by Prosecutors for the general interests of society”*.<sup>12</sup>
13. Moreover, the Defence notes that insofar as the ECCC is part of the Cambodian judicial system, whose code of criminal procedure is based on French law, the Trial Chamber could seek guidance from the practice within French domestic courts in relation to the role of civil parties. However, as stated by Mr. Kaing’s Defence and also by the Lawyers for the Group 4 Civil Parties at the initial hearing, on 18 February 2009, in French criminal procedure, civil parties may not address the issue of sentencing, as this is the role of the prosecution.<sup>13</sup>
14. However, the Defence considers that insofar as Cambodian law offers sufficiently clear and precise guidelines on the role of civil parties in a criminal trial, it is not necessary to rely on Rule 2 of the ECCC Internal Rules, but rather to seek guidance

---

<sup>9</sup> Rule 105(1) of the Rules.

<sup>10</sup> See Articles 335, 336, 375 and 402 of the Code of Criminal Procedure of Cambodia.

<sup>11</sup> Article 2 of the Code of Criminal Procedure of Cambodia:

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

*The purpose of a criminal action is to examine the existence of a criminal offense, 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.”*

<sup>12</sup> Article 4 of the Code of Criminal Procedure of Cambodia:

*“Criminal actions are brought by Prosecutors for the general interests of society.*

*Prosecutors initiate criminal proceedings and request the application of the law by investigating and trial judges.”*

<sup>13</sup> See Transcript of Proceedings, 18 February 2009, Public, pp. 5-7 and 8-10 (E1/4.1) and, Closed Session, pages 8-11 (E1/4.2) [Fr.].

[001/18-07-2007-ECCC/TC]

from established international procedures, especially considering that other international courts do not recognise civil parties.

#### **B. The right of the Accused to a fair trial**

15. The Defence submits that summoning witnesses at the request of layers for civil parties to address the court concerning sentencing would not only be contrary the letter and spirit of Cambodian law, which is applicable within the ECCC, but would also be in violation of the right of the Accused to a fair trial as enshrined in Article 14 of the International Covenant on Civil and Political Rights (ICCPR).<sup>14</sup>
16. Indeed, if the Trial Chamber were to allow civil parties to summon witnesses in respect of sentencing, it would, by the same token, be allowing such witnesses to address Chamber regarding the issue and hence to make submissions on the matter. This would be a violation of the equality of arms between the parties, since the Defence would have to respond to the submissions on sentencing as made by both the Office of the Co-Prosecutors and the teams of Civil Parties Lawyers acting as Co-Prosecutors.
17. Further, the attendance of the witnesses proposed by the Civil Parties and the latter's submissions regarding sentencing would make the proceedings last that much longer, and thereby impair the right of the Accused to be tried within a reasonable time.

#### **III. RELIEF SOUGHT**

18. Rule 80(2) of the ECCC Internal Rules allows the Trial Chamber to reject a request to summon a witness or expert where the Chamber considers that the hearing of the proposed witness or expert would not be conducive to the good administration of justice.
19. The Defence considers, for all the foregoing reasons, that it would not be conducive to the good administration of justice to allow the Group 1 Civil Parties to summon Professor Christophe Staker and Dr. Phuong Pham to address the court regarding the issue of sentencing.

---

<sup>14</sup> See also Rule 21 (1) (a) of the ECCC Internal Rules, and Article 33 (new) of the Law on the Establishment of the ECCC.

[001/18-07-2007-ECCC/TC]

20. Wherefore, the Defence requests the Trial Chamber to reject the request to summon these witnesses.

[001/18-07-2007-ECCC/TC]

**FOR THESE REASONS**

21. In light of all the foregoing submissions, and pursuant to Rule 80 (2) of the ECCC Internal Rules and Article 14 of the ICCPR, the Defence requests the Trial Chamber:

- to rule and declare that it is for the prosecution, and not civil parties, to address the court regarding sentencing;
- to dismiss the request to summon Professor Christophe Staker and Dr. Phuong Pham, who are named on the witness list filed by the Lawyers for the Group 1 Civil Parties.

**WITH ALL PROPER RESERVES**

Kar Savuth For both Co-Lawyers	Phnom Penh	<i>(Signed)</i>
Name	Place	Signature