

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

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**APPLICATION FOR RECONSIDERATION OF THE DECISION NOT TO RECALL
CIVIL PARTY TCCP-187, AND FOR REVIEW OF THE PROCEDURE FOR HEARING
CIVIL PARTIES**

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To:

The Trial Chamber

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Judge Silvia CARTWRIGHT

Judge YOU Ottara

Judge Jean-Marc LAVERGNE

Judge YA Sokhan

Co-Prosecutors

CHEA Leang

Andrew CAYLEY

All Civil Party Lawyers

All Defence Teams

MAY IT PLEASE THE TRIAL CHAMBER

1. Mr KHIEU Samphan's Defence would like to revisit the hearing of 23 November 2012 during which several of his rights were violated, thereby highlighting yet another flaw in the current procedure on hearing Civil Parties, which needs to be addressed.¹ The Defence also requests reconsideration of the President's decision not to recall Civil Party TCCP-187 to the witness stand.
2. At the end of his testimony on 23 November 2012, Civil Party TCCP-187, CHAU Ny, requested to question Mr KHIEU Samphan during his statement regarding his suffering. Mr KHIEU Samphan's international Co-Lawyer immediately observed that the statement regarding suffering should not be used as an opportunity for a Civil Party to confront an accused, and urged the Chamber to recall the applicable procedure. For his part, the Civil Party's lawyer, supported by the Co-Prosecutor, pointed out that nothing in the Rules prevents a Civil Party from asking questions and addressing an accused while the Civil Party is speaking about his suffering.²
3. The President asked Mr KHIEU Samphan whether he wished to exercise his right to remain silent or whether he wished to answer to the Civil Party's questions. Mr KHIEU Samphan reiterated his position, saying that he did not wish to answer those questions.³ First, the President indicated that Mr KHIEU Samphan "[TRANSLATION] *has clearly indicated his position. And has reiterated it*" and then went on to reject the Civil Party's request. Then, after consulting with the other Judges, he reversed his position and allowed the Civil Party to question the Accused through him [the President].⁴ The President did not explain his sudden change of position. This shows that the relevant procedure applicable before the Chamber remains unclear and ought to be clarified in the interest of respect for defence rights. It is all

¹ KHIEU Samphan's Defence recalls his "Response to "Demande des co-avocats principaux pour les parties civiles afin de définir l'étendue de la déclaration sur la souffrance des parties civiles déposantes", 12 November 2012, E240/1.

² Draft Transcript of Proceedings, 23 November 2012, pp. 90 to 93.

³ *Ibid.*, p. 93.

⁴ *Ibid.*, p. 94, lines 1 to 10.

the more important to clarify the procedure to follow, given that the one adopted by the Chamber has occasioned several violations of Mr KHIEU Samphan's rights.

I. Violation of Mr KHIEU Samphan's right to a fair trial

4. The Defence recalled that the Civil Party is not permitted to question the Accused directly at trial. Indeed, Internal Rule 90 provides that with the exception of questions asked by the Co-Prosecutors and the lawyers, "[a]ll questions shall be asked through the President of the Chamber and in the order as determined by him." However, this cannot be a reason for violations of the rights of the Accused, such as those observed at the hearing of 23 November 2012.

a. Violation of the right to effective representation

5. The right to be defended by a lawyer of one's choice is guaranteed by the Internal Rules and all international instruments on the protection of human rights. Yet, this right, central to a fair trial, was violated at the hearing of 23 November 2012.
6. At that hearing, after allowing the Civil Party to ask questions, the President again asked Mr Khieu Samphan whether he wished to answer them.⁵ Mr KHIEU Samphan's Co-Lawyer stood up to speak. The President denied her use of the microphone, saying, "[TRANSLATION] *My question was to Khieu Samphan, Counsel. My question is not to you Counsel. Khieu Samphan is free to respond or not to respond.*"⁶ Noticing that Mr KHIEU Samphan's Co-Lawyer still wanted to address the court, the President cut off her microphone, saying, "[TRANSLATION] *Once again, my question is to Khieu Samphan. Counsel, you may be seated.*" What ensued is truly surreal, in that not having been able to consult his lawyer, Mr KHIEU Samphan, sought legal counsel from the President, saying, "[TRANSLATION] *Mr President, I'd like to ask the President a question. Does answering to this question affect my rights to remain silent? If it does not affect my rights to remain silent, then I can*

⁵ *Ibid.*, p. 95, lines 11-12.

⁶ *Ibid.*, p. 95, lines 13-14.

answer”⁷ The President thus found himself in the role of counsel, and the answer he gave, whose French interpretation was rather difficult to understand, was, “[TRANSLATION] *That is your right, Mr Accused, because you have not clearly indicated whether you wish to exercise your right to remain silent. It is up to you to choose. It is for you to decide whether you wish to exercise your right to remain silent. The decision is yours.*”⁸ The Co-Lawyer made one last attempt to request to speak, but the President again told her to “*be seated.*”⁹ Confused, Mr KHIEU Samphan, chose to say to the President: “*My apology, I delegate my right to my defence counsel as my representative.*”¹⁰

7. Mr KHIEU Samphan is defended by a lawyer of his choice and is entitled to consult his lawyer whenever he wishes. The Internal Rules guarantee the Accused the right to be defended by the lawyer of his choice. This right must be effective and not just theoretical. In practice, Mr KHIEU Samphan ought to be able to exercise his right to consult his lawyer. Muzzling the Defence by cutting off the lawyer’s microphone when she wishes to address the court so as to state her client’s position or request to confer with him is unacceptable and should not be allowed to continue. The Defence is entitled to address the court, and Mr KHIEU Samphan is free to address the court directly or through his lawyers, because they represent his interests. Indeed, according to the Internal Rules, it lies with the President to guarantee “*the free exercise of defence rights.*”¹¹

b. Violation of Mr KHIEU Samphan’s right to question witnesses

8. Mr KHIEU Samphan clearly understands the difference between a witness and a civil party. That being as it may, the fact still remains that Civil Parties testify before this Chamber under similar conditions as witnesses, and their statements can constitute inculpatory evidence. During questioning by the Civil Party Lawyers and the Co-Prosecutors, the Civil Party made no reference to Mr KHIEU Samphan. At that point, Mr KHIEU Samphan’s Defence did not have questions to put to him.

⁷ *Ibid.*, p. 96, lines 7 - 11.

⁸ *Ibid.*, p. 96, lines 14 - 19.

⁹ *Ibid.*, p. 96, line 25.

¹⁰ *Ibid.*, p. 97, lines 16-17.

¹¹ Internal Rule 85 (1).

9. It was only while he was describing his suffering that he alleged that, according to a report by a former driver in 1979, one of his uncles received a letter from Mr KHIEU Samphan, dated 17 April 1975, urging him to return to Phnom Penh. The Civil Party then asked Mr KHIEU Samphan to relate the circumstances of his [the Civil Party's] uncle's death, linking his uncle's disappearance to the alleged letter.¹²
10. Such statements go directly to Mr KHIEU Samphan's alleged acts and conduct. As this was the first time the Civil Party brought this up, the Defence could not have anticipated it through either his Civil Party application or his testimony at trial. By allowing the Civil Party to ask the question without allowing the Defence to respond, the President did not ensure adversarial debate.
11. It was not until after the Civil Party had left the witness stand that the President allowed the parties to make rebuttal remarks concerning his testimony and asked them whether some of the Civil Party's answers were outside the scope of Case 002/1.¹³ After finally being allowed to speak, Mr KHIEU Samphan's international Co-Lawyer strongly challenged the procedure followed by the Chamber, whereby civil parties are allowed to address matters that fall outside statement of their suffering by providing "[TRANSLATION] *evidence that not only falls outside the scope of Case 002/01, but also it raises issues in regard to defence rights.*"¹⁴ The Defence pointed out that since the statement was made after the Civil Party's testimony, the Defence was no longer in a position to question him and was therefore denied the right to question him on the new evidence he had introduced.¹⁵
12. After a discussion among the Judges, Judge LAVERGNE was tasked with clarifying the Chamber's position. Judge LAVERGNE indicated that the Defence may question the Civil Party after the statement concerning his/her suffering.¹⁶ Mr KHIEU Samphan's lawyer therefore immediately sought to exercise this right,¹⁷ but was not allowed to do so by the

¹² Draft Transcript of Proceedings, 23 November 2012, p. 94, lines 12 to 25 and p. 95, lines 1-9.

¹³ *Ibid.*, p. 99, lines 23 - 25 and p. 100, lines 1 - 5.

¹⁴ *Ibid.*, p. 100, lines 19 - 25, and p. 101, line 1.

¹⁵ *Ibid.*, p. 101-102

¹⁶ *Ibid.*, p. 104, lines 22 - 25, p. 105, lines 1 -3, p. 106, lines 2-5.

¹⁷ *Ibid.*, p. 106, lines 7 to 9.

President, on the ground that “[TRANSLATION] *the civil party has gone home. And the accused person has asserted his right to remain silent.*”¹⁸

13. Yet, the issue was not whether the Accused has the right to remain silent, but rather whether he was allowed to question a Civil Party and to directly challenge the Civil Party’s testimony. Counsel GUISSÉ requested to question the Civil Party regarding the new statements he had made concerning Mr KHIEU Samphan’s alleged conduct. In this instance, she was only seeking to exercise a basic defence right.
14. Mr KHIEU Samphan submits that the principle that applies at the ECCC for witnesses to be summoned for adversarial challenge.¹⁹ Refusal to allow the Defence to rebut a statement by a witness or a Civil Party renders this principle nugatory.
15. The practice adopted in Case 002 to allow Civil Parties to speak last so as to talk about their suffering and harm has gone awry. In its present form, it runs counter to adversarial proceedings. It violates the defence right to rebuttal and to respond to any accusations made against the Accused. Allowing the Defence to make comments on the Civil Party’s testimony only after the Civil Party left the witness stand is not consistent with the requirements of these rights.
16. Mr KHIEU Samphan therefore requests the Chamber to reconsider the oral decision by which it refused to recall CHAU Ny to the witness stand for questioning in relation to the new evidence he had introduced. It is important to note that Internal Rule 87(2) provides: “*Any decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination.*” Should the Chamber decide not to recall Mr CHAU Ny to the witness stand, Mr KHIEU Samphan requests the Chamber to clearly state that pursuant to Internal Rule 87(2), Mr CHAU Ny’s statement regarding his suffering is not admissible into evidence.

¹⁸ *Ibid.*, p. 106, lines 13 to 16.

¹⁹ Internal Rule 84 (1)

17. Mr KHIEU Samphan also requests the Chamber to review the current procedure regarding Civil Parties' statements regarding their suffering, and to revert to the practice followed in Case 001 pursuant to which Civil Parties were allowed to describe their suffering in an environment that was conducive to safeguarding the rights of the Accused.

II. The procedure followed in Case 001

18. The Internal Rules do not permit Civil Parties to speak about their suffering at the end of their testimony. The possibility offered to them by the Chamber in this regard is therefore not provided for the Rules.²⁰ The on-going trial being the ECCC's second trial, it is important to draw from the experience gained in the first trial.

19. In Case 001, the Chamber allowed one Civil Party to question the Accused and to also talk about his suffering. However, the conditions were different from those in Case 002 and were more conducive to guaranteeing the rights of the Accused while safeguarding those of the Civil Parties.

20. For instance, at the hearing of 19 August 2009 in Case 001, three Civil Parties were heard.²¹ Each Civil Party was questioned according to the same procedure:

- Questioning by the President of the Chamber. The President then invited the Civil Party Lawyer to briefly introduce his/her client and to explain why the Civil Party was appearing as a civil party, and to present claims for reparations in relation to the charges against the Accused;
- The Civil Party Lawyer complied by referring to all relevant documents in support of the Civil Party application;
- The President allowed the Civil Party to describe the facts that prompted him/her to apply to be joined as a civil party in the case, to about the facts of the case, and to describe the suffering he/she endured as a result of those facts;
- The Civil Party Co-Lawyer was allowed to question the Civil Party;

²⁰ Memorandum titled "Response to issues raised by parties in advance of trial and scheduling of informal meeting with Senior Legal Officer on 18 November 2011, E141, p. 5,

²¹ Transcript of Proceedings *Duch*, 19 August 2009, D288/4.65.1.

- The Co-Prosecutors were allowed to question the Civil Party;
- The other Judges were invited to question the Civil Party;
- The Defence Lawyer was allowed to question the Civil Party;
- The Accused was allowed to make remarks.

21. At that hearing, two Civil Parties requested to question the Accused. Their questions were asked during the questioning by the Civil Party Co-Lawyer, namely, well before the questioning by the Defence. This practice is consistent with the Internal Rules, which provide that the Accused and his/her lawyer are entitled to make to make rebuttal statements.

22. Furthermore, at the hearing, the President asked the Accused – after the latter had responded to the Civil Party’s first questions “[TRANSLATION] *Mr Accused, can you answer. You should know that should you choose to remain silent, you are entitled to do so. Simply because I am repeating the question to you does not mean that you have to answer it. You still retain your right to remain silent.*”²² The President was giving effect to Internal Rule 21(4)(d) which guarantees the Accused the right of to be presumed innocent, to be informed of any charges brought against him, to be defended by a lawyer of his choice, and, at every stage of the proceedings, to be informed of his right to remain silent.

III. Remedy sought by KHIEU Samphan

23. Mr KHIEU Samphan’s Defence requests that the Chamber follow the procedure adopted in Case 001. That procedure guarantees the rights of both the Civil Parties and the defence. Moreover, following that procedure is in the interests of justice. By allowing Civil Parties to testify on the facts of the case against the Accused, the Chamber facilitates its final decision as to whether to afford this individual civil party status. The Chamber allows the Civil Party to prove the harm he/she has suffered and the link with the charges against the Accused in the present trial.

24. The rights of the Civil Parties are respected since in that Civil Parties are allowed to speak about the entirety of their suffering which is at issue in the trial, and, where appropriate, to

²² *Ibid.*, p. 96, lines 5 - 9.

seek additional answers from the Accused. The defence rights are also respected in that only the facts of the case are discussed and the statement by the Civil Party sets the perimeters of the questioning by the other parties. The Accused may exercise his/her right to remain silent. Lastly, the basic principle is that the Defence and the Accused are entitled to make rebuttal statements.

25. Reverting to this procedure is the only way to fully guarantee the rights of the Accused.

FOR THESE REASONS, Mr KHIEU Samphan requests the Trial Chamber to:

- **Guarantee** Mr KHIEU Samphan's right to a fair trial,

Accordingly,

- **Recall** CHAU Ny to the witness stand for the Defence to question him regarding the new accusations he made while speaking about his suffering,
- **Revert** to the procedure followed in Case 001 regarding the questioning of Civil Parties.

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