

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA
BEFORE THE SUPREME COURT CHAMBER

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SUPPLEMENTARY APPEAL OF CO-LAWYERS FOR CIVIL PARTIES (GROUP 2)
AGAINST TRIAL CHAMBER'S DECISION TO EXCLUDE CIVIL PARTY LAWYERS
FROM QUESTIONING THE ACCUSED, WITNESSES AND EXPERTS ON THE
ACCUSED'S CHARACTER

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Accused

KAING Guek Eav alias DUCH

ឯកសារបានច្បាប់តាមប្រព័ន្ធគ្រប់គ្រងឯកសារ
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I. BACKGROUND

1. On 16 September 2009, Civil Party Group 2 filed an Appeal against the Decisions of the Trial Chamber where they ruled that Civil Parties cannot participate in (i) making submissions on sentencing and (ii) questioning the Defendant and witnesses on character¹. [Hereinafter “*Sentencing Decision and Questioning Decision*”]. The reasoning for both Decisions were given on 12 October 2009, after the deadline already expired and thus, was not included in the Appeal.
2. The Supreme Court Chamber allowed the submission of additional arguments on the reasoning of the Trial Chamber’s Decisions due at the end of October 2009. Co-Lawyers for Civil Parties file herewith supplementary arguments.

II. ARGUMENT

3. The Trial Chamber’s Decision to exclude Civil Parties from filing submissions on sentencing, sets forth several arguments that are erroneous in their reasoning and do not uphold the law or serve justice.
4. The Sentencing Decision argues that “[The] ECCC Law did not envisage victim participation by means of Civil Party procedure...”²
While the Trial Chamber in the Sentencing Decision refers to Article 33 new, ECCC Law, which provides that Cambodian criminal procedure is applicable in the proceedings before the ECCC³, it stops short of recognizing that this includes Civil Party procedure. The ECCC Law did not need to envision victim participation by including Civil Party procedure, this mechanism was already in place at the time the Agreement and the ECCC Law was enacted. In fact, the ECCC Law relies on Cambodian criminal procedure for guidance, this is evidenced by its reference in Article 20 new, 23 new, and 33 new. At the time of drafting the

¹ Transcript 27 August 2009, p.42, l. 7-17 and p.74, l. 13-17.

² *Case against Kaing Guek Eav*, 001/18-07-2007/ECCC/TC, 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, 9 October 2009, E92/3, para 10.

³ *Ibid*, para 11.

ECCC Law, the 1993 Cambodian Procedure Code had fully incorporated the Civil Party system, and therefore the Civil Party procedure is explicitly part of the ECCC Law.

5. The Sentencing Decision also argues that the “specific nature” of the ECCC proceedings require that the Trial Chamber use its own discretion to adapt Civil Party procedure. The Trial Chamber’s reasoning does not provide any reasoning for why full Civil Party participation would impede the ECCC proceedings. Furthermore, if adaptation is required then limiting Civil Party procedure should be directly linked to whatever the “specific nature” of the proceeding requires. The Trial Chamber does not provide any argument indicating why limiting or restricting the Civil Parties on sentencing submission is necessary or needed to the specificity of the ECCC proceedings. Rather, this rationale if taken alone would allow for arbitrary limitations on the rights of any party, which is inconsistent with a fair and just criminal proceeding.

6. The argument that the role of Civil Parties should be limited in Sentencing, because of the nature of the ECCC proceedings, without providing why the nature of the proceeding requires the limitation, could lead to the damaging impact of allowing the Court to have unfettered discretion in limiting the rights of any party to a criminal proceeding.

7. The Trial Chamber uses the argument that the Civil Party procedure is not envisaged in the ECCC Law and that the “specific nature” of the ECCC proceedings require an adaptation to apply a restrictive interpretation to the rights of Civil Parties. As demonstrated above, both arguments are faulty and erroneous, and not based in law. As a result, the reasoning relied upon to conclude that a restrictive approach and interpretation of Civil Party rights is required has no merit.

8. Given that the Trial Chamber’s reasoning is fundamentally erroneous, any ruling derived from it should not be upheld.

9. The Sentencing Decision when defining the role of Civil Parties⁴ uses faulty and erroneous reasoning to uphold that a restrictive approach to Rule 23(1) is required for Civil Party participation. Rather, Civil Parties are equal parties to the proceedings, unless otherwise

⁴ Ibid, para 25.

stated by the Internal Rules and/or the Cambodian Procedural Code. This principle is highlighted by Judge Lavergne in his dissenting opinion, where he states, “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.”⁵

10. The Trial Chamber provides no legal basis or sound argument when they limit the role of Civil Parties to solely seeking reparations and to determine the criminality of the Accused. Again, this holding violates the provision set forth in Rule 23(1), which has no limitations set forth with regard to the participation rights of Civil Parties.

11. The Trial Chamber fails to recognize that a relevant and important part of serving the interest of victims and Civil Parties is to facilitate reconciliation, seek justice on their behalf and the behalf of the Cambodian people. The nature of being in an established criminal proceeding, rather than a Truth Commission, relies on the outcome of the trial. The outcome of the trial is Sentencing. As a result, to exclude the Civil Parties from playing a role in this process, the Trial Chamber does not fulfill its mandate of achieving justice.

12. Excluding Civil Parties from the Sentencing by adopting a restrictive approach to Civil Party procedure, is based on faulty reasoning, has no legal basis, and violates established Rules and Laws.

13. The Questioning Decision which is premised on the reasoning of the Sentencing Decision, is likewise faulty and erroneous, and therefore does not have any legal basis.

14. The Questioning Decision states that Civil Parties’ role is to determine the guilt or innocence of the Accused in order to support their reparations claims. The Questioning Decision further states that Civil Parties are to be excluded from questioning witnesses and experts on the character of the Accused, because it relates to the sentencing not his guilt. This limitation of excluding Civil Parties from questioning on the character of the Accused has no foundation or legal basis in any Rule or Law.

⁵ Ibid, para 13 of Dissenting Opinions of Judge Lavergne, Judge of the Trial Chamber.
Co-Lawyers for Civil Parties’ Supplementary Appeal Against TC Exclusion of Civil Parties’ Lawyers
From Questioning And Submissions On Sentencing

15. The Trial Chamber extended the limitation to excluding the Civil Parties from questioning psychological and psychiatric experts by using its reasoning on why Civil Parties cannot question the character of the Accused. This reasoning is also faulty because it does not account for the range of testimony that is offered by the experts, which is not limited to the character of the Accused. Rather, as stated by Judge Lavergne in his dissent⁶, the Trial Chamber oversimplified the expert witness process by failing to recognize that they could testify to any mental illness or affliction suffered by the Accused. This type of testimony would be highly relevant to criminal responsibility. By doing this, the Trial Chamber went beyond excluding the Civil Parties from questioning on character, but prevented them from questioning on the criminal responsibility of the Accused. Thus, this result, which is over exclusionary had no reasoning at all and is in contradictory to its own holding.

For the foregoing reasons, the Co-Lawyers for Civil Parties respectfully request,

- (i) To declare this Appeal admissible,
- (ii) To overturn the impugned decisions by the Trial Chamber.

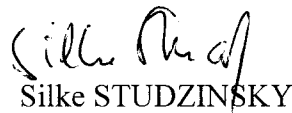
Respectfully submitted by Co-Lawyers for Civil Parties (Group 2)



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⁶ Ibid Dissenting Opinions of Judge Lavergne, Judge of the Trial Chamber para 36.
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