

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

FILING DETAILS

Case No: 001/18-07-2007-ECCC/TC

Party Filing: Co-Lawyers for Civil Parties
(group 2)

Filed to: Trial Chamber

Original Language: English and Khmer
(translation)

Date of Document:

16 September 2009

CLASSIFICATION

**Classification of the document
suggested by the filing party:**

Public

Classification by Chamber:

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception): 25 / 09 / 2009
ម៉ោង (Time/Heure) : 10:00
មន្ត្រីទទួលបន្ទុកសំណុំរឿង /Case File Officer/L'agent chargé du dossier:..... <i>P.A. Fuy</i>

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

Filed by:

Distribution to:

Co-Lawyers for Civil Parties

Trial Chamber

Mr. HONG Kimsuon

Judge NIL Nonn, President

Mr. KONG Pisey

Judge Silvia CARTWRIGHT

Mr. YUNG Phanit

Judge YA Sokhan

Ms. Silke STUDZINSKY

Judge Jean-Marc LAVERGNE

Judge THOU Mony

Accused

KAING Guek Eav alias DUCH

Counsel for the Accused

Mr. KAR Savuth

Mr François ROUX

Ms. Marie-Paule CANIZARES

ឯកសារបានច្បាប់ដោយស្មើគ្នា
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME
ថ្ងៃ ខែ ឆ្នាំ ត្រឹមត្រូវ (Certified Date/Date de certification): 28 / 09 / 2009
មន្ត្រីទទួលបន្ទុកសំណុំរឿង /Case File Officer/L'agent chargé du dossier:..... <i>SANN RADA</i>

Co-Prosecutors

Ms. CHEA Leang
Mr. William SMITH

Co-Lawyers for Civil Parties

Mr. KIM Mengkhy
Ms. MOCH Sovannary
Ms. Martine JACQUIN
Mr. Philippe CANONNE
Ms. Elizabeth RABESANDRATANA
Ms. Annie DELAHAIE
Mr. Pierre-Olivier SUR
Ms. TY Srinna
Mr. Karim KHAN
Mr. Alain WERNER
Ms. Brianne McGONIGLE
Ms. Fabienne TRUSSES-NAPRUS
Ms. Christine MARTINEAU

Co-Lawyers for Civil Parties (group 2) file herewith on behalf of the Civil Parties Mr. CHUM Sirath and Ms. PHUNG GUTH Sunthary, authorizations of our clients are attached as Annex 1 and 2,

APPEAL

This Appeal is against the decision of the Trial Chamber, dated 27 August 2009, where they ruled that Civil Parties cannot participate at all in (i) making submissions on sentencing or(ii) to question the Defendant and witnesses on character¹. [Hereinafter "*Decisions*'"]

I. BACKGROUND

1. On 27 August 2009, the Trial Chamber rejected the request of Civil Party Groups 1 and 2 to make submissions on sentencing. The Trial Chamber by majority, Judge Lavergne partly dissenting, issued the following decision:

- “ 1. The Joint Request by the Civil Party Co-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.”²

2. Further, the Trial Chamber had heard the Parties on the question if Civil Parties are allowed to question the accused and the witnesses called to testify at the part of the hearing that is entitled "Questioning the witnesses and expert on the issues relating to the character of the accused".

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

² Transcript 27 August, p. 42, l.7-17.

3. The Chamber decided by majority, Judge Lavergne dissenting, as follows³:

”Civil Parties are not allowed to ask questions to the Accused relevant to character and to the following witnesses appearing under the following pseudonyms or names: KW-34 and Françoise Sironi-Guilbaud, D1, D2, D3, D4, D5, D6, Christopher Lapel, D8 and D14.”

4. The Reasoning of both Decisions of the majority and minority has not been revealed when this appeal was filed to Court Management Section for translation.

II. ADMISSIBILITY OF THE APPEAL

The relevant legal basis

5. Pursuant to Rule 104 (4) Internal Rules (“IR”) are the following decisions of the Trial Chamber subject to immediate Appeal:

- a) *decisions which have the effect of terminating the proceedings;*
- b) *decisions on detention and bail under Rule 82;*
- c) *decisions on protective measures under Rule 29(4)(c);*
- d) *decisions on interference with the administration of justice under Rule 35(6);*
and
- e) *decisions declaring the application of a civil party inadmissible under Rule 23(4).*

6. According to Rule 104 (1) IR are grounds for an Appeal against a judgment or a decision as follows:

- f) *an error on a question of law invalidating the judgment or decision; or*
- g) *an error of fact which has occasioned a miscarriage of justice.*
- h) *Additionally, an immediate appeal against a decision of the Trial Chamber may be based on a discernible error in the exercise of the Trial Chamber’s discretion which resulted in prejudice to the appellant.*

Kind of the impugned decision

³ Transcript 27 August 2009, p.74.

7. Among all of the appealable decisions Rule 104 (4) (e) provides the legal basis for this Appeal, which appeals the declaration of inadmissibility.
While, the Trial Chamber's Decisions does not explicitly state that one or more Civil Party Applications are inadmissible it does in fact state the *temporally* exclusion of all 93 Civil Parties and their respective lawyers from making submissions on sentencing and the excludes them from the questioning of a number of witnesses and experts and the accused. the ac This creates the same effect of a declaration of inadmissibility.
8. The purpose of Rule 104 (4) (e) is to grant applicants a legal remedy against inappropriate rulings and to provide safeguards and protection towards the status of being a party with full rights to the proceedings.
9. The extensive restraint on the Civil Parties' rights through the impugned decisions becomes even more restrictive with the cumulative impact of both decisions viewed together. The decisions suspend the *core* rights of Civil Parties, specifically the decision regarding questioning the Accused's character is derived from the decision on sentencing.
10. The fact that the Trial Chamber did not exclude other rights of Civil Parties in its Decisions or did not declare Civil Party applications as inadmissible does not diminish the impact of these Decisions and the comparability with a declaration of inadmissibility.
11. During the relevant period in which Civil Parties are excluded from questioning, no other right(s) – except the passive right to be physically present in the court room— is actively meaningful or inclusive for the Civil Parties.
12. Therefore, the temporally factual exclusion of Civil Parties mitigates their (active) inclusion and participatory rights to an exclusively passive role. This is in contrast to the rights generally granted to victims's and as a result amounts to – temporally- the same position for an applicant whose application was declared inadmissible, relegating them to having no rights.

13. Without declaring a Civil Party application directly inadmissible, the Decisions substantially dismisses Civil Party participation. Due to the harsh impact of the impugned decisions on Civil Parties' and their rights, these Decisions must be considered similarly to decisions on inadmissibility under Rule 104 (4) (e) and must be appealable because of a comparable impact on Civil Parties' rights. Without the right to appeal, Civil Parties would not have any remedy to assert their rights and invalidating any position countering their rights. Their right would be limited to upholding the term 'Civil Party' which is ineffectual without their main participation rights, such as questioning the Accused, witnesses and experts and commenting on the relevant factors for sentencing, which is a circumvention and therefore must be considered a declaration of (temporally and partly) inadmissibility.⁴
14. The case of Ieng Sary before the Pre-Trial Chamber ("PTC") declaring the non- decision as a constructive refusal is comparable. There, the PTC held that the failure of the Office of the Co-Investigating Judges to decide the Defenses' request as soon as possible amounts to a constructive refusal of the application and can be appealed. Similarly, in the case where no declaration of inadmissibility was issued but a severe curtailing of Civil Parties' rights must be seen as a temporally inadmissibility declaration which can be appealed under Rule 104 (4 (e) Internal Rules.
15. Thus, the Appeal against both decisions is admissible.

Ground for Appeal

16. The relevant ground for this Appeal is Rule 104 (1) (a) IR which is based on
- “[...]”
- (a) *an error on a question of law invalidating [t]he [...] decision.*
- (b) [...]”

⁴ See *Case against Ieng Sary*, 002/19-09-2007/ECCC/(PTC10), Public Decision On Ieng Sary's Appeal Regarding The Appointment Of A Psychiatric Expert, 21 October 2008, A89/I/8, para 21-24.

III. RELEVANT LEGAL BASIS

17. Rule 23 (1) IR defines the purpose of Civil Party participation as follows:

“1. The purpose of Civil Party action before the ECCC is 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 reparations, as provided in this Rule.”*

18. Rule 94 IR states as follows:

“1. After examining all the evidence, the President of the Chamber shall call successively upon the following persons to make their closing statements:

- a) The Civil Parties;*
- b) the Co-Prosecutors, for such oral submissions as they consider necessary for justice to be done;*
- c) the lawyers for the Accused; and*
- d) the Accused.*

2. Civil parties and the Co-Prosecutors may make rebuttal statements.

3.[...].”

19. Art. 335 Criminal Procedure Code of Cambodia (“CPC”) provides:

“At the conclusion of the hearing, the presiding judge authorizes the following people to give their closing statements one after another:

- The civil party, civil defendants and the accused can make brief statements;*
- the lawyer of the civil party to present his closing arguments;*
- the Prosecutor of the Kingdom presents his closing argument;*
- the lawyer of a civil defendant and then the lawyer of the accused present his closing arguments.*

The civil party and the Prosecutor of the Kingdom can make rebuttal statements.

[...].”

20. Rule 91 IR states as follows:

“1. The Chamber shall hear the Civil Parties, witnesses and experts in the order it considers useful.

2. The Co-Prosecutors and all the other parties and their lawyers shall be allowed to ask questions with the permission of the President. Except for questions asked by the Co-Prosecutors and the lawyers, all questions shall be asked through the President of the Chamber.

3. The Co-Prosecutors and all the other parties and their lawyers may object to the continued hearing of the testimony of any witnesses, if they consider that such testimony is not conducive to ascertaining the truth. In such cases, the President shall decide whether to take the testimony.

4. [...].”

21. Art. 326 CPC states:

“The presiding judge shall listen to the statements of civil parties, civil defendants, victims, witnesses and experts in the order which he deems useful. The presiding judge can listen as witnesses to judicial police officers and judicial police agents who conducted the enquiry.

The Prosecutor of the Kingdom, the lawyers and all the parties may be authorized to question the accused. All questions shall be asked with the authorization of the presiding judge. Except for questions asked by the Prosecutor of the Kingdom and lawyers, all questions shall be asked through the presiding judge. In case of objection to a question, the presiding judge has discretion to decide whether the question should be asked.”

IV. ARGUMENT

Preliminary Remarks

22. Although the Decision on Questioning has been executed and Civil Party Lawyers were prohibited from questioning the Accused, experts and witnesses in the week from 31 August 2009 through 3 September 2009 the Supreme Court Chamber could remedy the unjustified restrictions on Civil Parties and order to summons the relevant witnesses and experts again in order to allow the Civil Parties to question them. The importance of an effective guarantee of Civil Parties’ core right to questioning outweighs the potential delays that may occur.
23. Unfortunately, the legal reasoning behind the Trial Chamber’s decisions which severely impacted Civil Party participation are not available. As a result, the Co-Lawyers for Civil Parties kindly request the opportunity to comment on the written opinion within 15 days from notification when the basis for the decisions are announced.

Decision on exclusion of submissions on sentencing

24. The Internal Rules clearly indicated that the purpose of Civil Parties is not limited to reparations, rather it encompasses the support of the prosecution by a broad participation.
- In granting victims the right to join the proceedings as Civil Parties, it was intended to

ensure their voices to be heard and respected.⁵ The interest of the Civil Parties to take an active part in the proceedings does not end at the sentencing stage. On the contrary, in order to fully allow for Civil Parties' need for truth and justice,⁶ their participating at the sentencing stage is of eminent importance.

25. For Civil Parties it is of outstanding relevance to understand how the atrocities occurred and why. In order to comprehend the magnitude of the crimes and their own history, Civil Parties must be allowed to ask questions about the character of the accused. If Civil Parties are excluded from this important stage of the trial, its outcome would not vindicate or satisfy the Cambodian victims. In so doing, the ECCC would fail one of its most important functions and purpose.
26. Furthermore, Rule 23 (1) (a) requires Civil Parties to *support* the prosecution. There is no doubt that the Prosecution has the task to assess and submit mitigating and aggravating factors for the sentence and demand an appropriate penalty for the Accused.
27. The support of the prosecution by the Civil Parties is not limited to any particular stage of the proceeding. Rather, supporting the prosecution should require the Civil Parties to submit comments and motions on sentencing. In allowing Civil Parties' to make submissions on the sentencing, Civil Parties can contribute and shed light on the personal background of the Accused, clarify facts and provide useful information on relevant factors for the determination of the sentencing.
28. As it was pointed out in Civil Parties' Co- Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing, Civil Parties can contribute effectively to the sentencing stage.⁷ Particularly, the assessment of the gravity of a crime and the value of an apology depend on victims' testimonies. By

⁵ Charles P. Trumball IV, The Victims of Victim Participation in International Proceedings, Michigan Journal of International Law 2008, p. 777 (803).

⁶ Charles P. Trumball IV, The Victims of Victim Participation in International Proceedings, Michigan Journal of International Law 2008, p. 777 (802).

⁷ Civil Parties' Co- Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing, 9. June 2009, Case File No. 001/18-07-2007-ECCC/TC, E 72, para. 36-39. Co-Lawyers for Civil Parties' Appeal Against TC Exclusion of Civil Parties' Lawyers From Questioning on the Character of the Accused and from Submissions on Sentencing

making submissions on the objective criteria regarding the degree of penalty, Civil Parties can considerably support the Court in finding an adequate sentence.

29. In conclusion, contributing to the factors that are relevant for the sentence is one of the three primary tasks given to the Civil Parties, namely *supporting* the Prosecution without any limits.
30. Furthermore, the voice of the Civil Parties during the proceedings has an influence on the mitigating or aggravating factors of the Accused's guilt and as such can and should influence his sentence. To exclude the Victims from this vital part of the trial from making submissions on sentencing denies them of their primary core right, i.e. supporting the prosecution. At this last stage of the proceedings, when Civil Parties have already been permitted to participate in the guilt phase of this trial, by precluding them from participating in the sentencing phase serves to emasculate their effort and defeat the purpose of their participation. In an attempt to promote balance and efficiency, the Court has mistakenly traded a speedy trial for the due process rights of the Civil Parties.
31. Excluding Civil Parties from submissions on sentencing is a grave error in law, an error in Rule 23 (1) and violates the core Rights of Civil Parties. Therefore, the Appeal against the decision of the Trial Chamber is reasoned in accordance with Rule 104 (1).
32. Finally, the two arguments proffered by the Defense should be addressed. First, the Defense puts forward that the "right to claim a particular sentence would amount to a regression in our jurisprudence, because it would bring us back to the days of direct revenge."⁸ It is clear that Civil Party participation in the sentencing stage will be understood as a factual contribution to mitigating and aggravating circumstances. The intention of Civil Parties is not only to claim a particular sentence, but to provide the Court with necessary information to determine an adequate sentence. This can not be seen as an act of revenge but as an attempt of the Civil Parties to substantially contribute to the work of the Court. It should not be forgotten that direct access to the

⁸ T. 18 February 2009, p.9, 1.-5.

views of Civil Parties is one of the advantages of this Court and one of primary reasons for the establishment of a Civil Party system.

33. Secondly, the Defense highlighted Rule 105 IR in order to show that matters of sentencing fall outside the scope of Civil Party participation. The fact that Civil Party appeals are restricted to their civil interests does not affect their ability to participate in the trial proceedings. Again, the purpose of making submissions on sentence as well as questioning character witnesses does not primarily lie in the outcome but equally in the participation itself. Even if Civil Parties are not allowed to challenge the degree of penalty, they must be permitted to be heard without exceptions in the proceedings. By upholding the purpose of Civil Party participation – to give victims a voice and to support the prosecution - can their role be fully served.

Decision on exclusion from questioning

34. The second decision is derived from the first decision and assumes that, if Civil Parties have no standing on sentencing thus they questioning their standing on questioning witnesses, experts and the Accused on defendants' character which is one of the elements that is considered in the decision on sentencing.
35. The right to question is one of the *core* rights for all parties and thus, also for Civil Parties during the trial phase. Rule 91 (2) IR as well as Art. 326 of the CPC does differentiate who and what questions Civil Parties are permitted to ask. Questioning is limited only to those questions that are conducive to ascertaining the truth.

V. CONCLUSION

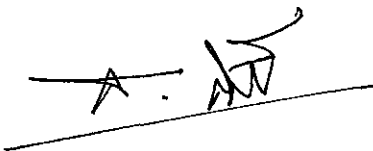
36. The impugned Decisions on exclusion of Civil Parties from submissions on sentencing and from questioning the Accused on character, violate the Internal Rules and the Cambodian Criminal Procedure Code and should be overturned.

E169

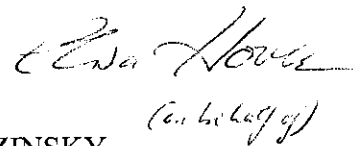
Co-Lawyers for Civil Parties (group 2) respectfully request:

- (i) To invalidate both Decisions of the Trial Chamber dated 27 August 2009;
- (ii) To order the summons of the experts and witnesses already heard in the week from 31 August 2009 through 3 September 2009;
- (iii) To grant Co-Lawyers for Civil Parties appropriate time to respond to the minority and majority grounds of the impugned decisions before the Supreme Court Chamber decides on the Appeal.

Respectfully submitted,



For HONG Kimsuon
Co-Lawyer



Silke STUDZINSKY
Co-Lawyer

Signed in Phnom Penh, Kingdom of Cambodia on 16 September 2009.