

**BEFORE THE TRIAL CHAMBER****EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** The Defence for IENG Sary**Filed to:** The Trial Chamber**Original language:** ENGLISH**Date of document:** 9 March 2011**CLASSIFICATION****Classification of the document  
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**IENG SARY'S REPLY TO THE CIVIL PARTIES' RESPONSE TO HIS MOTION  
REQUESTING GUIDELINES FOR CIVIL PARTY PARTICIPATION**

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Judge YA Sokhan  
Judge Silvia CARTWRIGHT  
Judge Jean-Marc LAVERGNE  
Reserve Judge YOU Ottara  
Reserve Judge Claudia FENZ**Co-Prosecutors:**CHEA Leang  
Andrew CAYLEY**All Defence Team**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby replies to the Civil Parties’ Response (“Response”)<sup>1</sup> to his Motion Requesting Guidelines for Civil Party Participation (“Motion”).<sup>2</sup> This Reply is made necessary because the Response contains certain inaccuracies, which must be corrected. The Defence maintains that this matter should be discussed at the Trial Management meeting to be held in April 2011<sup>3</sup> in order for all parties to express their views before the Trial Chamber.

**I. THE DEFENCE IS PERMITTED TO SUBMIT A DOCUMENT 15 PAGES IN LENGTH TO THE TRIAL CHAMBER**

1. The Practice Direction for Filing Documents before the ECCC (“Practice Direction”) permits the Reply to “be filed within 5 calendar days of notification, in the ECCC official language which the party has elected under Article 2.2, of the response to which the participant is replying.”<sup>4</sup> The Defence notified the Trial Chamber that its official languages are Khmer and English.<sup>5</sup> The Defence was notified of the Response in English on 3 March 2011. The 5 day deadline runs from the day after the date of notification.<sup>6</sup> 5-6 March 2011 was the weekend, and 8 March 2011 was a national holiday. On these days, the Interpretation and Translation Unit did not work. The deadline for the Reply, in light of the national holiday on 8 March 2011, is 9 March 2011.<sup>7</sup> In light of the translation constraints and the tight deadline, on 8 March 2011, the Defence requested that the Reply be filed in English initially with the Khmer translation to follow as soon as practicable. Susan Lamb, the Trial Chamber’s Senior Legal Officer, granted this request but stated that the Reply could only be 5 pages in English. This is in contradiction to the Practice Direction which allows for all documents to the Trial Chamber to be up to 15 pages in English. The Trial Chamber has provided no official order or decision for this

<sup>1</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Response to IENG Sary’s Motion Requesting Guidelines for Civil Party Participation, 14 February 2011, E23/2, ERN: 00649092-00649100.

<sup>2</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, IENG Sary’s Motion Requesting Guidelines for Civil Party Participation, 24 January 2011, E23, ERN: 00637283-00637291.

<sup>3</sup> *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Interoffice Memorandum from Susan LAMB, Senior Legal Officer, Trial Chamber, to all Parties, Case 002, 3 February 2011, E9/5, ERN: 00641511-00641511.

<sup>4</sup> Practice Direction, Art. 8.4.

<sup>5</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, IENG Sary’s Notification to the Trial Chamber’s Greffiers to File and Receive all Documents in Khmer and English, 24 January 2011, E22, ERN: 00637277-00637278.

<sup>6</sup> *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Interoffice Memorandum from Susan LAMB, Senior Legal Officer, Trial Chamber, to all Parties, Case 002, Regarding Time-limits for pleadings and responses before the Trial Chamber, 8 February 2011, E45, ERN: 00644019-00644019.

<sup>7</sup> Rule 39 states: “Except as otherwise provided, all of the time limits set out in these IRs expire on the last day at midnight Cambodian time. Should the time limit expire on a Saturday, Sunday or Cambodian public holiday, the time limit shall automatically be extended to the subsequent working day.”



restriction, only an email from its Senior Legal Officer. The email has not been signed by any of the Judges. No reasoning has been provided by either the Trial Chamber or the Senior Legal Officer for this restriction. No reasoning has been provided as to why this restriction was notified to the Defence only on the day before the filing is due. In order to comply with an official Practice Direction and not an unreasoned email from a Senior Legal Officer, the Defence will submit a Reply of not more than 15 pages in English.<sup>8</sup>

## II. REPLY

2. In paragraph 1, the Civil Parties err in their assertion that the Motion is not a pleading and that it “does not qualify as a pleading or an application within the meaning of Article 8 of the Practice Direction ECCC/01/2007/Rev.5.”<sup>9</sup> Rule 92 states in pertinent part that Parties “may, up until the closing statements, make written submissions as provided in the Practice Direction on filing of documents.” Article 8 of the Practice Direction for Filing Documents before the ECCC only pertains to time limits for pleadings and applications before the Chambers and does not define a pleading or an application. The Motion fulfills all criteria of a pleading and must be treated as such.
  
3. In paragraph 1, the Civil Parties further assert that “Mr Ieng Sary is requesting restrictions of their participation by means of guidelines to be enacted before the start of trial, in the form of a practice direction.” The Defence emphasizes that the Civil Parties do play an integral part at the ECCC, as stated many times before,<sup>10</sup> including in the Motion.<sup>11</sup> Contrary to the Response,<sup>12</sup> the Defence never requested the Trial Chamber to restrict the participation of the Civil Parties during trial. Rather the Defence requested that the Trial Chamber enact guidelines for the participation of the Civil Parties during trial “in order to ensure that their participation is tailored to their unique role in the proceedings.”<sup>13</sup> The Agreement, and Establishment Law<sup>14</sup> are both silent on the role of Civil Parties in the proceedings before the ECCC. Although the Rules state that Civil Parties are there to

<sup>8</sup> See also, *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Summary of IENG Sary’s Rule 89 Preliminary Objections & Notice of Intent of Noncompliance with Future Informal Memoranda Issued in Lieu of Reasoned Judicial Decisions subject to Appellate Review, 25 February 2011, E51/4, ERN: 00648370-00648385.

<sup>9</sup> Response, para. 1.

<sup>10</sup> See, e.g., *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 101), IENG Sary’s Response to the Appeal of Civil Party Applications Rejected by the OCIJ, 28 September 2010, D399/2/2, ERN: 00612145-00612147.

<sup>11</sup> Motion, introduction.

<sup>12</sup> Response, para. 1.

<sup>13</sup> Motion, introduction.

<sup>14</sup> Article 36 new of the Establishment Law gives “victims” the right to appeal Trial Chamber decisions before the Supreme Court Chamber.

support the Co-Prosecutors and to seek collective and moral reparations, the precise meaning of “supporting the prosecution” has not been defined.<sup>15</sup> The Trial Chamber held that the meaning of supporting the prosecution “must be interpreted restrictively, and does not confer a general right of equal participation with the Co-Prosecutors.”<sup>16</sup> Regarding the role of Civil Parties at trial, the Rules only explicitly mandate that the actions of a Civil Party are limited to his or her civil interests during trial.<sup>17</sup> For the purposes of trial proceedings, neither the Cambodian<sup>18</sup> nor French Procedural Codes explicitly provide for Civil Parties to act in a supporting role to the prosecution, nor do they grant them a platform to advocate the Accused’s guilt beyond establishing the connection between the Accused’s acts and the Civil Party’s injury.<sup>19</sup> The Motion requested that the Trial Chamber enact guidelines to clearly reflect the role of Civil Parties as defined by the applicable law at the ECCC.

4. In paragraph 2, the Civil Parties err in their assertion that “the guidelines sought are clearly illegal and would infringe on the rights of the Civil Parties.” First, in the Motion, the Defence requested the Trial Chamber to enact guidelines. It proposed suggestions to be considered when enacting guidelines. The suggestions – as explained in the following list – are based on the law applicable at the ECCC and/or found in ECCC jurisprudence; such guidelines cannot be considered illegal.
  - a. **Limit Civil Party intervention to matters which contribute to the truth.** Rule 85(1) states: “The President of the Chamber shall preside over the proceedings, and facilitate interventions by the other judges. He or she shall guarantee the free exercise of defence rights. In consultation with the other judges, the President may

<sup>15</sup> Rule 23(1) states: “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) Seek collective and moral reparations, as provided in Rule 23*quinquies*.”

<sup>16</sup> *Case of 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, E72/3, ERN: 00387022-00387047 (“Trial Chamber Guidelines in Case 001”), para. 25.

<sup>17</sup> Rule 80*bis*(4) states: “[At the initial hearing] the Trial Chamber may direct the Lead Co-Lawyers, within a deadline determined by the Chamber, to provide initial specification of the substance of the awards they intend to seek within the final claim for collective and moral reparation pursuant to Rule 23*quinquies* (3)(b). At a later stage, the Chamber will determine the date by which the Lead Co-Lawyers shall file the final claim for collective and moral reparation” (emphasis added).

<sup>18</sup> See CPC, Arts. 13-26, 334-35 which focuses Civil Party rights only to their interests in reparations.

<sup>19</sup> See CATHERINE ELLIOTT, *FRENCH CRIMINAL LAW 32-33* (Willan Publishing, 2001).



exclude any proceedings that unnecessarily delay the trial, and are not conducive to ascertaining the truth.<sup>20</sup>

- b. **Limit Civil Party interventions to matters which relate to both the charges and the Civil Party's civil interest and are exclusively for the purpose of establishing harm suffered.** Rule 80*bis*(4) states: “[At the Initial Hearing] the Trial Chamber may direct the Lead Co-Lawyers, within a deadline determined by the Chamber, to provide initial specification of the substance of the awards they intend to seek within the final claim for collective and moral reparation pursuant to Rule 23*quinqüies* (3)(b). At a later stage, the Chamber will determine the date by which the Lead Co-Lawyers shall file the final claim for collective and moral reparation.”<sup>21</sup> Articles 13-26 and 334-35 of the Cambodian Criminal Procedure Code (“CPC”) refer to the role of a Civil Party solely as relating to their interests in reparations.
- c. **Limit Civil Party interventions to interventions which are not inconsistent with the Accused's right to a fair and impartial trial.** Article 13(1) of the Agreement states: “The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights [(“ICCPR”)] shall be respected throughout the trial process. Such rights shall, in particular, include the right: to a fair and public hearing ...”<sup>22</sup> Article 14(1) of the ICCPR states in pertinent part: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>23</sup> Rule 21(1)(a) states in pertinent part: “ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties.”
- d. **Limit Civil Party interventions to matters which will not have an undue negative impact on expeditiousness of the proceedings.** Rule 21(4) states: “Proceedings before the ECCC shall be brought to a conclusion within a

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<sup>20</sup> Emphasis added.

<sup>21</sup> Emphasis added.

<sup>22</sup> Emphasis added.

<sup>23</sup> Emphasis added.

reasonable time.” Article 14(3)(c) of the ICCPR states in pertinent part: “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: To be tried without undue delay.”

- e. **Restrict Civil Parties from making submissions on sentencing.** The Trial Chamber in Case 001 found that “Rule 23(1)(a)... does not provide... a legal basis for the alleged right of Civil Parties to make submissions on sentencing.”<sup>24</sup>
- f. **Restrict Civil Parties from questioning witnesses, experts, or the Accused to enquire into the character of the Accused for the purpose of sentencing.** The Trial Chamber in Case 001 found that “Civil Parties may not in general question the accused concerning his character. It also decided Civil Parties may not question the following experts and witnesses who will testify exclusively to the character of the accused.”<sup>25</sup>

Second, the Civil Parties do not assert which of their rights the Motion infringes upon. The Civil Parties further err in their assertion that “the Defence Request stems from a misunderstanding...of the applicable procedure, which derives from civil law.” As stated *supra*, the Defence requested the Trial Chamber to enact guidelines and provided suggestions which would be reflective of the applicable law at the ECCC. In Case 001, the Trial Chamber enacted guidelines, indicating that the Trial Chamber considers it within its remit to do so.<sup>26</sup> There is clearly a procedure available to the Trial Chamber to make guidelines to ensure the smooth, efficient running of the trial. It is common for a Trial Chamber in cases of this magnitude to enact guidelines for this reason.<sup>27</sup>

5. In paragraph 2, the Civil Parties assert that “[t]he parties have equal entitlement to equality of arms and autonomy, a right that must be safeguarded without discrimination.” The Civil Parties further assert in paragraph 2 that “Civil Parties before the ECCC, through their Lawyers, have the right to participate as parties in all stages of the proceedings; they are therefore entitled to the same rights as other parties; established by law, those rights cannot be called into question.” It is not in dispute that the Civil Parties

<sup>24</sup> Trial Chamber Guidelines in Case 001, para. 35.

<sup>25</sup> *Id.*, para. 48.

<sup>26</sup> *Id.*, paras. 26-47.

<sup>27</sup> *See, e.g., Prosecutor v. Prlić et al.*, IT-04-74-T, Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings, 28 April 2006.



are a party to the proceedings. The Accused plays a central role in the proceedings at the ECCC: he or she is defending against both the allegations from the OCP and the Civil Parties. The role of a Civil Party during trial is limited to his or her civil interests and a restrictive interpretation of role of “supporting the prosecution.”<sup>28</sup> Although it must be stressed that the rights of all Parties must be respected, the rights of each Party are dependant on their respective role in the proceedings. Consequently, the Civil Parties do not have the same rights in the proceedings as the Accused. The Trial Chamber has found that the Civil Party role of supporting the prosecution “does not confer a general right of equal participation with the Co-Prosecutors.”<sup>29</sup> Although the Civil Parties are unclear as to what they mean when they assert that they “have equal entitlement to equality of arms,” as the Civil Parties and the Accused have differing rights, the issue of equality of arms does not arise. The Defence requested that the Trial Chamber enact guidelines which would reflect the role of the Civil Parties rather than infringe their rights.

6. In paragraph 3, the Civil Parties err in their unsupported assertion that the Motion is not conducive to an expeditious trial. The Motion does demonstrate that without Civil Party guidelines, Mr. IENG Sary’s right to be tried within a reasonable period of time will be violated. If guidelines are not enacted prior to trial to ensure that all parties are clear as to the scope of Civil Party participation, time at trial could be wasted, violating Mr. IENG Sary’s right to be tried within a reasonable period of time.<sup>30</sup> A lack of guidelines may result in multiple Civil Party lawyers asking questions outside the scope of examination and repetitive questions, thereby, violating Mr. IENG Sary’s right to be tried within a reasonable period of time.<sup>31</sup>
7. In paragraph 6, the Civil Parties assert that the Trial Chamber “has no jurisdiction to set guidelines or rules on civil party participation in the trial, to the extent that such guidelines would entail excessive amendment of the Internal Rules.” First, the Civil Parties provide not support for their assertion that the Trial Chamber has no jurisdiction to set guidelines on Civil Party participation. In Case 001, the Trial Chamber enacted guidelines without an amendment of the Rules, indicating that the Trial Chamber

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<sup>28</sup> *See supra*, para. 2.

<sup>29</sup> Trial Chamber Guidelines in Case 001, para. 25.

<sup>30</sup> Motion, para. 14.

<sup>31</sup> *Id.*, paras. 14-16.

considered itself to have the jurisdiction to do so.<sup>32</sup> Second as stated *supra*, the Defence's suggestions when it requested the Trial Chamber to enact guidelines do not entail any, let alone excessive, amendment of the Rules.<sup>33</sup> The Civil Parties do not provide any explanation as to why they consider that enacting guidelines would require an amendment of the Rules.

8. In paragraph 8, the Civil Parties assert that Mr. IENG Sary fails to demonstrate how without the guidelines, Mr. IENG Sary's right to equality of arms and right to be tried within a reasonable period of time will be violated. Contrary to the Civil Parties' assertion, the Motion does demonstrate that without Civil Party guidelines, Mr. IENG Sary's right to equality of arms and right to be tried within a reasonable period of time will be violated. If the Trial Chamber adopts a broad interpretation of Rule 23(1), Mr. IENG Sary may face additional prosecutors, violating Mr. IENG Sary's right to right to equality of arms.<sup>34</sup>
9. In paragraph 9, the Civil Parties refer to Rule 91 as a rule to prove that all parties have equal rights before the ECCC. The Defence does not dispute that Rule 91 states that Civil Parties can be heard, can ask questions and object to testimony which they believe is not conducive to ascertaining the truth. However, the rights of each Party are also delimited by other Rules and law applicable at the ECCC. As stated *supra*, the law applicable at the ECCC restricts Civil Party participation.<sup>35</sup> Consequently, Rule 91 must be read in light of the Civil Parties' civil interest.
10. In paragraph 11, the Civil Parties assert that they support the prosecution by representing the suffering and consequences of the Civil Parties and victims in general, and "for that, [the Civil Parties] participate in their own right in ascertaining the truth and bring an insight about certain events and evidentiary matters which are consistent with the prosecution case." The Defence agrees with the Civil Parties, but only insofar as the law applicable at the ECCC allows. As stated *supra*, the law applicable at the ECCC restricts Civil Party participation.<sup>36</sup> A victim acting as a Civil Party cannot support the prosecution beyond this mandate. The Defence will not object – even though contrary to

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<sup>32</sup> Trial Chamber Guidelines in Case 001, paras. 26-47.

<sup>33</sup> *See supra*, para. 3.

<sup>34</sup> Motion, paras. 10-13.

<sup>35</sup> *See supra*, para. 2.

<sup>36</sup> *See supra*, para. 2.



the Rules and the practice in Cambodian courts which only explicitly mandate that the actions of a Civil Party are limited to his or her civil interests and not as a witness<sup>37</sup> – if the Trial Chamber permits a Civil Party to become a witness and testify as to his or her knowledge of the criminal case, provided he or she does so under oath.<sup>38</sup> In this role, the person providing testimony will do so as a witness and not as a Civil Party.

11. In paragraph 12, the Civil Parties assert that “the goal of the Civil Parties is to obtain reparations for the injury they have suffered; this necessarily entails establishing the facts and the guilt of the Accused in relation to those facts.” The Trial Chamber held that the role of Civil Parties “within the trial must not, in effect, transform them into additional prosecutors.”<sup>39</sup> The role of the Civil Parties is to “demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based.”<sup>40</sup> The Civil Parties do not establish guilt; that is the role of the Co-Prosecutors.<sup>41</sup>
12. In paragraph 14, the Civil Parties incorrectly assert that “creating the post of Civil Party Lead Co-Lawyers does not remedy the inequality of arms which he claims is prejudicial to him without proof.” The Defence provided proof that creating the post of Civil Party Lead Co-Lawyers still does not cure the violation of Mr. IENG Sary’s equality of arms. The Defence explained that “the Lead Civil Party Co-Lawyers may still be assisted by the other Civil Party lawyers including through ‘oral and written submissions, examination of their clients and witnesses and other procedural actions.’ Seemingly, multiple Civil Party lawyers could question each witness.”<sup>42</sup> This has not been responded to by the Civil Parties.
13. In paragraph 15, the Civil Parties assert that “read together, Rules 12*ter* and 91 very clearly set out the rights of the Civil Parties; they do not need to be supplemented.” First, the rights of Civil Parties are further delineated through other law applicable at the

<sup>37</sup> CPC, Art. 312 states: “[a] Civil Party may never be heard as a witness.”

<sup>38</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, IENG Sary’s Motion for Civil Parties to Testify Under Oath if they are Permitted to Testify as to their Knowledge of the Criminal Case, 24 February 2011, E57, ERN: 00647783-00647789.

<sup>39</sup> Trial Chamber Guidelines in Case 001, para. 26.

<sup>40</sup> Rule 23*bis* (1)(b).

<sup>41</sup> Rule 87(1) states in pertinent part: “The onus is on the Co-Prosecutors to prove the guilt of the accused.”

<sup>42</sup> Motion, para. 16, *citing* Rule 12*ter*(6).

ECCC, which limit the role, and subsequent rights, of Civil Parties.<sup>43</sup> Second, the Defence does not seek to supplement the rights of the Civil Parties. It simply requested that the Trial Chamber enact guidelines in order to protect Mr. IENG Sary's fundamental fair trial rights. The Civil Parties do not support their assertion that "enacting guidelines would lead to an intolerable infringement of Civil Party rights and deprive them of the equality of arms." The Civil Parties do not state which of their rights the Motion infringes upon.

14. In paragraph 16, the Civil Parties assert that the Defence "speculates that by alleging that by their conduct, the Civil Parties could deny [Mr. IENG Sary] the enjoyment of [his right to be tried within a reasonable period of time]... [S]peculation has never constituted proof." The Defence cannot show actual proof because the trial has not begun. There is no reason to wait for the trial to commence. Through enacting guidelines, the Trial Chamber can protect Mr. IENG Sary's fundamental fair trial rights, without violating the Civil Parties' fair trial rights, and avoid any potential violation of Mr. IENG Sary's fundamental fair trial rights.

15. In paragraph 17, the Civil Parties assert that the Defence "attempts to compare Cambodian procedure, in relation to that of the ECCC, to the procedure before the International Criminal Court [(“ICC”)] ... There are no civil parties before the International Criminal Court; only victims." The Civil Parties err in their assertion that "the two Statutes have nothing in common." The ICC is an appropriate comparison as it is the only other court which tries crimes of the scale tried at the ECCC and provides for victim participation.<sup>44</sup> Contrary to the Civil Parties' assertion, the ICC case *Prosecutor v. Katanga*<sup>45</sup> can provide guidance. The Chamber in *Katanga* held that "where it is clear that an intervention by a legal representative is not related to the personal interests of any of the victims represented by that counsel, the Chamber cannot allow it."<sup>46</sup> It then laid down detailed guidelines for the modalities of victim participation.<sup>47</sup> This is similar to the actions of the ECCC Trial Chamber where it observed that "As the ECCC Law and the nature of the criminal proceedings are limitations which the Trial Chamber must

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<sup>43</sup> See *supra*, para. 2.

<sup>44</sup> Motion, paras. 17-20; ICC Statute, Art. 68(3); Rule 23.

<sup>45</sup> *Prosecutor v. Katanga & Ngudjolo Chui*, ICC-01/04-01/07, Decision on the Modalities of Victim Participation at Trial, 22 January 2010.

<sup>46</sup> *Id.*, para. 58.

<sup>47</sup> *Id.*, p. 25-28.



acknowledge, a restrictive interpretation of rights of Civil Parties in proceedings before the ECCC is required,”<sup>48</sup> and subsequently established guidelines.<sup>49</sup> Both the ECCC and ICC appear to be following a similar procedure and guidance can be sought from the ICC.

16. In paragraph 18, the Civil Parties assert that the Defence “invoke[s] limits and restrictions to the rights of the Civil Parties. Some of [the Defence’s suggested points to consider in enacting guidelines] are open to such broad interpretation that they would deprive the Civil Parties of any right to intervene....” The Defence did not propose actual guidelines in its Motion.<sup>50</sup> Rather, it provided suggestions for the Trial Chamber to consider when enacting guidelines. These suggested points to consider might be broad; however the Trial Chamber is free to enact more narrowly tailored guidelines if it deems this necessary. As stated *supra*, the Defence is not requesting that the Civil Parties be deprived of their right to take part in the proceedings.
17. In paragraph 19, the Civil Parties assert that the Defence is “proposing that a practice direction restrict Civil Parties from making submissions on sentencing, and from questioning experts and the Accused on the character of the Accused. Not only is it not possible to enact such guidelines in the form of a practice direction, requesting them runs counter to the rights of the Civil Parties.” First, requesting guidelines does not run counter to the rights of the Civil Parties. Second, even if enacted, the Civil Parties do not state how the provided suggestions for the Trial Chamber to consider when enacting guidelines will run counter to the rights of the Civil Parties. The rights of the Civil Parties must be viewed in light of the role they play at the ECCC. The role of a Civil Party during trial is limited compared to that of an Accused.<sup>51</sup> The provided suggestions fall within the law applicable at the ECCC. Guidelines were enacted by the Trial Chamber in Case 001: the Trial Chamber in Case 001 forbade the Civil Parties to make opening statements,<sup>52</sup> to make submissions on sentencing,<sup>53</sup> from questioning experts and

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<sup>48</sup> Trial Chamber Guidelines in Case 001, para. 13.

<sup>49</sup> *Id.*, para. 26-47.

<sup>50</sup> Motion, para. 21.

<sup>51</sup> *See supra*, para. 2.

<sup>52</sup> *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Decision on the Request of the Co-Lawyers for Civil Parties Group 2 to Make an Opening Statement During the Substantive Hearing, 27 March 2009, E23/4, ERN: 00293329-00293333.

<sup>53</sup> Trial Chamber Guidelines in Case 001, paras. 34-35.

the questioning of the Accused on the character of the Accused.<sup>54</sup> It is difficult to formulate how the provided suggestions run counter to the rights of the Civil Parties.

18. In paragraph 20, the Civil Parties assert that “the Defence refers to the arguments it raised in its Joint Request dated 9 June 2009 in Case 001.” The Defence did not submit a Joint Request dated 9 June 2009. The Defence was not a party to Case 001. The Defence furthermore did not refer to any arguments made in any Joint Request dated 9 June 2009.
19. In paragraph 20, the Civil Parties assert that the Defence “cites Article 3(c) and 12(c) of the ‘Fundamental principles and guidelines on the right to recourse and reparations for victims of flagrant violations of international human rights law and serious breaches of international humanitarian law [(“UNGA Resolution”)].’<sup>55</sup>” The Civil Parties further assert that “[t]his text clearly reveals that the Civil Parties can contribute to rendering justice and, by implication, to setting an appropriate sentence.” First, the Defence never referred to the UNGA Resolution in the Motion. Second, an UNGA Resolution is not binding on the ECCC. Third, Articles 3(c) and 12(c) of the UNGA Resolution state:

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation.

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should: (c) Provide proper assistance to victims seeking access to justice.

Articles 3(c) and 12(c) of the UNGA Resolution may provide victims access to justice, but this does not mean by implication the Civil Parties can make submissions on sentencing. In Case 001, when faced with the question whether the Civil Parties can

<sup>54</sup> *Id.*, paras. 45-47.

<sup>55</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, United Nations General Assembly Resolution, A/RES/60/147, 21 March 2006.



make submissions on sentencing, the Trial Chamber found Rule 23(1)(a) did not provide a legal basis for the Civil Parties to make submissions on sentencing.<sup>56</sup> This is because “Civil Parties cannot contribute to the establishment of the truth by providing direct information concerning the crime alleged. They may, however, possess background information which is helpful in ascertaining the truth.”<sup>57</sup>

20. In paragraph 21, the Civil Parties assert that the position taken by the Trial Chamber in ruling against Civil Parties enquiring into the character of the Accused is “inconsistent with the earlier practice of the Trial Chamber... Introducing restrictions on this point in Case 002 would severely infringe Civil Party rights.” First, the Trial Chamber’s reasoning for this decision was that “[t]he sole purpose of this evidence is to enable the Trial Chamber to determine matters of sentencing, if applicable.”<sup>58</sup> This is contrary to the Civil Parties assertion, there is no evidence that the Trial Chamber ruled in this manner “due to a peak period in the proceedings that was specific to [Case 001].”<sup>59</sup> Second, the Trial Chamber changed its practice in the middle of Case 001 as it acknowledged that the traditional model of Civil Party participation found in Civil Law jurisdictions was devised for “less complex proceedings with fewer victims.”<sup>60</sup> Case 001 was an effective change of plea hearing with only 93 Civil Parties.<sup>61</sup> Case 002 is a contested trial which currently has 2,123 Civil Parties.<sup>62</sup> As a result, a peak period in Case 001 could be analogized to a calm period in Case 002. Third, the Defence is not introducing restrictions on this point, it rather suggested that the Trial Chamber enact guidelines to address this matter. Fourth, the Civil Parties do not explain how their rights are being severely infringed. The Civil Parties err in their assertion that Judge Lavergne’s Dissenting Opinion allows Civil Parties to make submissions on “all matters, without distinction as to whether such matters relate to facts or to character.” Judge Lavergne agreed with the rest of the Trial Chamber that the Civil Parties could not make submissions on sentencing or legal

<sup>56</sup> Trial Chamber Guidelines in Case 001, para. 35.

<sup>57</sup> *Id.*, para. 34.

<sup>58</sup> *Id.*, para. 46.

<sup>59</sup> Response, para. 21.

<sup>60</sup> *Case of 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, E72/3, ERN: 00387022-00387047, para. 12.

<sup>61</sup> *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Judgment in Case 001, 26 July 2010, E188, ERN: 00572517-00572797, para. 637.

<sup>62</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OClJ, Closing Order, 15 September 2010, D427, ERN: 00604508-00605246, para. 12.

submissions relevant to sentencing.<sup>63</sup> Judge Lavergne solely opined that: **a.** Civil Parties should be permitted to make submissions on, or evaluation of, factors underlying a decision on sentencing when they refer to the guilt or innocence of the Accused or a claim for reparations;<sup>64</sup> and **b.** Civil Parties should be allowed to question an Accused or an expert on the character of an Accused.<sup>65</sup>

21. In paragraph 22, the Civil Parties assert that “the limitations and restrictions sought by the Lawyers for Mr Ieng Sary constitute an intolerable infringement of the rights of one of the parties to the trial.... [S]uch limitations and restrictions would amount to discrimination between the various parties, which is unacceptable.” First, the Defence requested that the Trial Chamber enact guidelines to clarify the role of the Civil Parties and protect Mr. IENG Sary’s fundamental fair trial rights. It did not seek limitations and restrictions. Second, the Civil Parties do not state how the guidelines would infringe on their rights. Third, there is a distinction within the Rules regarding the role of each party during trial. Limitations and restrictions which amount to discrimination between the various parties, is acceptable in light of the role of a Civil Party being limited when compared to an Accused.<sup>66</sup>

### III. CONCLUSION

22. The Defence acknowledges the rights of the Civil Parties and supports their participation as an integral part in the Cambodian judicial system, especially at the ECCC. However guidelines are needed to cure ambiguity in the Rules and for a clear demarcation of the roles of the Civil Parties in Case 002. Without reasonable and clearly articulated guidelines, Mr. IENG Sary’s fundamental fair trial rights to equality of arms and to be tried within a reasonable time *may* be violated. The Defence maintains that this matter should be discussed at the Trial Management meeting to be held in April 2011, in order for all parties to express their views before the Trial Chamber.

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<sup>63</sup> Trial Chamber Guidelines in Case 001, Dissenting Opinion of Judge Jean-Marc Lavergne, para. 19.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*, para. 20.

<sup>66</sup> *See supra*, para. 2.



Respectfully submitted,

  
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Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 9<sup>th</sup> day of **March, 2011**