

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENTG SARY'S MOTION REQUESTING GUIDELINES FOR CIVIL PARTY PARTICIPATION

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby moves the Trial Chamber to create guidelines for Civil Party participation during the trial in Case 002. The Defence recognizes that Civil Parties play an integral part in the Cambodian judicial system, including at the ECCC. Due to the procedural differences between the ECCC and other Cambodian courts and the size and complexity of the case, guidelines are necessary before the start of trial in order to ensure that their participation is tailored to their unique role in the proceedings. Without guidelines, Mr. IENG Sary’s fundamental rights to equality of arms and to be tried within a reasonable amount of time will be jeopardized. This matter should be discussed at the Trial Management meeting to be held in March or April 2011,¹ in order for all parties to express their views before the Trial Chamber.

I. APPLICABLE LAW

A. Equality of arms

1. According to Article 33 new of the Establishment Law, the Extraordinary Chambers shall ensure that trials “are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused...”² This Article also mandates that the ECCC shall exercise jurisdiction “in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights [(“ICCPR”)].”
2. According to Rule 21(1)(a) of the ECCC Internal Rules (“Rules”), “ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties.”³ The right to a fair trial includes the right to equality of arms. Equality of arms is “the principle in law that, in a trial, the defence and the prosecution must have procedural equality to ensure that the conduct of judicial proceedings is fair.”⁴ The Trial Chamber in Case 001 has confirmed that “the fundamental nature of this principle is acknowledged in the Internal Rules...”⁵ This principle is fundamental to various international human

¹ Email from Susan Lamb, Senior Judicial Coordinator, to the IENG Sary Defence team Re: Communication to the parties on behalf of the Trial Chamber - Ieng Sary Defence team, 14 January 2011.

² Emphasis added.

³ Emphasis added.

⁴ *Case of KAINING Guek Eav alias “Duch”, 001/18-07-2007-ECCC/TC, Decision on IENG Sary’s Request to Make Submission in Response to the Co-Prosecutors’ Request for the Application of Joint Criminal Enterprise, 3 July 2009, D288/6.90, ERN: 00345178-00345180, para. 4.*

⁵ *Id.*



rights instruments, including the ICCPR⁶ and the Universal Declaration of Human Rights⁷ which, in accordance with the Cambodian Constitution, the ECCC must respect.⁸

B. Right to trial within a reasonable time

3. According to Article 35 new (c) of the Establishment Law, "In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights. ... c. to be tried without delay..."
4. According to Article 14(3)(c) of the ICCPR, "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (c) To be tried without undue delay...."
5. According to Rule 21(4), "Proceedings before the ECCC shall be brought to a conclusion within a reasonable time."

C. Role of Civil Parties

6. According to Article 13 of the Cambodian Code of Criminal Procedure ("CPC"),

A civil action can be brought by the victim of an offense. In order to be compensated, the injury must be:

 - A direct consequence of an offense;
 - Personal damage;
 - Actually occurred and exist at the present time.

An injury can be damage to property or physical or psychological damage.
7. According to Rule 23(1), "[t]he 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*."

⁶ Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976 in accordance with Article 49. According to Article 14(1): "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..."

⁷ Article 10 of the Universal Declaration of Human Rights states: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

⁸ See 1993 Cambodian Constitution, as amended in 1999, Art. 31. This Article requires that Cambodian courts "shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights, women's and children's rights."



**D. Role of Lead Civil Party Co-Lawyers and their relationship with other
Civil Party lawyers**

8. According to Rule 12*ter*,

1. The Civil Party Lead Co-Lawyers shall ensure the effective organization of Civil Party representation during the trial stage and beyond, whilst balancing the rights of all parties and the need for an expeditious trial within the unique ECCC context.

[...]

5. The core functions of the Civil Party Lead Co-Lawyers shall include:

a. Representing the interests of the consolidated group of Civil Parties, as outlined in IR 23(1) and (2); and

b. Ultimate responsibility to the court for the overall advocacy, strategy and in-court presentation of the interests of the consolidated group of Civil Parties during the trial stage and beyond.

6. The Civil Party Lawyers shall endeavour to support the Civil Party Lead Co-Lawyers in the representation of the interests of the consolidated group. Such support may include oral and written submissions, examination of their clients and witnesses and other procedural actions. Subject to Rule 12 *ter* (5)(b), such support shall be mutually agreed between the Civil Party Lead Co-Lawyers and the concerned Civil Party lawyer. The Civil Party Lead Co-Lawyers shall coordinate actions by the Civil Party Lawyers undertaken by way of such support.

II. ARGUMENT

9. Mr. IENG Sary has the fundamental right to equality of arms and to be tried within a reasonable time. These rights could be jeopardized if guidelines are not enacted before the start of trial to clarify role of the Civil Parties. Guidelines will assist all parties to the proceedings, including the Civil Parties. As the KRT Trial Monitoring Group of the Asian International Justice Initiative found about Civil Party participation in Case 001,

From the Civil Parties' perspective, a lack of clear guidelines regarding the role of Civil Party Lawyers (as well as the extent to which Civil Parties should be anticipating the Court to implement a comprehensive reparations scheme) left some Civil Parties disenchanted by the process and frustrated by the seeming arbitrariness with which their counsels' rights were eventually curtailed.⁹

**A. Guidelines must be enacted to protect Mr. IENG Sary's fundamental
right to equality of arms**

10. According to Rule 23(1), "[t]he 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

⁹ Michelle Staggs Kelsall et al., *Lessons Learned from the 'Duch' Trial*, KRT TRIAL MONITORING GROUP, ASIAN JUSTICE INITIATIVE, December 2009 ("Staggs"), p. 28.



reparations...”¹⁰ If the language of this Rule is not interpreted properly, Mr. IENG Sary’s fundamental right to equality of arms may be violated.¹¹ As the Trial Chamber in Case 001 recognized, “the Accused’s right to a fair trial in criminal proceedings includes the right to face one prosecuting authority only. Accordingly, and while the Civil Parties have the right to support or assist the Prosecution, their role within the trial must not, in effect, transform them into additional prosecutors.”¹² As commentators on Case 001 have recognized, “Clearly, a practice directive that deals with defining both the notion of ‘supporting the Prosecution’ as provided in Rule 23(1) and the extent to which Civil Party Lawyers should question witnesses as a result, would be of benefit to the Parties.”¹³

11. Civil Parties play a unique role in Civil Law systems.

[I]n almost every civil law jurisdiction victims have the opportunity of joining their civil claims to the criminal prosecution, making them civil parties in the case. As the civil party (*partie civile* in France), victims generally have the right to lead and challenge evidence but only insofar as it pertains to their claim for damages against the accused.¹⁴

As the Trial Chamber in Case 001 explained,

In many jurisdictions following the French civil party system, victims have the right to participate in criminal trials in order to provide a timely and cost-effective vehicle to seek reparation from an Accused. In effect there are two goals of the trial: one to determine the guilt of innocence of the Accused and in case of proven guilt to pronounce on sentence and the other to secure reparation as a civil claim if the Accused is convicted. The Cambodian Code of Criminal Procedure ...

¹⁰ Emphasis added.

¹¹ “The principle [of equality of arms] is particularly important to maintain during mass atrocity cases, due to the extensive pressure to convict placed on the Prosecution and the correlative tendency historically to downplay the role of the Defense. At the ECCC, however, the application of this principle has been further complicated by the participation of Civil Parties in the proceedings, shifting the balance of power between opposing sides to a tripartite structure, which includes serving the rights of Civil Parties and their lawyers...” Staggs, at 22.

¹² *Case of Kaing Guek Eav alias “Duch”,* 001/18-07-2007/ECCC/TC, Decision on Civil Party Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Party Co-Lawyers to Make Submissions on Sentencing and Directions on the Questioning of the Accused, Experts and Witnesses Testifying on Character, 9 October 2009, E72/3, ERN: 00387022-00387047 (“Decision on Standing of Civil Party Co-Lawyers to Make Submissions on Sentencing”), para. 26.

¹³ Staggs, at 37. See also James P. Bair, *Comment: From the Numbers Who Died to Those Who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia*, 31 HAWAII L. REV. 507, 526 (2009): “Unless the Internal Rules are further defined and clarified ... this broad language poses a risk that civil parties may become or be perceived as the sort of ‘parallel role’ that has been condemned by other tribunals.”

¹⁴ Brianne N. McGonigle, *Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles*, 22 Leiden J. Int’l L. 127, 137-38 (2009) (“McGonigle”) (emphasis added).



clearly contemplates the possibility of having two proceedings – one for a civil claim and the other for a criminal procedure – in one.¹⁵

12. The role of the Civil Parties, as set out in Rule 23(1), must be read to mean that the Civil Parties may support the OCP in its role of representing the general interests of victims.¹⁶ It cannot mean that the Civil Parties may support the OCP generally (acting in effect as “second prosecutors”) in discharging its burden to prove the guilt of the Accused.¹⁷ Such a reading of the Rule would not comport with Cambodian law or with international standards of justice, which ensure that the Accused be treated fairly and that his right to equality of arms be respected.
13. The Rule amendment¹⁸ which requires that Civil Parties be represented at trial by Lead Civil Party Co-Lawyers does not remedy the inequality of arms created if Rule 23(1) is interpreted broadly. Unless this Rule is interpreted restrictively, the lead Civil Party Co-Lawyers could still in effect act as “second prosecutors.” In addition, 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.”¹⁹ Seemingly, multiple Civil Party lawyers could question each witness. In the interests of equality of arms, the Trial Chamber must clarify the role of the Civil Parties.

B. Guidelines must be enacted to protect Mr. IENG Sary’s right to trial within a reasonable time

14. Mr. IENG Sary has a fundamental right to be tried within a reasonable time.²⁰ This right may 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 in trial should not be wasted dealing with such issues.

¹⁵ Decision on Standing of Civil Party Co-Lawyers to Make Submissions on Sentencing, para. 18 (emphasis added).

¹⁶ The Trial Chamber in Case 001 recognized that “The prosecutorial authority also represents the ‘interests of justice’ and is entrusted to bring criminal actions in the ‘general interests of society.’ The interests of society as a whole and of justice necessarily include the general interests of victims of the alleged crimes.” *Id.*, para. 20 (emphasis added).

¹⁷ Rule 87(1).

¹⁸ See Rule 12*ter*.

¹⁹ Rule 12*ter*(6).

²⁰ See Establishment Law, Art 35 new (c); Rule 21(4); ICCPR, Art. 14(3)(c).



15. Commentators on Case 001 have often criticized Civil Parties for asking questions outside the scope of examination and repetitive questions.²¹ In Case 001 there were also arguments as to the acceptable scope of Civil Party participation, which delayed the trial and resulted in a Civil Party boycott of the proceedings.²² The fact that there were multiple Civil Party groups allowed for conflict between various Civil Parties or conflicting views as to the Civil Party role, which may also have resulted in confusion and delay.²³
16. In Case 001, there were only 90 Civil Parties in 4 groups.²⁴ In Case 002, there are 2,123 Civil Parties.²⁵ The problems which arose in Case 001 will only be exacerbated in Case 002. The Rule amendment to allow for one set of Lead Civil Party Co-Lawyers²⁶ is one step toward ameliorating the above-mentioned problems, but it will not cure them.²⁷ Ambiguity still exists. Rule 12ter(6) allows for other Civil Party Co-Lawyers to assist the Lead Civil Party Co-Lawyers including through “oral and written submissions, examination of their clients and witnesses and other procedural actions.” The Rules do not appear to prohibit several Civil Party lawyers from questioning a single witness.

C. Suggestions to consider in enacting Guidelines

17. As the ECCC is a Cambodian court, the Trial Chamber may be guided by Cambodian procedure in developing appropriate guidelines for Civil Party participation. It may also be guided by the International Criminal Court (“ICC”), since the ICC also provides for

²¹ See Michael Saliba, *Civil Party Participation at the ECCC: Overview*, CAMBODIA TRIBUNAL MONITOR, 6 November 2009 (“Saliba”), p. 3, available at http://cambodiatribunal.org/images/CTM/ctm_blog_11-6-2009.pdf: “the lack of coordination among the groups often led to redundant questioning.” See also Staggs, at 33: “A final concern relating to Civil Party representation was lawyers’ time management strategy, as Civil Party Lawyers seemed to frequently ask repetitive questions. In Week 9, the Trial Chamber imposed time limitation to the Parties’ questioning, but the problem did not cease to exist.” See also p. 39.

²² See Saliba, at 3.

²³ See Staggs, at 33: “This seeming lack of resources and overall coordination meant that Civil Party Lawyers’ performance throughout Case 001 was mixed. While some Civil Party Lawyers assumed that their role in Court was predominantly to ‘support the prosecution,’ others highlighted their role as the voice for their clients’ views and concerns. At times, this led lawyers to pursue lines of questioning solely premised on the needs of their individual clients, even when they did not appear relevant to the case. Conversely, lawyers who predominantly endeavored to support the Prosecution seemed sometimes to be acting as second prosecutors, rather than providing mere support.”

²⁴ *Id.*, p. 28.

²⁵ *Case of IENG Sary*, 002/19-09-2007-ECCC/OClJ, Closing Order, 15 September 2010, D427, ERN: 00604508-00605246, para. 12.

²⁶ See Rule 12ter.

²⁷ Staggs, at 7: “Regardless of any changes made to the Civil Party participation scheme in Case 002 and for future cases, the Judges of the ECCC may wish to consider issuing a practice directive with regard to Civil Party Lawyers’ participation at trial. Basic questions, such as the role Civil Party Lawyers should play vis-à-vis representing their clients’ interests as well as supporting the Prosecution, still require clarification.”



victim participation and deals with cases of a similar scope and complexity as those at the ECCC.

18. Cambodian procedure is particularly appropriate as “it is fair to say that the French system and those judicial systems based on the French model, such as that of Cambodia, offer a fairly broad example of successful victim participation.”²⁸ In Cambodia, Civil Parties may participate in proceedings in order to be compensated for an injury that is “A direct consequence of an offense; Personal damage; Actually occurred and exist at the present time. An injury can be damage to property or physical or psychological damage.”²⁹
19. At the ICC, “where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”³⁰ Victim’s lawyers must apply for permission to question witnesses. The Chamber may then require that the questions be submitted in advance and shared with the prosecution and defence. It may also limit the manner and order in which these questions are presented, and may even put the questions to the witness on behalf of the victim’s lawyer.³¹
20. In the ICC case, *Prosecutor v. Katanga*,³² the Chamber stated, “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.”³³ It then laid down detailed guidelines for the modalities of victim participation.³⁴
21. The Defence proposes that the following suggestions be considered by the Trial Chamber and discussed at the upcoming trial management meeting, for the purpose of clarifying Civil Party participation in order to protect Mr. IENG Sary’s fundamental fair trial rights:

²⁸ McGonigle, at 138.

²⁹ CPC, Art. 13.

³⁰ ICC Statute, Art. 68(3).

³¹ ICC Rules of Procedure and Evidence, Rule 91(3).

³² *Prosecutor v. Katanga & Ngudjolo Chui*, ICC-01/04-01/07, Decision on the Modalities of Victim Participation at Trial, 22 January 2010.

³³ *Id.*, para. 58.

³⁴ *Id.*, p. 25-28.




- Limit Civil Party intervention to matters which contribute to the truth;
- 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;
- Limit Civil Party interventions to interventions which are not inconsistent with the Accused's right to a fair and impartial trial;
- Limit Civil Party interventions to matters which will not have an undue negative impact on expeditiousness of the proceedings;
- Restrict Civil Parties from making submissions on sentencing; and
- Restrict Civil Parties from questioning witnesses, experts, or the Accused to enquire into the character of the Accused for the purpose of sentencing.


III. RELIEF REQUESTED

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to enact guidelines to clarify Civil Party participation for the purpose of protecting Mr. IENG Sary's fundamental fair trial rights to equality of arms and to be tried within a reasonable time.

Respectfully submitted,



ANG Udom



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 24th day of January, 2011