



Prosecutor v Kaing Guek Eav,
alias 'Duch'

The KRT Trial Monitor

Asian Justice Initiative: a Collaboration between the UC Berkeley War Crimes Studies Center and East-West Center

Report Issue No. 19:
Week Ending August 30, 2009

In this week's KRT Trial Monitor ...

Hearing of Duch's testimony concerning his character begins (p.2); Civil Party lawyers raise broad legal arguments in response to Defense's challenges to Civil Party applications (pp. 3-4); Chamber issues landmark decisions delineating Civil Party participation (pp. 4-5); Tensions straining scheme of Civil Party participation highlighted (p. 5); Civil Party lawyers display questionable standards of legal representation (pp. 6-7); Civil Parties risk removal of Civil Party status near the end of trial (pp. 7-8)...

I. SUMMARY

"If you saw the wind you will harvest the storms. You did see the wind and today you are harvesting the storm. The Chamber is asking if they should continue letting you behave as prosecutors..."¹

The role of Civil Parties took centre stage this week, as Civil Party lawyers and the Defense met head on over an array of legal issues concerning Civil Parties. Though their primary function is to establish the guilt of the Accused, the Co-Prosecutors too were asked in their capacity as officers of the Court to contribute to the debates.

In view of the ECCC's unique status as pioneer of civil party participation in international/internationalized criminal proceedings, decisions issued by the Chamber this week represented milestones in the ECCC's jurisprudence. It was finally pronounced that Civil Parties do not have standing to participate in the sentencing of the Accused. Also, Civil Party lawyers do not have standing to question the Accused and certain witnesses on the topic of the Accused's character.

From Tuesday afternoon through Thursday morning, challenges to Civil Party applications were presented by the Defense as scheduled. In response, Civil Party lawyers adopted a two-fold strategy. They first challenged the right of the Defense to raise objections to admissibility at this late stage of the proceedings. After the Chamber held that it would issue judgment on this preliminary issue together with its decision on the merits, Civil Party lawyers then submitted that the Chamber could admit Civil Party applications notwithstanding the absence of corroborating documents. In their view, the Defense's calls for additional documentary evidence corroborating Civil Party applications was unnecessary in light of the Internal Rules and applicable international law. Significantly, debates on these issues drew out tensions straining the current scheme of victim participation. Problems with Civil Party participation were further underscored

by instances of questionable standards of legal representation by Civil Party lawyers that impaired the proceedings' efficiency.

That proceedings this week ended as scheduled, despite the numerous issues raised, debated, and resolved, attests to the Chamber's general success in effectively ensuring the expeditiousness of proceedings. However, monitors note that the Chamber's decision to hear challenges to Civil Party applications, including admissibility objections, near the end of the trial is problematic, as Civil Parties now face the removal of their Civil Party status notwithstanding their participation as Civil Parties for the past 7 months since the initial hearing.

The hearing of Civil Parties' testimonies was completed this week, including the hearing of the expert testimony of a psychologist on the psychological consequences of the crimes at S21 on victims and Cambodian society, and on possible forms of reparations. The hearing of testimony on the Accused's character began on Thursday afternoon.

II. LEGAL AND PROCEDURAL ISSUES

A. Summary of Testimonies

A detailed summary of all testimonies given this week is provided in Annexure A to this report.

Testimony Relevant to Civil Party Claims

The following Civil Parties took the stand this week:

- **Chum Neou** (Civil Party Group 2)

Chum Neou lodged her complaint on account of her personal suffering and the deaths of her baby, who died while she was detained at Prey Sar, and husband, who died at S21.

- **Chhin Navy** (Civil Party Group 2)

Chhin Navy's husband had been arrested, detained and executed at S-21.

- **Touch Monin** (Civil Party Group 4)

Touch Monin's cousin, Chea Khan, had been detained and executed at S21.

As a direct S21 victim, Chum Neou was able to provide facts concerning conditions at Prey Sar, particularly from the perspective of a pregnant woman and mother. Significantly, Chum Neou described several alleged encounters with the Accused, one of which involved the Accused pointing a gun at her. Duch denied that these encounters had ever taken place. A former Khmer Rouge combatant, Chum Neou also revealed the perspective of a victim who was at the same time regarded by others as a perpetrator.

Also noteworthy is that Chea Khan, Civil Party Touch Monin's cousin, was a personal friend of Duch. While acknowledging his friendship with Chea Khan, Duch distanced himself from what happened to Chea Khan at S21.

The Chamber also heard the testimony of expert witness **Dr. Chhim Sotheara**, a psychologist, on the consequences of crimes at S21 on individual victims and Cambodian society as a whole. Dr. Sotheara also provided his opinion on possible forms of reparations.

Testimonies Relevant to the Accused's Character

On Thursday, the Chamber began its hearing of testimony relevant to the Accused's character. Taking the stand, the Accused elaborated on facts that had already been provided in the Closing Order, and also shed light on his ideological influences and personal motivations. His overall stance on his responsibility remained consistent: while shocked at the regime's activities after 1975, and although reluctant to carry out his tasks as Chairman of S21, he had no choice but to do so or be smashed.

B. Legal Arguments Raised At Trial

A number of legal questions were put before the Chamber during proceedings this week, when Civil Party lawyers and the Defense met head on over the admissibility and merits of Civil Party applications.ⁱⁱ

Defense's standing to challenge the admissibility of Civil Party applications at the present stage of proceedings. On Tuesday afternoon, Civil Party lawyers raised for the first time arguments against the Defense's right to challenge the admissibility of Civil Party applications at this time. Relying on Rule 23.4 read together with Rule 83.1 of the Internal Rules,ⁱⁱⁱ the Civil Party lawyers declared that challenges to admissibility of these applications could take place no later than the initial hearing, which had been conducted on 18 and 19 February 2009.^{iv} It was acknowledged that Rule 100.1^v allowed the Chamber to rule on the admissibility of Civil Party applications at any stage of the proceedings, but a distinction was drawn between the Chamber's right to adjudicate on admissibility and the right of the Defense to object to the same.

The Defense's primary argument in response was that its objections were allowed as they were made pursuant to a request by the Chamber. Since Rule 100.1 authorized the Chamber to rule on admissibility of Civil Party applications without time restriction, it followed that the Defense was entitled to raise its objections to admissibility whenever the Chamber requested it to present observations to aid the Chamber's determination.^{vi} Another main prong of the Defense's response was that it could not be expected to have raised all objections at that early stage when Civil Parties continued to furnish supporting evidence even at present.

Expressing concern that the debate would cause undue delay, while at the same time desiring to hear proper discussion on the issue, the Chamber decided that it would render judgment on both this procedural issue and the merits of the Defense's challenges to Civil Party applications together.

Aside from its legal significance, this issue raises an important trial management concern (see the Trial Management section below).

Requirement of corroborating evidence to support Civil Party applications. Challenges by the Defense to Civil Party applications were brought on grounds that the relevant Civil Parties had furnished no documentary evidence to prove their relationship with the alleged victim, and/or that the alleged victim had been detained at S21.^{vii}

On Wednesday, in response to these challenges, Civil Party groups unanimously argued that there was no fixed requirement for such corroborating evidence.^{viii} They submitted that a Civil Party's application should instead be considered substantiated by the statement's inherent coherence and logic.^{ix} Further, as it could not be disputed that S21 archives were incomplete,

not least because of the difficulty of preserving documents from 30 years ago,^x the lack of S21 photographs, biographies, confessions and prisoners' lists proving the alleged victims' detention at S21 was inconclusive.

In addition, submissions were made with regard to the nature of corroborating evidence furnished, in particular, the documents establishing the relationship with the alleged S21 victim. Civil Party lawyers called on the Chamber to take into account Cambodia's historical, cultural and socio-economic context when considering the absence of official documents verifying this relationship, for example, marriage certificates and birth certificates. In this regard, it had earlier been highlighted that Civil Party applicants often did not have the means to apply for or replace missing registration documents. Relying on Internal Rule 87.1,^{xi} Civil Party lawyers requested that the Chamber accept as sufficient evidence statements from persons such as parents, friends and neighbours certifying the relevant relationships.^{xii}

In rebuttal, International Co-Defense Counsel Francois Roux invoked sweeping general arguments that (re-)framed his opponents' submissions as an attempt to excuse Civil Parties from the requirements of the law. Summoning to his aid the principle *dura lex sed lex* – “the law is harsh but it is the law,” he reiterated that Civil Parties were required to produce the evidence necessary to fulfill the criteria for Civil Party applications. Continuing on the assumption that to decide in favour of his opponents was to allow Civil Parties to evade the law, Roux warned that this would cancel out the considerable progress made by the ECCC in the field of international criminal justice as the first international(ized) tribunal to allow civil party participation.

While the above arguments were made on Wednesday as general submissions prior to addressing individual Civil Party applications, the debate was re-opened on Thursday when Alain Werner, lawyer for Civil Party Group 1, sought to justify four of his clients' applications in the absence of any supporting documentation. Reiterating the Civil Party lawyers' submission on Wednesday, the thrust of his arguments was that applicable international law did not require Civil Parties to provide evidence corroborating their applications.^{xiii} However, Roux argued that it was only in cases where the witness had opportunity to be examined and cross-examined that, exceptionally, uncorroborated testimony would be accepted.

Establishing the requisite nexus between the Civil Party applicant and alleged direct S21 victim. Objections by the Defense have consistently implied that kinship between the Civil Party applicant and alleged direct S21 victim is required by the Internal Rules. Whether kinship is a requirement in all cases was called into question when a unique application was drawn to the Chamber's attention on Wednesday: Civil Party E2-22, a former Khmer Rouge soldier, had brought his application on the basis that he had witnessed the arrest of 6 of his close friends to S21, where they were subsequently killed.

The Defense asserted that the complete absence of kinship rendered the application inadmissible. In response, E2-22's lawyer Ms Fabienne Trusse-Napouse asked the Court to decide based on the case's unique facts. The relevant nexus was perhaps the applicant's physical proximity to and his friendship with the victims at the time of their arrest.

Notably, Judge Lavergne had on more than one occasion questioned the Defense on whether Civil Parties were confined to only kin of alleged direct S21 victims.^{xiv} While this kinship requirement is clearly justified where Civil Party applications are brought on the sole basis that a family member or relative had been a direct S21 victim, the stated requirement in Rule 23.2 is that the injury alleged be “the direct consequence of the offence” and of a personal nature.

III. VICTIM PARTICIPATION AND WITNESS AND VICTIM PROTECTION AND SUPPORT

Attendance of Civil Parties. 10 Civil Parties were in the courtroom on Monday and Tuesday, and 9 on Wednesday and Thursday.

Civil Parties' Right to Representation. Lawyer for Civil Party Group 2, Ms Silke Studzinsky, has been hospitalized and was absent from the proceedings this week. It was estimated in view of her condition that she would be unable to attend proceedings for a considerable period of time. Lawyers from other Civil Party groups offered their support and stepped forward to fill in the gap during her absence. Lawyer for Civil Party Groups 2 and 4, Mr Hong Kim Suon was absent on Wednesday. Previously absent, lawyer for Civil Party Group 3 Kong Pisey returned to Court from Monday to Wednesday, but was again absent on Thursday.

Defense's Objections to Civil Parties' applications. Debate on Civil Party applications took place as scheduled from Tuesday afternoon through Thursday morning.

Objections to the applications of 2 Civil Parties, D25-20 and E2-57, were withdrawn by the Defense on Wednesday, as the Defense was of the view that documents received the previous day provided a sufficient evidentiary basis for the applications.

2 Civil Parties, E2-77 and E2-49, E2-88, have waived their rights to be Civil Parties pursuant to Rule 23.10 of the Internal Rules.^{xv}

Chamber decides that Civil Party lawyers have no standing to make submissions on sentencing. Thursday saw the handing down of a milestone decision at the ECCC. Since the beginning of the trial, whether Civil Party lawyers have standing to make submissions on sentencing has been a lightning rod for contention.^{xvi} On 9 June 2009, Civil Party Groups 1 and 2 submitted a joint request for a ruling in favour of such standing. Finally resolving the controversy as the trial draws to a close, the Chamber rejected the Civil Party Lawyers' request, with Judge Lavergne partly dissenting. Written reasons for the decisions of the majority and minority are to be issued in due course.

Civil Parties are now directed not to make submissions relevant to sentencing, including: 1) submissions on a sentence to be imposed; 2) legal submissions relevant to sentencing, and 3) submissions on or evaluation of factors underlying a decision on sentencing. However, Civil Party lawyers are allowed to refer to such factors only when they also refer to the Accused's guilt or innocence or a Civil Party's claim for reparations.

Chamber decides that Civil Party lawyers may not question the Accused and certain witnesses on the Accused's character. Also issued on Thursday was another significant decision that further delineated the role of Civil Parties. Immediately following its pronouncement of the above decision, the Chamber heard oral submissions on the right of Civil Party lawyers to question the Accused and witnesses on the Accused's character. All parties, including the Co-Prosecutors, had been directed by the Chamber to make submissions.^{xvii} Notably, the Chamber asked that parties bear in mind its above decision regarding sentencing when making their submissions.

Arguments by the Co-Prosecutors and Civil Party lawyers in favour of this right revolved around a common theme: as a matter of principle, Civil Parties are regarded in the Internal Rules as full parties to the proceedings, with rights to participate at all stages of the proceedings.^{xviii} Accordingly, any time management concerns could be addressed through means of time allocation or organization of common representation, and ought not to detract from this principle.^{xix} Also invoked was the need for coherency in practice, as Civil Party lawyers had

consistently participated in questioning on all previous factual topics before the Chamber, and further, no objections had been raised when Civil Party lawyers put questions concerning the Accused's character. Drawing distinctions between certain experts and witnesses and the topics they were called to testify on would be "impossible" and "an enormous regression" from civil law practice."^{xx} Significantly, while acknowledging that facts concerning the Accused's character were relevant to sentencing - which the Chamber had decided was outside the role of Civil Parties - the International Co-Prosecutor submitted that such facts would also be relevant to the Accused's guilt.

The International Co-Prosecutor's submission turned out to be an accurate pre-emption of the Defense's primary argument. Maintaining that facts of the Accused's character went solely towards sentencing, Roux stated that in light of the Chamber's decision on Civil Party participation in sentencing, the Defense could well "simply stop pleading." Still, he proceeded to argue impassioned for a more limited conception of the role of Civil Parties (see below).

After a 30-minute adjournment for deliberation, the Chamber pronounced, with Judge Lavergne dissenting, that Civil Parties would not be allowed to question the Accused as well as certain witnesses on the Accused's character.^{xxi} Written reasons for the decisions of the majority and minority will be issued in due course.

Debates Draw Out Tensions Straining the Current Scheme of Victim Participation.

Tensions in the existing system of Civil Party participation were given an airing this week. Even as Civil Party lawyers and the Co-Prosecutors brandished Rule 23 of the Internal Rules to push for Civil Party rights consonant with their status as (technically) full-fledged parties, the Defense elucidated troubling concerns compelling circumscription of Civil Party participation.

Arguing for the right of Civil Parties to conduct questioning on the Accused's character, the International Co-Prosecutor pointed out lucidly that Civil Parties were either party to the trial, with all concomitant rights, or they were not. In light of Rule 23.1, decisions that rendered Civil Parties "discounted or second-rate" parties were simply unjustified. Also featuring in the Co-Prosecutor's arguments was the belief that Civil Party participation was justified as a platform to give voice to victims' perspectives.

Two main themes were given vent in the Defense's submissions on the requirement of evidence corroborating Civil Party applications. Roux emphasized the nature of the Court as a legal forum, and recalled how the dignity of the proceedings was impaired by emotional accusations and stinging rebukes directed at the Accused by Civil Parties last week, likening these to stones thrown at the Accused at the market square. In this regard, Roux declared that "criminal justice does not have the mission of acting as therapy for suffering victims."^{xxii} Further, he again raised the lack of equality of arms that purportedly resulted from giving Civil Parties a secondary prosecutorial role.^{xxiii}

In the context of the same issue, of significance were broad policy arguments concerning the impact on Case 002 of the Chamber's decision in this trial. Werner asserted that mandating the provision of evidence corroborating Civil Party applications would render almost all Civil Party applications in Case 002 inadmissible. He then pre-empted a 'floodgates argument' (i.e. that allowing applications on the basis of the applicant's uncorroborated statement would "drown the Court with floods" of Civil Parties), arguing that what mattered was that Civil Party applicants were acting in good faith. Roux responded by alluding to the need for strict admissibility criteria.

Civil Party lawyer unexpectedly raises new fact before the Chamber. On Thursday, Civil Party lawyer Hong Kim Suon submitted a request to admit new evidence concerning Civil Party

E2-32. E2-32 had omitted from her testimony in July 2009 that she had been raped by a former S21 guard.^{xxiv} After some initial confusion over the precise nature of the request, Hong Kim Suon clarified that the new evidence would be adduced in the form of a written statement.

Rule 87.4 of the Internal Rules governs the admission of new evidence, and requires that the requesting party satisfy the Chamber that the requested testimony or evidence was not available before the opening of the trial. While stating his appreciation of the difficulty of coming forward with such evidence, Roux argued, among other things, that this did not justify the tardiness of the request.^{xxv} However, according to Hong Kim Suon, E2-32's lawyer Ms Silke Studzinsky had earlier submitted, or attempted to submit, the same request. A decision on this matter will be issued by the Chamber at a later stage.

Questionable standards of Civil Party representation. On Monday, the testimonies of Civil Parties Chhin Navy and Touch Monin strayed beyond the scope of Case 001. Yet, no attempt was made by their lawyers, Kong Pisey and Hong Kim Suon respectively, to guide them back to the realm of relevancy. It is worth recalling that the Chamber had earlier made it abundantly clear it was delegating responsibility for the appearance and questioning of Civil Parties to their lawyers, particularly the responsibility to guide their clients to make statements relevant to Case 001.^{xxvi} As it turned out, others had to intervene.^{xxvii} As a result of Chhin Navy's lengthy and largely irrelevant testimony, Touch Monin was left with significantly less time to complete his testimony,^{xxviii} and proceedings ended later than usual. This is perhaps another example of how apparently lacking standards of Civil Party representation have compromised the expediency of proceedings.^{xxix} At a broader level, it illustrates the tension between seeking to give victims' a voice in the proceedings, while at the same time preserving all parties' rights to an expeditious trial.

Certain Civil Party lawyers also appeared dismally prepared for the scheduled discussion on the Defense's objections to Civil Party applications. 2 weeks ago, when the Chamber announced the scheduling of the discussion, a number of Civil Party lawyers pledged to deliver supporting documents to the Defense as soon as possible. This Wednesday, however, the Defense informed the Chamber that it was still receiving some such documents the previous evening or the morning of the hearing.^{xxx} The lawyers of Civil Party Group Three also indicated that with regards to a number of their clients, they could only supply additional documents next week.^{xxxi} National lawyer for Civil Party Group 2 Mr. Kong Pisey even indicated that he was not aware of the need to provide further documentations to support his clients' applications.^{xxxii} On separate occasions, Mr. Kong Pisey had to reserve his right to furnish the necessary supporting documents in future. This elicited repeated stern warnings from President Nil Nonn that time to do so was fast running out. The President also expressed discontent over the lamentable lack of preparation, noting that the Chamber had indicated its expectations to Civil Party lawyers when it announced the schedule for the debate.

Indeed, while what was communicated to monitors by a Civil Party lawyer is acknowledged,^{xxxiii} and it is appreciated that Civil Party lawyers do face resource constraints and practical obstacles in their duties, the fact remains that Civil Party lawyers had since the beginning of trial some 6 months ago to obtain and submit any evidence required by Rule 23 of the Internal Rules to fully substantiate their clients' claims. More broadly, inefficiency resulting from inadequate standards of preparation and representation by Civil Party lawyers may be interpreted by some as evidence of the ineffectiveness of allowing civil party participation in international criminal proceedings.

IV. TRIAL MANAGEMENT

Judicial Management. That proceedings this week ended as scheduled, despite the numerous issues raised, debated on and resolved, attests to the Chamber's general success in effectively ensuring the expeditiousness of proceedings.

Proceedings on Monday were adjourned late in order to complete the hearing of 3 Civil Parties' testimonies as scheduled. Unfortunately, the first 2 Civil Parties took up most of the time with often irrelevant testimony, and Touch Monin, the last Civil Party to testify, found himself pressured to refrain from posing certain questions to the Accused. Although the Chamber has delegated primary responsibility to the Civil Party lawyers to manage their clients' testimonies, monitors opine that the Chamber could have afforded to be more interventionist.

On Tuesday and Wednesday, the Chamber adjourned early to hold internal meetings to discuss urgent issues pertaining to questioning on the Accused's character.

On Wednesday and Thursday, parties often sidetracked into making general arguments more appropriately left for final submissions, threatening to derail the hearing schedule.^{xxxiv} President Nil Nonn was laudably firm in disallowing further debate.

Removal of Civil Party Status Near the End of Trial. Underlying the technical issue of whether the Defense has the right to object to the admissibility of Civil Party applications at this late stage of the proceedings is a significant practical concern. For the past 7 months since the initial hearing, Civil Parties have acted in reliance on their Civil Party status. Having consequently expended effort traveling to the Court, enjoyed all concomitant Civil Party rights,^{xxxv} and even having stepped forward to testify, to have their Civil Party status removed near the end of the trial is certain to cause great disappointment.^{xxxvi} Even though the Chamber's "*provisional recognition*" of applicants as Civil Parties may be justified by the Internal Rules,^{xxxvii} addressing the issue of admissibility at such a late stage of proceedings appears to be an instance of questionable trial management.

Chamber sets deadline on submission of documents supporting Civil Party applications. On Thursday morning, the Chamber directed Civil Parties to submit evidentiary materials supporting Civil Party applications to the Chamber, and to do so by Thursday, 3 September 2009, 4.30pm. Given that this deadline comes after challenges by the Defense were scheduled to be presented, this direction should probably have been made earlier.^{xxxviii}

Time Allocation for Questioning on the Accused's Character. On Monday and again on Tuesday, the International Co-Prosecutor requested that the Chamber make known the time allocated for parties to question the Accused on his character. A time frame of at least 1 hour, preferably 1 and a half hours, was proposed, with the other parties to be given questioning time in balance with that. The Co-Prosecutors emphasized that this was their last chance to question the Accused on his character and responsibility. Decision on this request was postponed to Thursday as the Chamber wished to first hear submissions on the Civil Parties' standing to question on the Accused's character. Eventually, the Chamber decided on Thursday to allocate 1 hour 15 minutes each to the Prosecution and Defense to question the Accused.

That same day, in response to the International Co-Prosecutor's query, the Chamber announced that it would consider and inform the parties in due course the time allocation for questioning of the 2 expert witnesses next week, as well as the manner in which the expert witnesses would testify (i.e. whether jointly or separately). It refrained from issuing fixed time

allocations at this stage, in order to take into account continuing developments, such as the Defense’s withdrawal of its witness D14.

Co-Prosecutors request opportunity to put before Chamber documents relating to armed conflict. On Monday, the Co-Prosecutors expressed their intention to put before the Chamber documents relating to the issue of armed conflict, and asked for time to be allocated for them to do so.^{xxxix} The Chamber subsequently decided that this would take place at the end of the hearing on the Accused’s character. It further called on parties intending to file new documents under Rule 87.4 of the Internal Rules to do so as soon as possible.

Directions issued for the close of proceedings. In preparation for the close of proceedings, the Chamber has issued “Directions on Proceedings Relevant to Reparations and on the Filing of Final Written Submissions.” Most notably, the hearing of closing statements will begin on 23 November 2009.

Parties’ Attendance: On Monday and Tuesday, Mr William Smith was present, in addition to Mr. Seng Bunkheang and Mr. Vincent de Wilde for the Prosecution. The Defense comprised Mr. François Roux, Ms. Marie Paule Canizares and Mr. Kar Savuth. This remained the case on Wednesday, except that Mr William Smith did not attend. On Thursday, International Co-Prosecutor Mr. Anees Ahmed was present in the afternoon session, together with Mr. Vincent de Wilde and Mr. Seng Bunkheang.

Public Attendance. Supported by the ECCC’s Public Affairs Section, approximately 500 people filled the public gallery on Monday: 300 people from Bakan District, Porsat province and 200 from Amlang commune, Thpong district, Kampong Speu province. On Tuesday, in attendance were 400 people from Staung District, Kampong Thom Province, 70 students from Norton University; 30 people from YRDP; and 26 people from Sen Sok district, Phnom Penh, thanks to the support of TPO. However, most left before the end of the proceedings. On Wednesday there were approximately 300 people from Prey Khmer commune, Kampong Tralach district, Kampong Chhnang province. On Thursday, 130 people from Kampong Cham province and 140 people from Boribo District, Kampong Chhnang province were in attendance. 70 Civil Party applicants in Case 002 were also present due to the support of the Victims Unit.

Significantly, Wednesday marked a new milestone for the ECCC, when total visitor attendance exceeded 20,000.

Time Management.

| DAY/ DATE: | START: | MORN. BREAK: | LUNCH: | AFT. BREAK: | RECESS: | TOTAL HOURS IN SESSION |
|--|--------|---------------------|--------------------|-------------------|---------|------------------------|
| MON. 24/08/09 | 9.00am | 10.45am- 11.10am | 11.45am- 1.38pm | 2.40pm- 3.05pm | 4.40pm | 4 Hours 57min |
| TUE 25/08/09 | 9.07am | 10.40am- 11.05am | 12.25pm- 1.40pm | 2.45pm- 3.25pm | 3.45pm | 4 Hours 18min |
| WED 26/08/09 | 9.05am | 10.20am- 10.50am | 12.05pm | NA | NA | 2 Hours 30min |
| THU 27/08/09 | 9.10am | 10.40am- 11.07am | 12.06pm- 1.35pm | 2.02pm- 3.00pm | 4.33pm | 4 Hours 29min |
| AVERAGE NO. OF HOURS IN SESSION : 4 HOURS AND 3 MINUTES | | | | | | |

TOTAL NO. OF HOURS THIS WEEK : 16 HOURS AND 14 MINUTES

**TOTAL NO. OF HOURS, DAYS, AND WEEKS AT TRIAL: 288 HOURS AND 54 MINS OVER 65 TRIAL DAYS
OVER 18 WEEKS**

ⁱ International Defense Counsel Francois Roux, during the debate on whether Civil Party lawyers had the right to question the Accused and witnesses on the topic of the Accused's character.

ⁱⁱ While admissibility appeared to be the primary contention, Ms Canizares for the Defense had on Tuesday expressed that its challenges applied to both the admissibility and grounds of selected Civil Party applications.

ⁱⁱⁱ Rule 23.4 reads: "...To be admissible, civil party applications must be filed within the Victims Unit at least 10 (ten) working days before the initial hearing. The President may, by special decision, extend or shorten the above-mentioned deadline. After a formal verification, the Victims Unit, without any delay, shall forward applications to the Greffier of the Trial Chamber. The Trial Chamber may, by written reasoned decision, declare the Civil Party application inadmissible." Rule 83.1 reads: "At the initial hearing, the Chamber shall consider any applications submitted by Victims to be joined as Civil Parties, as provided in Rule 23.4..."

^{iv} The issue was argued by Alain Werner, international lawyer for Civil Party Group 1, with whom all other Civil Party groups concurred. According to Civil Party lawyers, their position had a legitimate rationale: to prevent proceedings from being delayed should Civil Parties invoke their right under Rule 104.4(e) to an immediate appeal against decisions declaring their applications inadmissible.

^v Rule 100.1 reads: "The Chamber shall make a decision on any Civil Party claims in the judgment. It shall rule on the admissibility and the substance of such claims against the Accused..."

^{vi} To this, Mr Alain Werner replied that the Chamber had merely requested for "observations", which did not necessarily include objections to admissibility. However, Judge Lavergne later clarified that when asking the Defense for its comments, the Chamber did contemplate that these comments would include admissibility issues.

^{vii} See Defense's preliminary objections last Monday, 17 August 2009, and its full submissions on Tuesday, 26 August 2009.

^{viii} Werner pointed out that nothing in the Internal Rules or Practice Directions, in particular Rule 23.5 of the Internal Rules and Article 3.5(d) of the Practice Direction on Victim Participation (02/2007Rev.1), imposed a requirement for such evidence.

^{ix} This submission was made by Ms Fabienne Trusse-Napouse, with whom all other Civil Party lawyers agreed. It was also supported by the International Co-Prosecutor.

^x Expert David Chandler's earlier testimony was cited in support.

^{xi} Rule 87.1 states that "[u]nless provided otherwise in these IRs, all evidence is admissible..."

^{xii} This was demonstrated last Tuesday, 18 August 2009, in relation to Ms Sol Som, who relied on her commune mayor's stamped affidavit to establish her relationship to the alleged S21 victim.

^{xiii} Werner relied on the 10 August 2007 decision of the Pre-Trial Chamber of the International Criminal Court ("ICC") in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06), *Situation in the Democratic Republic of Congo*, for the following propositions: 1) indirect evidence in support of victims' applications to participate would be accepted if the victim proved s/he was indeed impaired by objective obstacles from providing direct evidence; and 2) the acceptance of a victims' application should be decided on a case-by-case basis, taking into account the merits of the intrinsic coherency of the victims' statement. Roux distinguished this decision on the basis that, unlike at the ECCC, victims were not regarded as full parties in ICC proceedings.

Werner also cited the 2 September 1998 decision by the International Criminal Tribunal for Rwanda ("ICTR") in the case of *The Prosecutor v. Jean-Paul Akayesu* (Case No. ICTR-96-4-T) for the proposition that an accused could be convicted on the basis of a single relevant and unequivocal statement that was not necessarily corroborated. Roux distinguished the ICTR's ruling on the basis that the witness in that case had undergone the process of examination and cross-examination, as the ICTR adhered to the common law tradition. Further, he pointed out that the ICTR had stressed that its ruling was exceptional.

Werner further submitted that accepting the applications of his 4 clients did not prejudice the Accused, because none of them were providing evidence that incriminated the Accused, and the Accused was not required to give financial compensation to them as reparations.

Interestingly, Werner also invoked a “presumption of good faith” in favour of his clients to persuade the Court to admit his clients’ applications on their statements alone. To this, Roux pointed out that the Civil Parties could also, in good faith, be mistaken.

^{xiv} Judge Lavergne had put queries to the Defense on this issue last Monday, 17 August 2009, and again on Wednesday, 26 August 2009.

^{xv} Rule 23.10 reads “At any time, a Civil Party may expressly waive the right to request reparation, or abandon a Civil Party action. The waiver of the right or abandonment of the action shall not stop or suspend the criminal prosecution.” The Chamber was informed of their waiver on Thursday. Reasons for the waiver by E2-77, Kim Sovannary from Civil Party Group 2, were unclear, but were apparently related to her frail health and old age. E2-49 from Civil Party Group 1 was no longer interested in participating.

^{xvi} The Defense made clear its opposition to such standing at the initial hearing, and again in response to the filing of a witness and document list by Civil Party Group 1 in February 2009. Asserting the existence of this right, Civil Party Groups 1 and 2 had on 9 June 2009 submitted a joint request for a ruling by the Trial Chamber on this issue: see “Groups 1 and 2 – Civil Parties’ Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Parties to Make Submissions on Sentencing”, 9 June 2009, available at http://www.eccc.gov.kh/english/cabinet/courtDoc/358/E72_EN.pdf. In its filed response, the Co-Prosecutors took no position on this issue except to request consideration of the fact that Case Files 001 and 002 had potentially numerous Civil Parties whose submissions may have to be regulated to maintain fair trial standards: see “Co-Prosecutors’ Response to Certain Civil Parties’ Request On the Standing of Civil Party Lawyers to Make Submissions on Sentencing,” 30 June 2009, available at http://www.eccc.gov.kh/english/cabinet/courtDoc/374/E72_1_EN.pdf.

^{xvii} For their submissions, the Co-Prosecutors were allocated 10 minutes, the Civil Party lawyers 40 minutes in total, and the Defense 40 minutes.

^{xviii} Reliance was placed by the various parties on Internal Rules 23.1 and 23.6(a), French civil procedure in general, and Article 3.26 of the Cambodian Criminal Procedure Code.

^{xix} See submissions of International Co-Prosecutor Vincent de Wilde and lawyer for Civil Party Group 3 Ms Fabienne Trusse-Napouse.

^{xx} See submissions of lawyer for Civil Party Group 1 Alain Werner. The International Co-Prosecutor also noted that no such distinction was drawn in Rule 91 (*Hearing of other Parties and Witnesses*) of the Internal Rules.

^{xxi} These witnesses are experts KW-34 and Françoise Sironi Guilbuad, and factual witnesses D1, D2, D3, D4, D5, D6, D8, D14 and Christopher Lapel. Accordingly, Civil Party lawyers may still question Richard J. Goldstone, Stéphane Hessel and Raoul Marc Jennar. See “Scheduling for the Hearing by Topic for the Period of 17 August to 17 September 2009,” 14 August 2009, available at http://www.eccc.gov.kh/english/cabinet/courtDoc/413/E138.1_KH-EN-FR.pdf.

^{xxii} Citing Robert Bandinter of French newspaper *Le Monde*. According to Roux, Civil Parties’ testimonies should comprise only 2 points: 1) what their suffering was, and 2) the memory of the person for whom s/he was suffering for.

^{xxiii} See Rule 23.1(a) of the Internal Rules, which reads: “The purpose of Civil Party action before the ECCC is to... Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution...”

^{xxiv} According to Hong Kim Suon, E2-32 had initially been too ashamed to disclose this at the hearing, but felt prompted to confront her alleged rapist after recognizing him when he testified in Court.

^{xxv} Invoking the ‘floodgates argument, Roux asserted that admitting new evidence on the basis of such a consideration would pave the way for more Civil Parties to submit similar requests. Roux stated that more appropriate solutions, such as an *in camera* hearing, would have been available had the Chamber been seised of the matter earlier. He also questioned the appropriateness of the request as the Defense was challenging the presence of E2-32 at S21.

^{xxvi} See the morning session on Monday, 17 August 2009.

^{xxvii} After reminding Chhin Navy not to stray from the matter at hand, President Nil Nonn subsequently intervened to put an end to her statement to allow other parties to question her. As proceedings were drawing to an end,

International Defense Co-Lawyer Francois Roux took the initiative to intervene during Touch Monin's statement, and requested the Chamber to invite him to re-focus his testimony.

^{xxviii} This was perhaps unfortunate as his testimony concerned a cousin who had been Duch's personal friend, and had died at S21.

^{xxix} Monitors opine that earlier instances of irrelevant and repetitive questioning are the result of both a lack of coordination among Civil Party lawyers, and inadequate standards of representation. See KRT Report Issue No. 3 at page 6, KRT Report Issue No. 7 at page 6, KRT Report Issue No. 8 at page 6 and KRT Report Issue No. 8 at page 6.

^{xxx} For example, the documents to support the applications of 5 members of Civil Party Group 1, including D25-20 and E2-57, were only submitted on Tuesday evening and only in Khmer. Still, the Defense, on the basis of the documents, decided to withdraw its challenges to the applications of D25-20 and E2-57.

^{xxxi} This most often occurred with the applications of Civil Parties from Group 3, especially in relation to documents proving kinship between the Civil Parties and the alleged direct S21 victims.

^{xxxii} When given the opportunity to respond to the Defense's objection to the application of E2-22, a Civil Party from Group 2, Mr. Kong Pisey asked the President whether this meant he was expected to supply further documentation to support his client's claim, and if so, when should he do so.

^{xxxiii} We set out here the view of the Civil Party lawyer contacted: The Civil Party lawyers were well aware that recognition of their clients as Civil Parties was only provisional. At trial management meetings, they were told only to prove the identity of Civil Party applicants. Civil Party lawyers had generally fulfilled this requirement. Until the issue was raised last week, Civil Party lawyers did not expect that the Defense would require evidence establishing kinship between the alleged victims of S21 and Civil Party applicants, and evidence proving that the alleged victim had been detained at S21. A rush to collect these supporting documents ensued. However, due to civil war and inexperienced registrar officials in the successor regime, it proved very difficult to find the relevant documents in the short period of time.

^{xxxiv} On Tuesday, Werner and Roux continued their clash over the right of the Defense to raise objections to the admissibility of Civil Party applications, even after the Chamber had stated it would decide on the issue together with its judgment on the merits. President Nil Nonn intervened to stop the debate in light of the internal meeting scheduled to follow. On Thursday, Werner's defense of 4 his clients' applications triggered a general debate between him and Roux on the sufficiency of evidence corroborating Civil Party applications. When lawyer for Civil Party Group 1 Ty Srinna, National Defense Co-Lawyer Ka Savuth and International Co-Prosecutor Vincent de Wilde joined the fray, all were cut short by President Nil Nonn.

^{xxxv} Civil Party rights include the right to: (a) choose a legal representative; (b) request the investigation of alleged crimes; (c) question witnesses and the accused; (c) produce evidence; (d) ask the court to take measures to respect their safety, well being, dignity and privacy in the course of their participation in the proceedings; (d) access all court documentation; and (e) request collective and moral reparations.

^{xxxvi} In an impassioned statement, Alain Werner explained that this concern was what motivated the Civil Party lawyers' present argument.

^{xxxvii} Roux pointed out that at the initial hearing, the Chamber had accepted the Defense's reservation of its right to object to the admissibility and substance of Civil Party applications in future.

^{xxxviii} International Co-Prosecutor Vincent de Wilde raised the need for such a deadline on Wednesday.

^{xxxix} Rule 87.3 of the Internal Rules requires that documents to be put before the Chamber be summarized and read out before the Court. To this end, parties are required to summarize the documents and explain their purpose and relevance to the Chamber.



WSDHANDACENTER
FOR HUMAN RIGHTS & INTERNATIONAL JUSTICE
Stanford University

This publication was originally produced pursuant to a project supported by the War Crimes Studies Center (WCSC), which was founded at the University of California, Berkeley in 2000. In 2014, the WCSC re-located to Stanford University and adopted a new name: the WSD Handa Center for Human Rights and International Justice. The Handa Center succeeds and carries on all the work of the WCSC, including all trial monitoring programs, as well as partnerships such as the Asian International Justice Initiative (AIJI).

A complete archive of trial monitoring reports is available online at:

<http://handacenter.stanford.edu/reports-list>

For more information about Handa Center programs, please visit:

<http://handacenter.stanford.edu>
