KRT TRIAL MONITOR

Case 002 ■ Issue No. 1 ■ Initial Hearing ■ 27 – 30 June 2011

Asian International Justice Initiative (AIJI), a project of East-West Center and UC Berkeley War Crimes Studies Center

But at the very least, this trial can ascertain the truth, acknowledge facts, provide a sense of tranquility for victims, and provide a sense of closure to their process of grieving.

-Martine Jacquin, International Civil Party Lawyer

I. OVERVIEW

Beginning 27 June 2011, the Trial Chamber of the ECCC presided over several days of Initial Hearings in the case against four alleged senior leaders of the Khmer Rouge: Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan. This marked the official commencement of the trial pursuant to Rule 80 *bis.*[1] During the hearing, the Chamber considered the parties' lists of potential witnesses and the initial specifications of reparations awards the CPLCL intend to seek under Rule 23 *quinquies* (3)(b). The parties also presented their oral arguments on the following legal issues: (i) *ne bis in idem* (also known as "double jeopardy" in common law systems), (ii) the royal pardon and amnesty granted to Ieng Sary by King Norodom Sihanouk, (iii) the statute of limitations for grave breaches of the 1949 Geneva Conventions, and (iv) the statute of limitations for the national crimes within the jurisdiction of the ECCC.

All four of the Accused in this case are charged with crimes against humanity, genocide,[2] and grave breaches of the Geneva Conventions of 1949, as well as murder, torture, and religious persecution in violation of the 1956 Cambodian Penal Code. The Indictment alleges that the Accused are responsible on account of their participation in a joint criminal enterprise for their acts or omissions in Cambodia, between 17 April 1975 and 6 January 1979. The Indictment further alleges that the Accused are liable, additionally or in the alternative, for having planned, instigated, ordered, and/or aided or abetted the various crimes charged and/or that they are culpable by way of command responsibility.

In addition to the regularly scheduled legal arguments addressed during the hearing, the Court also allowed the Nuon Chea Defense to raise additional concerns, after the Accused threatened to quit the proceedings for the day if his concerns were not addressed. Early in the hearing, Nuon Chea declared that he was "not happy"[3] with the agenda, and requested permission for his Counsel to address additional matters, outside the scope of the hearing. Mr. Nil Nonn, the President of the Chamber, initially denied Nuon Chea's request, but the latter's international lawyer, Mr. Michiel Pestman, proceeded to raise the issues. Pestman conveyed his client's objections to the manner in which the Investigating Judges carried out

the investigative phase of the trial. He also reiterated his client's demand that the Chamber allow the Nuon Chea Defense to call all 300 of their witnesses to testify at the trial. Significantly, Pestman informed the Court that unless Nuon Chea's objections and all his witnesses were included in the agenda, his client no longer wants to honor the proceedings.[4] Shortly thereafter, Nuon Chea abruptly requested permission to leave the Courtroom, stating that he would only return if the issues his counsel raised were addressed before the public in open court. The Chamber acquiesced to his request.

II. LEGAL AND PROCEDURAL ISSUES

A. *Ne bis in idem*

The Co-Lawyers for Ieng Sary began the hearing by raising the issue of *ne bis in idem*, which prohibits authorities from prosecuting one person for the same offense twice.[5]

The Defense sought termination of the proceedings against Ieng Sary with respect to the charges of genocide and other crimes, based on the fact that he was previous tried *in absentia* and convicted of genocide and other crimes by the 1979 People's Revolutionary Tribunal of Phnom Penh (**1979 Trial**). Application of *ne bis in idem* will divest the ECCC of jurisdiction over the crimes of genocide and possibly other crimes for which the 1979 Trial convicted Ieng Sary. This could effectively terminate all proceedings against him.

In a Decision dated 13 January 2011,[6] the Pre-Trial Chamber ruled that the principle of *ne bis in idem* did not prevent Ieng Sary's prosecution at the ECCC. The Chamber based its decision on the following: first, the principle as set out in Article 12 of the CPC only prohibits multiple prosecutions in cases where the previous trial resulted in an acquittal, not a conviction. Second, the principle of *ne bis in idem*, as expressed in the ICCPR, has a solely domestic application. It does not apply at the ECCC, the Pre-Trial Chamber reasoned, because the Court is in fact, an "internationalized" tribunal. Finally, the Decision explained, Ieng Sary's 1979 Trial falls within an exception to the application of *ne bis in idem* under certain procedural rules established at the international level,[7] because it was not conducted impartially or independently with regard to due process of law.

During the Initial Hearing, the Ieng Sary Defense challenged all three of the Pre-Trial Chamber's findings. They contended that it is not necessary to interpret Article 12 of the CPC. Ieng Sary's trial, they argued, is in fact prohibited under a broader principle contained in Article 7 of the CPC, which includes *res judicata* as one of the bases for extinguishing criminal actions. Counsel for the Accused went on to argue that, even if the Trial Chamber finds it necessary to apply Article 12 in conjunction with Article 7, Article 12 then must be interpreted to apply to finality of judgment, regardless of whether it is an acquittal or a conviction. Since the 1979 Trial unequivocally resolved Ieng Sary's case with a judgment of conviction, Ieng Sary's case is *res judicata* ("a thing decided") and the criminal action against him must be extinguished. To counter the Pre-Trial Chamber's second finding, Ieng Sary's defense team claimed that the ECCC is a national court that operates within the domestic judicial system, rather than an "internationalized" tribunal. As such, the ICCPR should apply to proceedings at the ECCC. Finally, the Ieng Sary Defense submitted that no fair trial-based exception to *ne bis in idem* should apply because Ieng Sary's prior conviction was, in fact, a final judgment, which resulted from proceedings that followed the prescribed procedure at the time they were conducted.

In response, the Co-Prosecutors contended that the provisions on *res judicata* in the CPC are irrelevant to Ieng Sary's case because they apply only to final acquittals to allow convicted persons to challenge the judgment against them under Articles 365, 370 and 371 of the CPC. As regards the argument based on the ICCPR, Cayley maintained that this convention does not apply to proceedings at the ECCC, which the Trial Chamber has confirmed as a "separately constituted independent and internationalized court"[8] in its 15

June 2009 decision. The ECCC has a special status, which places the cases before it beyond the ambit of the ICCPR. Finally, the OCP argued that Ieng Sary's conviction under the 1979 Trial does not constitute a final judgment to which *ne bis in idem* may attach since those proceedings before the People's Revolutionary Tribunal (**PRT**) were not conducted in conformity with basic fair trial standards. To support this argument, the Co-Prosecutors noted, *inter alia,* that the PRT was not created by law but by a decree of the People's Revolutionary Council of Kampuchea. This decree, Cayley explained, "expresses the views of the executive branch of government in respect of the guilt of the accused in that case, Ieng Sary and Pol Pot, before there had even been an investigation or the trial had even commenced."[9] He also pointed out that the PRT had predetermined the guilt of the Pol Pot-Ieng Sary clique, as evidenced by declarations made in a press conference before the start of the trial by the president of the Tribunal, Keo Chanda.

B. Amnesty and Royal Pardon (*RPA*)

After hearing arguments on the topic of *ne bis in idem*, the Chamber moved on to an amnesty-based jurisdictional challenge, also raised by Ieng Sary.

Following the 1979 Trial *in absentia*, Ieng Sary was sentenced to death and confiscation of all his property. This sentence was never enforced, however, and in 1996, King Norodom Sihanouk pardoned Ieng Sary. The "pardon" covered any penalty provided for in the Law to Outlaw the Democratic Kampuchea Group (**1994 Law**).[10] This was legislation that outlawed the group Democratic Kampuchea and declared all its members as violators of the Constitution promulgated by the Cambodian National Assembly in 1994.[11]

The Defense claimed that Ieng Sary's royal pardon should extinguish the criminal action against him. They maintained that the ECCC has competence to determine the scope, but not the legitimacy of the RPA. According to Ieng Sary's international Co-Defense lawyer, Michael Karnavas, the 1994 Law applied to all criminal acts committed by the Khmer Rouge from 1975 to 1979. As such, it covers all the charges in the Indictment.

The Co-Prosecutors disagreed with the Defense interpretation of the ECCC's competence vis-à-vis the RPA because the Chamber's determination of the RPA's scope necessarily includes determination of its validity. They further argued that regardless of the scope of the RPA, international law does not recognize the validity of any pardon or amnesty for *jus cogens* crimes such as genocide and as such, Ieng Sary's RPA is invalid.[12]

The Defense replied to Prosecution arguments by arguing that the ECCC is a domestic Court.[13] Cambodia's international obligations, the Defense insisted, should not affect the Court's interpretation of a domestic amnesty and pardon.[14] The Defense argued that states are free to grant amnesties, even for international crimes recognized as *jus cogens*. Although international law prohibits the commission of such crimes, there is no obligation for states to prosecute perpetrators, the Defense maintained.[15]

C. The Statute of Limitations under Cambodian Law

The third matter addressed during the hearing considered whether a statute of limitations bars prosecution of certain crimes under the 1956 Cambodian Penal code.

a. Is the Prosecution of National Crimes and Grave Breaches of the 1949 Geneva Conventions time-barred?

The four Accused are charged with international offenses, as well as the crimes of murder, torture and religious prosecution under the 1956 Penal Code of Cambodia. The period of prescription of these domestic felonies under Cambodian legislation (the 1956 Penal Code, the 1964 Code of Criminal Procedure and the 1992 UNTAC Law)[16] is 10 years, but the

ECCC Law of 2001 and the amended ECCC Law of 2004[17] extended that period to 20 and 30 years, respectively. It should also be noted that the subsequently adopted 2007 Code of Criminal Procedure grants a 15-year limitation period for most crimes, and provides no statute of limitations for genocide, crimes against humanity and war crimes.

Prior to the Initial Hearings, all Defense teams filed preliminary objections, raising the issue of statutory limitations to prosecution of crimes under the 1956 Penal Code. The Ieng Sary Defense Team also objected to the prosecution of grave breaches of the 1949 Geneva Conventions, claiming that the national statute of limitations also applies to these international crimes because of the hybrid nature of the ECCC. The following questions were therefore put before the Trial Chamber: (i) whether the statute of limitations in the Cambodian 1956 Penal Code applies to domestic crimes prosecuted before the ECCC or to grave breaches of the 1949 Geneva Conventions; and if so, (ii) whether the 10-year limitation period for the prosecution of these crimes had expired before 2001 or was suspended; and finally, (iii) whether the principle of legality allows for the reinstatement or extension of the period of limitation that would have otherwise expired under domestic law. The Parties presented their oral arguments during the Initial Hearings, where they also referred to decisions on the issue by the Trial Chamber in Case 001[18] and the Pre-Trial Chamber in the present case.[19]

b. Previous Decisions on the Statute of Limitations for National Crimes

The issue of the applicability of statutes of limitation to crimes in violation the 1956 Penal Code was first raised in Case 001 when lawyers for Kaing Guek Eav alias "Duch" argued that the ECCC had no jurisdiction over these domestic offenses because the prescriptive period had already expired.[20] The Trial Chamber considered the motion, but was split over the validity of the statute of limitations. In 2001, the Constitutional Council of the Kingdom of Cambodia confirmed the constitutionality of the extension of the statute of limitations for domestic crimes under Article 3 (new) of the ECCC Law.[21] Accordingly, the Trial Chamber's Cambodian judges maintained that the statute of limitations had not expired. The international judges, however, opined that the domestic charges of murder and torture must be extinguished, because the prescriptive period of 10 years under Cambodian law had already expired when the subsequent ECCC laws purported to extend the statute of limitations. Because the Trial Chamber could not agree over whether the domestic charges were valid or not, they did not rule on the guilt or innocence of the Accused vis-à-vis those charges. In the Case 001 Judgment dated 26 July 2010, the Trial Chamber simply stated that it had not evaluated Duch's culpability for the crimes of murder and torture under the 1956 Penal Code.[22]

When the same issue arose in Case 002, the Pre-Trial Chamber in the present case adopted the position that the Cambodian judges had taken in Case 001, and ruled that the 10-year statute of limitation of the 1956 Penal Code started to run on 24 September 1993 (the beginning of the UNTAC period), and had therefore not expired in 2001.[23] Consequently, the ECCC Law of 2001 (and as amended in 2004) validly extended the prescriptive period and the domestic crimes charged against the four Accused have not expired.

c. Arguments of the Parties on The Statute of Limitations for National Crimes

During the June 2011 arguments before the Trial Chamber, Defense Co-Lawyers challenged the Pre-Trial Chamber's calculation of when the statute of limitations began to run. Using the fall of the Khmer Rouge regime as the start date for the Statute, Defense Counsel argued that the limitation period for national crimes actually expired in 1989. Accordingly, the retroactive application of Article 3 of the ECCC Law of 2001 violates the principle of legality, and the prosecution of the domestic crimes of murder, torture and religious prosecution should be time-barred. Defense Co-Lawyers further argued that extending the prescriptive period of domestic crimes being prosecuted only before the ECCC, and not doing the same

for charges pending before domestic courts, would violate the principle of equality before the law. The Co-Prosecutors maintained, however, that this issue pertains to the subject matter jurisdiction of the ECCC over domestic crimes and does not affect its personal jurisdiction. In other words, the non-applicability of the statute of limitations relates to violations of the 1956 Penal Code, regardless of who the accused person is, provided that the accused is within the personal jurisdiction of the ECCC.

The Co-Prosecutors agreed with the Pre-Trial Chamber's ratiocination, arguing that the statute of limitations was not in force from 1979 to 1992. They explained that notwithstanding the existence of statute of limitations between 1979 and 1992, such prescriptive periods would have been tolled or suspended during that period because Cambodia was in a state of civil war and had no functioning judicial system. Only after 1992 did Cambodia begin to re-establish qualified legal personnel, a bar association, laws on criminal procedure, and a functioning court system. The Co-Prosecutors supported their position by citing historical practices tolling statutes of limitations in wartime Germany, France and the United States. The Prosecution also relied upon general international principles pertaining to armed conflict. Finally, the Co-Prosecutors argued that the Accused should not benefit from a statute of limitations that they helped to run-down through their own actions perpetuating a state of civil war. They should be prevented from invoking the statute, Prosecutors argued, because of the legal maxim that "no one is heard, when alleging their own fault."[24] The Civil Party Lawyers agreed with the arguments of prosecution.

N.B.: In a Decision dated 22 September 2011, the Trial Chamber ruled that the prosecution of offenses in the 1956 Penal Code cannot proceed because of material defects in the Closing Order, among them, a lack of specificity in the factual allegations. The Decision was silent on the matter of the statute of limitations for domestic crimes, but it would appear to render the arguments that took place during the initial hearing in June moot.

d. The Statute of Limitations for Grave Breaches of the Geneva Conventions

As previously noted, one of the four Accused wished to argue that the statute of limitations applied beyond Cambodian domestic law. In his preliminary objections, Ieng Sary claimed that the 10-year statute of limitations in the 1956 Penal Code also applies to grave breaches of the 1949 Geneva Conventions, and should bar him from prosecution on those charges in the Closing Order, as well. The Ieng Sary defense team based its argument on the fact that, unlike the articles on genocide and crimes against humanity, Article 6 of the ECCC Law does not contain the phrase "which have no statute of limitations." According to the Defense, this ambiguity in the Law should be resolved in favor of the Accused. The Trial Chamber asked[25] the parties to expound upon the two questions below, and order to assist the Court in resolving the matter raised by the Defense.

1. Did customary international law between 1975 and 1979 envisage and permit the application of statutory limitations to grave breaches of the 1949 Geneva Conventions?

The Ieng Sary Defense pointed out that nothing in the 1949 Geneva Conventions expressly prohibits the application of statutory limitations, however the Co-Prosecutors countered that states have an absolute positive obligation to prosecute individuals responsible for committing grave breaches of the 1949 Geneva Conventions. Counsel for the Prosecution reasoned that States cannot unilaterally limit their responsibilities under the 1949 Geneva Conventions by enacting prescriptive periods. They further argued that, in 1975, the prohibition against grave breaches had already obtained *jus cogens* status, meaning no derogation is permissible. The Civil Party Lawyers emphasized that no other international treaty shared the same status as the 1949 Geneva Conventions, which, as early as 1975, had been ratified without reservation by 133 of 138 members of the UN, including all permanent Security Council members and Cambodia, which had ratified them without

reservations.[26] Karnavas, on the other hand, claimed that the non-prescription of war crimes was not part of customary international law in 1975. The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, he submitted, had only been ratified by 17 states at that time, and Cambodia was not one of them. In fact, Cambodia is still not a state party to this treaty.[27]

2. Does Article 6 of the ECCC Law, as amended, criminalize Grave Breaches as defined in the Geneva Conventions, or does it provide for direct application of all provisions of the Geneva Conventions?

The Ieng Sary Defense pleaded for a narrow interpretation of Article 6 of the ECCC Law, as amended, indicating that this provision does not contemplate a direct application of all provisions of the 1949 Geneva Conventions. The Co-Prosecutors took the opposite position, arguing that the ECCC Law is a statute that confers jurisdiction over certain international crimes to the ECCC, and not a domestic law criminalizing conduct.[28] Accordingly, the judges are required to refer to the 1949 Geneva Conventions not only to obtain an exhaustive list and elements of the crimes, but also to rule on issues such as the question of an applicable statute of limitations, if any.

D. The Right of the Accused to Waive Right to be Present at Trial

The final legal matter contested during the initial hearing considered the rights of the accused to be present or absent during trial. Health-related absences from the proceedings have already been a frequent occurrence in the trial of these four accused, three of whom challenge their fitness to stand trial: Ieng Thirith, Ieng Sary and Nuon Chea. In the course of the four days of initial hearings, all the Accused requested to be excused from being present in the courtroom at various stages of the proceedings. At one point, Khieu Samphan's lawyers asked the Trial Chamber to allow their client to leave the courtroom because he was tired and he would be sufficiently represented through his counsel. The Trial Chamber found that Khieu Samphan's health condition did not appear to be deteriorating or severe. This lead to a discussion of whether or not an accused person is entitled to decide if and he or she wishes to be present at his or her own trial.

In general, an Accused person is expected to be present in court during his or her own trial, and judges are empowered to compel the attendance of the Accused at the proceedings.[29] The Internal Rules, however, provide for certain exceptions, such as when the Accused is absent due to health reasons and other serious concerns. In the case of these exceptions, the Chamber may either continue the proceedings in the absence of the Accused with his or her consent, or the Accused may participate through remote audio-visual broadcast.

a. Arguments by the Parties

When the Trial Chamber challenged the validity of Khieu Samphan's request to be excused on the grounds of fatigue and adequate representation by counsel, Karnavas asked the Trial Chamber to excuse his client Ieng Sary as well. He submitted that forcing an accused to be in Court when he is not willing to be there is a violation of the fair trial rights and human rights of the Accused. Karnavas likewise pointed out that at the ICTY, where he has worked, an accused person unwilling to attend his trial is permitted to stay in his or her cell, even without the benefit of audio-visual facilities. In an effort to persuade the Chamber to grant his client leave to be absent, Karnavas suggested that the accused could sign a written statement waiving his right to be present. This way, Ieng Sary cannot later claim that he was not afforded his due process rights.

Cayley agreed that accused should submit a signed written waiver that clearly indicates the reason why they chose not to attend the proceedings on a given day. He further cautioned that, while the ICTY did allow the absence of some accused persons, this did not mean that

the Accused should take the issue of attendance lightly. Cayley reminded the Court that there is a fundamental requirement in all international and national jurisdictions, that an accused attend trial. The Prosecution went so far as to suggest that the Chamber needs expert opinion if the Accused is unable to attend on account of a physical or mental condition.

b. The Trial Chamber's Decision

After the parties had concluded their arguments, Judge Lavergne clarifed that Internal Rule 81 provides for two scenarios in which the accused can be absent from proceedings, and these must not be confused. In the first scenario, the accused refuses to appear, waives his right to be present, and is represented by his lawyer. In the second scenario, the accused wishes to attend the hearing but is unable to do so because of health issues or other serious concerns and instead, participates remotely by virtue of audio-visual facilities the holding cell. This recourse applies only when counsel for the accused duly informs the Chamber of the circumstances attendant to the absence of the accused in order for the Chamber to make a determination on the request. Judge Nil Nonn reiterated that these permissions would be granted on a daily basis, so the Accused must still be brought to the courtroom in the morning of every session.

Following this clarification, the Chamber allowed Ieng Sary to avail himself of remote participation facilities at his holding cell, due to his severe back pain. They denied Khieu Samphan's fatigue-based request to be excused, however, and instructed him to stay in the courtroom.

III. CIVIL PARTY PARTICIPATION

In a 24 June 2011 decision, issued shortly before the initial hearings, the Pre-Trial Chamber, ruled in favor of 1,728 civil party applicants who had appealed prior rejection of their requests to be included in Case 002. According to the Pre-Trial Chamber, the Co-Investigating Judges had employed an excessively narrow interpretation of the criteria for what constitutes injury necessary to be recognized as a victim. Moreover, the Pre-Trial Chamber held, the threshold for admissibility of civil party applications in proceedings dealing with international mass crimes such as genocide, crimes against humanity and grave breached of the Geneva Conventions of 1949, differs from what is applicable in domestic trials relating to domestic crimes. The Pre-Trial Chamber decision almost doubled the total number of civil parties in Case 002 to close to 4,000.

a. Extension of Time Limit for Co-Lawyers to Submit Civil Parties Lists

The Civil Party Lead Co-Lawyer requested an additional two months time to file a revised civil party list that takes into account the substantial increase in the number of civil parties to Case 002. The lawyers explained that this postponement was necessary, because they needed time to determine who would be in a position to adduce evidence, and then use the revised list to identify which civil parties who will provide essential information pertaining to the first four segments of the trial. The CPLCL argued that it is incumbent upon them, not the Trial Chamber, to undertake the task of preparing the reduced list under Internal Rule 80. The CPLCL conceded that Rule 80 named the Trial Chamber as the party responsible for reducing experts and witness lists. They argued, however, the rule makes no mention of the civil parties, so that should be left to the CPLCL.

b. First Specification of the Type of Reparations Claims

Under Internal Rule 23, as amended, Civil Parties may seek two avenues for their claims for reparations: one in the form of a civil claim against the Accused, if he or she is convicted, and the other in the form of reparations initiatives, which can be facilitated by the VSS, but

for which financing must be found outside the court. The latter was recently made available through Internal Rule 12*bis* (2) and (3), Rev. 6.[30] Nevertheless, all forms of reparations available to civil parties remain "collective and moral," and thus only symbolic by nature.

CPLCL Pich Ang and Elisabeth Simonneau-Fort were asked to give a first specification of the substance of the reparations they intend to seek. The International CPLCL used the opportunity to remind the parties and the public that civil parties in the civil law system and before the ECCC are not guests, but rather protagonists in the trial, who share the same rights as the other parties. She went on to express concern about the "extraordinary and exceptionally demanding"[31] requirements regarding the civil parties' claims. She considered these requirements "unique in international and national courts"[32] and urged that they not become an obstacle to the parties' right to reparation.

Pich Ang spoke next and explained that NGOs, civil party lawyers, and the VSS had gathered information from the thousands of civil parties all over Cambodia. Based on these discussions, it became apparent that the civil parties were interested in four distinct categories of reparations. First, the Civil Parties will ask the Chamber to commemorate the terrible crimes committed by instituting remembrance day, building *stupas* and memorial sites, and preserving the major killing sites. Second, the Civil Parties will seek the establishment of a psychological treatment project and a consultation program, where they could come together, share their experiences and find help from each other, as well as from professional therapists. Third, the Civil Parties will ask that educational programs and centers, such as museums and libraries, be created to further the understanding of the history of Democratic Kampuchea. To the same end, they wish to have historical books and documents compiled for the sake of posterity, including a list of victims. Fourth, the Civil Parties will ask for various forms of reparations, including the dissemination of the judgment on Case 002, conferment of Cambodian citizenship civil parties of Vietnamese descent and the establishment of a special educational program in favor of children borne out of forced marriages. Finally, the Civil Parties will request the establishment of a trust fund that will finance these reparation claims. The CPLCL pointed out that they would have to modify their request by processing the input of the 1,728 civil parties recently recognized by the Pre-Trial Chamber.

N.B.: In a memorandum dated 23 September 2011,[33] the Trial Chamber made a note of the purpose of the initial specification of the reparations by the Civil Parties according to Internal Rule 80bis (4). The specification was meant, "to avoid potentially costly, time-consuming or misguided project development,"[34] to guarantee an optimal utilization of the resources of the Victim Support Section, which is burdened with project development and the securing of the funds, and to ensure a meaningful result within the ECCC's lifespan. In light of the foregoing, the Court emphasized that reparations outside the scope of the ECCC legal framework should not be requested. Upon reviewing the Civil Party initial specifications, the Trial Chamber reminded the CPLCL that the establishment of a trust fund for collective or individual financial compensation for Civil Parties cannot be entertained. Neither can the Trial Chamber endorse measures requiring governmental approval, unless they have already been approved or implemented by the Royal Government of Cambodia. The Trial Chamber refrained from commenting on a number of other forms of reparation – mostly the creation of museums and memorial sites – on the grounds that these requests lacked sufficient specificity. After making these clarifications, the Trial Chamber declared its intent to schedule another hearing on 19 October 2011 because a substantial number of the Civil Party admissibility appeals had been determined only shortly before the initial hearing. The purpose of the second hearing, the Court explained, was to give the CPLCL "the opportunity to supplement, update and, where necessary, remedy the initial specifications given at the Initial Hearing."[35]

IV. Trial Management

DATE	START	BREAK	LUNCH	BREAK	RECESS	TOTAL HOURS IN SESSION
Monday 27/06/11	09.00	10.21-10.48	11.57-14.05	–	16.10	4 hours and 35 minutes
Tuesday 28/06/11	09.14	10.29-10.58	11.56- 13.37	14.29-14.52	16.27	3 hours 40 minutes
Wednesday 29/06/11	09.02	10.45-11.05	12.15- 13.37	14.37-14.52	15.45	5 hours and 46 minutes
Thursday 30/06/11	09.05	10.55-11.28	-	-	11.49*	2 hours and 11 minutes
Average number of hours in session: 4 hours and 3 minutes **Total number of hours this week:** 16 hours and 12 minutes **Total number of hours, days, and weeks at trial:** 16 hours and 12 minutes						

* The court adjourned into closed session and ended the public session at 11.49 h.

Unless specified otherwise,

- the documents cited in this report pertain to *The Case of Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan* (Case No. 002/19-09-2007-ECCC) before the Extraordinary Chambers in the Courts of Cambodia;
- the quotes are based on the personal notes of the trial monitors during the proceedings;
- **Case 001** refers to *Case of Kaing Guek Eav alias "Duch,"* Case No. 001/18-07-2007-ECCC; and
- photos are courtesy of the ECCC.

Glossary of Terms

CIA	Central Intelligence Agency
CPC	Code of Criminal Procedure of the Kingdom of Cambodia (2007)
CPK	Communist Party of Kampuchea
CPLCL	Civil Party Lead Co-Lawyer
DK	Democratic Kampuchea
ECCC	Extraordinary Chambers in the Courts of Cambodia (also referred to as the Khmer Rouge Tribunal or "KRT")
ECCC Law	Law on the Establishment of the ECCC, as amended (2004)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IR	Internal Rules of the ECCC Rev. 8 (2011)
KR	Khmer Rouge
OCP	Office of the Co-Prosecutors of the ECCC
RAK	Revolutionary Army of Kampuchea
VSS	Victims Support Section
WESU	Witnesses and Experts Support Unit

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* This report was authored by Mary Kristerie A. Baleva, Samuel Gilg, Princess Principe, Noyel Ry, Kimsan Soy, Penelope Van Tuyl and Flavia Widmer as part of AIJI's KRT Trial Monitoring and Community Outreach Program. AIJI is a collaborative project between the East-West Center, in Honolulu, and the University of California, Berkeley War Crimes Studies Center. Since 2003, the two Centers have been collaborating on projects relating to the establishment of justice initiatives and capacity-building programs in the human rights sector in South-East Asia.

1 ECCC IR (Rev. 7), 23 February 2011.

2 The four Accused are charged with genocide by killing members of the groups of Vietnamese and Cham, punishable under Article 4, 29 (new) and 39 (new) of the ECCC Law.

3 Trial Chamber. Transcript of Initial Hearing (27 June 2011). E1/4.1 [hereinafter, **INITIAL HEARING TRANSCRIPT 27 JUNE**]. Lines 15-16. 11.

4 *Ibid.*, at lines 4-7. 17.

5 See also, International Convention on Civil and Political Rights, Art. 14 (7), Cambodian Criminal Procedural Code, Arts. 7 and 12.

6 Pre-Trial Chamber. "Public Decision on Ieng Sary's Appeal Against the Closing Order" (11 April 2011). D427/1/30 [hereinafter, PTC DECISION].

7 See Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 10, Statute of the International Criminal Tribunal for Rwanda, Art. 9, Statute of the Special Court for Sierra Leone, Art. 9, Statute of the Special Tribunal for Lebanon, Art. 5, and Rome Statute of the International Criminal Court, Art. 20.

8 INITIAL HEARING TRANSCRIPT 27 JUNE. Lines 23-24. 96.

9 Cayley, referring to Document No. D288/6/9/9.3, INITIAL HEARING TRANSCRIPT. Lines 20-24. 102.

10 The Law on Outlawing the Group of "Democratic Kampuchea", 15 July 1994, is available at <http://www.unhcr.org/refworld/docid/3ae6b51f8.html>, retrieved on, 4 October 2011]. Article 1: "Place the group of 'Democratic Kampuchea' and its troops as outlaws."

11 See, Sihanouk, Norodom. "A Pardon is Granted to Mr Ieng Sary." (12 May 2011). E51/8.1. Accessible at <http://www.eccc.gov.kh/en>, retrieved on 7 October 2011. Please note that there are at least three different English translations of this text.

12 See Ahmed, Anees and Quayle, Merryn. "Can Genocide, Crimes against Humanity and War Crimes be Pardoned or Amnestied?" *Amicus Curiae.* Issue 79 (Autumn 2009). 15-20.

13 Trial Chamber. Transcript of Initial Hearing (28 June 2011). E1/5.1 [hereinafter, **INITIAL HEARING TRANSCRIPT 28 JUNE**]. p. 24 et seq.; Ieng Sary. "Supplement to rule 89 preliminary objection" (Royal pardon and amnesty) (27 May 2011). E51/10 [hereinafter, **IENG SARY SUPPLEMENT**]. para. 2.B.3, 16 et seq., especially footnote 29, which refers to a "forthcoming supplementary submissions the Defence intends to make on this issue in its supplementary submission on the applicability of international law". See: Ieng Sary. "Indication of the Pre-Trial Chamber's Decision on Ieng Sary's Appeal Against the Closing Order Which Require Supplementary Submissions Related to the Application of International Crimes and Forms of Liability at the ECCC" (3 May 2011). E83. par 2.

14 The Defense argued in IENG SARY SUPPLEMENT para. 2.B.3, 16 et seq. that "the validity of a domestic amnesty in the State where granted is purely a matter of that State's domestic law. The international obligations of Cambodia, a sovereign State, are extraneous when determining the validity of the RPA in a Cambodian court."

15 The principle of prosecute or extradite constitutes an obligation *erga omnes*, an obligation owed by states towards the community of states as a whole. See also Anees Ahmed and Merryn Quayle, "Can genocide, crimes against humanity and war crimes be pardoned or amnestied?", Amicus Curiae Issue 79 Autumn 2009: 15 – 20.

16 Provisions dated 10 September 1994 Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period, Art. 30.

17 Article 3 and 3(new) ECCC Law.

18 Trial Chamber. "Public Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes" (26 July 2010). E187.

19 Pre-Trial Chamber. "Public Decision on Ieng Sary's Appeal against the Closing Order" (11 April 2011). D427/1/30 [hereinafter, **DECISION ON IENG SARY'S APPEAL AGAINST CLOSING ORDER**].

20 Case 001. Defense. "Preliminary Objection Concerning Termination of Prosecution of Domestic Crimes" (28 January 2009). E9/1.

[21] Constitutional Council of Cambodia Decision (12 February 2001).
[22] Case 001. Trial Chamber. "Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes" (26 July 2010). E187.
[23] DECISION ON IENG SARY'S APPEAL AGAINST CLOSING ORDER.
[24] Trial Chamber. Transcript of Initial Hearing (29 June 2011). E1/6.1 [hereinafter, **INITIAL HEARING TRANSCRIPT 29 JUNE**]. Line 12. 56
[25] INITIAL HEARING TRANSCRIPT 28 JUNE. Lines 22–5. 84-85.
[26] ICRC Annual Report 2010. 275 et. seq.
[27] Available at <http://treaties.un.org>, accessed on 12 October 2011.
[28] INITIAL HEARING TRANSCRIPT 28 JUNE. Lines 13-15. 106.
[29] ECCC Internal Rules (Rev. 7), Rule 81(1).
[30] Adopted during the ECCC's 8th Plenary Session on 17 September 2010.
[31] INITIAL HEARING TRANSCRIPT 29 JUNE. Line 17. 110.
[32] *Ibid.*, at line 24. 110.
[33] Trial Chamber. "Public Memorandum on the Initial Specification of the Substance of Reparations Sought by the Civil Party Lead Co-Lawyers pursuant to Internal Rule 23quinquies(3)" (23 September 2011). E125.
[34] *Ibid*., at par. 3.
[35] *Ibid.*, at p. 3.