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BEFORE THE TRIAL CHAMBER

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GROUPS 1 AND 2—CIVIL PARTIES' CO-LAWYERS' JOINT REQUEST FOR A RULING ON THE STANDING OF CIVIL PARTY LAWYERS TO MAKE SUBMISSIONS ON SENTENCING

PUBLIC

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I. INTRODUCTION

1. The Defence has stated that Civil Parties have '*no role to play in the sentencing of the Accused*',[1] and has represented that it '*would strongly oppose allowing the civil parties to address the court regarding the issue of sentencing.*'[2] The Co-Lawyers for Civil Parties Group 1 (CPG-1) and Group 2 (CPG-2) have been consistent in their position that not only do Civil Parties have standing to make submissions on sentence, they will significantly assist the Chamber in doing so.[3] The Internal Rules allow for Civil Party submissions on sentence, and relevant international and domestic practice support the CPG-1&2 position.

2. CPG-1&2 hereby seek a ruling from the Trial Chamber that it intends to hear their submissions on the point, whether included in a final trial brief, closing statement, or at any oral hearing on sentencing. Underpinning these submissions is the established principle that the sole discretion to determine an appropriate sentence lies with the Trial Chamber.[4] CPG-1&2 have not sought, nor do they currently seek to suggest a particular sentence to be imposed. Hearing submissions from Civil Party lawyers will in no way restrict the broad discretion designated to the Chamber to determine the sentence of an Accused. Rather it will allow the Trial Chamber to render a sentence which can draw its legitimacy from a consideration of the views of those individuals who are uniquely placed to reliably inform the Chamber as to the actual impact of an accused's acts and conduct, expressions of remorse, and admissions.

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[1] T. 17 February 2009, page 50: M. ROUX: 'this gives me the opportunity to recall that the civil parties **do not have a role to play in the proceedings pertaining to the sentence**'; *See also* T. 18 February 2009, page 7: 'The Co-Prosecutors will speak on behalf of the public opinion, of society, in order to require a sentence to be applied. **This is never the role of the civil parties.**'

[2] *Case of Kaing Guek Eav,* 001/18-07-2007-ECCC/TC, Réponse de la Défense aux Listes des Témoins et des Documents Déposées par les Co-Avocats du Groupe 1 des Parties Civiles, 24 March 2009, para. 3 ('Defence Response').

[3] T. 18 February 2009, pages 11-13 (Ms. Studzinsky and Mr. HONG Kimsuon), pages 16-21 (Mr Khan). *See also Case of Kaing Guek Eav,* 001/18-07-2007-ECCC/TC, Civil Parties' Co-Lawyers' Reply to Defence Response on Witness and Document List, 10 April 2009.

[4] This principle spans both national and international jurisdictions. See *Roche* [1999] 2 Cr.App.R. (S.) 105, per Lord Bingham C.J. who set out the principles to be followed by courts when faced with victims' opinions on sentence: '[I]t is, of course, a cardinal principle of sentencing that it is for the court to pass what it judges to be the appropriate sentence, having regarding to all the circumstances relating to the offence and the offender.' As regards sentencing at the ICTY and ICTR, see Allison Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing', Vol. 87 (2001) *Virgina Law Review*, 415 at 435: '[t]he precedents of Nuremberg and Tokyo reinforce the conclusion, also evident in the Tribunals' Statute that, as a matter of international law, judges of the Tribunals enjoy great discretion in their determination of prison sentences.'

II. BACKGROUND

3. During the initial hearing, the Defence represented that it was opposed to the participation of Civil Parties on the question of sentence.[5] No jurisprudential or legislative support was provided for its position. Mr. Khan, on behalf of CPG-1 and with reference to the Internal Rules, opposed the Defence position and stated that '*given that Civil Parties are parties of equal standing to my learned friends for the defence, and my learned friends for the prosecution, the presumption must be that the extent of submissions must be identical and equal to the participation allowed to the prosecutor and the defence unless expressly circumscribed.*'[6] As Ms. Studzinsky stated, there is no mention in either the Internal Rules or the Cambodia *Code of Criminal Procedure* ('CCP') of '*any restrictions in this respect, [...] [the right to address sentencing therefore] is included and part of the rights of full participation.*'[7] The Defence also stated that to allow Civil Parties the right '*to claim a particular sentence, would amount to a regression in our jurisprudence, because it would bring us back to the days of direct revenge.*'[8] Mr. Khan was clear in responding, and CPG-1 has since repeated,[9] '*the civil parties we represent* [...] *do not want vengeance. They do not want blood. They want justice.*'[10]

4. No ruling was made by the Chamber on this point, either during the initial hearing or subsequently. On 16 February 2009, CPG-1 filed the *Redacted Witness and Document List.*[11] In its response to this filing, the Defence again made the general claim that '*civil parties are not permitted to address the court concerning sentencing*'.[12] In its reply of 10 April 2009, CPG-1 argued that in raising the issue of Civil Party standing to make submissions on sentence, the Defence was '*seeking to obtain a ruling on this issue when it goes beyond the*

[5] T. 17 February 2009, page 50; T. 18 February 2009, page 7.
[6] T. 18 February 2009, page 17.
[7] T. 19 February 2009, page 11.
[8] T. 18 February 2009, page 7.
[9] *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Civil Parties' Co-Lawyers' Request that the Trial Chamber Facilitate the Disclosure of an UN-OIOS Report to the Parties, 11 May 2009, para. 17.
[10] Mr. Khan, T. 18 February 2009, page 20. This proposition is supported by an empirical study, which found that only a small minority of Cambodians – a significantly smaller number of people than in the other examined conflict or post-conflict regions – see revenge as the purpose for taking action against the perpetrators of human rights violations. Moreover, most Cambodians believe that the primary beneficiary of the prosecution of war crimes committed in their country would be the community as a whole, not individual victims. *See* Ernesto Kiza, Corene Rathgeber, Holger-C Rohne, *Victims of War – An Empirical Study on War Victimization and Victims' Attitudes towards Addressing Atrocities*, Hamburg 2006, pages 122-124.
[11] *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Civil Parties' Co-Lawyers' Redacted Witness and Document List, 16 February 2009, Doc. No. E5/12.
[12] Defence Response, para. 10.

scope of the filing by CPG-1.'[13] CPG-1 accordingly requested that '*no decision [be] made without affording the parties an opportunity to address this discrete and important issue as provided for by the rules.*'[14]

5. Nearly two months have now passed without an opportunity having been given to the parties to make submissions on this critical issue. CPG-1&2 therefore make the following arguments in support of a request for a ruling from the Chamber, having been prompted by the necessity of a timely resolution to this important question.

III. ARGUMENT

A. The Scope of 'Submissions on Sentence'

6. CPG-1&2 seek confirmation from the Chamber that it will hear Civil Party lawyers' submissions on sentence. On this point, a distinction must be drawn between submissions pertaining to 'guilt' and those which pertain wholly to 'sentence'. Submissions pertaining to guilt would obviously address whether evidence exists which can be relied upon to establish that the Accused committed each of the crimes charged beyond a reasonable doubt. By contrast, submissions pertaining to sentence include issues such as the impact of the Accused's crimes on the Civil Parties and their families, the relevance of any expressions of remorse, and the effect of the Accused's admissions. These submissions would draw on the testimony of the individual Civil Parties. Submissions on sentence would also include submissions as to the gravity of the offences,[15] and a discussion of the impact (if any) of various aggravating or mitigating factors.

7. The form of responsibility will also have an impact on the sentence imposed. Therefore, submissions on sentence must also necessarily extend to a discussion of the impact of the form of responsibility through which the Accused is ultimately held criminally liable. It has been held by the International Tribunals, for example, that aiding and abetting is a form of responsibility which generally warrants a lower sentence than responsibility as a co-perpetrator.[16] As regards liability through participation in a joint criminal enterprise, it has been held that indirect forms of participation in a joint criminal enterprise may also warrant

[13] *Case of Kaing Guek Eav,* 001/18-07-2007-ECCC/TC, Civil Parties' Co-Lawyers' Reply to Defence Response on Witness and Document List, 10 April 2009, para. 9.
[14] *Ibid.*
[15] See, *Prosecutor v. Delalić,* IT-96-21-A, Judgement, 20 February 2001, para. 731; *Prosecutor v. Kupreškić et al,* IT-95-16-A, Judgement, 23 October 2001, para. 442, where it was held by the ICTY Appeals Chamber that the gravity of the offence is the primary consideration in imposing sentence.
[16] *Prosecutor.v. Vasiljević,* IT-98-32-A, Judgement, 25 February 2004, para. 182.

the imposition of a lower sentence.[17] And while it is clear an accused cannot rely on a defence of duress or superior orders, these are factors which can properly be taken into account during sentencing.[18] Any submissions as to sentence would therefore necessarily include a discussion of this relevant practice.

8. The impact of any finding that the Accused was acting pursuant to superior orders is particularly relevant in the current proceedings, given the Defence contention that the Accused was operating within a strict command structure. The effect of the Accused's involvement within this command structure may end up being of crucial importance to these proceedings, and is directly relevant to sentencing. To shut Civil Parties lawyers out of this discussion will have the effect of excluding Civil Parties from an issue at the heart of the trial, and will be a clear retreat from the principle enshrined in the Internal Rules that Civil Parties may participate in the proceedings. CPG-1&2 therefore seek confirmation that they will be heard on these matters, all of which properly fall within the scope of submissions on sentence.

B. The Internal Rules Permit Civil Party Submissions on Sentence

9. As was stated by the lawyers of CPG-1&2 during the initial hearing, there is nothing in the Internal Rules which precludes the hearing of Civil Parties on sentence.[19] Firstly, Internal Rule 23(6)(a) makes it clear that '*when joined as a Civil Party, the Victim* ***becomes a party to the criminal proceedings***.' Rule 23(1)(a) then sets out the broad participatory rights of Civil Parties in ECCC proceedings and provides that the purpose of Civil Party participation is to:

> a) **Participate in criminal proceedings** against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution...

10. This overarching rule governing Civil Party involvement in proceedings at the ECCC could certainly have been drafted in more restrictive terms. Civil Party involvement could have been couched in terms of having a right to 'contribute to' or 'assist in' the criminal proceedings. Instead, Civil Parties are explicitly authorized to '***participate***' in the criminal proceedings, indicating expansive rights and an inclusive approach on the part of the Court.

11. Rule 91(1) then sets out the general proposition that Civil Parties shall be heard. When Civil Parties' broad participatory rights are to be restricted, this is specified in the

[17] *Prosecutor v. Krstić* IT-98-33-A, Judgement, 19 April 2004, para. 268.
[18] *Prosecutor v. Bralo*, IT-95-17-S, Sentencing Judgement, December 2005, para. 53.
[19] T. 18 February 2009, pages 11 (Ms. Studzinsky), 12 (Mr. Hong Kimsuon), 17 (Mr. Khan).

Internal Rules. Rule 82(3), for example, which relates to provisional detention and bail, provides that the Chamber shall decide '*after hearing the Co-Prosecutors, the Accused, and his or her lawyers*.' No provision is made for Civil Party submissions. Rule 105 (1) (c) states, that '[a]n Appeal may be filed by the Civil Parties [...] only where the Co-Prosecutors have appealed.' Accordingly, the Rules specify when the Chamber will hear only from the Co-Prosecutors and the Accused or when the rights of the Civil Parties are restricted. If no such specification is made, no limitation exists.

12. It is not open to the Defence to argue that the absence of an explicit authorisation in the Rules prevents Civil Party lawyers from making submissions on sentence. This is best illustrated by way of an example. The Internal Rules entitle Civil Parties to seek '*collective and moral reparations*' pursuant to Rule 23(1)(b). Rule 94(1) allows Civil Parties to make closing statements. No limitations are imposed as to its scope. Civil Party lawyers must therefore be able to make submissions as to reparations during a closing statement. It would be illogical to grant a party a right, and then to prevent it from making submissions directly relevant to that right. Rule 94(1) does not explicitly provide for Civil Party submissions as to reparations in the closing statement, but there can be no doubt that this right exists. The same reasoning applies also to Civil Party submissions on sentencing.

13. The proceedings before the Chamber are not bifurcated, nor does it appear that they could be. Rules 98(5) and (6) provide that one judgment will be rendered, which addresses the guilt of the Accused and pronounces on sentence. There is no provision for a separate hearing and judgment on the question of sentence, nor has the Trial Chamber indicated that this will be the approach adopted. This provides further support for the position that all parties are able to plead on all aspects, including those aspects relevant to the sentencing of the Accused.

14. It is acknowledged that the Chamber has a wide discretion to control the proceedings and to '*conduct the hearing*.'[20] Pursuant to Rule 85, the President, in consultation with other judges, '*may exclude any proceedings that unnecessarily delay the trial, and are not conducive to ascertaining the truth*' and '*maintain good order during the trial*'. However, this discretion does not extend to limiting the rights of parties in a manner which finds no support in the Internal Rules. The Chamber cannot decide that it does not wish to hear a party on a particular issue if its ability to make submissions is not limited by the governing documents. A Chamber would be acting *ultra vires* if it decided it would not hear the accused on

[20] Internal Rule 90(1): The President of the Chamber shall inform the Accused of his or her rights under Rule 21(1)(d) and shall conduct the hearing.

provisional release, or that it would not allow the Co-Prosecutors to make an opening statement. It would be doing the same should it refuse to hear Civil Parties on sentence. It is respectfully submitted that the Chamber's wide discretion to conduct the proceedings does not extend to imposing restrictions which find no support in the governing documents. The Rules have been drafted, and then amended three times.[21] Had the drafters wished to restrict the rights of Civil Parties as regards sentencing submissions this would have been explicitly done. It was not.

15. Even if the Chamber reads the Internal Rules differently, and considers that the question of Civil Party standing is not definitively resolved therein, regard must then be had to Rule 2. Rule 2 provides that in the case of *lacunae* in the Internal Rules, the Chamber shall decide in accordance with '*Article 12(1) of the Agreement and Articles 20 new, 23 new, 33 new or 37 new of the ECCC Law as applicable, having particular attention to the fundamental principles set out in Rule 21 and the applicable criminal procedural laws…*'.

16. The ECCC Law provides that the Chamber may have regard to procedural rules established at the international level. As at the ECCC, the ICC procedure provides for a broad victims' participation scheme. While none of the cases before the ICC have reached the sentencing stage, some indication has been given as to the approach which will be taken as to victims' standing to make submissions on sentence. The reasoning of the Pre-Trial Chamber in *Katanga* sets out that victims' interests in the proceedings 'go beyond the determination of what happened and the identification of those responsible, and extend to securing a certain degree of punishment for those who are responsible for perpetrating the crimes for which they suffered harm.'[22] This statement is confirmed by extensive empirical study and jurisdiction of the Inter-American Court of Human Rights ('IACHR') and the European Court of Human Rights ('ECHR'). In addition, studies and legal commentary underscore the need for transitional justice measures to take victims' interests into account for the sake of facilitating reconciliation in post-conflict societies[23] and justifying the implementation of international criminal law[24] and related punishments.

[21] Internal Rules [Rev. 1], 1 February 2008; Internal Rules [Rev. 2], 5 September 2008; Internal Rules [Rev. 3], 6 March 2009.

[22] *See Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, Pre-Trial Chamber I, (Single Judge), 13 May 2008, para. 38 (internal footnotes omitted).

[23] *See* Mark A. Drumbl, *Atrocity and Punishment in International Law* (2007), pages 133-138.

[24] Kiza, Rathgeber, et al., *supra* 10, page 16; Afghanistan Independent Human Rights Commission, *A Call For Justice – A National Consultation on past Human Rights Violations in Afghanistan*, 2006, page 5.

17. Contrary to the argument of the Defence, who have sought to narrow the scope of "victims' interests",[25] the ICC stated in *Katanga* that '[t]hese interests - namely the identification, prosecution and punishment of those who have victimised them by preventing their impunity - are at the root of the well established right to justice for victims of serious violations of human rights';[26] a right also acknowledged by the ECHR,[27] the IACHR,[28] legal commentary[29], and by this court.[30] The ICC further observed, that 'when this right is to be satisfied through criminal proceedings, victims have a central interest in that the outcome of such proceedings lead to the identification, prosecution and punishment of those who have victimised them.'[31] For this right to be exercised in a setting where the victims are parties to the proceedings and where the support for victims' participation in the criminal proceedings is exceptionally high,[32] the Civil Parties cannot be excluded from making submissions on sentence.

18. Finally, even if the Chamber finds that the issue of Civil Party standing is not resolved by the Internal Rules or procedural rules established at the international level, regard must then be had to Article 12(1) of the Agreement, pursuant to which the Chamber is to consider Cambodian law. On this point, the Defence has argued that Cambodian law supports its position, apparently on the basis that the Cambodian *Code of Criminal Procedure* makes a distinction between civil and criminal proceedings.[33] The Defence argument is unclear, but may be that Civil Parties are only able to bring '*civil actions*'. Or the Defence may be arguing that Civil Parties only have a '*civil interest*' in criminal proceedings and as such are removed from aspects such as sentencing. Either way, such arguments are unpersuasive. Cambodian law does make a distinction between civil and criminal actions. However, as at the ECCC,[34] victims are able to bring an application to join criminal proceedings and become a Civil Party

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[25] M. Roux stated that the Civil Parties can only make observations when their interests are affected: "*[a]nd when I'm speaking about their interests I'd like to remind you that we are only speaking about the reparations that the Civil Parties might request.*" T. 1 April 2009, page 49.
[26] *See Prosecutor v. Katanga*, *supra* note 22, para. 39.
[27] *Aydin v. Turkey* (22492/93) Judgement, 28 March 2000, paras 89-93; *Kilic v. Turkey*, Judgement, 24 October 2006, (70845/01), paras 103 - 109.
[28] *See Velasquez Rodriguez,* Judgment, 19 July 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), paras 174-176;*Vargas-Areco v. Paraguay,* Judgment, 26 September 2006, *(Merits, Reparations and Costs)*, para. 153.
[29] Kai Ambos, *The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC*, Heidelberg 2009, page 36, at footnote 101.
[30] These rights are recognized as "key concerns that are relevant to the Chamber's exercise of its discretion" in the Pre-Trial Chamber's '*Directions On Unrepresented Civil Parties Rights To Address The Pre-Trial Chamber In Person*', 29 August 2008, C 22/I/69, para. 8.
[31] *See Prosecutor v. Katanga*, *supra* note 22, para. 41
[32] In Cambodia, 82% of the questioned population stated that victims should participate in the prosecution of the offender of human rights violations, this being the highest of the overall eleven analyzed conflict- and post conflict regions. Kiza, Rathgeber, et al., *supra* note 10, pages 102-104.
[33] Defence Response, para. 12.
[34] Internal Rules 23(6)(a) and 23(1)(a).

before the investigating judge,[35] or later as a Civil Party before the trial court.[36] The fact that they can also bring '*civil actions*'[37] is no bar to their involvement in criminal proceedings.

19. Article 22 sets out the relationship of jurisdiction between civil and criminal courts in Cambodia. It provides that '*[a] civil action can be brought in conjunction with a criminal action which is before a criminal court'*, and '*[a] civil action can also be brought before the civil court.*' It does not limit the rights of Civil Parties to join criminal proceedings, or limit their participatory rights when they do.

20. On the precise question of the standing of Civil Parties to make submissions on sentence, the Cambodian *Code of Criminal Procedure* is silent. However, Civil Parties have the same right to be heard as the other parties to the proceedings.[38] Significantly, Article 335 allows Civil Parties to make brief statements at the conclusion of the hearing, which are not limited in their content. Co-Prosecutor Ms. Chea Leang explained that during this closing statement, Civil Parties make submissions on sentence. She told the Chamber that '*at the end of the trial hearing, usually the Trial Chamber asks the civil party on whether they have any proposal for the Trial Chamber to consider. They are not limited in the expression of the opinions. We all know that first they would like to seek their reparation,* ***however, they might also seek for the sentences to be imposed on the accused.***'[39]

21. In sum, CPG-1&2 submit that the Chamber need look no further than the Internal Rules, which give Civil Parties the right to be heard on the question of sentencing. In the alternative, the emerging international jurisprudence supports this position, as does Cambodian law. Having established that Civil Party lawyers have a right to be heard, CPG1&2 will now set out further submissions as to why they should.

C. The Statements of Civil Parties are Directly Relevant to Sentencing

22. Rule 91(1) of the Internal Rules provides that the Chamber shall hear the Civil Parties. In accordance with this Rule, in its *Direction on the Scheduling of the Trial* of 20 March 2009,[40] the Chamber divided the evidence into topics, and indicated that it would

[35] CCP, Articles 137, 138.
[36] CCP, Article 311.
[37] CCP, Article 13.
[38] CCP, Article 326.
[39] Initial Hearing, T. 18 February 2009, page 14.
[40] Document E26.

question '*relevant Civil Parties*' on these different topics.[41] Counsel for CPG-1 sought clarification of this Direction during the proceedings, stating as follows:

> '[...] on the 20th of March, 2009, you issued a direction on the scheduling of the trial and on Point 9 of the Direction it was explained or clarified that the evidence will be divided into topics and you did indicate seven topics. And then it was further clarified that on each topic, first the accused will be questioned, and then relevant civil parties, and then witnesses, and then experts for each topic. **Now, Your Honours, most of the civil parties that -- for our group will come before this Court to talk, do not have anything to say on any of those topics, and the reason is that most of them are relatives of people who were detained at S-21**. So they have nothing to say on M-13, S-21, Choeng Ek, or the character of the accused. So we would be grateful if, Mr. President, you could clarify the matter for us and tell us when do you intend to call the civil parties, [...].'

23. The Chamber responded to this request for clarification, and held that '*with regards to the hearing of civil parties at trial, the Trial Chamber will hear those civil parties who have knowledge of specific facts at the time when the Chamber deals with these facts. All other civil parties will be heard towards the end of the trial proceedings*.'[42] This response confirms that these Civil Parties who come at the end will not be testifying as regards the evidentiary 'topics' set down by the Trial Chamber, or the specific acts and conduct of the Accused, or his guilt as regards the crimes in the indictment. Rather, these Civil Parties will be informing the Chamber of the suffering of themselves and their family members as a result of the Accused's actions, and the effect the relevant events have had on their lives.

24. Take, for example, D25/4 who is a CPG-1 Civil Party. She is coming to tell the Trial Chamber about her father, who was taken away a few months before her birth. He was taken to Tuol Sleng, where he died. Since that time, her mother has been extremely traumatised to the point where she herself felt unable to participate in the proceedings as a Civil Party. D25/4 will testify on the extent to which her life and her mother's life have been affected by her father's death at Tuol Sleng. This testimony is not related to the guilt of the accused. It will not be used as evidence to support counts in the Indictment, nor will it be considered during the Chamber's deliberations on whether the elements of crimes have been established. This testimony is directly relevant to the sentence, as opposed to the guilt, of the accused.

25. To invite individual Civil Parties to tell such stories which are directly relevant to the sentencing of the Accused, while preventing their lawyers from making submissions on the

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[41] *Direction on the Scheduling of the Trial,* 20 March 2009, para. 9(1).
[42] T. 6 April 2009, page 4.

basis of this testimony would be, with respect, nonsensical. It would mean that Civil Party lawyers are operating in a system where they are allowed to call clients to give testimony before the Court, but are unable to make any submissions as to the testimony of these clients. This absurd result cannot be the outcome desired by the Chamber, and undermines the Defence position on this issue.

D. The Flaws in the Defence Position

26. An examination of the Defence arguments as to why the Civil Parties have '*no role to play*' in the sentencing of the Accused reveals that they do not hold up under scrutiny. The Defence contends that its position that Civil Parties are not able to make submissions on sentencing '*emerges from an analysis of the relevant provisions of the ECCC Internal Rules*'.[43] This is not the case.

27. Firstly, the Defence relies on Rule 23 to argue that '*Civil Parties can only bring a civil action.*'[44] This argument must be disregarded. It is clear that Civil Parties in these proceedings are not restricted to bringing a civil action. Rule 23(1)(a) clearly states that Civil Parties may '*participate in criminal proceedings*'. Rule 23(6)(a) states that '*when joined as a Civil Party, the Victim* ***becomes a party*** *to the criminal proceedings.*'[45] The Defence then relies on Rule 49 to argue that the '*[p]rosecution of crimes may be initiated only by the Co-Prosecutors*'. Clearly the fact that the Prosecution is responsible for initiating prosecutions in no way limits the ability of those granted Civil Party status to participate in the proceedings. The argument being made as regards Rule 49 is accordingly misconceived.

28. Secondly, the Defence relies on Rule 87(1) and states that '*[t]he onus is on the Co-Prosecutors to prove the guilt of the accused.*'[46] This is not disputed. How this relates to Civil Party standing to make submissions on sentence, being a separate question from that of guilt, is unclear.

29. Next, the Defence relies on Rule 94(1) of the Rules and argues that '*only the Co-Prosecutors may make closing arguments*' and that '*this includes the right to request a specific sentence and specify its length.*'[47] It is difficult to see how the Defence can make this argument. Rule 94(1) provides as follows:

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[43] Defence Response, para. 11.
[44] Defence Response, para. 11(i).
[45] Emphasis added.
[46] Defence Response, para. 11(ii).
[47] Defence Response, para. 11(iii).

Rule 94. Closing Statements

> 1. After examining all the evidence, the President of the Chamber shall call successively upon the following persons to make their closing statements:
> a) The Civil Parties;
> b) the Co-Prosecutors, for such oral submissions as they consider necessary for justice to be done;
> c) the lawyers for the Accused; and
> d) the Accused.

30. The Civil Parties are thus entitled to make closing statements. The Defence may be arguing that only the Co-Prosecutors can submit on sentence because of the qualifying statement in Rule 94(1)(b), namely '*for such oral submissions as they consider necessary for justice to be done.*' If this is the basis of the Defence argument, it should be noted that it would also prevent the Accused from making arguments on sentence. This cannot be what the Defence intends to submit. In any event, its argument is without merit as there is nothing in Rule 94(1) which limits the content of the Civil Party closing statements.

31. The Defence then relies on Rule 105(1) to argue that '*Civil parties may appeal the judgement only in respect of their civil interests, and only where the Co-Prosecutors have appealed.*'[48] Rule 105(1) does not assist the Defence. It pertains to the admissibility of appeals, and certainly does not restrict Civil Parties from making submissions as to sentence at first instance.

32. The Defence then attempts to rely on French practice to support its position, but cites only to Defence counsel's own submissions during pleadings.[49] On this point, CPG-1&2 note the tendency in these proceedings to rely on domestic practice without giving any legislative or jurisprudential support. A proper review is warranted. In Civil Law jurisdictions, victims enjoy broad participatory rights at all stages of the proceedings including the sentencing stage.[50] Since closing statements are not limited in their scope or their content, submissions on sentencing are permitted. In France, for example, there is nothing in the *Code de Procédure Pénale* which prohibits civil parties from making submissions on sentence.[51] In Switzerland,

[48] Defence Response, para. 11(iv).
[49] Defence Response, para. 13.
[50] *See for example*, Criminal Procedural Code of Germany, § 397 para. 1.
[51] Code de Procédure Pénale, Article 346: 'Une fois l'instruction à l'audience terminée la partie civile ou son avocat est entendu. Le ministère public prend ses réquisitions. L'accusé et son avocat présentent leur défense. **La réplique est permise à la partie civile** et au ministère public, mais l'accusé ou son avocat auront toujours la parole les derniers.' (Emphasis added).

Spain, Croatia, Sweden, Poland, Turkey, and Hungary, victims are even entitled to file an appeal against the sentence imposed.[52]

33. Significantly, even in common law criminal proceedings which make no such provision for Civil Party participation, a large number of jurisdictions have legislated for victim involvement in the sentencing stage. In the United Kingdom,[53] Australia,[54] Canada,[55] New Zealand,[56] and the United States,[57] victims are able to participate in the sentencing phase through either oral testimony or the provision of written impact statements. This is an unmistakable recognition of the fact that victims are uniquely placed to provide assistance to the Court on the question of sentence, even in jurisdictions which do not otherwise provide for Civil Party participation in criminal proceedings.

34. Returning then to the remainder of the Defence arguments; the Defence submission that hearing Civil Parties on the question of sentence would prolong the trial and infringe on his right to be tried within a reasonable time[58] is also without merit. Civil Parties have waited over 30 years to explain to a court how the Accused's actions have shattered lives. Hearing the scheduled testimony of the Civil Parties, and permitting their lawyers to make submissions on its significance will not infringe upon the right to an expeditious trial.

35. The Defence also attempts to argue that to hear Civil Parties on sentence will '*be a violation of the equality of arms between the parties, since the Defence would have to respond*

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[52] In Spain, Croatia, and Sweden *per se*, in their role as additional prosecutors in Switzerland, Poland, Sweden and Turkey, and as a private prosecutor in Switzerland, Spain, Hungary, Croatia, Poland, and Sweden; Marianne Wade, Christopher Lewis, Bruno Aubusson de Cavarlay, *Well-informed? Well Represented? Well Nigh Powerless? Victims and Prosecutorial Decision-making*, European Journal on Criminal Policy and Research 2008, pages 250-257.

[53] The Home Office introduced the Victim Personal Statement Scheme ('VPS Scheme') in October 2001, under the auspices of the *Victim's Charter (1996)*. Under this scheme, VPS are required to be taken into account at each stage of the criminal process, including sentencing (Home Office Communications Directorate, '*Making a Victim Personal Statement*', August 2001.

[54] All states and territories in Australia have passed legislation which requires the court to consider the victim at the sentencing stage, generally through the provision of a victim impact statement (See *Crimes (Sentencing Procedure) Act 1999 (NSW)* ss 26 – 30A; *Sentencing Act (NT)* ss 106A, 106B; *Criminal Offence Victims Act 1999 (Qld)* s 14; *Criminal Law (Sentencing) Act 1988 (SA)* s7A; *Victims of Crime Act (SA)* s10; *Sentencing Act 1997 (Tas)* s 81A; *Sentencing Act (Vic)* ss 95A – 95F; *Sentencing Act (1995) (WA)* ss24 – 26; *Crimes (Sentencing) Act 2005 (ACT)* ss 47 – 53).

[55] Important reforms have occurred in Canadian law to enable victims to orally present Victim Impact Statements under the 1999 Criminal Code as amended, and victims have been granted a formal role at sentencing and parole hearings (Verdun-Jones, Simon N.; Tijerino, Adamira, 'Victim Participation in the Plea Negotiation Process: An Idea Whose Time Has Come', (2005) 50 *Criminal Law Quarterly,* page 192).

[56] *Victims' Rights Act 2002 No. 39* (as at 1 October 2008), s 17(1).

[57] The *Attorney General Guidelines for Victim and Witness Assistance (2005)* provides that a crime victim has the right under 18 U.S.C. § 3771(a) 'to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding'.

[58] Defence Response, para. 17.

to the submissions on sentencing as made by both the Office of the Co-Prosecutors and the teams of Civil Parties Lawyers acting as Co-Prosecutors.'[59] This argument must also be disregarded by the Chamber. The number of parties to whom another party chooses to respond is unrelated to the issue of equality of arms. In Case 002, the '*equality of arms*' will not be violated because the Co-Prosecutors are required to respond to the arguments of four accused, as opposed to the one Accused in the current trial. This Defence argument, like all of those examined above, is unfounded. The Defence has found no support in either the Internal Rules, domestic practice or through reliance on fair trial rights for its position that Civil Parties should be prevented from being heard on the question of sentence.

E. The Unique Contribution of Civil Parties

36. The sentencing of an accused is a complex process. Many different aspects require consideration before a sentence can be rendered which adequately and accurately reflects the criminal conduct of an accused. A Chamber must determine the weight to be accorded, (if any) to numerous mitigating and aggravating circumstances, and must consider the gravity of the crimes. The impact of any admissions must be considered. The value of expressions of remorse or an apology must be determined. A Chamber must consider whether cumulative convictions are permissible. Thought must be given as to whether a single sentence is to be rendered or whether each of the convictions requires a separate penalty, and whether sentences for separate crimes are to be served concurrently. A determination must also be made as to the extent to which the sentencing procedures in the national jurisdiction should be considered.

37. Civil Parties are uniquely positioned so as to assist the Chamber in its deliberations on many of these matters. Civil Parties are able to appraise the Chamber of the actual impact of an accused's crimes on them, their families and other victims known. Civil Parties are able to make submissions on the effect of any expressions of remorse or apology actually made by the accused. Civil Parties are also well positioned to highlight what may be spurious or exaggerated claims made by an accused in mitigation. Accordingly, it is the position of CPG-1&2 that a sentence rendered with proper regard to these factors will be significantly more accurate and meaningful than one made without the benefit of such submissions. It is submitted that there would be no prejudice to the Defence by granting the present Motion. That the voice of Civil Parties be heard is not to drown out the voice of the Accused. No discernible prejudice is likely to be caused to the Defence or any other party if this motion is granted. In addition, CPG-1&2 are confident that, as professional judges, the Trial Chamber is

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[59] Defence Response, para. 16.

fully able to give such weight as is appropriate to any submissions made by any party on this issue. In short, it is respectfully submitted that the quality of the Trial Chamber's determination on this issue would be enriched by granting the present motion.

38. A review of the sentencing practice at the ICTR and ICTY provides support for the CPG-1&2 position. Take, for example, the question of the impact of a guilty plea on an accused's sentence – a question of relevance to the current proceedings. In *Plavšić,* the Trial Chamber accepted that the accused's guilty plea would have a '*positive impact on the reconciliatory process*', and as such accorded the plea '*significant weight*' in its determination of the appropriate sentence.[60] However, the ICTY Trial Chamber was required to make this determination in the abstract, without the benefit of having heard the submissions of the victims themselves on whether the guilty plea actually had a positive effect on the region. The opposite view espoused at the ICTY is that guilty pleas actually have a detrimental effect on the victims, as a plea effectively denies the court the opportunity to give full expression to the totality of an accused's conduct through the imposition of a sentence which adequately reflects the seriousness of the crimes and the culpability of the accused.[61]

39. The existence of two diametrically opposed views on this important aspect of sentencing is undoubtedly a consequence of the lack of involvement of victims in the sentencing process. Absent victims' submissions, the Chambers of the ICTY and ICTR are precluded from making informed decisions on crucial aspects of sentencing, such as whether a guilty plea has actually had a positive impact on the victims themselves, or on the region more generally. The ECCC should take full advantage of its access to the views of Civil Parties. Their involvement will facilitate the rendering of a sentence with greater perceived and actual legitimacy, and with a realistic chance of having a positive impact on the lives of the people for whom the Court was created.

IV. CONCLUSION

40. A view exists that '*it is an infliction of secondary harm upon the victim to deny the victim the right to articulate at sentencing the extent and the consequence of the primary harm.*'[62] Similarly, to invite the Civil Parties to explain to the Chamber the way in which the Accused's conduct has destroyed lives and families, only to prohibit their lawyers from

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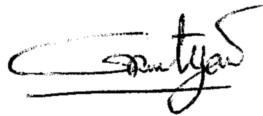
[60] *Prosecutor v. Plavšić*, IT-00-39&40/1-S, Judgement on Sentence, 27 February 2003, paras 80, 81.
[61] *See, Prosecutor v Deronjić*, IT-02-61-S, Sentencing Judgement, 30 March 2004, Dissenting Opinion of Judge Schomburg.
[62] Douglas Evan Beloof, 'The Third Model of Criminal Process: The Victim Participation Model, (1999) *Utah Law Review*, page 322.

making submissions on the basis of testimony would be an illogical and unwarranted approach. Sentencing is precisely an aspect of the proceedings in which Civil Parties can, and should be involved. Civil Party lawyers have standing under the Internal Rules to make such submissions, and they are able to greatly assist the Chamber in doing so. The Trial Chamber is invited to take full advantage of its access to those individuals who are uniquely placed to give the Chamber a real insight into matters crucial to the sentencing process. It is respectfully submitted that the Chamber grant the Civil Party request, and provide clarity on this important question.

V. REQUEST

41. For all the above reasons, CPG-1&2 respectfully requests that the Trial Chamber **DECIDE** that Civil Party lawyers will be heard on the sentencing of the accused.

The whole respectfully submitted by Co-Lawyers for Civil Parties (Group 1 and Group 2)
Signed in Phnom Penh on 9 June 2009



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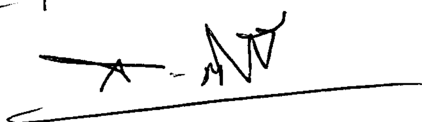

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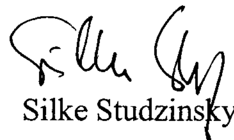

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