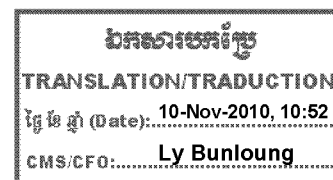


BEFORE THE PRE-TRIAL CHAMBER
OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Case File No. : 001/18-07-2007-ECCC/OCIJ
Date of Document : 5 October 2010
Party Filing : Civil Party Co-Lawyers – Group 3
Filed Before : THE SUPREME COURT CHAMBER
Original : French / Khmer translation

Classification

Classification Suggested by the Filing Party: PUBLIC
Classification by the Co-Investigating Judges or the Chamber:
Review of Interim Classification
Records Officer's Name:
Signature:



**Appeal of the Co-Lawyers for the Group 3 Civil Parties against
the Judgement of 26 July 2010**

Filed by:

Civil Party Co-Lawyers:
KIM Mengkhy
MOCH Sovannary
Martine JACQUIN
Annie DELAHAIE
Philippe CANNONE
Elisabeth RABESANDRATANA
Fabienne TRUSSES NAPROUS
Christine MARTINEAU

Before:

The Supreme Court Chamber
Judge KONG Srim, President
Judge Motoo NOGUCHI
Judge Agnieszka KLONOWIECKA-MILART
Judge SIN Rith
Judge Chandra Nihal JAYASINGHE
Judge YA Narin

Distribution to:

The Accused:

KAING Guek Eav alias Duch

Lawyers for the Accused:

KAR Savuth

The Office of the Co-Prosecutors:

CHEA Leang
Andrew CAYLEY

YET Chakriya
William SMITH

The Civil Party Lawyers:

Karim KHAN
TY Srinna
Alain WERNER
YUNG Panith
NY Chandy
LOR Chunthy
KONG Pisey
HONG Kim Suon
Silke STUDZINSKY
Pierre-Olivier SUR

I- INTRODUCTION

1. On 26 July 2020, the ECCC Trial Chamber found Kaing Guek Eav guilty of the crimes of Grave Breaches of the Geneva Conventions and Crime against humanity, and sentenced him to 35 years imprisonment with a reduction of five years for unlawful detention.
2. Pursuant to the provisions of the Internal Rules, the Group 3 Civil Party Co-Lawyers appealed the dispositions of the Judgement, which state: *“The Chamber declares all Civil Parties listed in paragraphs 645 and 650 to have suffered harm as a direct consequence of the crimes for which KAING Guek Eav has been convicted. (...) It rejects all other Civil Party claims”*.
3. The appeal deals exclusively with dispositions relating to the Civil Parties.
4. The appeal is admissible and is in compliance with the provisions of Rule 104(4) (Rev. 3). The Notice of Appeal to which were joined the powers-of-attorney of Civil Parties E2/34 SO Saung; D25/11 KHUON Sarin; E2/82 MORN Sothea; E2/70 CHAN Yoeung; E2/71 SOME Pov; E2/63 PANN Pech; E2/33 PHAOK Khan; E2/23 LAY Chan; E2/84 UK Va Sothin; E2/80 CHIN Meth; E2/78 MEAS Saroeun; E2/79 SIEK Sek; E2/72 KAN San; E2/76 HUL Voeun; E2/30 NHOEM Kim Hoeun, was filed on time and in accordance with the formal requirements.
5. This appeal addresses each of the points raised in the Civil Parties’ claims, pursuant to the provisions of Rule 104 of the Rules (Rev. 3) concerning Jurisdiction of the Supreme Court Chamber.

II- SUBMISSIONS OF THE GROUP 3 CIVIL PARTIES

Pursuant to the provisions of Rule 104 of the Rules (Rev. 3):

6. *“The Supreme Court Chamber shall decide an appeal against a judgement or a decision of the Trial Chamber on the following grounds:*
7. *An error on a point a question of law invalidating the judgement or decision; or*
8. *An error of fact which has occasioned a miscarriage of justice.”*
9. This appeal brief contains two sets of grounds, namely grounds in respect of the rejection of the Civil Party claims in the Judgement under appeal in regard to questions of fact law and of fact, and grounds in respect of reparations for all Group 3 Civil Parties.

A/ GROUNDS I, II, III, IV CONCERNING THE FOLLOWING CIVIL PARTIES:

10. E2/34 SO Saung
11. D25/11 KHUON Sarin
12. E2/82 MORN Sothea
13. E2/70 CHAN Yoeung
14. E2/71 SOEM Pov
15. E2/63 PANN Pech
16. E2/33 PHAOK Khan
17. E2/23 LAY Chan.

18. These Civil Parties are declared inadmissible in the impugned decision, on the grounds set out below:

19. **SO Saung (E2/34):** her claim is based on the arrest and detention at S-21 of her brother-in-law, MEAS Sun alias Teng Sun.

20. According to the Judgement under appeal, SO Saung did not provide proof of bonds of dependency or affection with her brother-in-law:

21. *“Although kinship by marriage was established by attestation (“Lettre de confirmation”, E2/34/5.2), such kinship alone is insufficient (Section 4.2.2)”.*

22. **KHUON Sarin (D25/11)** was also found inadmissible due to lack of kinship or bonds of affection; her claim is based on the arrest and execution of KHIEV Sakhor, a staff member of the Cambodian embassy in Japan.

23. *“While KHIEV Sakour’s detention at S-21 has been proven; (...) for example KHIEV Sakhor’s statements at S-21, Doc. No. E2/12.1, there is no document showing the exact nature of his alleged kinship to the Civil Party or proof of any special bonds of affection. Although KAING Guek Eav did not dispute this Civil Party application, the Chamber nevertheless cannot uphold it”.*

24. **MORN Sothea (E2/82):** according to Trial Chamber, MORN Sothea had no demonstrable link with S-21.

25. His mother, a former diplomat, and several members of his family disappeared during the evacuation of Phnom Penh in April 1975.¹

26. *“Although his statement appears credible, it is unsupported by proof of any demonstrable link to the crimes for which KAING Guek Eav has been convicted.”*

27. **CHAN Yoeurng (E2/70):** his uncle was detained and executed at S-21.

28. *“While an attestation of this kinship was provided, (...) letter of certification established by the commune chief,² the applicant admits that no substantiation of her uncle’s alleged detention at S-21 was provided”.*

¹ Victim Information Sheet – MORN Sothea, E2/82; T. 26 August 2009.

29. **SOEM Pov (E271)**: his brother-in-law, NGUY Sreng, was detained and executed at S-21.
30. *“Although the detention of NGUY Sreng at S-21 is thus established, kinship by marriage alone is an insufficient foundation absent proof of any special bonds of affection or dependency.”*
31. **PANN Pech (E2/63)**: his brother-in-law, PLAING Haury, was allegedly detained and executed at S-21.
32. *“(…) provides no evidence in support of this claim.”*
33. *“Further, alleged kinship by marriage alone is an insufficient basis for a Civil Party application.”*
34. **PHAOK Khan (E2/33)** was tortured and interrogated in a prison in the vicinity of Phnom Penh during the period of Democratic Kampuchea.
35. *“While it is plausible that the Civil Party may have been detained and tortured by Khmer Rouge soldiers, there is no objective evidence that this occurred at the S-21 complex.”*
36. **LAY Chan (E2/23)**:
37. *“Although the Chamber does not doubt that LAY Chan (E2/23) suffered severe harm as a result of detention, interrogation and torture during the DK period, no evidence was provided to show that this occurred at S-21.”*

I. GROUND 1: ERROR ON A QUESTION OF LAW RELATING TO ADMISSIBILITY OF CIVIL PARTY APPLICANTS E2/23, E2/33, E2/34, E2/63, E2/70, E2/71, E2/82 and D25/11

38. The Trial Chamber issued two rulings on the admissibility of the Civil Party applications, in violation of Rules 21(1), 21(1)(a), 21(1)(c), 23(4), 83(1) and 100 of the Internal Rules (Rev. 3), and of current practice before the other international tribunals.
39. The Chamber violated international norms on victims’ rights, as the victims were already recognised as civil parties in the context of UN resolution 60/147, adopted on 16 December 2005.
40. The Chamber cannot act counter to the rules of evidence already accepted during the judicial investigation.

² E161.5.

II. GROUND 2: ERROR ON A QUESTION OF LAW RELATING TO RULES OF EVIDENCE

41. Concerning Civil Parties E2/23, E2/33, E2/34, E2/63, E2/70, E2/71, E2/82,³ the Trial Chamber erroneously applied Rule 23(5) (Rev. 3) evidence and criteria recognized in the jurisprudence of the International Criminal Court in regard to these Civil Parties' statements and the identity of their family members found at Tuol Sleng Museum.
42. According to the impugned decision, these Civil Parties did not provide proof of a causal link between the harm suffered by the victim and KAING Guek Eav's criminal acts.
43. To the extent that KAING Guek Eav was found to be fully responsible for the crimes against humanity and other crimes specified in the disposition of the Judgement, which crimes were committed at the S-21 and S-24 detention centres, the causal link with these detention centres is sufficiently established, in view of the particular context of the case.
44. Pursuant to the provisions of Rule 23(5) of the Internal Rules, "*All Civil Party applications must contain sufficient information to allow verification of their compliance with these IRs. In particular, the application must provide details of the status as a Victim, specify the alleged crime and attach any evidence of the injury suffered, or tending to show the guilt of the alleged perpetrator. (...)*"
45. This confirms that there is freedom of proof on this issue.
46. Thirty years on, for some of the survivors of the inhuman conditions, this freedom must be interpreted in light of the historical context and the particular context of detention at S-21 and S-24, the fact that the S-21 records are either incomplete or have been lost and the fact that many documentary records were either not found or were destroyed, damaged or kept in poor conditions.
47. Yet, these are the documents which helped the Office of the Co-Prosecutors draw up a consolidated list of S-21 prisoners based on biographies, prisoner rosters, persons killed and photos recovered.
48. As expected, the list is incomplete, and the Accused recognized this several times, notably before the Co-Investigating Judges. The estimated 12,800 names on the list do not reflect the actual number of people who perished at S-21; this is well below the actual figure.
49. Contrary to the Trial Chamber decision, the elements of proof provided by each of the rejected Civil Parties contain proof of the corroborative and consistent nature of the accounts relating to them.

³ Judgement, paras. 747, 648 and 649.

50. In order to determine the required level of specificity, it is necessary to adopt a clear definition of the material facts for which the Accused was found guilty.
51. *“The materiality of such things as the identity of the victim, the place and date of the events for which the accused is alleged to be responsible, and the description of the events themselves, necessarily depends upon the alleged proximity of the accused to those events.”*⁴
52. In the instant case, *Duch* was found guilty by virtue of his functions as a command superior, hence for acts committed by other persons.
53. *“However, so far as those acts of the other persons are concerned, although the prosecution remains under an obligation to give all the particulars which it is able to give, the relevant facts will usually be stated with less precision, and that is because the detail of those acts (by whom and against whom they are done) are often unknown – and because the acts themselves often cannot be greatly in issue”*.⁵
54. It is also worth noting that in relation to crimes against humanity and crimes of war and genocide, the general legal principles on rules of evidence must be assessed in light of the effect that these crimes had on the victims.
55. In this regard, it is worth noting the jurisprudence of the International Criminal Court in respect of the crimes committed in Uganda, where the judges admitted that evidence could adduced simply through description of the facts or through the harm caused.
56. The International Criminal Court also has recognized indirect evidence (which relates more to facts or circumstances – in the case where the burden of proof is rendered impossible by objective obstacles).
57. Indirect evidence is based on a series of correlated facts, which logically lead to the same conclusion. The Judge must choose criteria based on the evidence on the case file.⁶

Link with S-21 and/or S-24

Civil Party E2/82 – MORN Sothea

⁴ ICTY, *Prosecutor v. Milroad Krnojelac*, Case No. IT-95-25-PT, “Decision on Preliminary Motion on Form of Indictment”, 11 February 2000.

⁵ Case-law cited *supra*.

⁶ International Criminal Court, ICC-02/04-101 13-08 2007 – ICC-02/04-101 13-08-2007 111/62 IT PT.

58. MORN Sothea's claim is based on the disappearance of his mother, SEM Sok Lim, who was a former secretary at the Cambodian embassy in the Philippines during the Lon Nol regime. She was among the intellectuals evacuated from Phnom Penh in April 1975
59. MORN Sothea's Victim Information Sheet reveals that he declared publicly during his evacuation that the Democratic Kampuchea was a cruel regime.
60. At trial, Duch confirmed that intellectuals and former civil servants were the prime targets of the Khmer Rouge, that they were arrested, detained and tortured in order to obtain confessions.
61. The many survivor accounts in the form of books, such as PIN Yathy's "*Tu Vivras Mon Fils*", bear testimony to the executions and their ideological impact.
62. Diplomatic staff returning from Cambodia's embassies were sent to S-21 upon their return home.
63. It was not permissible for the Trial Chamber to deny MORN Sothea's Civil Party application on the basis of the criteria set out above, considering that it recognized that her mother was one of the intellectuals and did not question the credibility of her account.
64. Especially considering that the Co-Investigating Judges declared her Civil Party application admissible in their "Order on the Admissibility of Civil Party Applicants from Current Residents of Kampong Thom Province",⁷ D418, dated 15 September 2010, on the grounds that the injury she suffered is directly related to the crimes committed at S-21.⁸
65. Wherefore, the Supreme Court Chamber ought to amend the Order by recognising the merits of MORN Sothea's Civil Party application.

Civil Party E2/70 – CHAN Yoeurng:

66. As for the preceding Civil Party, direct evidence of detention at S-21 was provided:
67. SOK Bun, his uncle, was indeed the mayor of Romeas Hek, Rovieng district, Preah Vihear province; this proves that some village chiefs and mayors were arrested in this commune and district in early 1978 and taken to Ro Vieng school before being transferred to S-21 in Phnom Penh.

⁷ Order on the Admissibility of Civil Party Applicants from Current Residents of Kampong Thom Province, D418, 15 September 2010.

⁸ D418, Annex 2: Admissibility Findings, 09-VU-00095.

68. At trial, Duch recognized that such internal purges did occur.
69. Consequentially, the Victim provided sufficient evidence as to the credibility of the transfer, detention and execution of SOK Bun at S-21.

Civil Party E2/63 – PANN Pech:

70. According to the Judgement, this Victim claimed that his brother, PLAING Hauy, was detained and executed at S-21, but provided no substantiation of his claim, and moreover, that the alleged kinship alone is not sufficient basis for a Civil Party application.
71. In view of the consistent nature of the victim's statements, the facts reported him are clearly truthful.
72. The Court ought to take into consideration the difficulties encountered by the victim in producing proof of his brother's detention at S-21, and of the fact that a large number of the records relating to S-21 have either disappeared or were destroyed. refuse

Civil Party E2/33 – PHAOK Khan:

73. The evidence provided by PHAOK Khan was credible enough not to be contested by Duch.
74. In view of the context of the case and the difficulties encountered by some Civil Parties to produce direct evidence of a causal link, the Accused's recognition ought to weigh in favour of PHAOK Khan, and the impugned Judgement ought to be set aside.
75. This recognition is to the same effect as the Co-Investigating Judges' "Order on the Admissibility of Civil Party Applicants from Current Residents of Seam Reap Province",⁹ D424, dated 15 September 2010, which recognises that PHAOK Khan sustained psychological injury that is directly linked to the crimes committed at S-21.¹⁰
76. The Supreme Court Chamber is requested to take into consideration this new proof of the merits of PHAOK Khan's Civil Party application.

Civil Party E2/38 – HIET Tey Choy:

⁹ Order on the Admissibility of Civil Party Applicants from Current Residents of Seam Reap Province", D424, 15 September 2010.

¹⁰ D418.1, Annex 2: Admissibility Findings: 09-VU-00095.

77. HIET Tey Choy is an indirect victim, who filed her claim based on the detention of her uncle SOSS El at S-21.¹¹
78. In light of the consistency of her statements, the facts she reported are clearly established.
79. In this instance, the Court ought to take into consideration the difficulties encountered by the victim to produce proof of her uncle's detention at S-21, and of the fact that a large number of records have either disappeared or have been destroyed.
80. The difficulty of providing proof kinship with her uncle must also be taken into account, having regard to the pos-conflict situation in Cambodia over the last decades and the lack of a reliable civil status register.

Civil Party E2/23 – LAY Chan:

81. While Chamber does not doubt that LAY Chan suffered severe harm as a result of detention, interrogation and torture during the DK period, it indicates that the evidence provided in its entirety does not concern the practices at S-21.
82. Notably, the description of his cell does not correspond to others provided of the cells at S-21.
83. Yet, the photographs taken at S-21 show that, as reported by LAY Chan, there were cells under a staircase as described by him and as he asserted several times.¹²
84. The erroneous application of the rules of evidence amounts to an error on a question of law invalidating the Judgement in respect of the dismissal of the Civil Party applications.

III. GROUND 3: ERROR OF LAW CONCERNING KINSHIP AND BONDS OF AFFECTION

85. According to Directive 2007/2/F1
86. A loved one may be a relative, but it can also be a third party, for example, someone who raised the victim, a friend.
87. As emphasized in footnote 1077 of the Judgement,¹³ the expert noted that there has been a historical tendency in Cambodia for families to live together with other

¹¹ Victim Information Sheet – HIET Tey Chov, E2/38.

¹² Photograph attached to the appeal.

family members, such as aging parents or with siblings and their families and hence, the likelihood of strong bonds also to grandparents, cousins, uncles and aunts.

88. SO Saung showed proof of kinship with MEAS Sun.
89. Requiring the victim to provide proof of bonds of affection with his brother-in-law amounts to requiring object proof of sentiments.
90. Whereas the Pre-Trial Chamber rejects the causal link, it does not define the rules as to how to show proof of kinship, instead, it takes refuge in a fallacious argument.
91. Such arguments apply to Civil Parties E2//63, E2/71, D25/11, that for Civil Party D25/11, KHUON Sarin, was the victim's uncle, a single man, who raised the victim and considered him as his own son.
92. The Trial Chamber erred on a question of law in considering that there was no proof of kinship and bonds of affections for Civil Parties E2/34, E2/63, E2/71 and D25/11, because it misinterpreted Rule 23(2) of the Rules, which does not require proof of "bonds of affection".
93. The error of interpretation is further revealed on reading Co-Investigating Judges' Orders on admissibility in Case File No. 002. Indeed, in regard to Victims D25/11, E2/34 and E2/71 – KHUON Sarin,¹⁴ SO Saung¹⁵ and SOME Pov,¹⁶ respectively – the Co-Investigating Judges declared them admissible because they showed proof of having suffered psychological harm that is directly linked to the crimes committed at S-21.
94. The error invalidates the Judgement, and the Supreme Court Chamber is requested to amend it on this point.

IV. GROUND 4: ERROR OF FACT OCCASIONING A MISCARRIAGE OF JUSTICE

95. The decision to declare inadmissible Civil Parties E2/23, E2/33, E2/34, E2/70 and E2/82 is based on an error of fact which has occasioned a miscarriage of justice,

¹³ T., 25 August 2009 (CHHIM Sotheara), pp. 36-37, 48 – (noting the historical tendency of Cambodia families to live together with other family members, such as aging parents or with siblings and their families and hence, the likelihood of strong bonds also to grandparents, cousins, uncles and aunts. While such bonds were common, their closeness nevertheless depends on the particular case).

¹⁴ See Order on the Admissibility of Civil Party Applicants from Current Residents of Rattanakiri Province, D394, 27 August 2010, and Annex 2 thereto, D394.1: Admissibility Findings, 08-VU-0841.

¹⁵ See Order on the Admissibility of Civil Party Applicants from Current Residents of Preah Sihanouk Province, D401, 2 September 2010, and Annex 2 thereto, D401.1: Admissibility Findings: 08-VU-0840.

¹⁶ See Order on the Admissibility of Civil Party Applicants from Current Residents of Preah Sihanouk Province, D403, 7 September 2010, and Annex 2 thereto, D403.1: Admissibility Findings: 08-VU-0840

in that it overlooks the fact that photographs of direct victims of Tuol Sleng were provided.

96. The same goes for the decision to declare Civil Party E2/34 due to lack of evidence, whereas proof of kinship is on the record.

**B/ GROUND 5 CONCERNING ALL THE GROUP 3 CIVIL PARTIES:
ERROR OF LAW IN RELATION TO REPARATIONS**

97. The Trial Chamber erred in law by making an erroneous interpretation of Rule 23(12) of the Internal Rules (Rev. 3) on collective and moral reparations, which provides that such reparations may take the form of an order to fund any non-profit activity or service that is intended for the benefit of Victims.
98. The Trial Chamber omitted to apply the provisions of the ECCC Law on property acquired unlawfully or by criminal conduct, which shows that the ECCC can go beyond its mandate with regard to awarding reparations.
99. The Trial Chamber erred in law by indicating that the Civil Parties' claims lacked sufficient specificity regarding estimated cost of memorials and their envisaged location, whereas the location was specified.
100. It is not for the Civil Parties to estimate the cost.
101. The Trial Chamber erred in law in that it omitted to address the issue of establishing a trust fund to implement reparations.
102. The Trial Chamber erred in law by rejecting the principal of a causal link between the claims for reparation relating to the establishment of medical, health and educational facilities and the crimes committed by KAINC Guek Eav, whereas the link is crystal clear as to health, and that in regard to education, the claims are keeping with the aim of the trial, that of ensuring that the victims are not forgotten.

CONCLUSIONS

103. The Civil Party Co-Lawyers for Group 3 have filed this appeal within the time limits indicated in the Notice of Appeal.
104. The Civil Party Co-Lawyers request the Chamber:
105. To find the appeal admissible,
106. To allow the filing of further material,

107. To annul the Judgement in respect to the impugned dispositions,
108. And to grant all the original Civil Party claims filed before the Trial Chamber.

**Without prejudice
And justice will be done**

Case File No. 001/18-07-2007-ECCC/SCC

Done in Phnom Penh, on 5 October 2010

By the Civil Party Co-Lawyers for Group 3:

(Signed)

KIM Mengkhy

(Signed)

Martine JACQUIN

Head, ASF-France Project

MOCH Sovannary

Philippe CANNONE

Christine MARTINEAU

Fabienne TRUSSES-NAPROUS

Annie DELAHAIE

Elizabeth RABESANDRATANA