Good afternoon ladies and gentlemen, and dear colleagues. I am very honored to be invited to this Interdisciplinary Colloquium on systematic sexual violence and victims' rights and to be able to speak about developments at the Extraordinary Chambers in the Courts of Cambodia and my experiences during my past three years as a civil party lawyer in that jurisdiction.

Introduction

The Extraordinary Chambers in the Courts of Cambodia (otherwise known as the ECCC, or the Khmer Rouge Tribunal) is the first internationalized Court dealing with mass crimes that allows victims to apply as civil parties and to become a party to the proceedings alongside the prosecution and the defense. In case 001, against Kaing Guek Eav (alias Duch), the former director of the security center, S-21, the Trial Chamber announced a judgment on 26 July 2010. This judgment is currently under appeal by all Parties. The Supreme Court Chamber held the Appeal hearings last week. The Appeal decision is expected in several months.

In Case 002, against four senior leaders of the Khmer Rouge regime, indictments were finalized in January 2011 and the Trial Chamber and all parties to the proceedings are currently preparing for the trial. The substantive hearing in Case 002 is expected to be scheduled for the middle of this year.

In my presentation I will give you (i) an overview on the **participation rights** and the **protection scheme** available for victims of sexual crimes, (ii) I will outline the current situation at the ECCC with regard to sexual violence, (iii) the challenges that victims face and (iv) the lessons to be learned.

1. Overview of the participation rights of and the available protection scheme for victims of sexual violence before the ECCC

Participation Rights

Being a party to the proceedings, a victim of sexual violence who applies to become a civil party and thus a party to the proceedings, has equal standing before the court as the prosecution and defense, and various procedural and specific rights, in accordance with his or her role as a civil party. The Internal Rules determine the purpose of Civil Party participation as " (a) to **participate in criminal proceedings** against those responsible

for crimes within the jurisdiction of the ECCC **by supporting the prosecution**; and (b) [to] seek collective and moral reparations."

Civil Parties have a right to legal representation, which has been made mandatory in the trial phase. They have full access to the electronic case file through their lawyers, including to confidential documents, can respond to all applications submitted by the other parties and raise any legal or factual matters *proprio motu*, and until now – have not needed to give reasons as to the extent of their personal interest in the respective matter, unlike victims participating at the International Criminal Court (ICC). Most importantly, in this context, is the right during the investigation phase to submit investigative requests to the Co-Investigating Judges. This right was exercised by the Civil Parties, in order to get cases of sexual violence addressed and investigated at the ECCC, with a view to getting an appropriate indictment on this matter. During the trial phase, the most important right of civil parties is the questioning of witnesses, civil parties and experts through their lawyers. Civil Parties can also submit their own witness/civil party/expert lists to the Trial Chamber in order to ensure the Civil Parties are heard. Questioning does not need to be linked to a specific personal interest. Nevertheless this right, which is unlimited in its application under both the Cambodian Procedure Code and the Internal Rules, was restrained by the Trial Chamber in case 001. The Trial Chamber ruled that Civil Parties are not allowed to question **witnesses** who testify on the character of the Accused, and experts who examine the mental health of the Accused in relation to his culpability. The Trial Chamber determined the role of Civil Parties to, essentially, the seeking of reparations and therefore, limited their participation rights to addressing only **the guilt** of the Accused, but not on matters relating to sentencing.

This limitation has no legal basis. That said, the possibility for civil parties to intervene is still broad.

Protective measures at the ECCC

At the ECCC a wide range of protective measures is available. They vary from the redaction of names and clients' identifying facts, to the use of pseudonyms, to testifying in closed court sessions, voice distortion and relocation. However, the threshold for a grant of protective measures remains high, and any protective measures will only be granted if an individual can demonstrate *specific* circumstances that would put him/her at

risk of harm. A special unit, the Witness and Expert Support Unit (WESU), conducts a risk assessment of witnesses, Civil Parties and experts who have requested protective measures. Although civil parties are not reflected in the name of this Unit, they are not excluded from the unit's work in analysing potential risks. In each case, WESU assesses the general danger that an individual fears, including examining whether and to what extent a specific and concrete potential risk exists, that might imperil a person and/or his/her family. The Co-Investigating Judges rejected the general request of the Prosecutors for protective measures for a large number of victims and witnesses to whom they referred in their Introductory Submission. The Prosecutors did not give a personal risk specification and therefore the request was deemed as unnecessary in the investigation phase. This part of the proceedings is, generally, considered as confidential. Thus, the question of protective measures arises mainly during the trial phase, where matters come to the public domain.

To provide some background to the developments in Cambodia, early on, at the beginning of 2008, a large number of civil party applicants requested protective measures, but subsequently withdrew their requests during the course of proceedings. Initially, most protective measures requests were based on a general concern that the Khmer Rouge could come back to power at any time and seek revenge against the victims who exposed themselves by applying for civil party status. Between 2008 and 2010, the number of civil party applicants increased exponentially, and Applicants grew less concerned, as they had by then, not experienced any reprisals in their communities. The son of the Accused, IENG Sary, now Deputy Governor of Pailin Province, which is still a strong hold Khmer Rouge province, noted during a Public Forum in late 2008 that the victims do not need to have fear because of their sheer numbers!

The fact that many individuals had applied between 2008 – 2010, coupled with the numerous outreach activities country-wide, and the fact that suspected persons, *ie* the alleged senior leaders, have remained in detention, led to a reduction in fears about participating, and the ultimate withdrawal of most of the initial requests for protective measures. However, this does not apply to all victims: minority groups such as the Vietnamese and the Khmer Krom, who suffered targeted persecution under the Khmer Rouge regime (and genocide, on the part of the Vietnamese), and still suffer from general

discrimination in society today, feel a higher degree of intimidation linked with participating in any activities initiated at the state level, such as the ECCC. The majority of these victims raised protective measures concerns. These requests have not yet been decided. However, so far most of these individuals will have difficulties demonstrating concrete, specific and objective incidents that form the basis for a belief that they and/or their families are at risk of harm. They may also have difficulties linking their fears specifically to their participation as complainants and civil parties at the ECCC. This is because the fears they face are based on the accumulation of violent policies against the groups under various government leaderships in the past, and particularly, the genocidal policy to destroy these groups, by the Khmer Rouge regime, rather than specific instances of abuse *resulting* from their participation.

For victims of sexual violence, the situation is different: These victims feel insecure simply submitting their story to the Court. This feeling is amplified with the prospect of testifying in public. However, the reasons behind their fears are not so much intimidation by the Accused or the Khmer Rouge fellows but because of the anticipated stigma and discrimination from their respective communities should they disclose sexual violence against them. Even today, a victim of sexual violence who speaks out is marginalized. This is more so for male victims.

Therefore, some civil parties who are listed by Civil Party Lawyers to testify on details of sexual violence committed against them, wish to keep their identity and testimony undisclosed to the public. As their lawyers, we requested that the Trial Chamber impose the following measures: To allow our clients to testify in a closed court session, and to be referred to under a pseudonym. These measures would not infringe upon the Accused' rights because they have full access to the identity of these victims via the Case File. The requests are still pending and so far no jurisprudence is available for these specific cases.

Dealing with sexual crimes - the status quo

The first preliminary investigations by the Co-Prosecutors which resulted in the Introductory Submission – binding on the Co-Investigating Judges – did not include any investigations in cases of sexual violence at all. Although this Court was established after the ADHOC tribunals and after the ICC, the ECCC seems to be far behind these courts with regard to the investigation of sexual crimes. The reason the Co-Prosecutors

informally gave was, that in light of a huge number of victims who were killed, starved and overworked, priority focused on those crimes. In addition, the Prosecutors adopted the common perception that whilst the Khmer Rouge acted cruelly against their own population, they exercised the moral high ground when it came to sexual matters. These assumptions by the Prosecution were made without a clear line of questioning to establish this as a fact, and without further investigations.

In case 001, only one case of rape, disclosed and admitted by the accused during the investigations, was indicted and subsequently convicted. It was the rape of a female prisoner by a male interrogator. The Accused did not punish him which was – according to the Accused – with the agreement of his superior, a member of the highest ruling body, the Standing Committee. Although there was more evidence that suggested that other cases of rape were committed, these cases were not investigated, and witnesses were not interviewed in detail. During the hearing, a civil party disclosed facts pertaining to her rape, after she saw the perpetrator testifying. This evidence was rejected on the basis that it was introduced too late.

In the Case 001 Judgment, the Trial Chamber used the narrow definition of rape from the ICTY Appeals Chamber in the *Kunarac* case. This definition excludes the application of rape against males because of the use of term *penetration* instead of the broader term, *invasion*. The absence of the victim's consent is still necessary.

Astonishingly, evidence indicating that under the order of the Accused, at least one case of forced marriage among the S-24 staff had taken place, was not included, and the respective witness was even removed from the witness list.

Any questioning on the topic of forced marriage among staff members of S-21 or S-24 was immediately interrupted by the President of the Trial Chamber. Further, the Chamber did not consider it worthy to shed light on this aspect of the life and working conditions of staff.

All efforts by my legal team to have other sexual violence cases included into case 001, beyond the single admitted rape case, failed.

In case 002 – I had, early on, tried to push the issue of forced marriages by seeking further investigations from the Court on this widespread practice of the Khmer Rouge. Through my interviews with clients, I had discovered that this was a very common policy

– and a systematic crime under the Democratic Kampuchea. The purpose of the regime's forced marriage policies was to breed a new population, able to contribute to the agrarian work of the country. Pol Pot articulated an objective of the Communist party of increasing Cambodia's population to 20 million within ten to fifteen years, an expected growth of more than threefold of the population. The Communist Party, the CPK, also aimed to control the interaction between individuals, such that they were only permitted to marry and have sexual relations in accordance with the CPK. At the beginning the objective was also to match couples with similar political status. The forced marriages were always organized in groups between 2 couples and 300 couples. Often the new couple did not know each other before the marriage. The mass wedding would be followed by a political speech and a declaration of commitment to one another under the orders of *Angkar*, the name for the leaders and Standing Committee, meaning "organization. The newly wedded couples were then forced to spend several nights together, and often-times, the males were explicitly ordered to have sexual intercourse with their new wives. The couples were monitored by soldiers to check and control whether sexual intercourse took place. In the event that the couple did not engage in sexual intercourse, by joint agreement or otherwise, they were either individually, or both, sanctioned. This was usually through being assigned to harder work, being sent to re-education or imprisonment or being killed. Through interviews with my clients, I found that there was a demonstrated pattern of forced marriages which was imposed on the non-married or widowed population country wide with only few regional variations.

The practice of forced marriages under the Khmer Rouge regime was common knowledge and most scholars and researchers on Cambodian history have referred to it in their writings. Forced marriage was not *discovered* by the Civil Parties. But the investigating bodies at the ECCC *ignored* this systematic and widespread crime, even though the impact on the victim population is significant and continues to this day. Only by actively exercising their participation rights, victims of forced marriages, both female and male, submitted focused Civil Party applications, and requested investigations into forced marriage. It was due to the courage of our clients to talk, and our own legal efforts, that forced marriage was successfully pushed at the ECCC, with the result that the court eventually included this attack against the population into the Indictment.

In the course of the investigations, the Co-Prosecutors filed a supplementary submission for five cases of forced marriages, raised by our clients. This was then extended to a country-wide investigation and recognition of forced marriages. It was included into the ECCC's judicial "scope of investigations". 664 out of approximately 2000 so far admitted Civil Party applicants, were admitted as civil parties on the basis of the forced marriage claims they raised. This must be seen as one of the biggest successes of the participation of civil parties, many of whom are direct and indirect victims of forced marriages – not only because it was the basis on which 1/3 of civil parties were admitted, but it also introduced the implementation of a significant criminal policy into the Closing Order. Forcing people to marry was a population policy which was widespread and systematically imposed on hundreds of thousands of victims in order to breed the new revolutionary human. The impact on victims, their families and their future generations is considerable. This crime is to be distinguished from "arranged marriages" in Cambodia, where at least, there is dignity and consent in most cases. In the cases of forced mass weddings under the Khmer Rouge regime, no dignity was afforded to couples, who were forced to wed and whose bedroom activities were monitored by KR cadre.

The investigations resulted in the indictment of forced marriage as rape under crimes against humanity and forced marriage as another inhuman act under crimes against humanity. According to the indictments, the unions "were part of the attack against the civilian population, in particular **the imposition of sexual relations aimed at enforced procreation".**

The Accused appealed the Closing Order (the Indictment) *inter alia* with the objection to the charge of rape as a crime against humanity stating that during the relevant time (1975-79), rape was not yet applicable as an offence under crimes against humanity. The Pre-Trial Chamber agreed with this argument and, in a decision dated 17th of February 2011, held that rape was not a crime in its own right, and instead, ruled that the facts described as rape can be subsumed as 'other inhumane acts'.

The reasoning was surprising, as rape was already in the Control Council Law 10, in various national legislations as a crime against humanity. It was also recognized as a war crime since the *Lieber Code* in 1863, drafted by Francis Lieber. This Code, known as

General Orders No. 100, became the official legal basis for the U.S. Army on the laws of land warfare. The latter is a strong indicator that rape can be considered as part of customary international law, since rape has long been recognized as a crime in war times, and a crime prohibited in the context of war. If committed as part of a widespread or systematic attack against the civilian population, the inclusion of rape as a war crime (since 1863) would seem to support and confirm a categorization of rape as an underlying Crime against Humanity, and also as customary international law- throughout the relevant period, 1975-79. This is particularly so because, at the relevant time, Crimes against Humanity required a nexus with armed conflict.

Civil Parties have exercised their participation rights to request expert opinion on this matter, in order to have the crime of forced marriage appropriately addressed and the criminality involved, against females and males alike, fully acknowledged.

Regrettably, the indictment does not hold the Accused liable for the few cases of rape in security centers, even where a link up the chain of command could be made out. Instead, it alleged that rape was not one of the common purposes of the Khmer Rouge, and, to the contrary, that the Khmer Rouge had a policy of punishing perpetrators of sexual violence if the conduct was discovered.

Civil Party Lawyers will demonstrate that the examples of alleged punishment provided in the Closing Order do not support this conclusion. To the contrary, we will submit that rapes against a declared enemy were committed, akin to torture, ill-treatment and killing, without being punished. In addition, Civil Parties will submit additional evidence which clearly demonstrates that rape of an “enemy”, who was already targeted for execution, was not punished, although known by the perpetrator’s superiors.

Half of the victory that civil parties through performing their participation rights achieved, by having forced marriages country-wide included into the indictment, is tainted by the exclusion of rapes outside of the context of forced marriage. The problematic definition and offence elements for forced marriage and rape used at the ECCC, and the Pre-Trial Chamber’s decision excluding rape as a crime against humanity for the relevant period of time are backward steps for these issues in international jurisprudence.

Challenges

At the current stage of the proceedings at the ECCC, with the investigations closed, the indictment issued, and the trial about to commence, the work of Civil Parties will have to focus on the proper legal qualification of forced marriage, **and** persuading the Trial Chamber to reconsider the liability of the accused for sexual violence outside of forced marriages. To achieve the latter, the existing evidence on sexual violence needs to be put before the Chamber, in order to be considered *at all*.

Witnesses and/or Civil Parties who testify on sexual violence should do this in an environment where they feel comfortable to speak out. The Trial Chamber should establish guidelines on witness/civil party testimony on sexual violence and guarantee an appropriate environment for their testimony. The experience during the investigations has shown that the interviews for victims of sexual violence were not conducted with the necessary diligence, sensitivity and competence that is required. In addition only male investigators were employed. In one instance, this contributed to the collapse of a client, who was the victim of a gang rape, when she was overwhelmed by being surrounded exclusively by males during the interview.

Any requests for protective measures by victims, who risk their well-being through testifying on these crimes, and risk negative reaction and stigmatizing, should be granted by the Trial Chamber.

The new legal representation scheme, which now stipulates that one national and one international Lead Co-Lawyer employed with the Court represent a "consolidated" group of Civil Parties, could reduce, if not hinder, the proper representation of Civil Parties through their Lawyers. Because of the intermediary "Lead Co-Lawyers", deadlines for Civil Party Lawyers are shortened, due to additional procedural requirements such as the need to translate submissions into an additional language. Further, where the Lead Co-Lawyers do not react in a timely manner on Civil Party Lawyers' submissions, the effect could be a silencing of the Civil Parties. The scene for civil party representation has indeed changed at the ECCC, and it remains to be seen how Civil Party Lawyers could continue to represent their clients without direct access to the Court, where they have standing to be heard, since the Trial Chamber have expressed that it would liaise only with the Lead Co-Lawyers.

Since the last Rule amendment, there is a possibility that the charges and/or accused persons could be tried in separate sessions. Due to the complexity of Case File 002 and the increasing age of the accused persons, it is now open that the Trial Chamber separates one or more charges in order to achieve a judgment in a timely manner. If this becomes an issue, Civil Parties have to lobby for an inclusion of forced marriages into separated charges, since "forced marriage" is the factual basis on which the second highest number of Civil Parties were admitted, after forced transfer from Phnom Penh.

Lessons learned

- The prosecutorial strategy at the beginning of an investigation is of crucial importance and largely determines the charges at a later stage in proceedings. Utmost vigilance is required at the investigative stage, and sexual violence has to be considered as a severe and grave crime instead of often being considered as peripheral to other crimes, such as killings.
- The participation of victims vested with strong rights to influence the prosecution has to be included at the earliest point.
- Being familiar with and learning from the achievements and failures of other courts and tribunals is of great importance in order to avoid the same mistakes. Best practices with regard to the inclusion and investigation of sexual violence cases, should be the duty of any future Court, the permanent International Criminal Court and any national prosecution of mass crimes.
- The respective procedural rules should include evidentiary provisions on how to deal with testimonies concerning sexual violence.
- A careful consideration of the alleged sexual crimes against male persons should be included for Best Practice at international courts. For all sexual crimes the victims should have the option to be interviewed either by female or male investigators and interpreters.

  Competent and appropriate staffing is a prerequisite for investigating cases of sexual violence from all organs of a Court. As such, sensitivity to sexual criminal matters should be a priority criterion for recruitment of staff members. Further, continuous trainings and updates should be mandatory for all court staff, including judges and prosecutors.

Conclusion

The ECCC is the first court dealing with mass crimes that grants victims the role of parties to the proceedings. This could be a unique chance for the ECCC to have victims actively involved and to become a model for any future internationalized courts.

In the beginning, back in 2008, the ECCC clearly disregarded and ignored cases of sexual violence. What has been achieved thus far has been the direct result of civil party lawyers' work – and of course, the courage and bravery of our clients, in speaking out, amidst risk of stigma and social alienation. The Court itself has, in the past, appeared hesitate about properly and appropriately addressing sexual crimes. For example, the prosecutors' strategy did not include sexual crimes at all, in the earlier stages of investigation. This approach is extremely difficult to change and influence at later stages in the proceedings. Adequate provisions for dealing with sexual violence are lacking in the Internal Rules, and well-trained and competent court personnel were never recruited. In addition, although the need for training was, in-principal, foreseen in the budget, adequate training of investigators and court staff has never taken place.

More recently, amendments to the Internal Rules have effectively reduced the actual possibilities of Civil Parties to participate by imposing a Lead Co-lawyer section, responsible for representing the "consolidated group".

For this and other reasons, the role of Civil Parties to obtain some remnant of justice through actively participating in this process remains a continuing challenge and one that must be balanced against secondary harm caused to civil parties and applicants by the gaps and inadequacies that have resulted so far in both cases 001 and 002.

To conclude, it has been a huge challenge to ensure that victims of sexual violence a voice and justice in this jurisdiction at all stages of the proceedings. However, inclusion of forced marriages in the Indictment is one visible success story resulting from civil party participation. The inclusion of "forced marriages" under the judicial "scope of investigations", coupled with its inclusion in the indictment, have stirred up much discussion, debate and awareness-raising about the criminal nature of forced marriages under the Khmer Rouge regime. Prior to this, forced marriages were simply not considered to be so much "a crime", as compared with other horrendous acts perpetrated by the regime. It has now been given its proper place in these criminal proceedings and

this had led to a total of approximately 1/3 of all civil parties, admitted on the basis of their connection to this crime, alone.

Hopefully, the inclusion of forced marriage in the Indictment at the ECCC will give some basis, at the international level, for courts to take gender-based crimes seriously and to draw adequate attention to these types of offences world-wide – particularly at early stages of the criminal process.

Unfortunately, there remains little time for me to further embellish on these unprecedented issues at the Extraordinary Chambers and internationally – however, I would be happy to further discuss any points in the light of any questions from the floor.