

To: Supreme Court Chamber of the ECCC

**Copies to: Office of the Co-Prosecutors
Defence of KHIEU Samphân
Victims' Support Section
UNAKRT Coordinator**

16 June 2022

Your Honours

Re: Withdrawal as International Civil Party Lead Co-Lawyer

I write to inform you of my decision to withdraw from my role as International Civil Party Lead Co-Lawyer.

Months of reflection have led me to the painful conclusion that I am ethically obliged to withdraw from representing the Case 002 Civil Parties. This is because I find myself unable to provide effective representation to them and am without further recourse to rectify this situation.

As Your Honours are aware, our team has lost essential human resources, with a significant impact on our ability to represent the Civil Parties.¹ However, the decisive issue has been another, even more fundamental matter. We are without resources to enable meetings between the Civil Parties and their legal representatives (the Civil Party Lawyers and/or Civil Party Lead Co-Lawyers).

It remains my understanding that our role as Civil Party Lead Co-Lawyers is to *represent* the Civil Parties in the ECCC proceedings. This is what Internal Rule 12ter(5) states. And indeed, if the Civil Parties are parties in these proceedings, as the Court has held them to be,² then the persons speaking for them in the proceedings must be their representatives.

Representation requires communication. Your Honours implicitly recognised this in your reasons for postponing the Case 002/02 appeal hearing, which explained that the hearing could not proceed when defence counsel had been unable to communicate with their client.³ For the same reasons, effective representation of Civil Parties is not occurring where there is no communication between Civil Parties and their legal team.

Civil Parties are individuals. They have had differing experiences and possess various rights and views concerning the proceedings. The Civil Parties are not fungible. Speaking to five, or ten, or two hundred Civil Parties does not fulfil the rights of all. There are 3,865 individuals who hold the status of Civil Party (or successor) in Case 002. Reasonable efforts must be made to communicate with all of them.

It is a matter of deep disappointment to me that a combination of factors has caused the breakdown of this communication between the vast majority of Civil Parties and their lawyers. Funding is the primary problem. All but three Civil Party Lawyers receive *no remuneration* from the ECCC for their work. Civil Party Lawyers and the Lead Co-Lawyers are provided *no resources* by the ECCC to cover the costs of meeting Civil Parties. The Lead Co-Lawyers are expected to independently fundraise from external sources to facilitate this core representational work. Our ability to do so has been limited by own tiny human resource allocation (which must also be stretched to cover work on judicial proceedings) and by diminishing donor interest.

¹ **F70**, [Urgent Request for Orders to Protect Civil Party Rights to Effective Representation and a Fair Trial](#), 28 October 2021.

² **Case 001 – F28** Appeal Judgement, 3 February 2012, para. 488; and (more recently) **F65**, [Decision on the Civil Party Lead Co-Lawyers' Request for Postponement of the Appeal Hearing and Instructions With Regard to New Dates and Modalities for the Appeal Hearing](#), 10 June 2021, para. 51.

³ **F65**, [Decision on the Civil Party Lead Co-Lawyers' Request for Postponement of the Appeal Hearing and Instructions With Regard to New Dates and Modalities for the Appeal Hearing](#), 10 June 2021, paras 52-53.

When I took up my role, in August 2019, many Civil Parties had already been out of touch with their lawyers for some time. Although regular meetings were held during trial and continued thereafter, it was already challenging to maintain communication with all Civil Parties. Contact had been lost with many and it was unknown how many had died. Some funds had been granted for meetings by GIZ-Civil Peace Service,⁴ and an attempt was being made during the period between trial and appeal proceedings to locate and engage with some Civil Parties who had not recently been met. Then the pandemic began, and for two years additional barriers restricted movement and gatherings.

With normality returning, and our limited human resources no longer overwhelmed by the appeal proceedings, I had hoped that we could now return to the essential work of communicating with Civil Parties. The overwhelming majority of Civil Parties do not know what has occurred at the ECCC over the past few years, or what will happen after the final judgment. As we explained in a filing last year, we have had a chance to ask only a tiny number of Civil Parties for their views on the crucial question of what public access should be allowed to documents and information they submitted to the Court, including on deeply personal matters such as sexual violence, forced marriage, and continuing mental health problems.⁵

However, when I request funds from the Office of Administration so that we can carry out this work I am simply told that no budget is allocated for it. No funds are provided. Despite requests, no explanation is given as to why the essential work of communication with Civil Parties has not been included in the Court's core budget. It is telling that, concurrently, budget *has* been allocated by the Office of Administration for various sizeable endeavours unrelated to the judicial proceedings (such as the production of a "handbook" about the ECCC's work and a series of workshops about residual phase activities). It is clear that the Office of Administration is not without available funds.

As well as being denied funding for meetings with the Civil Parties, I am also refused reasons for the Office of Administration's decisions on this issue. However, in informal communications it has at times been insinuated that an established practice of not funding this work exists, as though this may itself justify the continuing refusals. If this is the reason, it is flawed. An existing violation of parties' rights or longstanding poor practice is a reason for change, not for rigidity. In this case that is particularly so, since the impact of the poor practice has increased over time as external funding alternatives have diminished.

I note that at all other international courts which provide for victims' participation, the cost of meetings between lawyers and participating victims in an active case⁶ is recognised as core judicial work and as such is covered by Registry funding. That is the case at the International Criminal Court ("ICC"), the Special Tribunal for Lebanon and the Kosovo Specialist Chambers. Of course, practical challenges will always exist in large-scale collective representation. But my experience at other courts – including at the ICC, where comparable numbers of victims participate – convinces me that with dependable funding from the court budget it is possible to maintain communication with the great majority of participating victims.

In contrast, at the ECCC, we are currently able to reach only a tiny fraction of the Civil Parties. No funding is provided by the Office of Administration. I am simply told to carry out my own fundraising. In recent months I have intensified my efforts to do so. However, to date we have been unable to secure more than a small amount of funding (again from GIZ-Civil Peace Service, funded by Germany) which may enable large group meetings ("forums") for a total of only around 200-250 of our 3,865 clients during 2022. In my view, this constitutes communication with an inexcusably small number of the Civil Parties.

⁴ GIZ-Civil Peace Service, with funding from the German government, has been the committed supporter of Civil Party participation at the ECCC since its inception, and continues to provide funding. However, the amounts are only a small fraction of what is required to meet the Civil Parties. Each year we receive sufficient funding to meet at most 200-300 of the 3865 civil parties, or even fewer if it is necessary to meet them individually to discuss specific matters.

⁵ See [F71 Request for Directions Regarding the Reclassification of Civil Party Documents](#), 14 December 2021.

⁶ It is true that at the International Criminal Court, such funding is not provided until a suspect is before the Court and a case is therefore able to proceed. However, where a case is proceeding, this funding continues until victims have been informed about the final outcomes of the case, including appeals and reparations proceedings.

I have sought assurances from the ECCC’s Office of Administration that this position will not continue next year. I have requested confirmation that the Office of Administration will fund the attendance of Civil Parties at the delivery of the final judgment in Case 002/02. I have requested confirmation that my team will be sufficiently resourced in order to analyse the likely lengthy judgment for matters of importance to Civil Parties, and (with assistance from Civil Party Lawyers) to make reasonable attempts to meet all civil parties or their successors in order to explain the outcome of Case 002/02. I was told that no assurances can be given to me about budget being allocated for any of this work.

I am unable to seize Your Honours of these matters, given Your Honours’ ruling last year that matters of resourcing are not subject to judicial oversight.⁷

I therefore find myself in an untenable position. I am asked to represent the Civil Parties. But I am unable to communicate with them.

I have carefully considered the position under my rules of professional conduct, both in my own jurisdiction (England and Wales) and in Cambodia. While neither set of conduct rules specifically addresses the peculiarities of large-scale collective representation, or the ECCC’s specific civil party representation structure, both contain some principles of relevance. In particular, communication is essential.⁸ And both codes of conduct require that a lawyer must withdraw representation when she is no longer able to comply with her professional obligations.⁹

I note that in other international criminal jurisdictions, it is a requirement that victims’ counsel seek judicial leave in order to withdraw representation.¹⁰ I have found no indication that this is required at the ECCC. Unlike defence lawyers, counsel for Civil Parties at the ECCC are without legal service contracts or regulations establishing such procedures.¹¹ My two predecessors withdrew without any formal process or request for leave.¹²

Nonetheless, while not being required to request leave, I consider it an important courtesy to explain why I have taken this decision. Sharing this information also enables it to be made known to the Civil Parties and the Court’s other stakeholders. I therefore request that this communication be added to the record of Case 002.

I remain deeply concerned about the fate of the Civil Parties following my withdrawal. Despite the prevailing sense that the ECCC’s work is ending, the tasks remaining for the Civil Party Lawyers and Lead Co-Lawyers are considerable. All Civil Parties (or surviving family members) should be located and informed by their

⁷ [F70/1/1 Decision on Civil Party Lead Co-Lawyers’ Urgent Request for Orders to Protect Civil Party Rights to Effective Representation and a Fair Trial](#), 4 November 2021.

⁸ **Cambodia:** Code of Ethics for Lawyers of the Bar Association of the Kingdom of Cambodia, art.24: “Communication with the clients shall be direct and personal”. In England and Wales this is not made explicit but is implied through the requirements to act in the best interests of the client, and to provide a competent standard of work and service to each client (**England and Wales:** [Bar Standards Board Handbook](#), CD2, CD7, rC15). This requires “seeking to advise your client, in terms they can understand” (**England and Wales:** [Bar Standards Board Handbook](#), gC38). For clients represented without a solicitor, guidance makes clearer this link by requiring the barrister to “ensure that the client is supported properly and understands fully any information which you communicate to them , so that you may act in their best interests.” (Bar Standards Board Handbook, [Public Access Guidance for Barristers](#), para. 27).

⁹ **Cambodia:** Code of Ethics for Lawyers of the Bar Association of the Kingdom of Cambodia, art. 29: “A lawyer shall not represent or defend, or shall stop representing or defending clients after such representation or the defence has already been initiated, when: ... Such representation or defence will result in the violation of the rules of the legal profession or other laws”; **England and Wales:** [Bar Standards Board Handbook](#), rC25 (requiring counsel to cease to act where a circumstance from rC21 arises) and rC21 (making clear that instructions should not be accepted where circumstances prevent counsel from acting in the best interest of the client). See also “Instructions are...returned in circumstances which adversely affect the administration of justice, access to justice or (so far as compatible with these) the best interests of the client”.

¹⁰ See for example ICC [Code of Professional Conduct for counsel](#), article 16(3)(a) and *Prosecutor v Ali Kushayb*, [Order on victims’ legal representation](#), ICC-02/05-01/20-482, 11 October 2021, para. 9.

¹¹ Defence counsel withdrawal is covered by Regulation 7.3 of the DSS [Administrative Regulations](#) and **E320/2/2/1.1** [Confidential] Legal Services Contract, clauses 4.4. I have previously bemoaned the Office of Administration’s failure to provide legal service contracts or regulations for Civil Party Lead Co-Lawyers: See **F70**, [Urgent Request for Orders to Protect Civil Party Rights to Effective Representation and a Fair Trial](#), 28 October 2021, paras 24, 93 and 108. My own contract is a standard UN consultancy contract with UNAKRT, allowing termination with a fourteen-day notice period.

¹² Civil Party Lawyers may likewise withdraw without seeking leave: See for example: **D337/10/4** Letter of withdrawal to Trial Chamber, 30 September 2010; and **E61.1** Letter of Withdrawal to Pre-Trial Chamber, 16 January 2011.

lawyers about the end of the Court's work and its outcomes. And significant additional work will be required on reclassification if Civil Parties' are afforded a chance to be heard on the treatment of their sensitive personal information held on the case file.¹³ However, I have had to accept that my own attempts to further these tasks are failing due to resource constraints. It is my sincere hope that my withdrawal will highlight that Civil Party participation before the ECCC is collapsing, so that this may spur the Office of Administration, donors, and Your Honours to rectify the situation.

I respectfully ask that Your Honours take note of Internal Rule 12*ter*(4), and of Article 2(5) of the Addendum to the ECCC Agreement.¹⁴ They implicitly require that throughout the proceedings *and* the residual phase that Civil Parties will be represented by two Lead Co-Lawyers. It therefore remains essential that I am replaced. I will remain available to brief a new International Lead Co-Lawyer to the fullest of my abilities so that the Civil Parties are not disadvantaged by my withdrawal.

I am conscious that Your Honours are currently working at full pace on the final appeal judgment in Case 002 and may have little available time for other matters. However, without effective representation for Civil Parties, that final judgment will remain unknown to the Court's primary stakeholders. I therefore implore you to take any steps within your powers to ensure that Civil Parties have effective representation not merely in theory, but in practice, and are able to meet with their lawyers.

Yours sincerely



Megan Hirst
International Civil Party Lead Co-Lawyer

¹³ See [F71 Request for Directions Regarding the Reclassification of Civil Party Documents](#), 14 December 2021.

¹⁴ [Addendum to the Agreement between the RGC and the UN Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea on the Transitional Arrangement and the Completion of Work of the ECCC](#), signed 21 and 26 August 2021.