

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL

ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception):
..... 22 / FEB / 2008

ម៉ោង (Time/Heure): 10:30'

មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé
du dossier: NUP SOTHUN VICHET

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

In the Matter of the appeal by Nuon Chea
Against the order of provisional detention
by the Office of the Co-Investigating Judges dated 19 September 2007

On the issue of civil party participation in appeals
against provisional detention orders

Case No. 002/19-09-2007-ECCC/OCIJ(PT01)

ឯកសារចម្លងត្រឹមត្រូវតាមប្លង់ដើម
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME

ថ្ងៃ ខែ ឆ្នាំ ត្រឹមត្រូវ (Certified Date/Date de certification):
..... 22 / FEB / 2008

មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé
du dossier: NUP SOTHUN VICHET

*A submission from Anne Heindel, Documentation Center of Cambodia (DC-Cam)
Legal Advisor, in her personal capacity*

002/19-09-2007-ECCC/OCIJ(PT01)

I. INTEREST OF AMICUS CURIAE

Anne Heindel is a legal advisor to the Documentation Center of Cambodia (DC-Cam), Phnom Penh, Cambodia. She has worked for non-governmental organizations on questions relating to human rights and international criminal law for over 10 years and is a member of the Bar Association of the State of California, United States of America. The views expressed in this submission are her own and do not reflect the opinions or policies of the DC-Cam. Sarah Thomas, David W. Leebron International Human Rights Fellow resident at the Center, contributed to the preparation of this submission.

II. SUMMARY OF ARGUMENT

This brief is submitted pursuant to the public notice of the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) dated 12 February 2008, allowing submission by *amicus curiae* addressing the balance between the rights of the Charged Person to a fair trial and the rights of the Civil Parties in the context of the ECCC Internal Rules.

Victims meeting specified criteria are authorized to participate as full parties in ECCC cases and have an inherent interest in participating in pre-trial proceedings. Their role is qualitatively different than that of victim participants at the International Criminal Court (ICC), where victims do not have full participation rights, but must apply to participate at different stages of the proceedings by indicating how their personal interests will be affected. This ICC practice should not be adopted by the ECCC. There is no textual support for requiring ECCC Civil Parties to apply again to participate at stages of the proceedings. The ICC approach is also time consuming and has required the expenditure of substantial resources by the court, the parties, and victim participants. Moreover, the text of the ECCC Internal Rules supports the view that Civil Parties have the right to participate in all appeals before the Pre-Trial Chamber, including those related to provisional detention. Finally, the Internal Rules explicitly provide that Civil Parties' interest in participating in the proceedings is not limited to reparations, but also includes supporting the prosecution during the investigative stage. For these reasons, Civil Parties should be allowed to participate in appeals of provisional detention orders.

Nevertheless, victim participation in ECCC proceedings must at all times be balanced against the right of Charged Persons to a fair trial. The ECCC Internal Rules provide several means by which to preserve this balance. First, the definition of Civil Party in the ECCC Internal Rules limits Civil Party participation to those victims who have suffered harm that is the "direct consequence of the offence, personal and have actually come into being."

002/19-09-2007-ECCC/OCIJ(PT01)

Following the practice of the ICC, the Co-Investigating Judges (CIJs) should clarify this criterion and explain how they have applied it with regard to the four Civil Parties who have joined the *Nuon* case. Second, the Pre-Trial Chamber should strictly require Civil Parties to file pleadings in advance of any proceedings in which they wish to participate in order to avoid prejudicial surprise. Third, the Pre-Trial Chamber should limit Civil Party interventions to the specific issues on raised on appeal. Finally, the Pre-Trial Chamber should encourage — and when necessary require — Civil Parties with similar interest to group together and impart their views through common representation in order to avoid delays and repetition in the proceedings.

III. ARGUMENT

A. The ECCC Internal Rules Require Civil Parties to Have a Specific Interest in the Case to Which They Are Joined

1. The ECCC Internal Rules allow all victims who have suffered harm as a result of a crime coming within the jurisdiction of the ECCC to exercise the right to take a civil action when their injury is “personal, material or psychological” and “the direct consequence of the offence, personal and have actually come into being.”¹ At the time of the hearing on Mr. Nuon’s appeal of his order of detention, four Civil Party applications had been accepted by the CIJs²; however, no decision has been made public explaining how this criterion has been interpreted in assessing victim applications, or how these Civil Parties meet the criterion.
2. In contrast, at the ICC, the only international court that provides for victim participation, there have been numerous public decisions addressing the definition of “victim.” The ICC Rules provide that both persons and entities may be recognized as victims.³ Persons are defined as victims when they are “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.”⁴ On the other hand, entities may qualify as victims only when they have sustained “direct harm.”⁵ “Applying a purposive interpretation” to these provisions, the ICC Trial Chamber has determined “that people can be the direct or indirect victims of a crime within the jurisdiction of the Court.”⁶

¹ ECCC Internal Rules, R.23(2) (*as amended* 1 Feb. 2008).

² See Press Release, ECCC Victims Unit, Historic Achievement in international law: Victims of Khmer Rouge crimes fully involved in proceedings of the ECCC (4 Feb. 2008), *available at* http://www.eccc.gov.kh/english/press_release.list.aspx.

³ See International Criminal Court, Rules of Procedure and Evidence, R.85, ICC-ASP/1/3 (2002).

⁴ *Id.* R.85(a).

⁵ See *id.* R.85(b) (providing in part that “Victims may include organizations or institutions that have suffered direct harm to any of their property”).

⁶ Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. 01/04-01/06, Decision on Victims’ Participation, ¶ 91 (Trial Chamber, 18 Jan. 2008) [hereinafter “January 2008 ICC Trial Chamber Decision”].

002/19-09-2007-ECCC/OCIJ(PT01)

3. Both the ICC Pre-Trial Chambers and the Trial Chamber have also analyzed the ICC Rules' requirement that victims must have suffered harm "as a result of the commission of any crime within the jurisdiction of the Court."⁷ The Pre-Trial Chambers have found that this language requires a causal link between the harm suffered by the victim and a crime with which the accused has been charged.⁸ Recently, however, the Trial Chamber interpreted this requirement more broadly and found that "a victim of any crime falling within the jurisdiction of the Court can potentially participate" if an evidentiary link can be shown between the victim and evidence that will be considered or the victim's personal interests "are in some real sense" engaged by an issue that will arise in the proceedings.⁹
4. A textual analysis of the ECCC Internal Rules indicates that Civil Parties must have suffered "direct," "personal," and "actual" harm. However, what these terms mean in practice is not entirely clear, in particular when applied to the family members of victims. The ECCC Internal Rules are also unclear on the necessary relationship between crimes under the jurisdiction of the Court and the harm suffered by victims. Language in the Practice Direction on Victim Participation, which provides that "[a]ny victim of a crime coming within the jurisdiction of the ECCC may join the proceedings as a civil party in a case concerning *that crime*["],"¹⁰ suggests that Civil Party applicants must show a causal link between a crime charged and the harm suffered.
5. Because the CIJs have not released a reasoned decision analyzing what type of harm must be demonstrated to be joined as a Civil Party in a particular case, it is unclear how broadly or narrowly they are interpreting the Civil Party criteria in the Internal Rules. Mr. Nuon's right to a fair trial may have been violated if he did not receive an explanation of the basis for the four Civil Parties' interest. A clear and precise definition of Civil Parties is a necessary first step in balancing the rights of victim participation and the rights of the accused to a fair and impartial trial. As stated by an ICC Judge,

[I]t is important to remember that victims are not abstract entities but concrete persons or groups of individuals who have suffered harm as a result of conduct attributed or specified in a particular case or situation and their rights must be upheld. The best possible way to uphold those rights is to ensure that, as a logical starting point, we have clearly defined who is to be

⁷ ICC RPE, *supra* note 3, R.85(a).

⁸ See January 2008 ICC Trial Chamber Decision, *supra* note 6, ¶ 8 (citing PTC I), ¶ 14 (citing PTC II).

⁹ *Id.* ¶ 95.

¹⁰ ECCC Practice Direction on Victim Participation 02/0007, art. 3.1 (emphasis added).

002/19-09-2007-ECCC/OCIJ(PT01)

afforded victim status. Only from that basis will it be possible to then regulate victim's participation rights.¹¹

B. ECCC Civil Parties Have an Interest in Participating in Appeals Against Detention Orders

1. Civil Parties Should Not Be Required to Apply to Participate in Interlocutory Appeals of Detention Orders

6. Once a victim is found to meet the Internal Rules criteria to join a case as a Civil Party he or she "becomes a party to the criminal proceedings"¹² with rights similar to those of the accused, including extensive rights to participate during the investigative process¹³ as well as at later stages of the proceedings. Comparatively, at the ICC, victims are not considered "true" parties, but are limited to presenting their "views and concerns ... at stages of the proceedings determined to be appropriate by the Court" where their "personal interests are affected."¹⁴ As noted by an ICC Appeals Judge,

[t]he right of victims to participate enunciated by article 68(3) [of the Rome Statute] has no immediate parallel or association with the participation of victims in criminal proceedings in ... the Romano-Germanic system of justice, where victims in the role of civil parties or auxiliary prosecutors have a wide-ranging right to participate in criminal proceedings.¹⁵

7. The ICC Appeals Chamber has found that the language of the Rome Statute "mandates a specific determination by the Appeals Chamber that the participation of victims is appropriate in the particular interlocutory appeal under consideration."¹⁶ For that reason, victims must apply for leave to participate in appeals by providing "a statement in relation to how their

¹¹ January 2008 ICC Trial Chamber Decision, *supra* note 6, Separate and Dissenting Opinion of Judge René Blattmann ¶ 6.

¹² ECCC Internal Rules, *supra* note 1, R.23(6)(a).

¹³ See, e.g., *id.*, R.55(10),(11) (authorizing Civil Parties to request the CIJs to make orders and undertake investigative actions and to consult the case file); R.59(5) (authorizing Civil Parties to request the CIJs to "interview him or her, question witnesses, go to a site, order expertise or collect other evidence on his or her behalf"); R.74(4) (authorizing Civil Parties to appeal against certain orders of Co-Investigating judges, including primarily those relating to investigative actions and Civil Party application). See also Cambodian Code of Criminal Procedure, art. 134 (*as adopted* 10 Aug. 2007).

¹⁴ Rome Statute of the International Criminal Court, art. 68(3), *adopted* on July 17, 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force* July 1, 2002. See also War Crimes Research Office, Victim Participation Before the International Criminal Court at 31-33 (Nov. 2007), *available at* <http://www.wcl.american.edu/warcrimes>.

¹⁵ Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. 01/04-01/06(OA 8), Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals chamber of 2 February 2007, Separate Opinion of Judge Georgios M. Pikis ¶ 11 (Appeals Chamber, 13 June 2007) (footnotes omitted) [hereinafter "June 2007 ICC Appeals Decision"].

¹⁶ Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. 01/04-01/06(OA 7), Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mis en liberté provisoire de Thomas Lubanga Dyilo, ¶ 40 (Appeals Chamber, 13 Feb. 2007) [hereinafter "February 2007 ICC Appeals Judgment"].

002/19-09-2007-ECCC/OCIJ(PT01)

personal interests are affected by the particular appeal, as well as why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented.”¹⁷ Thus at the ICC, unlike at the ECCC, “participation is not a once-and-for-all event but rather [is] decided on the basis of the evidence or issue under consideration at any particular point in time.”¹⁸ There is no textual basis for the ECCC to follow the ICC approach on this matter; moreover, it would not be consistent with the role of Civil Parties and their status as full parties.

8. It bears noting that even among ICC judges there is disagreement about the ICC’s time-consuming approach to victim participation. For example, Judge Song has argued that repeatedly requiring victims to demonstrate how their personal interests are affected “leads to unnecessary procedural steps that are bound to slow down the appellate process.”¹⁹ Additionally, Judge Blattmann has said that requiring multiple applications “places too large a burden on victims” and that “[i]t should be possible for victims to apply to participate fully in their original application.”²⁰
9. Based on the experience thus far at the ICC, requiring ECCC Civil Parties to explain their interest in each pre-trial proceeding would also place a large burden on the Defense and the Office of the Prosecutor. It is reported that, as of November 2007, the ICC Office of the Prosecutor, the Defense teams, and Victims’ representatives had filed around 60 submissions, and the Pre-Trial and Appeals Chambers had filed around 30 decisions, each addressing requests by victims to participate in pre-trial proceedings.²¹ If the ECCC adopted the ICC approach, trial proceedings would be substantially delayed and there would be a genuine likelihood that a number of Charged Persons would not live to see final judgment.

2. Civil Parties Have an Inherent Interest in Participating in Pre-Trial Appeals of Detention Orders

10. The ECCC Internal Rules do not appear to contemplate Civil Party participation in adversarial proceedings regarding provisional detention before either the CIJs or the Trial Chamber.²² They also do not appear to allow Civil Parties to *appeal* detention decisions.²³

¹⁷ *Id.* ¶¶ 2, 38.

¹⁸ January 2008 ICC Trial Chamber Decision, *supra* note 6, ¶ 101.

¹⁹ February 2007 ICC Appeals Judgment, *supra* note 16, Dissenting Opinion of Judge Sang-Hyun Song Regarding the Participation of Victims, ¶ 2.

²⁰ January 2008 ICC Trial Chamber Decision, *supra* note 6, Separate and Dissenting Opinion of Judge René Blattmann ¶ 22.

²¹ See War Crimes Research Office Report, *supra* note 14, at 60.

²² See ECCC Internal Rules, *supra* note 1, R.63(1) (providing that “[d]uring the [provisional detention] hearing, the Co-Investigative Judges shall hear the Co-Prosecutors, the Charged Person and his or her lawyer”). *Cf. id.* R.81(3) (providing that the Trial Chamber may rule on provisional release “after hearing the Co-Prosecutors, the Accused and his or her lawyers”).

²³ Compare *id.*, R.74(4) (not providing for Civil Party’s right to appeal detention decisions by the CIJs) with *id.* R.74(3) (providing for a Charged Person’s right to appeal detention decisions by the CIJs). *Cf. id.* R.81(5)

002/19-09-2007-ECCC/OCIJ(PT01)

Nevertheless, the Rules can be read to include the right of Civil Parties *to participate* in all appeals before the Pre-Trial Chamber, including those related to detention. For example, the Rules provide that “[a]fter the co-rapporteurs have read their report [on the facts at issue and the details of the decision being appealed] the Co-Prosecutors and the lawyers for *the parties* may present brief observations.”²⁴

11. Notably, even at the ICC, where victims are not full parties to the proceedings, they have been allowed to participate in the appeal of a detention order. In the *Lubanga* case, the ICC Appeals Chamber considered whether the personal interest of victim participants were affected by the appeal of a provisional detention order, and found that victims of the case had an interest in “in appeals relating to determinations of whether or not a person subject to a warrant of arrest should be granted interim release.”²⁵ The concerns recognized by the Appeals Chamber in that case are similar to those at issue in Mr. Nuon’s appeal, including the danger that if released the accused might obstruct the investigation.²⁶
12. Furthermore, the interest of Civil Parties in expressing their views on provisional detention matters is implicitly recognized in the ECCC Internal Rules. In addition to mentioning the interest of Civil Parties in seeking collective and moral reparations, the Rules emphasize their interest in “participating in the criminal proceedings by supporting the prosecution.”²⁷ These dual roles are similarly highlighted in decisions of the ICC and the European Court of Human Rights (ECHR). For example, the ICC Trial Chamber has stressed that victims’ interest in participating in ICC proceedings goes beyond receiving reparations and “should encompass their personal interests in an appropriately broad sense.”²⁸ In another case, an ICC Appeals Chamber judge noted that the Rome Statute recognizes a victim’s interest in seeing justice done that “goes beyond the general interest that any member of society may have in seeing offenders held accountable.”²⁹ He found support for this view in *Kiliç v. Turkey*, in which the ECHR found that the right to an effective remedy under the European Convention requires,

[i]n addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and

(providing that “[a]ll decisions of the Trial Chamber concerning provisional detention are open to appeal by the Accused or the Co-Prosecutors, as appropriate”).

²⁴ *Id.*, R.77(10) (emphasis added).

²⁵ February 2007 ICC Appeals Judgment, *supra* note 16, ¶ 54.

²⁶ See Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. 01/04-01/06, Observations of victims a/0001/05, a/0002/06 and a/0003/06 in respect of the application for release filed by the Defense, ¶¶ 11-15 (Pre-Trial Chamber, 9 Oct. 2006).

²⁷ ECCC Internal Rules, *supra* note 1, R.23(1).

²⁸ January 2008 ICC Trial Chamber Decision, *supra* note 6, ¶ 98.

²⁹ June 2007 ICC Appeals Decision, *supra* note 15, Song Separate Opinion ¶ 13.

002/19-09-2007-ECCC/OCIJ(PT01)

punishment of those responsible for the deprivation of life and including effective access for the complainant to the investigation procedure.³⁰

13. As a consequence of his recognition of this broad view of victims' personal interests, the ICC judge found, against the majority, that victim participants' interest extended to participating in a proceeding on the narrow question of whether to admit an appeal against the confirmation of charges against the accused.³¹ In his view, ultimately "a successful appeal would diminish the prospects of the Victims to receive reparations and to see that justice is done."³²
14. A similarly broad reading of Civil Party's interests during ECCC pre-trial proceedings is warranted by Civil Party's status as full parties to the proceedings and the specific recognition in the Rules that they have an interest in supporting the prosecution. Rather than excluding Civil Parties from certain types of proceedings, any potential prejudice to Charged Persons may be reduced by appropriately regulating the scope of victim interventions.

C. The Scope of Civil Parties' Right to Participate in Appeals Must Be Balanced Against the Rights of an Accused to a Fair Trial

15. In all ECCC proceedings, the right of victims to participate must be balanced against the rights of the accused to a fair trial, including the right to be presumed innocent and the right to be tried without undue delay.³³ As noted by one commentator,

If the victims were able to exercise [participation] rights freely without any control by a judge, the proceedings could last indefinitely, infringing the rights of the accused. The number of victims in cases of war crimes and crimes against humanity often runs into the thousands or even tens of thousands. Furthermore, the nature of the damage they have suffered adds to the emotive power of their intervention in the proceedings. If not controlled, their participation could therefore interfere with the smooth conduct of trials and the rights of the accused, as well as the search for truth.³⁴

1. The Pre-Trial Chamber Should in All Cases Require Advance Submissions by Civil Parties

³⁰ ECHR App. No. 22492/92, ¶ 91 (28 Mar. 2000). *See also* Case of the Caracazo v. Venezuela, Inter-Am. Ct. H.R. (ser. C) No. 95, ¶ 115 (29 Aug. 2002) ("any person who considers himself or herself to be a victim of [human rights] violations has the right to resort to the system of justice to attain compliance with ... [States' duty to investigate and punish such violations], for his or her benefit and that of society as a whole").

³¹ *See* June 2007 ICC Appeals Decision, *supra* note 15, Song Separate Opinion ¶ 18.

³² *Id.*

³³ *See* Law on the Establishment of the Extraordinary Chambers as amended 27 October 2004, No. NS/RKM/1004/006, art. 35 new, (c).

³⁴ Jerome de Hemptinne, *The Creation of Investigating Chambers at the International Criminal Court*, 5:2 J Int'l Crim. Just. 402, 412 (1 May 2007).

002/19-09-2007-ECCC/OCIJ(PT01)

16. To prevent prejudice to the accused's right to a fair trial, prior to appeals hearings the Pre-Trial Chamber should strictly require all parties to submit advance notice of the arguments they intent to raise as required by the Internal Rules and the Practice Direction on the Filing of Documents.³⁵ By making an exception to this requirement for the *Nuon* appeal hearing, the Pre-Trial Chamber risked prejudicing the rights of the Charged Person and also opened the door for the Defense to itself raise an oral challenge to the participation of Civil Parties without first filing pleadings with the Court.

2. The Pre-Trial Chamber Should Limit Civil Party Interventions to the Specific Issues on Appeal

17. The ECCC Chambers should also limit Civil Party observations to those issues that are "specifically relevant to the issues arising in the appeal rather than more generally."³⁶ For example, the ICC Appeals Chamber has required victim participants to make an "explicit link between their submissions and the specific issues on appeal."³⁷ The Chamber has said that

it is not appropriate either merely to repeat evidence that was before the Pre-Trial Chamber, or to introduce new evidence before the Appeals Chamber, without making any specific link as to how such material affects the Appeals Chamber's determination of the issues raised on appeal.³⁸

Furthermore, where the concerns of victim participants have not provided assistance in determining the specific grounds of appeal, the ICC Appeals Chamber has not relied on them in making its decision on the merits.³⁹

18. Such limitations are appropriate even with regard to Civil Parties, despite their status as full parties to the proceedings. For example, the ECHR has recognized that the scope of Civil Party's right of access to court proceedings may be limited "[h]aving regard to the role accorded to civil actions within criminal trials and to the complementary interests of civil parties and the prosecution...., their roles and objectives being clearly different."⁴⁰ However, "these limitations must not restrict or reduce a person's access in such a way or to such an

³⁵ ECCC Internal Rules, *supra* note 1, R.77(4) (providing that in appeals before the Pre-Trial Chamber, "[t]he Co-Prosecutors and the lawyers for the parties ... must file their pleadings with the Greffier of the Pre-Trial Chamber" for inclusion in the case file"); ECCC Practice Direction on Filing of Documents Before the ECCC 01/0007, art. 8.1-8.3.

³⁶ February 2007 ICC Appeals Judgment, *supra* note 16, ¶ 55. *See also* Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. 01/04-01/06 (OA 7), Decision of the Appeals Chamber, ¶ 3 (Appeals Chamber, 12 Dec. 2006) (granting "the right to participate in [the] appeal for the purpose of presenting their views and concerns respecting their personal interests in the issues raised on appeal").

³⁷ February 2007 ICC Appeals Judgment, *supra* note 16, ¶ 71.

³⁸ *Id.*

³⁹ *See id.* ¶ 72.

⁴⁰ Case of Berger v. Fr., ECHR App. No. 48221/99, ¶ 38 (3 Dec. 2002).

002/19-09-2007-ECCC/OCIJ(PT01)

extent that the very essence of the right is impaired[.]”⁴¹ Moreover, any limitations must pursue a legitimate aim and have “a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”⁴²

19. The ECHR has found that all parties to a trial have a right “to submit any observations they consider relevant to their case” and the court has “a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties” and to give reasons for their decisions.⁴³ Nevertheless, courts may assess whether or not party submissions are relevant, and need not give a “detailed answer” to every argument.⁴⁴

3. The Chambers May Require Civil Parties to Select a Common Representative

20. The ECCC Internal Rules provide that “[a] group of Civil Parties may choose to be represented by a common lawyer drawn from the list held by the Victims Unit.”⁴⁵ In addition, the Co-Investigative Judges or the Chambers may organize such common representation by (1) requesting a group of Civil Parties to choose a common lawyer, (2) requesting the Victims Unit to choose a common lawyer for them, or (3) “[w]here the interests of Justice so require,” themselves designating a common lawyer for the group.⁴⁶
21. The authority to group Civil Parties provides the Court with an important means by which to find an appropriate balance between the rights of Civil Parties and Charged Persons. At this juncture it is unknown how many victims will apply to and meet the criteria for participating as Civil Parties. The crimes allegedly committed by the Charged Persons do, however, have millions of *de facto* victims and the proceedings could potentially involve a very large number of Civil Parties with very significant ramifications for the course of proceedings. As recognized by the ICC Trial Chamber, “the personal appearance of a large number of victims could affect the expeditiousness and fairness of the proceedings”⁴⁷ and cause significant delay. For that reason, if a large number of Civil Parties are joined to ECCC cases, the Chambers may wish to encourage, and if necessary require, grouping as a necessary mechanism to ensure the efficiency and fairness of proceedings — bearing in mind the individual interests of each Civil Party.
22. The Internal Rules provide that “[t]he Co-Investigating judges or the Chambers and the Victims Unit shall take all reasonable steps to ensure that in the selection of lawyers, the

⁴¹ *Id.* ¶ 30.

⁴² *Id.*

⁴³ Case of Perez v. Fr., ECHR App. No 47287/99, ¶ 80 (12 Feb. 2004).

⁴⁴ *See id.* ¶ 81.

⁴⁵ ECCC Internal Rules, *supra* note 1, art. 23(8).

⁴⁶ *Id.*, art. 23(8)(a)-(c).

002/19-09-2007-ECCC/OCIJ(PT01)

distinct interests of each of the Civil Parties are represented and that any conflict of interest is avoided.”⁴⁸ Similar provision for grouping of victims through common representation is made in the ICC Rules of Procedure and Evidence.⁴⁹ In a recent decision, the ICC Trial Chamber advocated “a flexible approach” to grouping and identified the following considerations as potentially relevant making the selection: “the language spoken by the victims (and any proposed representative), links between them provided by time, place and circumstance and the specific crimes of which they are alleged to be victims[.]”⁵⁰

23. Importantly, the judges may only mandate grouping in the face of opposition from Civil Parties when required in “the interests of Justice.” Therefore, until grouping becomes necessary to ensure the fairness and efficiency of the proceedings, voluntary grouping should be encouraged to avoid repetition during in the proceedings. At the same time, the Chambers may find it necessary to limit oral participation in ECCC hearings to group representatives⁵¹ — or one or more members of the group — if the number of interventions would cause significant delay or result in prejudice to the accused.

IV. CONCLUSION

24. Due to the likelihood that the ECCC will provide the only opportunity for victims to face those who harmed them and their families during the Democratic Kampuchea era, thousands of survivors may apply to act as Civil Parties. This process has the potential to make a significant contribution to national reconciliation in Cambodia. However, the scope of Civil Party interventions must be carefully regulated by the Chambers or the proceedings could lose focus and be substantially delayed, undermining the very interests Civil Party participation is intended to further: assisting the prosecution and seeing justice done.

Respectfully submitted,



Anne HEINDEL
Legal Advisor
Documentation Center of Cambodia
P.O. Box 1110
Phnom Penh, Cambodia
+855 (0)23 211 875

Signed in Phnom Penh, Cambodia, 20 February 2008

⁴⁷ January 2008 ICC Trial Chamber Decision, *supra* note 6, ¶ 116.

⁴⁸ ECCC Internal Rules, *supra* note 1, art. 23(8)(d).

⁴⁹ See ICC RPE, *supra* note 3, R.90(1)-(3).

⁵⁰ January 2008 ICC Trial Chamber Decision, *supra* note 6, ¶ 124.

⁵¹ See, e.g., ICC RPE, *supra* note 3, R.91 (authorizing the participation of legal representatives in hearings).