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Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

C11/53

អង្គបុរេជំនុំជម្រះ

PRE-TRIAL CHAMBER

CHAMBRE PRELIMINAIRE

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.

Criminal Case File N° 002/19-09-2007-ECCC/OCIJ (PTC01)

Before:

Judge PRAK Kimsan, President

Judge Rowan DOWNING

Judge NEY Thol

Judge Katinka LAHUIS

Judge HUOT Vuthy

Date:

20 March 2008

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NUP SOTHUNVIHET

DECISION ON CIVIL PARTY PARTICIPATION IN PROVISIONAL DETENTION APPEALS

Co-Prosecutors

CHEA Leang
Robert PETIT
YET Chakriya
William SMITH
TAN Senarong
Anees AHMED

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Charged Person

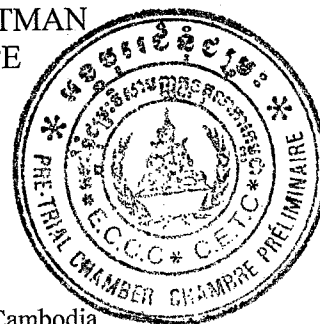
NUON Chea

Lawyers for the Civil Parties

Mr. HONG Kim Suon
Mr. LOR Chunthy
Mr. NY Chandy

Co-Lawyers for the Defence

SON Arun
Michiel PESTMAN
Victor KOPPE



I. BACKGROUND

A. Status of Civil Party Applications

1. The Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") held a hearing on the appeal by the Co-Lawyers for the Charged Person Nuon Chea against the Provisional Detention Order of the Co-Investigating Judges ("appeal against provisional detention") on 7-8 February 2008.
2. At the time of the hearing, there were four Civil Parties in the criminal proceedings relating to case file no. 002/19-09-07-ECCC/OCIJ. On 28 December 2007, the Greffiers of the Co-Investigating Judges filed formal notifications to this effect addressed to the Civil Parties.¹ The Greffiers of the Co-Investigating Judges had previously filed Inter-Office Memoranda addressed to the Pre-Trial Chamber dated 20 November 2007² and 13 December 2007³ respectively, concerning two of the civil party applications. The memoranda informed the Pre-Trial Chamber that the applications had been notified to the other parties and the Charged Persons and that the applicants could be considered Civil Parties for all purposes related to case file no. 002/19-09-07-ECCC/OCIJ.
3. On the basis of the memorandum dated 20 November 2007, on 22 November 2007 the Pre-Trial Chamber notified the Civil Party concerned of the appeal against provisional detention.⁴ On 19 December 2007, the Pre-Trial Chamber scheduled the hearing of the appeal for 4 February 2008.⁵ On 16 January 2008, the President of the Pre-Trial Chamber informed the four Civil Parties that, in accordance with Rule 77(4) of the Internal Rules ("Rules"), their lawyers could consult the case file up to the date of the hearing and that any pleadings had to be filed in accordance with the Practice Direction ECCC/01/2007/Rev. 1 on the filing of documents before the ECCC.⁶ On 31 January 2008, the Pre-Trial Chamber was informed by the Victims Unit of

¹ Charged Person Nuon Chea, Status of Civil Party Application, 28 December 2007 (Case File: 002/19-09-2007-ECCC/OCIJ, D22/1/1); Charged Person Nuon Chea, Status of Civil Party Application, 28 December 2007 (Case File: 002/19-09-2007-ECCC/OCIJ, D22/6/2); Charged Person Nuon Chea, Status of Civil Party Application, 28 December 2007 (Case File: 002/19-09-2007-ECCC/OCIJ, D22/7/2); Charged Person Nuon Chea, Status of Civil Party Application, 28 December 2007 (Case File: 002/19-09-2007-ECCC/OCIJ, D22/2/2).

² Charged Person Nuon Chea, Office of the Co-Investigating Judges, Interoffice Memorandum, Status of civil party petition of Chan Theary Seng, 20 November 2007 (Case File: 002/19-09-2007-ECCC/OCIJ, A70).

³ Charged Person Nuon Chea, Bureau des Co-Juges D'Instruction, Interoffice Memorandum, Statut de la constitution de partie civile de Dana Chhor, 13 December 2007 (Case File: 002/19-09-2007-ECCC/OCIJ, A93).

⁴ Charged Person Nuon Chea, Notification of Appeal in Case of Charged Person Nuon Chea, 22 November 2007 (Case File: 002/19-09-2007-ECCC/OCIJ (PTC01), C11/9).

⁵ Charged Person Nuon Chea, Scheduling Order, 19 December 2007 (Case File: 002/19-09-2007-ECCC/OCIJ (PTC01), C11/14).

⁶ Charged Person Nuon Chea, Status of Civil Party Applications, 16 January 2008 (Case File: 002/19-09-2007-ECCC/OCIJ (PTC01), C11/17).



the appointment of lawyers for all four Civil Parties and of their intention to appear at the hearing. On 4 February 2008, the Co-Investigating Judges filed Lawyer's Recognition Decisions dated 31 January 2008,⁷ accrediting and recognising HONG Kim Suon, LOR Chuntty and NY Chandy as the Lawyers for the four Civil Parties.

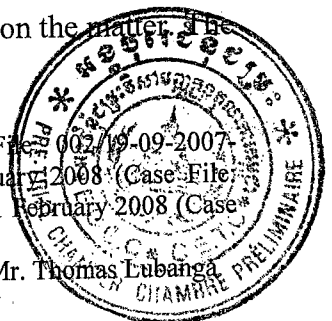
4. Prior to the hearing scheduled for 4 February 2008, the Pre-Trial Chamber distributed a document entitled "Conduct of Criminal Proceedings" to the parties, setting out the procedures to be followed during the hearing and indicating the point at which the President would invite the lawyers for the Civil Parties to make submissions, if applicable. During the hearing, the lawyers for the Civil Parties were invited to comment on the defence application for an adjournment. Prior to the re-scheduled hearing on 7 February, an updated version of the "Conduct of Criminal Proceedings" document was distributed to the parties, indicating the names of the lawyers for the Civil Parties and stating that they would be allowed to make submissions for up to thirty minutes each.

B. Arguments of the Parties at the Hearing on 7 February 2008

5. At the hearing, the national Co-Lawyer submitted that according to Internal Rule 23 and the Cambodian Criminal Procedure Code ("CPC"), Civil Parties were only permitted to participate in the trial on the merits and not in pre-trial proceedings. He subsequently framed his argument around the difficulty of having two complainants – both the Charged Person and the victims – in the provisional detention proceedings. The international Co-Lawyer argued that Rule 23 was silent as to the scope of civil party participation but that since the notion of participation in Rule 23(1)(a) presupposed an interest in the outcome of the proceedings, a restrictive approach should be applied. The lawyer cited the decision of the Appeals Chamber of the International Criminal Court in the case of *Lubanga* in support of his arguments.⁸ The lawyer argued that the Chamber must ensure that any views and concerns of victims are presented in a manner which is not prejudicial to, or inconsistent with, the rights of the accused and the right to a fair trial. It was noted that the Civil Parties had not filed pleadings or otherwise made their interests known.
6. The national Co-Prosecutor responded that the Internal Rules did not provide a clear indication of when Civil Parties should be involved and requested that the Bench decide on the matter.

⁷ Charged Person Nuon Chea, Lawyer's Recognition Decision, 4 February 2008 (Case File: 002/19-09-2007-ECCC/OCIJ, D22/7/5); Charged Person Nuon Chea, Lawyer's Recognition Decision, 4 February 2008 (Case File: 002/19-09-2007-ECCC/OCIJ, D22/2/5); Charged Person Nuon Chea, Power of Attorney Letter, 1 February 2008 (Case File: 002/19-09-2007-ECCC/OCIJ, D22/2/3).

⁸ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I", 13 February 2007.



international Co-Prosecutor submitted that Rule 23 did not limit the meaning of “proceedings” and pointed to the evolution of international criminal practice to include civil party participation at the investigative stage. He argued that the outcome of the *Lubanga* case was that a group of victims were allowed to participate in a pre-trial detention appeal and that the Pre-Trial Chamber had acted within the ambit of Rule 23.

7. The lawyers for the Civil Parties argued that under Rule 23, Civil Parties had the right to participate from the commencement of the prosecution and wished to address the court on how the Charged Person could affect society if he were released.

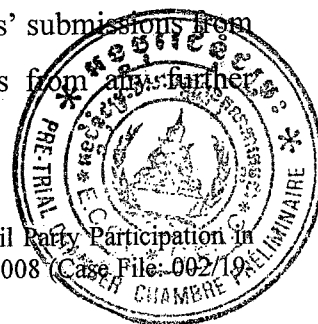
C. Decision to Proceed with the Hearing while Reserving all Rights

8. The Pre-Trial Chamber deliberated and heard further submissions, which disclosed a joint interest in proceeding with the hearing. The hearing proceeded on the basis that the Civil Parties and their lawyers would submit any written notes of their submissions to the Co-Lawyers for the defence in advance and would be permitted to make their submissions. Following a ruling by the Pre-Trial Chamber on the issue of civil party participation in provisional detention appeals, the submissions by the Civil Parties and/or their lawyers would be admitted or excluded as appropriate prior to determining the provisional detention appeal.
9. On 12 February 2008, the Pre-Trial Chamber issued a public order for the defence teams in all outstanding provisional detention appeals, the Co-Prosecutors and the Civil Parties to file submissions on the issues related to Civil Parties raised in the hearing, and inviting *amici curiae* to submit briefs by 22 February 2008.⁹ The Pre-Trial Chamber sought “focused submissions from *amici curiae* addressing the issue of the balance between the rights of the Charged Person to a fair trial and the right of the Civil Parties in the context of the ECCC Internal Rules”. The parties were permitted to file responses by 6 March 2008.

D. Requests from the Co-Lawyers of the Charged Person

10. In their submissions the Co-Lawyers for all the Charged Persons who were invited to make submissions requested the Pre-Trial Chamber to: (i) exclude the Civil Parties’ submissions from the record of the Nuon Chea appeal and (ii) preclude the Civil Parties from any further participation in proceedings related to provisional detention.

⁹ Charged Person Nuon Chea, Public Order on the Filing of Submissions on the Issue of Civil Party Participation in Appeals against Provisional Detention Order and an Invitation to *Amicus Curiae*, 12 February 2008 (Case File: 002/19-09-2007-ECCC/OCIJ (PTC01), C11/36).



II. WRITTEN SUBMISSIONS OF THE PARTIES

11. The Co-Lawyers for the Defence in all four cases affected by the current decision filed submissions¹⁰ in which they argue the following:

- (i) According to the Criminal Procedure Code of Cambodia ("CPC"), compensation following a determination of guilt is the sole purpose of civil party action. Furthermore, Civil Parties may not appeal against warrants for temporary detention or judicial supervision, and neither the investigating judge nor the court of first instance is required to hear civil party submissions prior to ordering the release or continued detention of an accused person.
- (ii) The Internal Rules accord with the CPC on the question of civil party appellate standing in not permitting Civil Parties to appeal against decisions concerning provisional detention.
- (iii) At the International Criminal Court ("ICC") victims must seek leave to participate in appeals related to provisional detention and the burden is on them to demonstrate how their personal interests are affected, the appropriateness of their participation and the lack of prejudice to the defence. Even if this burden is satisfied, the Chamber may reject their participation as being unhelpful.
- (iv) The Pre-Trial Chamber has no jurisdiction to allow the Civil Parties to participate in appeals related to provisional detention as there has been no formal review and acceptance of their applications to become Civil Parties by the Co-Investigating Judges.
- (v) Civil party participation in appeals on provisional detention is prohibited under the CPC and Internal Rules when read together, and in practice before the courts of Cambodia.
- (vi) Alternatively, the Civil Parties may not participate in proceedings in which their personal interests are not affected and any general concerns are capable of vindication by the Prosecution.
- (vii) Civil party participation is inconsistent with the rights of the Charged Persons as it could slow down the proceedings, place an unjust burden on the defence to respond to a multiplicity of opponents and risk injecting irrelevant and potentially prejudicial material into the proceedings.

12. The Co-Prosecutors¹¹ submit as follows:

¹⁰ Charged Person Nuon Chea, Joint and Several Submissions on Civil-Party Participation in Appeals Related to Provisional Detention, 22 February 2008 (Case File: 002/19-09-2007-ECCC/OCIJ (PTC01), C11/45).

¹¹ Charged Person Nuon Chea, Co-Prosecutors' Submission on Civil Party Participation in Provisional Detention Appeals, 22 February 2008 (Case File: 002/19-09-2007-ECCC/OCIJ (PTC01), C11/44).



- (i) Internal Rule 23 codifies the law on civil party actions by victims and the purpose of such action is to participate in criminal proceedings by supporting the prosecution and to allow victims to seek reparations. The term "criminal proceedings" is used without limitation and should be interpreted to mean all stages of the proceedings. The Internal Rules envisage that participation can be regulated by requesting multiple Civil Parties to have a common counsel.
- (ii) The CPC also allows victims to join as Civil Parties and participate at every stage of criminal proceedings although it is silent on the extent of participation during provisional detention appeal hearings.
- (iii) Municipal jurisdictions, such as France and Spain provide for victims' participation in criminal proceedings to varying degrees.
- (iv) At the ICC, victims have participated in pre-trial proceedings and in the *Lubanga* case, the Appeals Chamber allowed victims to participate in provisional release appeal proceedings after requiring them to file a statement explaining how their interests were affected.
- (v) International human rights documents advocate a broad approach to the participatory rights of victims.
- (vi) The letter and spirit of the basic documents of the ECCC lead to the conclusion that the Civil Parties are parties at all stages of the proceedings including provisional detention appeals. Even though Civil Parties do not attend the adversarial hearing on provisional detention nor are they eligible to appeal the order, they may participate in the appeal hearing to support the prosecution. A contrary interpretation would limit a Civil Party's right to be a party to a criminal proceeding as its interest in the proceeding would not be represented.
- (vii) The recognition of victims as parties is guided by sound legal and policy considerations. They can inform the court of issues relevant to provisional detention on the basis of their first-hand knowledge.
- (viii) The Pre-Trial Chamber ought to weigh the rights of potentially numerous victims to participate meaningfully in the proceedings with the right of the defendants to fair and expeditious proceedings.
- (ix) The Co-Prosecutors therefore propose an eight point regime for civil party participation during provisional detention appeals.

13. The Civil Parties make the following arguments:

- (i) In the Cambodian legal system and other civil law systems, victims may be joined as Civil Parties to seek reparations and enjoy the same rights as other parties. Reference is



- made to Articles 259 and 260 of the CPC and to examples of Cambodian cases in which Civil Parties were present during appeals concerning provisional detention or bail.
- (ii) Cambodian law explicitly allows the presence of Civil Parties at all stages of the proceedings and Civil Parties may make observations during hearings. This practice does not contradict international standards.
 - (iii) The presence of Civil Parties does not violate the Charged Person's right to a fair trial. This would only occur if there were a violation of a specific right such as the right to a lawyer.
 - (iv) In the Cambodian legal system, the ECCC law and the Internal Rules, in contrast to the ICC, there is no requirement that victims demonstrate that their personal interests are affected. Victims at the ICC do not enjoy the status of Civil Parties. ICC practice is not binding on the ECCC.
 - (v) In Cambodian law, there is no obligation to submit a brief and the failure to do so does not amount to a waiver of the right to make oral submissions.
 - (vi) Internal Rule 23(1)(a) means that Civil Parties shall enjoy the same rights as the defence and prosecution. Pursuant to the Internal Rules, Civil Parties have the right to participate in appeal hearings without seeking prior permission.

III. *AMICUS CURIAE* BRIEFS

14. The Pre-Trial Chamber acknowledges with thanks the *amicus curiae* briefs received from:

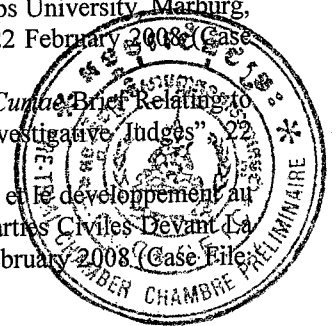
- Anne Heindel, Legal Adviser, Documentation Center of Cambodia¹²
- Christoph Safferling, Professor, Philipps University, Marburg¹³
- Khmer Institute of Democracy¹⁴
- L'Association pour les droits de l'Homme et le développement au Cambodge (ADHOC)¹⁵
- Redress Trust, International Federation of Human Rights (FIDH) and Avocats sans Frontières¹⁶

¹² Charged Person Nuon Chea, *Amicus Curiae* brief: Anne Heindel, Legal Adviser, Documentation Center of Cambodia, "On the Issue of Civil Party Participation in Appeals against Provisional Detention Orders", 20 February 2008 (Case File: 002/19-09-2007-ECCC/OCIJ (PTC01), C11/38).

¹³ Charged Person Nuon Chea, *Amicus Curiae* brief: Dr. Christoph Safferling, Professor, Philipps University, Marburg, "Amicus Curiae concerning Criminal Case File No. 002/19-09-2007-ECCC/OCIJ (PTC01)", 22 February 2008 (Case File: 002/19-09-2007-ECCC/OCIJ (PTC01), C11/39).

¹⁴ Charged Person Nuon Chea, *Amicus Curiae* brief: Khmer Institute of Democracy, "Amicus Curiae Brief Relating to Civil Party Participation in Appeals against Orders of Provisional Detention By the Co-Investigative Judges", 22 February 2008 (Case File: 002/19-09-2007-ECCC/OCIJ (PTC01), C11/40).

¹⁵ Charged Person Nuon Chea, *Amicus Curiae* brief: L'Association pour les droits de l'Homme et le développement au Cambodge (ADHOC), "Mémoire D'Amicus Curiae Sur La Question de la Participation des Parties Civiles Devant La Chambre Préliminaire Pour L'Appel Formé Contre la Décision de Détention Provisoire", 22 February 2008 (Case File: 002/19-09-2007-ECCC/OCIJ (PTC01), C11/41).



15. These briefs have been published on the website of the ECCC and the information contained therein has been considered by the Pre-Trial Chamber. The Pre-Trial Chamber notes that the submissions in some cases are broader in scope than explicitly requested. The Pre-Trial Chamber has been assisted by submissions related to the interest of Civil Parties in participating in appeals against detention orders, the balancing of the rights of Civil Parties and those of Charged Persons, civil party participation at the ICC and in national jurisdictions, and relevant jurisprudence of regional courts.

IV. WRITTEN RESPONSES OF THE PARTIES

16. The Co-Lawyers for three of the Charged Persons filed a joint response to the submissions of the other parties and the *amicus curiae* briefs in which they raised the following additional points:
- (i) A majority of the *amicus curiae* briefs are inadmissible as they fail to address or go beyond the specific issue presented by the Chamber and are defective in their form. Most tend to focus on the question of civil-party *raison d'être* rather than the question of civil party interests in provisional detention proceedings.
 - (ii) The Defence position should be seen as a logical and practical reflection of the existing law which does not contemplate civil party participation in provisional detention appeals. Civil party involvement at the pre-trial stage should be procedure-specific.
 - (iii) The Internal Rules are not as permissive as described by the Co-Prosecutors and amici and Rule 74 recognizes a difference between the parties with regard to their *locus standi* before the Pre-Trial Chamber raising the question of what is meant by the notion of full-party status.
 - (iv) The presumed benefits associated with victim participation will not be diminished by excluding them from proceedings related to provisional detention.
 - (v) The ICC Appeals Chamber has recognized that a procedure involving the filing of applications to participate is vital to safeguarding the rights of the Charged Person.
 - (vi) Allowing the Civil Parties to participate in provisional detention appeals would violate the presumption of innocence and the principle of equality of arms.
 - (vii) Jurisprudence of the European Court of Human Rights is distinguishable and cannot meaningfully be applied to the issue at hand.

¹⁶ Charged Person Nuon Chea, *Amicus Curiae* brief: Application of the Redress Trust (Redress), International Federation of Human Rights (FIDH) and Avocats sans Frontieres (ASF), "Amicus Curiae Submission of the Applicants", 21 February 2008 (Case File: 002/19-09-2007-ECCC/OCIJ (PTC01), C11/42).



(viii) Alternatively, the Defence propose a regime to be applied in preference to the one proposed by the Co-Prosecutors.

17. The Co-Prosecutors reiterate their previous submissions and present arguments with respect to the Co-Lawyers' contention that the Co-Investigating Judges' procedures were deficient as they did not themselves accept the civil party applications.¹⁷ The Co-Prosecutors submit that neither the Internal Rules nor the Practice Direction on Victim Participation¹⁸ require a reasoned order by the Co-Investigating Judges when admitting a civil party application and that the absence of such a mechanism is justified on policy grounds. Moreover, it is argued that the Pre-Trial Chamber is not vested with the power to recognize Civil Parties or find their applications inadmissible as this power is vested only in the Co-Investigating Judges or Trial Chamber under the Rules.

18. The Lawyers for the Civil Parties submit that the CPC has priority over the Internal Rules. They refer to Article 5 of the CPC which provides that a victim may join "*l'action publique*" as a Civil Party and does not only have a role in "*l'action civile*". They describe the conduct of appeal hearings before the Cambodian *Chambre d'instruction* and cite cases where Civil Parties participated in an appeal against a detention order. They argue that reliance on ICC jurisprudence is misplaced and that the CPC does not require victims to present their personal interests with respect to different procedural stages or hearings, rather, Civil Parties have full procedural rights. They submit further that a lack of written pleadings does not prohibit oral arguments and that the rights of Civil Parties would be jeopardised if the Pre-Trial Chamber were to refuse the right of oral argument to a Civil Party who has no relevant submission to make, as proposed by the Co-Prosecutors.

V. APPLICABLE LAW

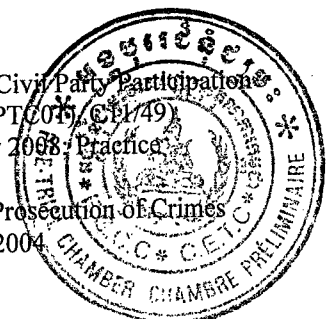
19. The first sentence of Article 33(new) of the ECCC Law¹⁹ provides:

The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses.

¹⁷ Charged Person Nuon Chea, Co-Prosecutors' Response to the Joint Defence Submissions on Civil Party Participation in Provisional Detention Appeals, 6 March 2008 (Case File No. 002/19-09-2007-ECCC/OCIJ (PTC01/CP1/49)).

¹⁸ Internal Rules (Rev. 1) of the Extraordinary Chambers in the Courts of Cambodia, 1 February 2008 Practice Direction 02/2007 on Victim Participation, 5 October 2007.

¹⁹ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 2001 as promulgated on 27 October 2004 (NS/RKM/1004/006), Article 33(new).



20. The second sentence of Article 33(new), which is mirrored in Article 20(new) concerning the Co-Prosecutors and Article 23(new) concerning the investigations, as well as in Article 12(1) of the ECCC Agreement²⁰, goes on to provide:

If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, guidance may be sought in procedural rules established at the international level.

A. The Internal Rules

21. Internal Rule 21(1)(a) states in relevant part:

ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties.²¹

22. Internal Rule 23 concerning civil party action by victims provides in relevant part:

1. The purpose of Civil Party action before the ECCC is to:

- a) Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution; and
- b) Allow Victims to seek collective and moral reparations, as provided in this Rule.

[...]

3. At any time during the judicial investigation, a Victim may apply to the Co-Investigating Judges in writing to be joined as a Civil Party. Subject to the provisions in these IRs relating to the protection of Victims, the Co-Investigating Judges must notify the Co-Prosecutors and the Charged Person. The Co-Investigating Judges may decide by reasoned order that the Civil Party application is inadmissible. Such order shall be open to appeal by the Victim.

4. A Victim may submit a Civil Party application up until the opening of proceedings before the Trial Chamber. Such application shall be in writing and filed with the Greffier of the Trial Chamber and shall be placed on the record of proceedings. A Victim who has filed a Civil Party application during the investigation shall not be required to renew the application before the Chambers.

²⁰ Agreement between the UN and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 2003, Article 12(1).

²¹ Internal Rules (Rev. 1) of the Extraordinary Chambers in the Courts of Cambodia, 1 February 2008, Rule 21(1)(a).



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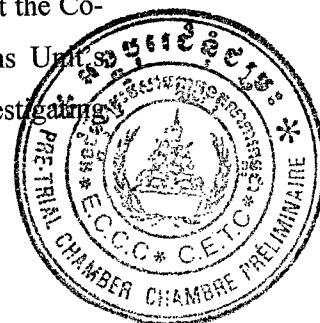
[...]

6. Being joined as a Civil Party shall have the following effects:

- a) When joined as a Civil Party, the Victim becomes a party to the criminal proceedings. The Civil Party can no longer be questioned as a simple witness in the same case and, subject to Rule 62 relating to Rogatory Letters, may only be interviewed under the same conditions as a Charged Person or Accused;
 - b) The Chambers shall not hand down judgment on a Civil Party action that is in contradiction with their judgment on public prosecution of the same case; and
 - c) The Co-Investigating Judges and the Chambers may afford to Civil Parties the protection measures set out in Rule 29.
7. Any Victim participating in proceedings before the ECCC as a Civil Party has the right to be represented by a national lawyer, or a foreign lawyer in collaboration with a national lawyer.

[...]

8. A group of Civil Parties may choose to be represented by a common lawyer drawn from the list held by the Victims Unit. In addition, the Co-Investigating Judges or the Chambers may organize such common representation, as follows:
- a) The Co-Investigating Judges or the Chambers, may request a group of Civil Parties to choose a common lawyer within a set time limit;
 - b) Where a group of Civil Parties is unable to choose a common lawyer within such time limit, the Civil Parties may request the Victims Unit to choose one or more common lawyers for them. In that case the Unit shall take into account the wishes of the Civil Parties concerned and the particular circumstances of the case, and any conflicting interests within the group, as well as the need to respect local traditions and to assist vulnerable groups;
 - c) Where the interests of Justice so require, the Co-Investigating Judges or the Chambers may, after consulting the Victims Unit, designate a common lawyer for such a group of Civil Parties;
 - d) The Co-Investigating judges or the Chambers and the Victims Unit shall take all reasonable steps to ensure that in the selection of common lawyers, the distinct interests of each of the Civil Parties are represented and that any conflict of interest is avoided;
 - e) At any time, the Civil Parties may, by reasoned application, request the Co-Investigating judges or the Chambers to reconsider the Victims Unit's choice of common lawyers, or their designation by the Co-Investigating judges or the Chambers; and



- f) Civil parties who lack the necessary means to pay for a common lawyer designated by the Co-Investigating Judges or the Chambers may seek assistance from the Victims Unit.

[...]

23. Rule 63(1)(a) on provisional detention provides:

The Co-Investigating Judges may order the Provisional Detention of a Charged Person after an adversarial hearing. If the Charged Person does not yet have the assistance of a lawyer, he or she shall be advised of the right to a lawyer as provided by Rule 21(1)(d). The Charged Person has the right to a reasonable period in order to prepare his or her defence. During the hearing, the Co-Investigating Judges shall hear the Co-Prosecutors, the Charged Person and his or her lawyer. At the end of the hearing the Co-Investigating Judges shall decide on Provisional Detention. If Provisional Detention is not ordered, the Charged Person shall be released. If the Co-Investigating Judges decide to order Provisional Detention they shall issue a Detention Order.

24. Rule 74(4) concerning grounds for pre-trial appeals provides that Civil Parties may appeal against the following orders of the Co-Investigating Judges:

- a) refusing requests for investigative action allowed under these Rules;
 - b) declaring the Civil Party application inadmissible;
 - c) refusing requests for the restitution of seized property;
 - d) refusing requests for expert reports allowed under these IRs;
 - e) refusing requests for further expert investigation allowed under these IRs;
 - f) a Dismissal Order where the Co-Prosecutors have appealed;
 - g) refusing an application to seize the Chamber for annulment of investigative action;
- or
- h) relating to protective measures.

25. Rule 77 describes the procedure for pre-trial appeals and applications and states in relevant part:

- 3. The President of the Chamber shall verify that the case file is up to date and set a hearing date. The Greffier of the Chamber shall notify the Co-Investigating Judges, the parties and their lawyers.
- 4. The Co-Prosecutors and the lawyers for the parties may consult the case file up until the date of the hearing. They must file their pleadings with the Greffier of the Chamber as provided in the Practice Direction on filing of documents. The Greffier



shall record the date of receipt on pleadings and immediately place them in the case file.

10. The President of the Chamber shall appoint one international and one national judge to be co-rapporteurs. The co-rapporteurs shall prepare a written report which shall set out the facts at issue and the details of the decision being appealed, which shall be placed on the case file. After the co-rapporteurs have read their report, the Co-Prosecutors and the lawyers for the parties may present brief observations. The Chamber may order the personal appearance of any person, as well as the production of exhibits.

14. All decisions under this Rule, including any dissenting opinions, shall be reasoned and signed by their authors. Such decisions shall be notified to the Co-Investigating Judges, the Co-Prosecutors and the other parties by the Greffier of the Chamber. The Co-Investigating Judges shall immediately proceed in accordance with the decision of the Chamber.

26. The Glossary of the Internal Rules defines a "Civil Party" as "a victim whose application to become a Civil Party has been accepted by the Co-Investigating Judges or the Trial Chamber in accordance with these [Internal Rules]". The word "Party" includes the Co-Prosecutors, the Charged Persons/Accused and Civil Parties.

B. Cambodian Procedure and Practice

27. Article 2 of the CPC defines the purpose of criminal and civil actions:

L'action publique et l'action civile sont deux actions en justice.

L'action publique a pour objet de constater l'existence d'une infraction, d'établir la culpabilité de son auteur et d'infliger à celui-ci les peines prévues par la loi.

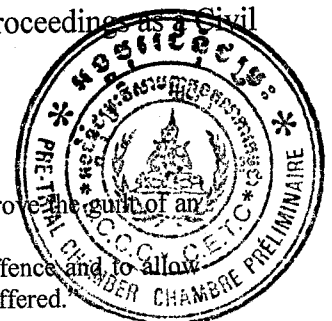
L'action civile a pour objet de réparer le préjudice causé à la victime d'une infraction et de permettre à la victime d'obtenir des dommages intérêts suffisants par rapport au préjudice subi.²²

28. Article 5 describes how a victim may lodge a complaint and join criminal proceedings as a Civil Party on application to the investigating judge.

²² Unofficial English translation provides:

"The purpose of a criminal action is to examine the existence of a criminal offence, to prove the guilt of an offender, and to punish this person according to the law.

The purpose of a civil action is to provide compensation for injuries to victims of an offence and to allow victims to receive sufficient moral reparations corresponding with the injuries they have suffered.



29. The CPC envisages the participation of Civil Parties during the investigation. Article 134 describes requests that may be made by the Civil Party to the investigating judge. Articles 137 and 138 provide that when an investigation starts, a victim may file a request or complaint with the investigating judge to become a Civil Party. Articles 203 to 218 of the CPC dealing with provisional detention do not make reference to Civil Parties and Article 268, which sets out the warrants of the investigating judge that may be appealed against by Civil Parties, does not include provisional detention orders. Article 258 concerning the Investigative Chamber (comparable in its functions to the ECCC's Pre-Trial Chamber) provides that after receiving an appeal, the President of the Chamber shall notify the parties and their lawyers of the hearing date. The accused person, Civil Party or lawyer shall sign to confirm receipt of the notification if it is made orally. In accordance with Article 259, the lawyers may consult the case file up to the date of the hearing and the parties and lawyers may file pleadings with the court clerk. Article 260 provides that the parties may be summonsed to attend the hearing.

C. International Standards

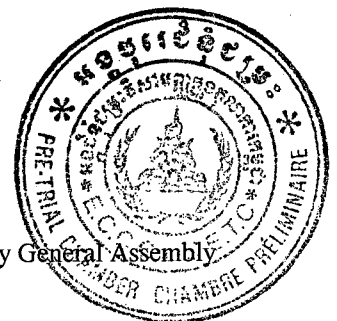
UN Victims Declaration

30. On 29 November 1985, the United Nations General Assembly unanimously adopted a Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power ("UN Victims Declaration"), designed to assist governments and the international community in their efforts to recognise and respect the rights of victims without prejudice to the rights of suspects or offenders. Principle 6 provides that:

The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

- (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information.
- (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.²³

²³ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34, 29 November 1985, principle 6(a).



31. The principles enunciated in the UN Victims Declaration were reaffirmed in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the United Nations General Assembly on 16 December 2005.²⁴ The principles include the obligation to provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice.

Structure of other international or internationalized courts

32. The ICC Statute provides in Article 68(3):

Where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.²⁵

33. Article 12.3 of UNTAET Regulation No.2000/30 in the Transitional Rules of Criminal Procedure of East Timor states:

Any victim has the right to be heard at a review hearing before the Investigating Judge, and at any hearing on an application for conditional release pursuant to Section 43 of the present regulation. In the exercise of this right, the victim may be represented in court by a legal representative. An individual victim has the right to be notified by the prosecutor, or by the police in proceedings pursuant to Section 44 of the present regulation, in advance of the time and place of review hearings referred to in Sections 20, 29.5 and 43 of the present regulation, provided that the victim has previously indicated in a reasonable manner to the court, prosecutor or investigating officer a desire to be so notified.

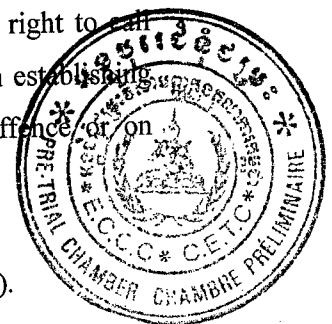
34. The Provisional Criminal Procedure Code of Kosovo provides in Articles 80, 81 and 82:

Article 80

- (1) The injured party has the right to file a property claim in criminal proceedings in accordance with Article 108 paragraph 1 of the present Code.
- (2) During all stages of criminal proceedings, the injured party has the right to call attention to all facts and to propose evidence which has a bearing on establishing the criminal offence, on finding the perpetrator of the criminal offence or on establishing his or her property claims.

²⁴ General Assembly resolution 60/147.

²⁵ Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998, article 68(3).



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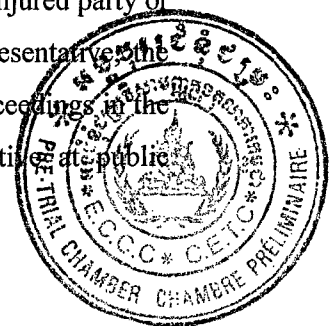
- (3) In the main trial, the injured party has the right to propose evidence, to put questions to the defendant, witnesses and expert witnesses, to make remarks and present clarifications concerning their testimony and to give other statements and to file motions.
- (4) In accordance with the provisions of the present Code, the injured party has the right to inspect the record and documents and objects that serve as evidence.
- (5) The public prosecutor, the pre-trial judge and the presiding judge shall inform the injured party about the rights provided for in paragraphs 1 through 4 of the present article.

Article 81

- (1) The injured party and his or her legal representative may also exercise their rights in proceedings through an authorized representative.
- (2) The injured party, his or her legal representative and authorized representative are obliged to inform the court of every change in address or current residence.
- (3) An authorized representative shall have a duty to safeguard the rights of the injured party, especially to protect his or her integrity during examination before the authority conducting the proceedings and to file and pursue property claims.
- (4) Victim Advocates of the Victim Advocacy Unit shall assist injured parties in safeguarding their rights, including, where appropriate, as authorized representatives of the injured parties in accordance with the present article.

Article 82

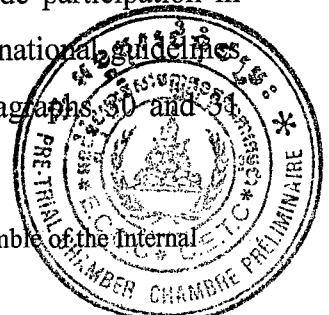
- (1) The injured party shall have an authorized representative from the initiation of the criminal proceedings:
 - 1) If the injured party is a child;
 - 2) If the injured party has a domestic relationship with the defendant;
 - 3) If the proceedings are conducted for the criminal offences in Article 139 of the Provisional Criminal Code or the criminal offences against sexual integrity in Chapter XIX of the Provisional Criminal Code, except the criminal offences in Article 203 of the Provisional Criminal Code;
 - 4) If the injured party has a mental disorder or disability; or
 - 5) If the court finds that the injured party is particularly vulnerable and in substantial need of the assistance of an authorized representative.
- (2) In the cases provided for in paragraph 1 of the present article, if the injured party or his or her legal representative does not engage an authorized representative, the president of the court or the competent authority conducting the proceedings in the pre-trial phase shall appoint *ex officio* an authorized representative at public expense.



VI. CONSIDERATION

35. At issue is the scope of Internal Rule 23(1) where it reads: "The purpose of Civil Party action before the ECCC is to a) Participate in criminal proceedings...by supporting the prosecution". The question raised is whether this includes the possibility of Civil Parties to participate in the appeal against the Provisional Detention Order in the case of the Charged Person.
36. The Pre-Trial Chamber finds that the text of Internal Rule 23(1)(a) is clear in its wording that Civil Parties can participate in all criminal proceedings, which includes the procedure related to appeals against provisional detention before the Pre-Trial Chamber. The Pre-Trial Chamber further considers that the provisions in the Internal Rules quoted in paragraphs 20 to 26 make it clear that Civil Parties have active rights to participate starting from the investigative phase of the procedure.
37. The Pre-Trial Chamber notes that the inclusion of Civil Parties in proceedings is in recognition of the stated pursuit of national reconciliation.²⁶ The Pre-Trial Chamber has no jurisdiction to examine the Internal Rules in full regarding victim participation, but merely to examine the issue as outlined above.
38. The jurisdiction of the Pre-Trial Chamber in the Internal Rules regarding provisional detention appeals was based on the jurisdiction of the Investigation Chamber. The Pre-Trial Chamber can therefore seek guidance for its functioning in the articles in the CPC prescribed for the Investigating Chambers. In the CPC, there is a provision in articles 259 and 260 for the Civil Parties related to participation in appeals against detention orders. Reading Rule 23(1) in the light of the CPC means that the wording envisages participation of Civil Parties during the proceedings of the ECCC, including appeals against provisional detention orders.
39. According to Article 12 of the ECCC Agreement, there is an obligation for the Pre-Trial Chamber to see whether the CPC is consistent with international standards on this issue if the Pre-Trial Chamber is to seek guidance from the CPC.
40. The Pre-Trial Chamber finds that Internal Rule 23(1), when read to include participation in proceedings of appeals against detention orders, is consistent with the international guidelines concerning civil party participation in criminal proceedings set out in paragraphs 30 and 31.

²⁶ General Assembly of the United Nations, Resolution 57/228, 18 December 2002, and the Preamble of the Internal Rules of the ECCC.



above²⁷. Furthermore, it is consistent with procedural rules of the international tribunals mentioned in paragraphs 32, 33 and 34. The Internal Rules differ in some procedural respects from those of other courts, but not in respect of the principle of civil party participation during the detention phase. Considering this international practice, civil party participation during the detention phase must in addition be regarded as generally complying with fair trial principles. In general, it is further accepted that Civil Parties may have an interest in the outcome of an appeal against a detention order.

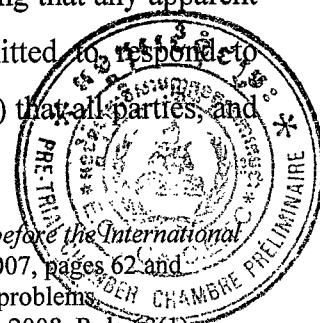
41. The Pre-Trial Chamber notes that the Internal Rules differ from the CPC and the aforementioned provisions in so far as there is no provision for the Civil Parties to participate in the adversarial hearing before the Co-Investigating Judges of the ECCC. Internal Rule 63(1) provides for the Co-Investigating Judges to hear only “the Co-Prosecutors, the Charged Person and his or her lawyer”.²⁸ . Where an investigation is commenced by the Co-Prosecutors on the basis of a complaint, there is no procedure for the complainant to be informed of whether this has been followed by a judicial investigation. By operation of the Internal Rules, any prospective Civil Party will first become aware of any judicial investigations against a specific Charged Person upon the notification of the issuing of a provisional detention order, as is provided for in Internal Rule 46. Thus civil party participation is only possible and provided for in the Internal Rule 23(3) from and after the commencement of a judicial investigation, and, in effect, after an order has been made under Rule 63. Where a Charged Person has made an appeal against a provisional detention order, as provided for in Internal Rule 63(4), the Civil Parties will have the right to “participate”, as at this point the appeal forms part of the “criminal proceedings”, as provided for in Internal Rule 23(1).

42. The effect of this participation of the Civil Parties in an appeal against a provisional detention order is that the Charged Person is confronted with matters which may not have been previously submitted at the adversarial hearing before the Co-Investigating Judges. This is a matter that could cause an imbalance in the procedures and the right to a fair trial, but such participation of Civil Parties is authorised and the procedures adopted by the ECCC must allow for this.

43. The Internal Rules provide the Pre-Trial Chamber with the means of ensuring that any apparent imbalance or unfairness can be addressed. A Charged Person is permitted to respond to submissions made by any Civil Parties. It is provided by Internal Rule 77(4) that all parties, and

²⁷ Internal Rule 23(1); The Pre-Trial Chamber notes that in the *Report on Victim Participation before the International Criminal Court* by the War Crimes Research Office, Washington College of Law, November 2007, pages 62 and following, it is noted that the systems adopted in respect of victim participation are not without problems.

²⁸ Internal Rules (Rev. 1) of the Extraordinary Chambers in the Courts of Cambodia, 1 February 2008, Rule 63(1).



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this will include the Civil Parties, must file written submissions with the Greffier of the Pre-Trial Chamber before the hearing on the appeal. At all times the Pre-Trial Chamber can allow the Charged Person to provide written or oral submissions in response where the interests of the Charged Person are involved, even when new issues are raised during the hearing. In this way, the interests of the Charged Person can be protected without having a prescriptive procedure adopted which can potentially cause problems, as can be concluded from the experience of the ICC²⁹. The Pre-Trial Chamber is additionally guided by the provisions of Internal Rule 21(1)(a), which provide:

ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties.³⁰

44. The Pre-Trial Chamber finds that the right of the Charged Person to a fair trial is therefore sufficiently guaranteed in the Internal Rules and balanced with the rights of Civil Parties to written and oral participation in the proceedings before the Pre-Trial Chamber dealing with an appeal against the detention order.
45. The procedures of the Pre-Trial Chamber were followed, as related in paragraphs 1 to 4 of this decision. A few days before the hearing, lawyers were appointed for the Civil Parties and they indicated that they wished to be heard. The Pre-Trial Chamber made such directions as were necessary to ensure that the rights of the Charged Person were not adversely affected.
46. In the instant case, the Charged Person was confronted with the fact that the Civil Parties could make oral submissions after the Co-Lawyers made their initial submissions during the hearing. Prior to the hearing, the Civil Parties did not file written submissions. The Co-Lawyers complained about permitting the Civil Parties to orally submit their views. The Pre-Trial Chamber requested the lawyers of the Civil Parties to deliver copies of the written versions of their oral submissions. The contents of these submissions were taken into account by the Pre-Trial Chamber and the parties when addressing the Chamber concerning the asserted right by the Civil Parties to participate in the appeal. The Pre-Trial Chamber decided to continue the hearing of the appeal with the participation of the Civil Parties with agreement from all parties. The contents of the submissions of the Civil Parties disclosed their awareness of their duty to only address relevant issues regarding the interests of the Civil Parties in the issues dealt with. This does not foreclose the possibility that the Civil Parties will in the future be encouraged or required to join their submissions where they share the same views in order to enhance the



²⁹ See *Report on Victim Participation before the International Criminal* above.

³⁰ Internal Rules (Rev. 1) of the Extraordinary Chambers in the Courts of Cambodia, 1 February 2008, Rule 21(1)(a).

efficiency of the proceedings. The rights of the Charged Person were preserved by permitting him to make further written submissions addressing the ability of the Civil Parties to be heard on the appeal. Additionally, the Charged Person exercised the right given by the Pre-Trial Chamber to respond to the submissions of the Civil Parties during his initial oral submissions. The rights of the Charged Person to a fair hearing were thus balanced and protected and not violated, as asserted by him.

47. The Pre-Trial Chamber finds that according to Internal Rule 23(3) it is the decision of the Co-Investigating Judges to approve the applications of the Civil Parties. There is no possibility for the Charged Person to appeal this decision. The Pre-Trial Chamber therefore has no jurisdiction to determine whether the Co-Investigating Judges' assessment was not made in accordance with the Rules, as is asserted by the Co-Lawyers.

48. The Co-Lawyers asserted that difficulties may arise in the future if the number of Civil Parties increases.³¹ The Pre-Trial Chamber has reflected upon the implications of its decision for the future. In exercising its jurisdiction, the Pre-Trial Chamber cannot speculate on facts that may or may not be presented to it in the future, as its jurisdiction is limited to only matters that have occurred and not those that may occur.

49. Unlike the ICC Statute, the Internal Rules provide that once admitted, a Civil Party may participate in all stages of the proceedings according to Internal Rule 23(4). There is no need to show any special interest in any stage of the proceeding, as asserted by the Co-Lawyers.

³¹ Charged Person Nuon Chea, Joint and Several Submissions on Civil-Party Participation in Appeals Related to Provisional Detention, 22 February 2008 (Case File: 002/19-09-2007-ECCC/OCIJ (PTC01), C11/45), para 29.



THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:

The requests of the Charged Person to: (i) exclude the Civil Parties' submissions from the record of the Nuon Chea appeal and (ii) preclude any further participation by the Civil Parties in proceedings related to provisional detention are refused. ny

GIVEN IN PUBLIC BY the Pre-Trial Chamber,

Phnom Penh, 20 March 2008

Pre-Trial Chamber

President

Rowan DOWNING

NEY Thol

Katinka LAHUIS

HUOT Vuthy

PRAK Kimsan

Greffiers

KEO Vanny

Dirk Jan LAMAN

