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LEGAL BRIEF

Joint response to the submissions of the Defence, the Co-Prosecutors and amici curiae relating to the participation of Civil Parties in appeals against provisional detention orders

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I. Procedural Background

1. Based on Rule 23 of the ECCC Internal Rules ("IR") the victims were admitted as Civil Parties in the case against Nuon Chea on 31 January 2008, and notified on Friday 1 February 2008. Due to the lack of time¹, the Legal Representatives were not notified of the hearing on Monday 4 February 2008 by the Court Clerk. The Legal Representatives of the Civil Parties were not invited by the Pre-Trial Chamber ("PTC") to submit pleadings relating to the appeal of the Charged Person on 16 January 2008², because they were not yet assigned as Lawyers of the Civil Parties, neither have they been requested to file written submissions since their admission on 31 January 2008.
2. The PTC held a hearing on 7-8 February 2008 on the appeal by the Co-Lawyers of the Charged Person against the provisional detention order of the Co-Investigating Judges.
3. At the hearing as well as in their submission, the Defence argued that the participation of the Civil Parties in the appeal hearing against the provisional detention order would violate the right of the Charged Person to a fair trial. They objected that the Civil Parties had not filed written pleadings nor had they presented their personal interest in participating at this stage of the proceedings. In addition, the Defence argued that Rule 23 IR does not grant the Civil Parties the right to participate in proceedings dealing with appeals against detention orders. They referred to the decision of the Appeals Chamber before the International Criminal Court ("ICC") in the case *Prosecutor v. Thomas Lubanga Dyilo* of 13 February 2007.
4. The PTC issued on 12 February 2008 a public order and requested submissions from the parties on the issue of Civil Party Participation in appeals against provisional detention orders and requested *amici curiae* to the issue of the balance

¹ The Victims Unit could at that time not yet assist the Civil Parties effectively in an adequate manner and either provide the Civil Parties at time with legal representatives. Funds for legal representation of indigent Civil Parties- in contrary to the Defence - are not foreseen in the budget of the ECCC.

² see Defence' submission, para 5

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 until 22 February 2008.

The parties have been granted the opportunity to respond to the submitted files until 06 March 2008.

5. The Legal Representatives herewith submit a joint response in particular to the submissions of the Defence, the Co-Prosecutors and the amici curiae from Anne Heindel and Christoph Safferling.

II. Legal sources

6. Pursuant to the ECCC-Law³ in its Articles 20 (new), 23 (new), and 33 (new) and Article 12 of the Agreement⁴ the applicable law is the Cambodian National Law ~~in~~ *in* force. Only 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 at the international level.


The Internal Rules *consolidate* applicable Cambodian procedure for proceedings before the ECCC⁵.

7. However, if the Cambodian Criminal Procedure Code ("*CPC*") is clear, is unambiguous regarding the interpretation, deals with the particular matter in question and is consistent with international standards, the CPC has priority to the Internal Rules.

8. Therefore, relating to the raised questions of
 - (i) Civil Parties' participation
 - (ii) the personal interest of the Civil Parties in the instant appeal
 - (iii) potential limits for participation of Civil Parties

³ Law on the Establishment of the Extraordinary Chambers as amended on 27 October 2004 (NS/RKM/1004/006)

⁴ Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea, 06 of June 2003

⁵ see Preamble of the Internal Rules 

the CPC is the first source to give answers about the manner of Civil Parties' rights and the practice before the ECCC.

If the CPC matches the requirements mentioned above (*see para 6*) it is the applicable law, *lex specialis*. In case of contradictions between the Internal Rules and the CPC the latter is binding.

III. The Criminal Procedure Code and participation of Civil Parties in appeals hearing against detention orders

9. The Defence states⁶ that according to the Cambodian CPC such participation in appeals is "*categorically prohibited*". The Defence refers to Art. 2 of the CPC and argues that "*criminal and civil actions are two separate actions, civil action has the purpose to demand compensation and reparation and that the public action is brought by the prosecutor for the general interest.*"

Therefore, the defence concludes that the CPC only offers the "*civil party action*" directed to compensation the possibility of participation after a criminal court has declared that the accused person is guilty.

10. Furthermore, the Defence continues that the pending appeal against a detention order is reserved for the Prosecutor and the Accused Person and not for the Civil Party. Because the participation of the Civil Party is not mentioned in the adversarial hearing⁷ dealing with the issuance of a detention order, the Defence argues that the participation of Civil Parties is not permitted in the pending appeal according to the CPC.

11. The Defence must fail in these arguments.

The CPC⁸ provides in its Article 5 as follows:

« Mise en mouvement de l'action publique par la victime

La victime d'un crime ou d'un délit peut déposer une plainte avec constitution de partie civile auprès du juge d'instruction. La plainte avec constitution de partie

⁶ see para 2, 8-10 of the defence' submission

⁷ see Art. 206, 266-268

⁸ Further quoted in the French version

civile a pour effet de saisir le juge d'instruction de l'action publique, dans les conditions prévues par les articles 139 (...) et 140(...). »

That the victim is even allowed to make a complaint, to start "*l'action publique*" and to join such as Civil Party indicates clearly that the Civil Party is not only in an active role in "*l'action civile*" but as well in "*l'action publique*". Therefore, regardless if the prosecution opens "*l'action publique*" or the victim submits a complaint which is taken by the prosecution to start "*l'action publique*" in both cases the victim is allowed to join "*l'action publique*" as Civil Party.

12. The CPC⁹ describes the general conduct of appeal hearings before "*La chambre d'instruction*" which corresponds to the PTC before the ECCC.

In the conduct of appeal hearings no distinction is made between appeals submitted by Civil Party or Defendant.

In article 258 it states:

"...La notification est faite au mis en examen détenu ainsi qu'il suit:

(...)

La notification est faite au mis en examen non détenu, à la partie civile et aux avocats ainsi qu'il suit:

(...)

Article 259 provides the following:

"Le procureur générale près la cour d'appel et les avocats peuvent consulter le dossier jusqu'à l'audience.

Le procureur général doit¹⁰ remettre au greffier, au plus tard la veille de l'audience, ses réquisitions écrites.

Les parties et les avocats peuvent¹¹ remettre au greffier des mémoires.

(...)

Les parties et les avocats sont admis à présenter des mémoires jusqu'au début de l'audience. »

Article 260 states:

« ...Après le rapport du président de la chambre d'instruction, le procureur générale près la cour d'appel et les avocats observations sommaires.(...) »

According to the CPC¹², it is specified¹³ that "*la chambre d'instruction*", which is competent for all appeals in the preliminary phase (and correspondent to the PTC), shall notify the date of the hearing to the parties and their lawyers. Furthermore, it

⁹ see article 257-265 CPC

¹⁰ emphasis added

¹¹ See supra 8

¹² see article 257 CPC

¹³ see article 258

is noted, that the *parties and the lawyers may* submit written statements before the hearing takes place and they are allowed to give oral statements during the hearing.

13. The relevant articles 5 and 258-260 of the CPC of Cambodia are clear, unambiguous regarding the interpretation, without any contradictions and consistent with international standards. They accomplish the prerequisites cited above.¹⁴

Thus, in the question at issue the CPC applies and specifies the right to participation of the Civil Parties and their Legal Representatives.

Furthermore, the full rights of the Charged Person are respected by the CPC and the fact of participation of Civil Parties in appeals in general and equally in an appeal against a detention order does not infringe on the rights of the Charged Person.¹⁵

Consequently, when the CPC of Cambodia applies, the Internal Rules¹⁶ and international practice need not be consulted in this pending question.

14. Moreover, in contrary to the Defence' point of view, in Cambodia the participation of Civil Parties in a hearing of an appeal against a detention order is well-known and practised.¹⁷

IV. The Criminal Procedure Code and the requirement of a personal interest in the appeal hearing against a detention order

15. The Defence refers¹⁸ to the ICC and in particular to the case against

¹⁴ see para 6

¹⁵ In other civil law systems the Civil Parties have been granted as well full rights as parties in the criminal proceedings. The performance of these wide range of rights has never been seen as a prejudice to the defendant. Furthermore, e.g. in the case *Perez v. France* (Application no. 47287/99) the European Court of Human Rights (ECHR) noted,

"that the right to a fair trial as guaranteed by Art. 6 § 1 of the European Convention of Human Rights includes the right of the parties to submit any observations that they consider relevant to their case." (para 80).

¹⁶ see rules 74, 77 (3) and 77 (4) IRs which are similar to the CPC

¹⁷ see e.g. case no. 170, v. Born Sam Nang and Sok Sam Oeun (alias Boeun); 16 March 2004, Court of Appeal, Phnom Penh, Cambodia

case no. 696, v. Teang Ny, 13 September 2006, Court of Appeal, Phnom Penh, Cambodia

In both cases, the Civil Parties and their lawyers participated in the appeal hearings against a detention order

¹⁸ see para 14-18 and 24-26 of the Defence' submission

Thomas Lubanga Dyilo and request for a practice similar to that of the ICC where the victims have to present their personal interest before being allowed to participate in the pending appeal of a detention order.

16. The Defence' reliance on the jurisprudence of the ICC in this matter is misplaced. As demonstrated above¹⁹ the CPC is the relevant applicable law which provides victims the status of Civil Parties and a referral to the ICC related to the issue in question is not indicated because the CPC has priority and is *lex specialis*. Furthermore, the CPC does not stipulate any request of the victims as such to present their personal interest in the different stages or hearings. Moreover, a victim who has filed a Civil Party application during the investigation phase shall not be required to renew the application.²⁰ Once admitted as Civil Parties, the victims and their legal representatives may perform their rights as *inter alia* getting access to the file²¹, participating in at all stages of the proceedings²², presenting evidences²³ and questioning witnesses²⁴. Only in their application does a Civil Party have to specify that they are victims and how their suffering is related to the case.²⁵ An additional requisite in different stages or hearings is not at all required, neither in the Internal Rules.
17. Under the Rome Statute, the ICC affords victims the mere status of "participants" in its proceedings, who are granted the right to present their "views and concerns" during proceedings.²⁶ But the ECCC, which draws on Cambodian law in a civil law system, allow victims to participate as Civil Parties, with full procedural rights.²⁷

¹⁹ see para 13

²⁰ see rule 23 (4) IR

²¹ see rule 56 (11) and 86 IR

²² see rule 23 IR

²³ see rule 55 (10) IR

²⁴ see rule 91 (2) IR

²⁵ see rule 23 (5) IR

²⁶ Rome Statute of the ICC, Article 68(3): "Protection of the victims and witnesses and their participation in the proceedings."

²⁷ See, e.g. Rules 23, 24, 31(10), 55, 59, 62, 67, 72, 74(4), 75, 86, 88, 94, 98(1), 100, 103, 105 and 113(1) of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, detailing the procedural right afforded to Civil Parties at the ECCC.

Consequently, the rights of victims before the ICC are restricted due to their role as participants and consequently in their rights as codified in the Rome Statute²⁸ and in the Rules of procedure and evidence.

The role of victims before the ICC is not transferable to the ECCC. Which means, that the victims as Civil Parties before the ECCC are not at all requested to submit their personal interest in order to be granted the right to participate in the different stages of the proceedings?

V. Potential limits on the scope of Civil Parties rights

18. As far as Anne Heindel in the *amicus curiae* brief²⁹ the main point brought forward is that when the Defence in general³⁰ and the Prosecution in particular³¹ request to regulate victims participation, these restrictions must be:

- (i) in accordance with the applicable law
- (ii) equal with the other parties and
- (iii) without undermining the rights of the (Civil) Parties

19. The advise to submit written pleadings as demanded by Anne Heindel and by the Co-Prosecutors additionally with the proposal to exclude the right of oral argument, if a written pleading has not been submitted, is inconsistent with the CPC.

20. The CPC does not stipulate written submissions by the Parties before an appeals hearing. As described above,³² the CPC states in Art. 259 that the prosecutor *must* submit written pleadings and that the parties *may* do so.

Explicitly, the CPC grants parties the right to oral observations in the appeals hearing³³ and does not impose any conditions or prerequisites on this right.

²⁸ Art. 68 (3) which mentions as a prerequisite the necessity of the "personal interest"

²⁹ see para 15-23

³⁰ see submission of the Defence, para 27 - 30

³¹ see the submission by the prosecutor, para 22

³² para 12

³³ Art. 260 CPC

21. The CPC is fully consistent and clear in this point and without contradictions. Thus, as explained above³⁴ the Cambodian law in force, the CPC, is applicable and is the relevant law that deals with the issue in question. Consequently, the proposal of the prosecutor to the PTC to oblige the Civil Parties to submit written pleadings in advance and if not done so to refuse the right of oral argument is inconsistent with the applicable CPC and undermines the right to participation.
22. Although the Internal Rules³⁵ stipulate that the parties *must* file written pleadings before the appeal hearing, according to the Internal Rules, parties have the right to brief observations during the hearing.³⁶
- The Rule in question makes a distinction between the words “brief observations” and “pleadings” thus, the parties are allowed to give brief observations and their right to give “*brief observations*” is not affected, even if they have not submitted written pleadings before the hearing.
- Relating the lack of written pleadings before the PTC in an appeal hearing, to the prohibition of any oral representation would also be inconsistent with the Internal Rules. It would undermine the rights of the Civil Parties and let the right to participation meaningless.
23. As far as the Co-Prosecutors propose to the PTC “*to refuse right of oral arguments to a Civil Party who(...) has no relevant submission to make in respect of the particular case of the appellant*” would be such a restriction and infringement on the rights of Civil Parties that it would severely jeopardise their right to due process.³⁷

³⁴ see para 6

³⁵ rule 77 (4) IR

³⁶ rule 77 (10) IR

³⁷ See the case of *Perez v. France* of the ECHR (application no. 47287/99) where the Court states to Art. 6 § 1 of the Convention: “*The purpose of the Convention being to guarantee not rights that are theoretical or illusory but rights that are practical and effective if the observations are actually “heard”, (...). In other words, the effect of Art 6 of the convention is, among others, to place the “tribunal” under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant.*” (para 80)

24. The Legal Representatives and the Civil Parties are willing to have an expeditious trial and intend to give joint statements as much as possible if common issues are concerned.

But any future restrictions like the time limit for each Civil Party/Legal Representative recently in the appeal hearing of the Charged Person and without an equivalent time limit for the other Parties is a violation of their rights.

VI. Conclusion

According to the applicable ECCC Law, Criminal Procedure Code and Internal Rules the Civil Parties have the right to participate in appeals against provisional detention order. Restrictions on the performance of their afforded rights have to be consistent with the applicable law and must not undermine the substance of their rights.

For these reasons,

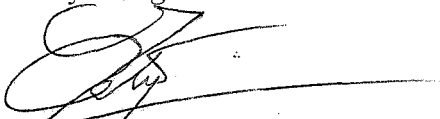
may it please the Pre-Trial Chamber

To reject the Defence' demand

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Done on 6 March 2008
Phnom Penh