

BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**AMICUS CURIAE BRIEF RELATING TO CIVIL PARTY PARTICIPATION IN
APPEALS AGAINST ORDERS OF PROVISIONAL DETENTION BY THE CO-
INVESTIGATING JUDGES**

Respectfully Submitted By:

**Khmer Institute of Democracy
(KID)**

Phnom Penh, February 22, 2008

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INTEREST OF THE AMICI CURIAE

1. The Khmer Institute for Democracy (KID) is a non-profit, non-partisan organization carrying out a number of activities to promote the respect of human rights and encourage democratic participation in a democratic society.
2. One of KID's fundamental goals is to inform and involve Cambodian citizens in the activities of the Extraordinary Chambers in the Courts of Cambodia (ECCC) by promoting dialogue on fair trial principles, victim participation, and victim and witness protection. Having direct communication with Cambodian citizens about the ECCC, KID is in a unique position as amici to offer opinion on the breadth of Civil Party participation during the trials.

STATEMENT OF FACTS

3. NUON CHEA appealed the Order of Provisional Detention issued by the Office of the Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") dated September 19, 2007. On January 31, 2008, the Pre-Trial Chamber was informed of the participation of four Civil Parties, approved by the Co-Investigating Judges, in NUON CHEA's case.
4. The Pre-Trial Chamber was informed of the appointment of Civil Party lawyers and their intention to appear at the appeal hearing. A Scheduling Order was modified by the Pre-Trial Chamber and time was allocated for submissions by the Civil Parties. The Pre-Trial Chamber held a hearing on the appeal by the Co-Lawyers for NUON CHEA against the Detention Order on 7-8 February, 2008.

OUTLINE OF ARGUMENTS

- I. The Internal Rules of the ECCC (ECCC Rules) permit a full participation right to Civil Parties. A literal and purposive analysis of the Internal Rules of the ECCC indicate that there is a right to full Civil Party participation at all proceedings.
- II. The ECCC must follow Cambodian criminal procedure laws that empower pre-trial decision makers to order the attendance of certain parties to Pre-Trial detention appeal hearings proceedings.
- III. The participation of Civil Parties at Pre-Trial detention appeals does not prejudice the accused.

ARGUMENTS

I. The ECCC Rules indicate that Civil Parties may participate in ECCC proceedings, including Pre-Trial detention appeals.

A) Literal Interpretation

5. ECCC Rule 23¹ defines the procedure for Civil Party actions by victims. KID respectfully disagrees with NUON CHEA'S defence team's characterization of ECCC Rule 23 as restricting Civil Party participation to select proceedings. The word proceedings is used seven times in Rule 23 to describe the participation of Civil Parties. Only once the word proceedings indicated a specific proceeding, when describing at Rule 23.4 that the victim may submit a Civil Party application until the *opening of proceedings before the Trial Chamber*.

6. At Rule 23.1, the rule simply states that the purpose is of Civil Party actions is to participate in *criminal proceedings*. Rule 23.6(a) also utilizes the broad term *criminal proceedings* when referring to Victims becoming a party to the proceedings when accepted as Civil Parties. Rule 23.7 refers to *proceedings before the ECCC* twice when delineating a Civil Party's right to a lawyer, and at Rule 23.7(e)(ii), the Rule utilizes the language, *at all stages of the proceedings* when clarifying the right of the national lawyer to speak first.

7. Looking to the use of the word 'proceeding' through the whole ECCC Rules, it becomes clear that the word proceedings includes ECCC proceedings such as judicial investigations, Pre-Trial, and Trial Chambers proceedings. Part D of the ECCC Rules is titled, *Pre-Trial Proceedings*, and Rule 74.5 refers to *investigative proceedings*.

8. Rule 23 is a permissive rule, describing the rights and expectations of Civil Party participation. Reading Rule 23 in light of the whole ECCC Internal Rules indicates that Civil Party participation rights are granted at all stages of proceedings.

B) Purposive Interpretation

9. The inclusion of Civil Party participation at all stages of proceedings also matches with the intended purpose of Civil Party participation at the ECCC. Unlike more limited participation rights, such as those granted at the International Criminal Court, there is no

¹ See Extraordinary Chambers in the Courts of Cambodia: Internal Rules, 1 February 2008 ("ECCC Rules") Rule 23.

application or selection procedure in the ECCC Rules for Civil Party participation; except for the application and acceptance of their party status.

10. At this time of acceptance, they retain full party status and are granted a right to be included in all proceedings. As HIS EXCELLENCY SOK AN voiced, "The ECCC is being established in a functioning civil law system, with particular institutions and concepts not found under common law, such as providing full participation of the victims and Civil Parties in the criminal proceedings."²

11. When deciding on the appropriateness of Civil Party participation during ECCC proceedings, it is important to reflect on the unique nature of the ECCC as an organ of the Cambodian courts. As HIS EXCELLENCY SOK AN stated, "The ECCC has a number of specific characteristics, such as the deep national and international involvement in all organs of the court. It is the first such court to be established within a national court system, with explicit provision to follow national applicable procedure except in certain defined circumstances, so as to ensure that international standards of justice are met".³

12. It is evident that Cambodian criminal procedures surpass the current international standards of justice relating to victim participation⁴. At a minimum, Article 6(b) of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuses of Power (UN Declaration) shall be followed. Cambodian criminal procedures encompass the principles in the UN Declaration and elaborate the principle so that each Civil Party attains a personal interest in all parts of the case by their right to participate at all levels of proceeding until a final judgment is ordered.

13. In HIS EXCELLENCY SOK AN'S words, "Following the applicable national criminal procedures, The Extraordinary Court in the Chambers of Cambodia is the first court with international participation that permits full Civil Party status to victims. In this circumstance,

² His Excellency Sok An, Deputy Prime Minister, "Opening Remarks at the 4th Colloquium of International Prosecutors," 7 November 2007, Extraordinary Chambers in the Courts of Cambodia, Phnom Penh.

³ *Ibid.*

⁴ Article 6(b) of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuses of Power requires that the responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: 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. See United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. GAOR, 40th Sess., 96th plenary mtg., Annex, U.N. Doc. A/RES/40/34 (1985). Even following this basic right of participation, the Civil Parties' personal interests are affected NUON CHEA'S pre-trial detention appeal. Submissions relating to the grounds for detention at Rule 63(3) inherently involve the personal interest of civil parties whereby one ground for detention is to prevent the Charged Person from exerting pressure on any witnesses or victims. Surely Civil Parties have a personal interest in the analysis of risk that the Charged person may exert pressure on them, and that the Civil Parties might have evidence to share at the initial hearing, or additional facts and points of law to discuss at an appeal hearing on this ground.

the Cambodian justice system and this court can act as an example for the international community."⁵

14. KID agrees with the Co-Prosecutor's submission at NUON CHEA's February 7, 2008 appeal hearing when Mr. ROBERT PETIT, International Co-Prosecutor stated that it should be assumed that ECCC Rule 23 was in the minds of the Pre-Trial Chamber when they made the Scheduling Order permitting the Civil Parties to participate in the Pre-Trial detention appeal.⁶ It is clear that the Judge's ordering the attendance of the Civil Parties was appropriate within the meaning of participation with the ECCC Rules.

II The ECCC must follow Cambodian criminal procedure laws that empower pre-trial decision makers to order the attendance of certain parties to Pre-Trial detention appeal hearings proceedings.

15. If the Pre-Trial Chambers finds that the question of participation of Civil Parties at Pre-Trial detention appeals is not delineated within the ECCC Rules, then the Chambers must decide in accordance with Article 12(1) of the Law Establishing the ECCC which states, "The procedure shall be in accordance with Cambodian law".⁷

16. The express order from the Pre-Trial Chamber for Civil Party attendance during the detention appeal hearing explicitly follows Cambodian criminal law procedures. Article 260(2) of the Criminal Procedure Code of the Kingdom of Cambodia states that the institution responsible for hearing appeals can ask the parties as well as the charged person to appear in the hearing directly and to provide evidence or proof to the judge.⁸

17. When, pursuant ECCC Rule 77.3⁹, the President of the Pre-Trial Chambers created the Scheduling Order for NUON CHEA'S appeal, the Judges made a decision to permit the attendance of Civil Parties at the Pre-Trial detention appeal. Madame Judge KATINKA LAHUIS questioned NUON CHEA'S defense team during the first day of the appeal hearing

⁵ *Supra* note 2.

⁶ Mr. ROBERT PETIT, International Co-Prosecutor, 'Nuon Chea's Pre-Trial Chambers Appeal Hearing against the Provisional Detention Order of the Co-Investigating Judges', 7-8 February 2008.

⁷ Article 12(1) continues, "When Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level. *See* 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 ("The Agreement"), Article 12(1).

⁸ The Criminal Procedure Code of the Kingdom of Cambodia, promulgated by the King 10 August 2007.

⁹ *See* Extraordinary Chambers in the Courts of Cambodia: Internal Rules, 1 February 2008 ("ECCC Rules") Rule 77.2.

asking, "The Pre-Trial Chamber decided to include the Civil Parties in the hearing today by issuing the Scheduling Order. You do not agree with our Order?"¹⁰

18. It is KID's view that this Order was made in alignment with Article 260(2) of the Criminal Procedure Code of the Kingdom of Cambodia, and that ECCC must follow this Cambodian criminal procedure that empower pre-trial decision makers to order the attendance of certain parties to Pre-Trial detention appeal hearings proceedings.

19. Article 12(1) of the Law Establishing the ECCC is an important mechanism for the unique structuring of the ECCC. On the matter of whether a pre-trial decision maker may order the attendance of certain parties at a detention appeal, Cambodian criminal procedure is clear. To retroactively restrict what the Judges have appropriately ordered would have a chilling effect on Civil Party participation whereby their attendance, although initially ordered by the Judge, and despite their designation as full-party status, can be perceived as on constant attack once the proceedings begin.

III The participation of Civil Parties at Pre-Trial detention appeals does not prejudice the accused.

20. KID respectfully disagrees with NUON CHEA'S defense lawyers' argument that the involvement of Civil Parties at NUON CHEA'S detention appeal violated his right to a fair trial, and that a blanket order of non-participation was desired to protect NUON CHEA'S rights. KID agrees that Civil Party submissions must not be presented in a way that is prejudicial to the Accused. The Judges may dismiss evidence where it is shown that the prejudice it causes outweighs its value as evidence.

21. While Civil Party submissions are not purely evidence-based; to dismiss participation wholly before even hearing such submissions would be to stranglehold participation that may include crucial and reliable information to assist the Judges make their decision.

22. At detention appeals, Civil Parties are present to support the prosecution, not as a separate plaintiff or prosecutor. Throughout the proceeding, they may not be afforded full rights of questioning or submissions, but their full right to participation as a party is maintained. The inclusion of Civil Parties within the proceedings at the ECCC indeed re-distributes the scales of justice from two parties to more. However, this does not mean that the 'scales are tipped' in any one direction. The inclusion of Civil Parties as participants is

¹⁰Madame Judge KATINKA LAHUIS, International Pre-Trial Chamber Judge, 'Nuon Chea's Pre-Trial Chambers Appeal Hearing against the Provisional Detention Order of the Co-Investigating Judges', 7-8 February 2008.

fundamental to the Cambodian justice system and particularly the ECCC where the number of victims is vast.

CONCLUSIONS

23. To restrict the right of full Civil Party participation in Pre-Trial detention appeal court proceedings is contrary to Cambodian criminal procedure whereby the Judges ordered the attendance of the Parties. As KID is an organization dedicated to educating citizens about their rights under law, KID supports the full participation of Civil Parties during ECCC proceedings, as this participation follows the rules of Cambodian criminal law. KID also supports Judge's orders that are made pursuant to valid Cambodian criminal law, such as the ordered attendance of parties to a Pre-Trial detention hearing. It is for this reason that we urge the court to ensure that it is at all times conducting itself in a manner that upholds the fundamental rights of all who come before it, accused, witness, or victims.