



**លមាតមអាជ្ញាក**  
**ADHOC**

# សមាគមអាជ្ញាក

## ការពារសិទ្ធិមនុស្ស និងអភិវឌ្ឍន៍សេដ្ឋកិច្ច

ផ្ទះលេខ៣ ផ្លូវ១៥៨ ឬទ្រកញ្ជីត្រៀមកាង សង្កាត់បឹងរាំង ខណ្ឌដូនពេញ No: 1, St 158 Oukghna Toeung Kang, Beng Raing Daun Penh P.P  
Tel: (855-23) 218653 & 990544 Fax: (855-23) 217229 P.O. Box: 1024 P.O. Box 20 at CCC  
E-mail: adhoc@forum.org.kh Website: www.adhoc-chra.org

### Extraordinary Chambers in the Courts of Cambodia

Case File No. : 002/19-09-2007-ECCC/OCIJ (PTC01)

### PRE-TRIAL CHAMBER

**Before:** Judge PRAK Kimsan, President  
Judge Rowan DOWNING  
Judge NEY Thol  
Judge Katinka LAHUIS  
Judge HUOT Vuthy

**Date:** 22 February 2008

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### AMICUS CURIAE BRIEF ON THE PARTICIPATION OF CIVIL PARTIES IN APPEALS AGAINST PROVISIONAL DETENTION ORDERS BEFORE THE PRE-TRIAL CHAMBER

Submitted by:

The Cambodia Human Rights and Development Association  
(ADHOC)

<b>ឯកសារបានតម្កល់ត្រឹមត្រូវតាមច្បាប់ដើម</b>
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<b>Charged Person</b> NUON Chea
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: C.H.E.A. K. S. S. A.

#### Lawyers for the Civil Parties

HUONG Kim Suon  
LOR Chunthy  
NY Chandy

#### Co-Lawyers

SON Arun  
Michiel PESTMAN  
Victor KOPPE



**សមាគមអាជ្ញាប័ណ្ណ  
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Tel: (855-23) 218653 & 990544 Fax: (855-23) 217229 P.O. Box: 1024 P.O. Box 20 at CCC  
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**AMICUS CURIAE BRIEF ON THE PARTICIPATION OF CIVIL PARTIES IN  
APPEALS AGAINST PROVISIONAL DETENTION ORDERS BEFORE THE PRE-  
TRIAL CHAMBER**

Submitted By:

The Cambodia Human Rights and Development Association  
(ADHOC)

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

**FOREWORD**

The Cambodia Human Rights and Development Association (ADHOC), which was established in the Kingdom of Cambodia in December 1991 and is now present throughout the country, seeks to uphold human rights in Cambodia. As part of its programme on the trials of former leaders of Democratic Kampuchea, ADHOC has been actively involved in raising public awareness, counseling, legal assistance, monitoring the Extraordinary Chambers in the Courts of Cambodia (ECCC) and training for journalists. At the invitation of Pre-Trial Chamber of 12 February, ADHOC, as *amicus curiae*, hereby presents to the Chamber its submissions in respect of the issue of the participation of civil parties in appeals against provisional detention orders.

**INTRODUCTION**

The Pre-Trial Chamber held hearings on the appeal filed by the Co-Lawyers for the Charged Person NUON Chea against the provisional detention order of the Co-Investigating Judges on 7 and 8 February 2008.

At these hearings, four Civil Parties and their Lawyers participated in the proceedings. During the hearings, the Co-Lawyers for NUON Chea expressly objected to such participation, by invoking the following reasons:

- The civil parties did not file a written application;

- They did not notify the other Parties and the Pre-Trial Chamber of their interest to attend;
- Rule 23 of the ECCC Internal Rules does not provide for the participation of civil parties in appeals against provisional detention orders.

In their arguments, the Co-Lawyers for NUON Chea referred to the jurisprudence of the International Criminal Court, in particular the Decision of the Court's Appeal Chamber dated 13 February in the case of *The Prosecutor v. Thomas Lubanga Dyilo*.

The question we will try to answer here is:

*“Are the Civil Parties entitled to participate in appeals against provisional detention orders?”*

The answer to be given by the Pre-Trial Chamber will constitute an authority. This will clearly establish the procedure before the Pre-Trial Chamber with respect to this question, which is crucial for those victims who are joined as Civil Parties.

In the present submissions, we will state the reasons why we hold the view:

- that the Civil Parties are entitled to participate in appeals of provisional detention orders before the Pre-Trial Chamber (1),
- that insofar as the victim's civil action is found to be admissible by the Co-Investigating Judges, the question of their interest to take civil action is moot (2), and lastly
- that their participation in any stage of the proceedings does not violate the Defence's right to a fair trial (3).

## **1. Whether Civil Parties are entitled to participate in the appeal proceedings against provisional detention orders before the Pre-Trial Chamber**

1.1. Article 23 new of the Law on the establishment of Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea, promulgated on 27 October 2004 (NS/RKM/1004/006) (“Law on the establishment of Extraordinary Chambers”), provides that:

“All investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges, *and shall*

*follow existing procedures in force.* 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, the Co-Investigating Judges may seek guidance in procedural rules established at the international level.” (Emphasis added)

1.2. The first paragraph of Article 20 new of the same Law is to the same effect and states that:

“The Co-Prosecutors shall prosecute *in accordance with existing procedures in force.* 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, the Co-Prosecutors may seek guidance in procedural rules established at the international level.” (Emphasis added)

1.3. The first paragraph of Article 33 new of this Law states that:

“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. If these existing procedure 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 standard, guidance may be sought in procedural rules established at the international level.” (Emphasis added)

1.4. And finally, Article 37 of the said Law states that:

“The provisions of Article 33, 34 and 35 shall apply *mutatis mutandis* in respect of proceedings before the Extraordinary Chambers of the Supreme Court.”

1.5. Article 12(1) of the Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of the Democratic Kampuchea, of 6 June 2003, states that:

“*The procedure shall be in accordance with Cambodian law. Where 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.*” (Emphasis added)

1.6. The fifth and last paragraph of the Preamble to the ECCC Internal Rules states that:

“Now therefore the ECCC have adopted the following Internal Rules, the purpose of which is to conclude applicable Cambodian procedures for proceedings before the ECCC and, *pursuant to Articles 20 new, 23 new, and 33 new of the ECCC Law and Article 12(1) of the Agreement*, to adopt additional rules where 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.” (Emphasis added)

1.7. In view of the foregoing, it follows that the ECCC Pre-Trial Chamber – whose procedure forms an integral part of that of the ECCC as a whole – ought to apply the existing Cambodian procedure in force in the first instance.

1.8. However, where the Cambodian laws in force 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, it may adopt the international procedural standards, which are recalled, notably in the ECCC Internal Rules.

1.9. In this respect, we wish to recall that two instruments govern criminal proceedings before the Extraordinary Chambers, namely the new Cambodian Code of Criminal Procedure and the

ECCC Internal Rules, which attempts to summarize the latter while adopting the criminal procedure to the specific circumstances of the Extraordinary Chambers.

1.10. As regards the rights of civil parties, Rule 23 of the Internal Rules on civil party action by victims, in other words, on the rights of civil parties, does not deal with the particular matter of their right to participate in the appeal proceedings against provisional detention orders before the Pre-Trial Chamber, but simply states in paragraph 6(a) that:

“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 (...) subject to Rule 62 relating to Rogatory Letters, may only be interviewed *under the same conditions* as a Charged Person or Accused;” (emphasis added)

1.11. Further, paragraph 7 of this Rule defines a civil party as *“any victim participating in proceedings before the ECCC”*. Sub-paragraph 7(e) contains provisions on civil parties and their lawyers, which provisions apply *“at all the stages of the proceedings before the ECCC”*.

1.12. In view of the foregoing, it therefore seems to follow that the Internal Rules do not preclude participation of civil parties in appeals against provisional detention orders before the Pre-Trial Chamber, but rather provide for such participation at any stage of all proceedings before the ECCC.

1.13. We recall that the criminal procedure in force in Cambodia is based on the French model. This clearly transpires when one reads the French and Cambodian Codes of Criminal Procedure together and compares them. Now, in the French Code of Criminal Procedure, it is understood that judicial investigation forms an integral part of the entire procedure before the criminal courts. It cannot be treated separately. The idea of separating prosecuting authorities from adjudicating authorities does not necessarily lead to a fragmented procedure. The two stages, examination and adjudication, together form the overall structure of the criminal procedure which is attended by all parties in fairness and equity.

1.14. May we therefore warn you against distorting the substance of the criminal procedure in force in Cambodia – and by implication, the one in force before the ECCC. To interpret the different stages of the Cambodian criminal procedure, which you are to apply in your Chamber – we wish to emphasize this point – in a fragmented fashion without ensuring preservation of the

balance acquired as to its overall structure would be to risk inventing a fragmented and inefficient criminal procedure, one that may even be contrary to international standards.

1.15. Should there be any any lingering doubt, your Chamber would be well advised to seek the opinion of a qualified expert in French criminal law. Such an expert could, among other things, provide you with guidance on the impact your refusal to allow the civil parties the exercise of their right to participate in appeal against provisional detention orders would have on the balance of the proceedings before your Chamber and the other Chambers of the ECCC.

1.16. According to the *lex specialis* doctrine, a general legal principle, special law supercedes general law. Since the Internal Rules of ECCC do not address the issue of the right of civil parties to participate in appeals against provisional detention orders, it is for you to ensure that this issue is addressed in the new Code of Criminal Procedure.

1.17. In this connection, Rule 2 of the Internal Rules on the procedure applicable in case of lacunae, expressly provides that:

“Where in the course of ECCC proceedings, a question arises which is not addressed by these IRs, the Co-Prosecutors, Co-Investigating Judges or the Chambers shall decide in accordance with Article 12 (1) of the Agreement and Articles 20 new, 23 new, 33 new or 37 new of the ECCC Law as applicable, having particular attention to the fundamental principles set out in Rule 21 and the *applicable criminal procedural laws (...)*”. (Emphasis added)

1.18. We therefore call your attention to Articles 258 and 259 of the new Code of Criminal Procedure, which are incorporated into Title 2 thereof relating to the Investigating Chamber, which states that:

**“Article 258 (notice of the date of the hearing)**

The President of the Investigating Chamber shall ascertain that the case is ready for trial and set the date of the hearing. He shall notify the date of the hearing verbally to the Prosecutor General attached to the Court of Appeal. The Prosecutor General shall notify the date of the hearing to the parties and the lawyers.

The notification shall be made to the charged person under detention as follows:

- verbally;
- or through the director of the prison or of the detention centre.

The notification shall be made to the charged person who is not under detention, *to the civil party and to the lawyers*, as follows:

- verbally;

- or through the administrative channels;
- or through the police or gendarmerie services.

When the notification is made verbally, the greffier shall mention the date of the notification in the margin of the order. The charged person, *the civil party or the lawyer* shall affix their signature to it.

In the other cases, the notification shall be made through the provision of a copy of the order, with acknowledgement of receipt. (...) » (Emphasis added).

1.19. Further, Article 267 of the same Code provides as follows:

**“Article 267 (appeals by the charged person against the orders made by the Investigating Judge)**

The charged person shall be entitled to appeal against the following orders:

(...)

- *orders relating to provisional detention and judicial supervision provided forth in Section 5 (provisional detention) and Section 7 (judicial supervision) of Chapter 3 (measure of prevention) of Title 1 of this Book and of Article 249 (provisions of the order of settlement relating to provisional detention and to judicial supervision) of this Code. (Emphasis added )* Sections 5 (provisional detention), to which reference is made, covers Articles 203 to 218 of the Code of Criminal Procedure.

1.20. You ought to seek guidance from the criminal procedure in force in Cambodia and to ensure that with respect to the issue at hand, the Pre-Trial Chamber plays the same role as the Investigating Chamber of the Cambodian Court of Appeal under national law.

1.21. Moreover, the structure of the ECCC has no equivalent in any other international criminal court. For example, there is no such notion as co-investigating judges or civil parties in the International Criminal Court or any other *ad hoc* international criminal tribunal. Your Chamber will find no relevant authorities in the case-law of these courts in resolving the issue of the participation of civil parties in appeals against provisional detention orders of Co-Investigating Judges.

1.22. Following this reasoning, which seems cogent, you will render your decision to allow civil partes to exercise the right to participate in appeals against provisional detention orders before your Chamber on the basis of Articles 258 and 259 of the new Code of Criminal Procedure by adapting these provisions to the circumstances of your Chamber.



1.23. In accordance with established precedents in international law, you are empowered to determine your own jurisdiction. Such discretion, which is inherent to all international courts, empowers you to resolve this issue once with respect to all appeals against provisional detention orders to filed before your Chamber in the future.

1.24. Moreover, it is in the best interest of your Chamber to ensure that no further reference is made the case-law of the International Criminal Court. As recalled *supra* (para. 1.21), the system of the ECCC is significantly different from that of the other *ad hoc* international criminal courts, including the International Criminal Court. The procedure in force before the ECCC is, as stated *supra*, based on the French model, which belongs to the civil law system, whereas the other international criminal courts follow the common law system.

1.25. Participation of civil parties in proceedings is a good example of this. Such participation is unheard of in common law. None of the *ad hoc* international criminal courts established earlier allows for such participation. While the International Criminal Court allows participation of victims, it does not consider them as parties to the trial (we emphasize the term “parties to the trial”). Accordingly, under no circumstances can its Appeals Court Decision of 13 February 2007 in the *The Prosecutor v. Thomas Lubanga Dyilo* amount to an authority in respect of the question now at issue before your Chamber. It was wrong for the Defence to invoke it.

1.26. It therefore falls to you to ensure that there is no misunderstanding regarding this issue in the future by holding that the case-law of the International Criminal Court is not applicable to the litigation of any matters relating to the right of civil parties which may be brought before you.

## **2. Civil parties’ interest to take civil action**

2.1. Rule 23 of the ECCC Internal Rules states:

### **“Rule 23. Civil Party Action by Victims**

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.

2. The right to take civil action may be exercised by Victims of a crime coming within the jurisdiction of the ECCC, without any distinction based on criteria such as current residence

or nationality. In order for Civil Party action to be admissible, the injury must be:

- a) physical, material or psychological; and
- b) the direct consequence of the offence, personal and have actually come into being.

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.*” (emphasis added)

2.2. The question as to whether to take civil action becomes moot at any stage of the ECCC proceedings once the civil party action by a victim has been found admissible by the Co-Investigating Judges, pursuant to Rule 23(4), which expressly states that “[a] *Victim who has filed a Civil Party application during the investigation shall not be required to renew the application before the Chambers?*”.

2.3. Further, under Rule 23(1)(a), the purpose of civil party action is, *inter alia*, to “*participate in criminal proceedings against those responsible for the crimes within the jurisdiction of ECCC*”. Now, appeals against the provisional detention order deal with substantive issues relating to proceedings against those responsible for crimes within the jurisdiction of ECCC. Exerting pressure on victims and witnesses, collusion between the charged person and an accomplice or accomplices, preserving evidence, ensuring the presence of the Charged Person during the proceedings, protecting the security of the Charged Person or preserving public order which may obstruct the proper conduct of the proceedings are all issues which relate to the success – or failure – of the proceedings against the persons charged before ECCC and are by the same token of interest to the civil parties.

2.4. Further more, we wish to point out for all intents and purposes that the jurisprudence of the *Cour de cassation* in France allows civil action for offences of obstruction of justice (*Crim. 23 févr. 2000, Bull. n°78*).

2.5. Finally, we ask the question: "What is one to make of the Defence's assertion that releasing the detainees will not affect public order as opposed to the assertions to the contrary by victims notably the ones joined as civil parties, given that the the majority of the people in the country where the trial is taking place are victims?"

### 3. Respect for the Defence's right to a fair trial

3.1. In determining whether the participation of civil parties violates the right of the charged person in provisional detention to a fair trial under international law, it is necessary to refer to the jurisprudence of the European Human Rights Court. Before this international Court, many questions, such as the one at hand, are raised at each encounter between two judicial systems in Europe, civil law and common law.

3.2. Further, the European Court of Human Rights has expanded its jurisprudence on criminal cases in respect of the right to a fair trial. The question as to whether the right of the civil parties violates the the Defence's right to a fair trial within the meaning of Article 6(1) of European Convention on Human Rights, Liberties, has thus been examined by the European Court of Human Rights. Its decisions seem to point to an answer in the negative. The right of the civil parties would not violate the Defence's right to a fair trial.