

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

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**CO-PROSECUTORS' RESPONSE TO THE JOINT DEFENCE SUBMISSIONS ON  
CIVIL PARTY PARTICIPATION IN PROVISIONAL DETENTION APPEALS**

**Filed by:**

**Office of the Co-Prosecutors**  
 Ms. CHEA Leang  
 Mr. Robert PETIT  
 Mr. TAN Senarong  
 Mr. Anees AHMED

**Distributed to:**

**Pre-Trial Chamber:**  
 Judge PRAK Kimsan  
 Judge Rowan DOWNING  
 Judge NEY Thol  
 Judge Katinka LAHUIS  
 Judge HUOT Vuthy

**Counsel for NUON Chea:**  
 Mr. SON Arun  
 Mr. Michiel PESTMAN  
 Mr. Victor KOPPE

**Counsel for Civil Parties:**  
 Mr. HONG Kim Suon  
 Mr. LOR Chunthy  
 Mr. NY Chandy

**ឯកសារដើម**  
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 du dossier: ... Nu P. SOTHUNVICHET ...

## I. INTRODUCTION

1. The Co-Prosecutors respond<sup>1</sup> to Argument A of the Defence Submission on civil party participation in provisional detention appeals.<sup>2</sup> For the rest of the contentions in the Defence submission, the Co-Prosecutors reiterate and incorporate by reference the arguments in their Submission filed on 22 February 2008.<sup>3</sup>
2. Citing letters of recognition (“Letters of Recognition”) issued by the Greffiers of the Co-Investigating Judges (“CIJs”),<sup>4</sup> the Defence contends that the Pre-Trial Chamber (“PTC”) has “no jurisdiction” to allow the civil parties to participate in the provisional detention appeal hearing unless the “CIJs themselves” have reviewed and accepted the applications of those parties.<sup>5</sup>

## II. SUBMISSION

3. The Co-Prosecutors submit that the Defence contention does not accord with the mechanism of civil party recognition laid down in the Internal Rules (“Rules”)<sup>6</sup> and the Practice Directions on Victim Participation (“Practice Directions”).<sup>7</sup>

### *Greffiers’ Action Valid: CIJs’ Reasoned Order not Required*

4. Under the Rules, civil parties may apply to the CIJs to join as parties in the proceedings.<sup>8</sup> However, the CIJs are required to issue a reasoned order *only* in the event of inadmissibility of an application. The Practice Directions also reflect this practice and require the CIJs to issue a

<sup>1</sup> *Case of 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, Criminal Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 01), 12 Feb 2008, p. 3 (ERN 00162546 – 00162548, C11/36). (granting time till 6 March to the Co-Prosecutors to respond to submissions made by other parties or *amici*).

<sup>2</sup> *Case of NUON Chea*, Joint and Several Submissions on Civil Party Participation in Appeals Related to Provisional Detention, Criminal Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 01), 22 Feb 2008, para. 19, 20 (ERN 00164866 – 00164877, C11/45) [*hereinafter* Defence Submission]

<sup>3</sup> *Case of NUON Chea*, Co-Prosecutors’ Submissions on Civil Party Participation in Provisional Detention Appeals, Criminal Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 01), 22 Feb 2008, fn. 32 (ERN 00164711 – 00164720, C11/44).

<sup>4</sup> Joint Defence Submission, fn. 32. [*hereinafter* Letters of Recognition]

<sup>5</sup> Joint Defence Submission, para. 19, 20.

<sup>6</sup> ECCC Internal Rules, Rev. 1, 1 Feb 2008. [*hereinafter* Internal Rules]

<sup>7</sup> Practice Directions on Victim Participation, Practice Direction 02/2007, 5 Oct 2007. [*hereinafter* Practice Direction]

<sup>8</sup> Internal Rules, rule 23(3).

decision only “if applicable”.<sup>9</sup> Neither the Rules, nor the Practice Directions, provide for a reasoned order by the CIJs when admitting a civil party application. Accordingly, they envisage appeals only against orders rejecting civil party applications (that require reasoned decisions) and not against the orders admitting civil parties (that do not require a reasoned decision).<sup>10</sup>

5. In this background, the CIJs’ Greffiers correctly issued Letters of Recognition to the civil parties. The Rules authorise them to do so.<sup>11</sup> In addition, the Letters of Recognition state that the civil party applications were analysed “by the OCIJ”, clearly indicating that the Office of the CIJs (“OCIJ”) appropriately scrutinised the applications for their suitability and did not mechanically admit them.<sup>12</sup> The Greffiers,<sup>13</sup> however, informed the applicants that the CIJs may, at any time during the judicial investigation, “reject” their applications if they did not fulfil the criteria for victim participation.<sup>14</sup>
6. This mechanism is consistent with the practice and procedure of civil law inspired courts, like the ECCC, where the investigating judges, at any time until the issuing of the closing order, may conclude that they no longer needed to retain an already-designated civil party owing to the emergence of new facts or the legal characterisation placed upon them. An order of inadmissibility entails adverse legal consequences for a civil party and, as such, those courts provide an appellate remedy to that party against that order.<sup>15</sup>
7. This mechanism is justified on policy grounds as well. The CIJs are not required to give a reasoned order while admitting a civil party because, in doing so, they would have to rule – albeit, *prima facie* – whether the applicant is a *victim* of a *crime*; and thus implicitly conclude, before the completion of the judicial investigation, that a crime took place. The practice of not

<sup>9</sup> Practice Directions, art. 3.10.

<sup>10</sup> Internal Rule, rule 23(3); Practice Directions, art. 3.9.

<sup>11</sup> Internal Rule, rule 14(2) (providing that the Greffiers shall keep a record of the investigation and undertake such other activities as required by the CIJs).

<sup>12</sup> See *Case of NUON Chea*, Status of Your Civil Party Application, Criminal Case File No. 002/19-09-2007-ECCC/OCIJ, 27 Dec 2007, ERN 00157040 – 00157041, D22/6/2, para. 1.

<sup>13</sup> Practice Directions, art. 3.8.

<sup>14</sup> See *Case of NUON Chea*, Status of Your Civil Party Application, Criminal Case File No. 002/19-09-2007-ECCC/OCIJ, 27 Dec 2007, ERN 00157040 – 00157041, D22/6/2, para. 3.

<sup>15</sup> Internal Rule, rule 23(3).

requiring a reasoned order, therefore, maintains objectivity and neutrality in the judicial investigation and affords the presumption of innocence to the charged persons.<sup>16</sup>

8. The Cambodian Criminal Procedure Code is also clear on this issue. It provides that when a civil party application is received it be attached to the case file (*versé au dossier*).<sup>17</sup> It only obliges the judge to notify the parties.<sup>18</sup> The practice is similar in other civil law jurisdictions.<sup>19</sup>

*Alternatively, "CIJs Themselves" Recognised the Civil Parties*

9. Documents on the Case File indicate that, wherever appropriate, the CIJs "themselves" have issued orders in respect of civil party participation. They, for example, did so while recognising the counsel of the civil parties under Rule 23.<sup>20</sup> Similarly, when the CIJs concluded that a civil party application or a victim complaint was incomplete, improperly filed, did not relate to the crimes currently under judicial investigation or crimes beyond the jurisdiction of this Court, they decided so by an appropriate order.<sup>21</sup> Finally, and most importantly, the CIJs, in their Forwarding Order of 29 February 2008, expressly noted that they (the CIJs) have "received" applications from victims and have "currently accorded civil party status to four persons".<sup>22</sup>
10. The Co-Prosecutors, therefore, request the PTC to reject the Defence submission that the OCIJ's "procedure is unacceptable" as "CIJs themselves" did not accept the civil parties applications.<sup>23</sup>

*Recognition not Challenged before the CIJs: Objection before the PTC not Permitted*

11. On 27 December 2007, the CIJs recognised the civil parties that appeared before the PTC during the provisional detention appeal hearings.<sup>24</sup> To date, the Defence has not contested their

<sup>16</sup> To assert that an applicant is a victim is also to assert, in essence, that a crime took place.

<sup>17</sup> Criminal Procedure Code of the Kingdom of Cambodia, 2007, art. 137.

<sup>18</sup> Criminal Procedure Code of the Kingdom of Cambodia, 2007, art. 137.

<sup>19</sup> Code of Criminal Procedure, 20 Feb 2008, art. 87, available at [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr).

<sup>20</sup> *See, e.g., Case of NUON Chea*, Lawyer's Recognition Decision, Criminal Case File No. 002/19-09-2007-ECCC/OCIJ, 31 Jan 2008, ERN 00160732 – 00160733, D22/7/5.

<sup>21</sup> *See, e.g., Case of NUON Chea*, Forwarding Order, Criminal Case File No. 002/19-09-2007-ECCC/OCIJ, 7 Dec 2007, ERN 00156515 – 00156516.

<sup>22</sup> *Case of NUON Chea*, Forwarding Order, Criminal Case File No. 002/19-09-2007-ECCC/OCIJ, 29 Feb 2008, ERN 00165199 – 00165200, D77, p. 1.

<sup>23</sup> Joint Defence Submission, para. 19, 20.

<sup>24</sup> Joint Defence Submission, fn. 32.

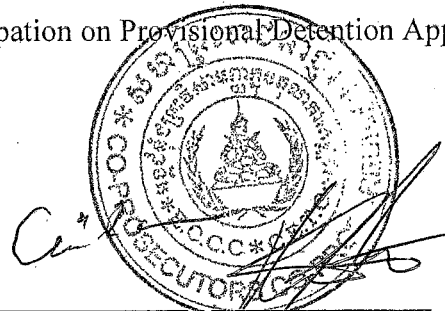
recognition by the CIJs.<sup>25</sup> The Co-Prosecutors submit that the Rules bar the Defence from challenging the recognition now at appeal. Neither the Rules nor the Practice Directions vest the PTC with the power to recognise or derecognise civil parties. This power vests only in the CIJs or the Trial Chamber, as appropriate.<sup>26</sup>

### III. REQUEST

12. The Co-Prosecutors, therefore, request the PTC to:

- i. reject Argument A raised in the Defence Submission; and
- ii. consider the rest of the contents of the Defence Submission in light of the Co-Prosecutors' Submission on Civil Party Participation on Provisional Detention Appeals of 22 February 2008.

Respectfully submitted,



YET Ckakriya  
Deputy  
Co-Prosecutor

Robert PETIT  
Co-Prosecutor

Signed in Phnom Penh, Kingdom of Cambodia on this sixth day of March 2008

<sup>25</sup> See, e.g., *Case of NUON Chea*, Status of Civil Party Application of Chan Theary SENG, Criminal Case File No. 002/19-09-2007-ECCC/OCIJ, 20 Nov 2007, ERN 00152966.

<sup>26</sup> Internal Rule, rule 23(3), (4); Practice Directions, art. 3.3.