C11/47

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

BEFORE THE PRE-TRIAL CHAMBER

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JOINT RESPONSE TO SUBMISSIONS ON CIVIL-PARTY PARTICIPATION IN APPEALS RELATED TO PROVISIONAL DETENTION

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I. INTRODUCTION

1. Counsel for Charged Persons NUON Chea, IENG Sary, and IENG Thirith (collectively, the "Defence") hereby file their joint response to the various submissions on the issue of civil-party participation in appeals against provisional detention.[1] A majority of the submissions—including those of the Office of the Co-Prosecutors (the "OCP") and the civil-party applicants (the "Applicants")—advocate a broad though somewhat regulated role for civil parties,[2] whereas a single *amicus curiae* argues against civil-party participation without exception.[3] The Defence hereby adopts the latter's submissions *in toto* and makes the following observations in response to the Majority Submissions.

II. ARGUMENT

A. Preliminary Issues

1. Certain Submissions are Beyond the Scope of the Order

2. Pursuant to Rule 33 of the Internal Rules (the "Rules"), the "Chambers may, if they consider it desirable for the proper adjudication of the case, invite or grant leave to an organization or person to submit a written *amicus curiae* brief concerning any issue". In its order of 12 February 2008, the Pre-Trial Chamber (the "PTC") called for "focused submissions from *amici curiae* addressing the issue of the balance 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".[4] As a general matter, international criminal tribunals have found it necessary to limit the intervention of *amici curiae* for reasons of judicial economy given the high level of interest in the issues that arise before such courts. Accordingly, the assistance offered by any *amicus curiae* must be both desirable for the proper determination of the case[5] and limited to the precise question/s posed by the court.[6] Such restrictions are of particular relevance to the ECCC given the current funding crisis and the difficulty of translating documents.

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1 *See* Document Nos. C-11/38–C-11/44.
2 *See* Document Nos. C-11/38 and C-11/40–C-11/44 (collectively, the "Majority Submissions").
3 *See* Document No. C-11/39 (the "Safferling Submission").
4 Document No. C-11/36, '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*', (the "Order"), para. 6.
5 *See Prosecutor v. Kallon*, Case No. SCSL-03-07-PT, 'Decision of the Application for Leave to Submit *Amicus Curiae* Briefs', 1 November 2003, para. 5.
6 *See Prosecutor v. Semanza*, Case No. ICTR-97-20-T, 'Decision on the Kingdom of Belgium's Application to File an *Amicus Curiae* Brief', 9 February 2001, para. 10.

3. Considering the terms of the Order and the above-stated principles of international law, a majority of the purported *amicus-curiae* briefs are inadmissible as they fail to address and/or go beyond the specific issue presented by the PTC. Because such submissions therefore are not desirable for the proper determination of the pending question, the PTC is invited to reject them as inadmissible. For example, *amicus curiae* Anne Heindel addresses the definition of civil parties and the requirements for achieving such status at the ECCC.[7] While the Defence acknowledges the need for clarification of this unsettled issue,[8] such discussion is beyond the scope of the instant exercise which is limited to the discrete question of civil-party participation in appeals related to provisional detention.[9]

4. Additionally, *amici curiae* Redress Trust, International Federation of Human Rights, and *Avocats sans Frontières* attempt to establish a link between excluding civil parties from provisional detention appeals and the drafting of indictments.[10] Again—as with most of the Redress Submission—this argument is not directed to the issue at hand. Rather, it appears to be a general criticism of narrow indictments at other international tribunals. Of course, civil parties are free to liaise with the OCP with a view to shaping the charges in the manner they see fit. The Defence simply submits that an appeal on provisional detention is not the appropriate forum for engaging in such an exercise.[11]

2. Certain Submissions are Defective

5. The Rules and Practice Direction ECCC/01/2007/Rev.1 (the "Practice Direction") set out the general technical requirements for filing documents before the ECCC.[12] Moreover, with respect the instant matter, the PTC clearly set the limit for all submissions in English and French at ten pages.[13] Mindful of the drawbacks of endorsing an overly parochial approach to the filing of documents, the Defence does not take issue with certain *de*

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7 *See* Document No. C-11/38 (the "Heindel Submission"), paras. 1–5.

8 Indeed, the Defence has argued that the PTC has no jurisdiction to allow the applicants to participate in appeals related to provisional detention because the OCIJ has not yet made a proper determination as to their status. *See* Document No. C-11/45, (the "Joint Submissions"), paras. 19–20.

9 *See* Order, para. 6. The Defence, therefore, does not respond to this particular matter but reserves its right to do so should the PTC chose to dispose of the question at some point in the future. In such case, the Defence submits that proper notice to and further briefing by the interested parties would be required.

10 *See* Document No. C-11/42 (the "Redress Submission"), para. 14.

11 In any event, given the breadth of both the OCP's Introductory Submission and the OCIJ's initial charges, one cannot credibly suggest that the scope of proceedings at the ECCC is too narrow.

12 These documents are readily accessible on the ECCC's official website.

13 *See* Order, p. 2.

minimus infractions contained in the various submissions.[14] However, as the Defence was careful to limit its own filing to the stated ten-page limit, it does object to the Redress Submission which appears to be composed in nine-point, single-spaced typeface of the Arial/Helvetica style. Applying the requirements of Article 3.8 of the Practice Direction,[15] this document essentially amounts to a fifteen-page submission. The Defence submits that this attempt to circumvent the page limit is unacceptable especially given the author's stated familiarity with the workings of the various international tribunals.

B. Civil-Party Participation in Appeals on Provisional Detention is Not Contemplated by Cambodian Law or the Rules

6. The Defence reiterates its position that civil-party participation in appeals related to provisional detention is categorically prohibited under Cambodian law and the Rules.[16] This argument is in no way diminished by the Majority Submissions which tend to focus on the general question of civil-party *raison d'être* rather than the more focused analysis of civil-party interests in provisional detention proceedings. The Defence wish to stress that such proceedings are uniquely concerned with the liberty of the accused persons and not the determination of the charges against them.

7. The Majority Submissions contend that Rule 23(1)(a) provides a broad mandate for unfettered civil-party participation at all stages of the proceedings.[17] While the Defence does not challenge the "importance of victims' access to justice",[18] it cannot accept that such access is without limitation. Rather than an existential threat to civil-party actions at the ECCC, the Defence position should be seen for what it is—a logical and practical reflection of the existing law which does not contemplate civil-party participation in appeals related to provisional detention. Civil-party involvement, at least at the pre-trial stage, must be considered a procedure-specific concept. When read in conjunction, Rules 23(1) and 74(4) support no other conclusion.

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14 *See, e.g.*, Heindel Submissions (which appear to have been written in ten-point typeface).

15 Article 3.8 provides: "The typeface in English or French shall by typed in font Times New Roman 12 point with 1.5 line spacing."

16 *See* Joint Submissions, paras. 21–23.

17 *See* Document C-11/44 (the "OCP Submission"), paras. 7, 18; Hiendel Submission, p. 1 and para. 6; and Document No. C-11/40 (the "KID Submission"), paras. 1, 8, 10.

18 Carsten Stahn, Héctor Olásolo, and Kate Gibson, 'Participation of Victims in Pre-Trial Proceedings of the ICC', Journal of International Criminal Justice 4 (Oxford 2006), p. 230.

8. The Rules are simply not as permissive as the OCP, Applicants, and supporting *amici curiae* would have it. Attempting to draw a meaningful distinction between the practice of the International Criminal Court (the "ICC") and the Rules of this tribunal, the Majority Submissions have characterized civil parties as *full parties* to all ECCC proceedings.[19] Although the notion of full-party status has a certain superficial appeal, the position of the majority is ultimately belied by Rule 74 which quite clearly recognizes a divergence among the various parties with regard to their *locus standi* before the PTC. Only the OCP may appeal against *all* orders of the Co-Investigating Judges; even the Defence therefore is not a "full party" in this sense. Accordingly, just as a charged person would not have standing to participate in an appeal against, for example, an OCIJ order refusing a request for restitution of seized items belonging to another charged person, neither do civil parties have the right to take part in appeals related to provisional detention. And while civil parties and their representatives may be permitted *to be present* at provisional detention appeals in the courts of Cambodia,[20] the Defence is still unaware of a single instance of civil-party *participation* in any such appeal.[21]

9. Given the obvious need to balance the rights of charged persons and the practical realities of the tribunal against the rights of civil parties, the approach advocated by the Defence and Professor Safferling is the most prudent one for settling the instant debate. In appeals related to provisional detention, putative civil-party interests are necessarily subsumed by the broader interests of justice reflected in the criteria for imposing provisional detention. These general interests are adequately protected by the OCP without need for support or assistance. Furthermore, because a decision on a provisional detention appeal has no bearing on the merits of a pending case and therefore cannot affect a civil party's ability to collect reparations, it is difficult to comprehend how civil-party involvement could ever be justified.[22]

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19 *See, e.g.*, Heindel Submission, para. 7.

20 *See* Document C-11/43 (the "Civil Party Submission"), pp. 3–4. *N.B.* The two cases cited here—those of CHEA Vichea and TEANG Ny—took place in 16 March 2004 and 13 September 2006 respectively, prior to the adoption of the current Criminal Procedure Code.

21 *See* Joint Submissions, para. 10.

22 *See* Safferling Submission, p. 3 ("The reason for this restrictive view on civil party participation is to be seen in the fact that pre-trial detention does not affect the position of the victim. [...] It serves the interests of justice and the efficiency of the judiciary, and does not serve private needs. [...] The question of whether or not the alleged perpetrator should be detained does therefore not affect the legal position of the victim as a civil party to the prosecution.") *N.B.* The Redress Submission, for example, suggests a "real and substantial connection" between victims coming forward and their safety and security. However, no arguments are advanced to substantiate this conclusion. In fact, at the appeal hearing of 7–8 February 2008,

10. Ultimately, the suggestion that civil-party participation will give "voice to victims' unfiltered concerns and perspectives"[23] does not serve the purposes of appeals related to provisional detention. The "importance of affording a process in which the harm victims suffered is formally acknowledged"[24] is equally irrelevant at this stage. Assuming the legitimacy of these general concerns in the context of a criminal trial, an appeal on provisional detention is simply not the appropriate juncture at which to trumpet them. Should their pending petitions be formally approved by the OCIJ, the Applicants will have ample opportunity to participate in proceedings in which their standing is clearly acknowledged by the Rules. None of the presumed benefits typically associated with victim participation[25] will in any way be diminished by excluding civil parties from proceedings related to provisional detention.

C. Civil-Party Participation in Appeals on Provisional Detention Negatively Impacts Fundamental Defence Rights

11. The Defence has highlighted the risk that civil-party participation would violate the charged persons' right to an expeditious trial, the presumption of innocence, and the principle of equality of arms.[26] Nothing in the Majority Submissions has allayed these concerns; instead, the position of the OCP and the various *amici curiae* has served to further accentuate the danger raised by the Defence.

12. The right to a prompt determination of the issue of provisional detention is fundamental.[27] The Heindel Submission argues that, based on the ICC experience, requiring civil parties to file applications to participate would substantially delay the proceedings and therefore should not be necessary.[28] The Defence urges the Pre-Trial Chamber to draw the opposite conclusion: dispensing with the application requirement

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counsel for the Applicants spoke only in general terms and did not suggest any unique threats to the personal security of the Applicants themselves.

23 Redress Submission, para. 12.

24 *Ibid.*

25 *See, e.g.*, OCP Submission, para. 20; Redress Submission, para. 12.

26 *See* Joint Submissions, paras. 27–30.

27 At other international tribunals, this right is enforced in practice by the imposition of exceptional expedited filing deadlines for appeals related to provisional detention. For example, appeals against decisions on interim release at the ICC "shall be filed by the appellant within seven days of notification of the relevant decision. The response shall be filed within five days of notification of the document in support of the appeal". ICC Regulations of the Court, Document No. ICC-BD/01-01-04, 26 May 2004, Regulation 64(5). This ensures that, barring any participation by the civil parties, the issues on appeal are brought before the Appeals Chamber as expeditiously as possible.

28 *See* paras. 6–9.

is no solution, as the ICC Appeals Chamber has recognized that such procedure is vital to safeguarding the rights of the charged persons.[29] In fact, given the lack of demonstrable interest in appeals related to provisional detention, the most appropriate result is the absence of civil-party participation. The charged persons should not be forced to choose between the right to a fair trial and the right to an expeditious one.[30]

13. The presumption of innocence, guaranteed by Rule 21(1)(d), would also be violated by allowing civil parties to participate in provisional detention appeals. This point is (inadvertently) made by the Redress Submission which argues: "provided that a particular intervention does not expressly or impliedly point to the particular guilt of an accused in respect of actual charges, it is difficult to see how any prejudice might arise".[31] Obviously the authors of the Redress Submission were not present at the appeal hearing on 8 February 2008 when civil-party applicant SENG Chantheary stated: "If Nuon Chea claimed he was not responsible, then who was for the loss of my parents and other victims' loved ones?"[32] Such submissions, although no doubt sincere, are clearly intended to influence the PTC as to the guilt of the charged person—an issue wholly irrelevant to the resolution of an appeal against an order of provisional detention.

14. Finally the delicately balanced equality of arms, which this tribunal is scrupulously required to uphold, would be unfairly tilted in favor of the OCP if civil parties were permitted to participate in appeals related to provisional detention. Rather than preserving equality in the courtroom with respect to the time available for oral submissions, the OCP—through the "anonymous mouthpiece" of the civil parties—would essentially gain more than twice the amount of time allocated to the Defence. This would place the charged persons at a significant disadvantage when presenting their cases[33] and would require additional resources to be provided at a time when pressure on the ECCC budget is increasing.[34]

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29 *See, e.g., See 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, para. 55; *Ibid.*, 'Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06', 13 June 2007, para. 28.

30 *N.B.* The issue of civil-party participation has already caused substantial delay in the determination of Mr Nuon's pending appeal.

31 Redress Submission, para. 28.

32 *See* The Independent, 'After 30 years, victim of Khmer Rouge faces leader in court', 9 February 2008.

33 *See Prosecutor v. Milutinović et al.*, Case No. IT-99-37-A, 'Decision on Interlocutory Appeal on Motion for Additional Funds', 13 November 2003, para. 24.

34 *N.B.* In this regard, see the 'Report on the operation of the [ICC's] legal aid system and proposals for its amendment', Document No. ICC-ASP/6/4, 31 May 2007, para. 35(iii) which allows for the addition of one

D. The Cited Case Law of the ECHR is Distinguishable

15. The OCP and several of the *amici curiae* discuss certain decisions of the European Court of Human Rights (the "ECHR"). In particular, the OCP Submission argues that the ECHR "has recognized extensive rights of the victims and their relatives to be involved in criminal proceedings including at investigative stages".[35] Additionally, the Redress Submission refers to the ECHR's recognition of the importance of public scrutiny over investigations.[36] The ADHOC Submission refers to ECHR jurisprudence, but fails to provide any particular citations to support its assertions.[37] However, as the issue at hand is whether civil parties should be allowed to participate in *appeals* related to provisional detention rather than *investigative proceedings*, the cited jurisprudence is distinguishable and does not support the majority position.

16. Although the ECHR has not wholly denounced the practice of civil-party participation in appeals on provisional detention, it has clearly held that Article 6(1) of the European Convention on Human rights does not "confer any right to 'private revenge' or to an *actio popularis*".[38] Accordingly, the pursuit by civil parties of either vindictive aspirations or purely public objectives is not appropriate in appeals on provisional detention. Moreover, if ECHR case law were in fact to squarely address civil-party participation in appeals on provisional detention, it is highly questionable whether one could meaningfully apply that court's jurisprudence to an international criminal trial, where thousands of victims are likely to seek to participate in the proceedings. Equally, the other international sources referenced in the Redress Submission cannot be interpreted to apply to appeals relating to provisional detention.[39]

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full time staff at the P2 UN level of € 6,113 per month for every 50 'victims' that are allowed to participate in proceedings at the ICC.

35 OCP Submission, para. 17.

36 Redress Submission, para. 21.

37 ADHOC Submission, para. 3.1–3.2.

38 *Perez v. France*, ECHR, 12 February 2004, para. 70.

39 *See* Redress Submission, para. 20. Nor should the domestic law of any particular country be transposed *mutatis mutandis* to ECCC proceedings. The mere fact that Cambodian criminal procedure is derived from its colonial relationship with France, does not justify ADHOC's proposal to exclude the ICC interpretation in favor of the French approach. *See* ADHOC Submission, para. 1.13 and 1.24. In any case, the Defence invites the PTC to consider the remarks of Robert Badinter, a respected French criminologist: "[L]a justice pénale n'a pas pour mission d'être une thérapie de la souffrance des victimes. Elle a une fonction répressive, dissuasive et expressive, car elle exprime les valeurs de la société. Mais elle ne saurait avoir une finalité thérapeutique." Le Monde, 'Ne pas confondre justice et thérapie', 9 September 2007.

E. Proposed Regime for Potential Civil-Party Participation

17. Should the PTC determine that it may be appropriate for civil parties to participate in appeals related to provisional detention, the Defence proposes the imposition of the following regime—as opposed to the one suggested by the OCP—in order to protect the rights of the charged persons and to ensure the expeditious and appropriate conduct of appeal hearings:

    a. Only individuals whose applications have been substantively reviewed and approved by the Co-Investigating Judges shall be recognized as civil parties. Such formal recognition shall be a mandatory prerequisite for civil-party participation in appeals related to provisional detention.

    b. Once recognized as such, any civil party wishing to participate in an appeal related to provisional detention shall file an application to the PTC in the form of a response to the substantive submissions of the appellant and, in any event, following the filing of submissions by the OCP. Such application shall clearly set out:

        i. how the civil party's personal interests are affected by the appeal;
        ii. why it is appropriate for the PTC to permit the civil party's views and concerns to be presented, in particular:
            - how the OCP submissions have failed to address the personal concerns of the civil party;
            - why the OCP is not willing or able to make submissions on the civil party's behalf; and
            - whether and why the civil party should be permitted to make further oral submissions at the hearing; and
        iii. why the presentation of such views and concerns would not be prejudicial to or inconsistent with the rights of the Defence.

    In the preparation of such application, the civil party shall review the OCP submissions and liaise with the OCP with a view to consolidating common positions. Where multiple civil parties seek to participate in the same appeal, a common application shall be required, barring demonstrable conflicts of interest between or among the various individual civil parties.

c. The appellant shall be given a reasonable amount of time in which to reply to such civil-party application notwithstanding Article 8.4 of the Practice Direction, and the PTC shall deliver a scheduling order detailing, *inter alia*, the approved civil-party issues and the scope of civil-party participation at the appeal hearing.

18. Contrary to the Majority Submissions, such approach will not unduly impede the progress of appellate proceedings. Ensuring, in advance, that civil-party participation is based on demonstrable personal interests, appropriate and relevant under the circumstances, and not prejudicial to the rights of the accused—as opposed to allowing unrestrained involvement—will ultimately conserve judicial time and promote focused and comprehensible appeal hearings.

III. CONCLUSION

19. For the reasons stated above and contained in the Joint Submissions, the Defence requests the PTC to exclude the Applicants' submissions from the record of the NUON Chea Appeal and preclude any further participation by the Applicants in future appeal proceedings related to provisional detention. In the alternative, the Defence seeks the implementation of the proposed regime on civil-party participation.

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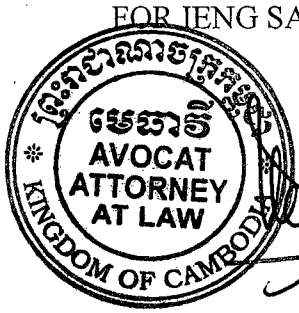

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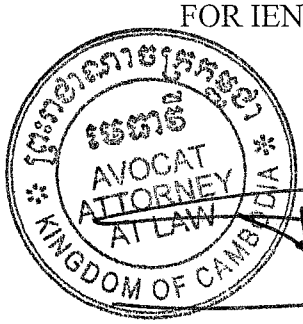

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