

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

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 du dossier: SANN RADA

**CO-PROSECUTORS' SUBMISSION ON CIVIL PARTY PARTICIPATION
IN PROVISIONAL DETENTION APPEALS**

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I. INTRODUCTION

1. The Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is the first and the only international or internationalised criminal court that has accorded the status of a party to victims of crimes within its jurisdiction.¹ It designates them as civil parties and envisages their active participation in its proceedings.² Cambodian law³ and laws of certain similar national jurisdictions also provide for active participation of civil parties in various stages of criminal proceedings.⁴ Similarly, victims are considered as *participants* in the proceedings of the International Criminal Court (“ICC”) and their views are considered whenever they are “determined to be appropriate.”⁵
2. International and national practice provide that the courts can regulate the participation of civil parties at all stages of its proceedings to strike a judicious balance between their effective representation on one hand and the expeditious conduct of the proceedings and the rights of the defendants on the other.⁶ The Co-Prosecutors submit that the Pre-Trial Chamber (“PTC”) interprets the extent of participation of civil parties before this court – including, in provisional detention appeals - in similar terms.⁷

II. PROCEDURAL BACKGROUND

3. On 12 February 2008, the PTC asked the parties and *amicus curiae* to file written submissions on the issue of participation of civil parties in appeals against provisional detention orders.⁸ This order followed an objection by the Charged Person NUON Chea that Internal Rule 23 did not provide for such participation. During the appeal hearing on 8 and 9 February 2008, the

¹ ECCC Internal Rules, Rev. 1.1 2008, Glossary, def. of *Party* [hereinafter Internal Rules]

² Practice Directions on Victim Participation, Practice Direction 02/2007, 5 Oct 2007, art. 1.1. [hereinafter Practice Direction]

³ See, e. g., Criminal Procedure Code of the Kingdom of Cambodia, 2007, art. 2, 5, 13, 22, 134, 137-40, 253-4, 258, 268, 270, 286, 294, 298, 311-3, 322, 324-8, 333-5, 355, 372, 375, 382, 388, 393-6, 402, 415-6, 418, 422, 433-4, 475, 482, 492, 533 etc.

⁴ See generally C Stahn, H Olasolo & K Gibson, *Participation of Victims in Pre-Trial Proceedings of the ICC*, 1 April 2006, *Journal of International Criminal Justice* 4 2 (219) [hereafter Stahn et al Article]; M E I Brien & E H Hoegen, *Victims of Crimes in 22 Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of Victim in the Framework of Criminal Law and Procedure*, Dissertation, University of Tilburg, Wolf Legal Productions, Nijmegen, 2007. [hereafter Brien et al Dissertation]

⁵ Rome Statute of the International Criminal Court, art. 68(3) [hereinafter Rome Statute].

⁶ See, Stahn et al Article, p. 2-3.

⁷ Pursuant to Internal Rules, rule 21, 23 etc.

⁸ *Case of NUON Chea*, Public Order on the Filing of Submissions on the Issue of Civil Party Participation in Appeals Against Provisional Detention Orders an Invitation to *Amicus Curiae*, Criminal Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 01), 12 Feb 2008, ERN 00162546 – 00162548, C11/36. [hereinafter PTC Order]

Charged Person argued that the civil parties had not filed written pleadings and had not made their interests known to the PTC or indeed to other parties and, as such, the PTC should not hear them.

4. The Co-Investigating Judges (“CIJs”) joined the civil parties in the proceedings upon the referral of the Office of the Co-Prosecutors (“OCP”) or the Victims Unit.⁹ They were satisfied that the victim-applicants fulfilled the criteria for civil parties contained in the Practice Direction on Victim Participation.¹⁰ The civil parties notified this to the PTC, which permitted their participation in the appeal hearing with advanced notice to other parties.¹¹
5. The Co-Prosecutors attach considerable importance to the issue of the civil party participation at every stage of the proceedings before the ECCC and hence file these written submissions to assist the PTC in a just determination of the issue raised by this Charged Person.

III. THE LAW

ECCC

6. The Internal Rules (“Rules”) of this court are a consolidation of the Cambodian procedure and relevant international practice and standards as applicable to this court in terms of Articles 20 (new), 23 (new) and 33 (new) of the ECCC Law and Article 12 (1) of the Agreement.¹² They provide that, once admitted as a civil party by the CIJs or a Chamber, the victims of crimes within the jurisdiction of this court become a party before the ECCC and enjoy rights as such.¹³ Like other parties, they can be summoned before this court,¹⁴ be interviewed,¹⁵ receive notice of all its orders,¹⁶ seek investigative actions and appeal against their denial¹⁷ and be notified of the closing order and appeal it, *etc.*¹⁸

⁹ Practice Directions, art. 1-2.

¹⁰ Practice Directions, art. 3.

¹¹ PTC Order, para. 2.

¹² Internal Rules, pmbi.

¹³ Internal Rules, Glossary, def. of *Party*; Internal Rules, rule 23(6)(a).

¹⁴ Internal Rules, rule 41(1).

¹⁵ Internal Rules, rule 59(1).

¹⁶ Internal Rules, rule 46(1).

¹⁷ Internal Rules, rule 55(10).

¹⁸ Internal Rules, rule 67(5).

7. Rule 23 comprehensively codifies the law on civil party actions by victims. According to it, the purpose of a civil party action is to (a) participate *in criminal proceedings* ... by supporting the prosecution¹⁹ and (b) allow victims to seek ...reparations.²⁰ Clearly, Rule 23 (1) (a) uses the term *criminal proceedings* without limitation and it should be interpreted that it envisages victim participation during *all* stages of the proceedings. Additionally, a conjoint reading of Rules 23 (1) (a) and (b) leads to the only conclusion that the Rules envisage the participation of the civil parties not just for the purposes of determination of reparations but, indeed, throughout the proceedings before this court.
8. This court has interpreted the term *proceedings* to include preliminary investigation, judicial investigation, trial and appeal.²¹ It would clearly also include the appeals brought before the PTC during judicial investigation. Rule 77 (3) provides that the Greffier of the PTC shall notify the civil parties of all the appeals filed before that Chamber. They may also consult the case file, file pleadings²² and may make brief observations before the PTC.²³ They may also request for and be heard on the issue of holding a public hearing.²⁴ In addition, the civil parties can appeal to the PTC against the decisions of the CIJs²⁵ and participate extensively at the trial and appellate stages.²⁶
9. While the Rules provide extensive rights to the civil parties to participate in criminal proceedings, they also envisage that this court can regulate their participation by requesting multiple civil parties to have a common counsel²⁷ or, indeed, by designating one.²⁸ Civil parties may also collectively represent themselves through Victim Associations.²⁹ The Rules stipulate that while regulating civil party participation by joint representation the court shall ensure that

¹⁹ Internal Rules, rule 23(1)(a) (emphasis added).

²⁰ Internal Rules, rule 23(1)(b).

²¹ *Case of NUON Chea*, Order Refusing a Request for Annulment, Case No. 002/19-09-2007-ECCC/OCIJ, 24 Jan 2008, ERN 00159002 – 00159006, D55/1, para 13.

²² Internal Rule, rule 77(4).

²³ Internal Rules, rule 77(10).

²⁴ Internal Rules, rule 77(6).

²⁵ Internal Rules, rule 74(4).

²⁶ *See e.g.*, Internal Rules, rule 91(1), 94(1), 105(1).

²⁷ Internal Rules, rule 23(8)(a).

²⁸ Internal Rules, rule 23(8)(c).

²⁹ Internal Rules, rule 23(9).

their distinct interests are represented and conflict of interests are avoided.³⁰ Civil parties have a right to challenge such a regulation.³¹

Cambodian and Other Similar National Jurisdictions

10. Like the Rules of this court, the Cambodian Criminal Procedure Code also allows the victims to join as civil parties and hence participate at every stage of criminal proceedings.³² The civil parties, without limitation, receive notification of hearings of appellate hearings,³³ can consult the dossier and make written submissions³⁴ and can be ordered to be personally present *etc.*³⁵ While, the Code is silent on the extent of the participation of civil parties during provisional detention appeal hearings, anecdotal evidence suggests that their presence is not common. The Code also provides for joint legal representation by human rights organisations in cases of certain offences including discrimination, slavery and torture.³⁶
11. Numerous other municipal jurisdictions also provide for victims' participation in domestic criminal proceedings, albeit in varying degrees.³⁷ Many of them allow victims to join criminal proceedings as a civil complainant or *partie civile*. In France, for example, the Code of Criminal Procedure affords victims specific participatory rights such as the right to tender evidence and request investigative action³⁸ seek annulment of proceedings,³⁹ and, in general, participate with full rights as a party.⁴⁰
12. A smaller number of jurisdictions, like Spain, recognise the right of victims to participate as a prosecutor, allowing them full prosecutorial rights.⁴¹ Other jurisdictions allow victims to serve

³⁰ Internal Rules, rule 23(8)(d).

³¹ Internal Rules, rule 23(8)(e).

³² Criminal Procedure Code of the Kingdom of Cambodia, 2007, art. 2.

³³ Criminal Procedure Code of the Kingdom of Cambodia, 2007, art. 258.

³⁴ Criminal Procedure Code of the Kingdom of Cambodia, 2007, art. 259.

³⁵ Criminal Procedure Code of the Kingdom of Cambodia, 2007, art. 260.

³⁶ Criminal Procedure Code of the Kingdom of Cambodia, 2007, art. 17, 18, 19.

³⁷ Stahn *et al* Article, fn 2.

³⁸ Code of Criminal Procedure, version of 5 Jan 2008 in effect from 20 Feb 2008, art. 81, 81-2, 82-2, available at www.legifrance.gouv.fr. [hereinafter French Code of Criminal Procedure]

³⁹ French Code of Criminal Procedure, art. 89-2.

⁴⁰ Stahn *et al* Article, p. 2. Although, under Article 186 of the Code of Criminal Procedure Code of France, the civil parties cannot appeal against an order of provisional detention by the Investigating Judge they have other vital participatory rights like being heard before the *chambre d'instruction* under Article 221-3 regarding extension of detention (*audience de contrôle*).

⁴¹ See Stahn *et al* Article, p. 2 (referring to Spanish Code of Criminal Procedure, art. 101); see generally United Nations Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims: On the Use and*

as a subsidiary prosecutor and submit evidence, suggest questions to be put to witnesses and defendants and comment on evidence submitted in the proceedings.⁴²

13. In legal systems where victims do not have such prosecutorial rights, victims are able to participate in criminal proceedings through the submission of victim impact assessments or victims' statements of opinion. This mode of victim participation is provided for in Canada, New Zealand, and Ireland and in some states of the United States and Australia.⁴³

ICC and other International Jurisdictions

14. Drafters of the Rome Statute recognised victims as *participants* in the proceedings before the ICC.⁴⁴ This was due to the widespread acknowledgement of the victims' right of access to justice and the realisation that their interests may differ from those of the Prosecutor and the States, especially, in the pre-trial proceedings.⁴⁵ The Rome Statute provides that, where the victims' interests are affected, the ICC shall consider their concerns at appropriate stages of the proceedings in a manner that is consistent with the rights of the accused and a fair and impartial trial.⁴⁶ For ensuring the effectiveness of the proceedings, the ICC may request the victims to choose a common legal representative⁴⁷ or require that the victims confine their intervention to written observations or submissions.⁴⁸
15. Article 68 (3) of the Rome Statute does not prescribe a period limiting the involvement of victims in the proceedings. Additionally, the Rome Statute and the Rules of Procedure and Evidence set out three regimes for victims' involvement during the pre-trial proceedings.⁴⁹

Application of the Declaration on Basic Principles for Justice for Victims of Crimes and Abuse of Power, New York, 1999, p. 39.

⁴² Stahn *et al* Article, p. 2.

⁴³ Stahn *et al* Article, p. 2.

⁴⁴ Stahn *et al* Article, p. 2.

⁴⁵ See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Violations of International Human Rights and Humanitarian Law, UN doc. E/CN. 4/2000/62, 18 January 2000, Annex; see also William A Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, 2004, p. 172 – 173.

⁴⁶ Rome Statute, art 68(3).

⁴⁷ ICC Rules of Procedure and Evidence, rule 90(2).

⁴⁸ ICC Rules of Procedure and Evidence, rule 91(2).

⁴⁹ These are: (i) the submission of "representations" and "observations" under Articles 15 (3) and 19; (ii) "participation" pursuant to Articles 53 (3) and 61; and (iii) "seeking the views of the victims" under Rule 93. These regimes allow the involvement of victims at very early stages; in some cases before the identification of suspects or even before the initiation of an investigation of a "situation." Article 15(3) and Rules 50(1), 50(3), 92(2) and 107(5) of the ICC Rules of Procedure and Evidence allow the involvement of victims before the initiation of an

Specifically, the Rules require that its Pre-Trial Chamber, before imposing or amending any conditions to restrict a defendant's liberty, *shall* seek the views, *inter alia*, of "the victims that have communicated with the Court in that case and whom the Chamber considers could be at risk as a result of a defendant's release or due to bail conditions imposed."⁵⁰

16. In the ICC, the victims have actively participated before its Pre-Trial, Trial and Appeals Chambers from the earliest stages of the proceedings. In *Lubanga*, its very first case, the victims participated, and were heard, in the accused's appeal concerning the jurisdiction of that Court.⁵¹ In the same case, the Trial Chamber laid down detailed "general guidelines on all matters related to the participation of victims throughout the proceedings" ("Lubanga Trial Decision").⁵² In particular, it dealt with the victims' right to participate in hearings, status conferences, trials, and to file written submissions. In *Lubanga* again, the Appeals Chamber determined that a victim seeking to participate in a provisional release appeal must file an application including a statement as to how her or his interests are affected by the appeal and why she or he should be heard ("Lubanga Appeals Decision").⁵³ Having held so, the Appeals Chamber allowed the victims to participate in the provisional release appeal proceedings.⁵⁴ In a dissenting opinion, however, Judge Song stated that on a conjoint reading of the basic texts of the ICC, no such application was required to be filed by the victims. He held that this "leads to unnecessary procedural steps that are bound to slow down the appellate process."⁵⁵

investigation. Additionally, Article 19 allows the involvement of victims when a "case" has been brought before the ICC and Article 61 provides for the participation of victims at the confirmation of charges.

⁵⁰ ICC Rules of Procedure and Evidence, rule 119(3) (emphasis added).

⁵¹ *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo*, Judgement on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, Appeals Chamber of the ICC, Case No. 01/04-01/06 (OA 4), 14 Dec 2006, para.12, 17.

⁵² *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victims' Participation, Trial Chamber I of the ICC, Case No. 01/04-01/06, 18 Jan 2008, p.27.

⁵³ *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo*, Judgement on the Appeal of Mr Thomas Lubanga Dyilo Against the Decision of the Pre-Trial Chamber I Entitled "Decision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", Appeals Chamber, Case No. 01/04-01/06 (OA 7), 13 Feb 2007, p. 3 [*hereinafter* Lubanga Appeal Decision].

⁵⁴ In this Appeal, victims a/0001/06, a/0002/06 and a/0003/06 were allowed to participate in the proceedings by the decision of the Appeals Chamber on 12 December 2006 (ICC-01/04-01/06-769) and were given until 15 December 2006 to present their views and concerns in respect of the appeal lodged by the accused Lubanga concerning his detention..

⁵⁵ Lubanga Appeals Decision, p. 55.

17. International human rights documents also advocate a broad approach to the victims' participatory rights.⁵⁶ The European Court of Human Rights ("ECHR") has recognised extensive rights of the victims and their relatives to be involved in criminal proceedings including at investigative stages.⁵⁷

IV. ARGUMENT

18. The letter and the spirit of the basic documents of this court clearly lead to the conclusion that the civil parties are *parties* at *all* the stages of criminal proceedings before it. This, the Co-Prosecutors submit, would necessarily include the provisional detention appeal hearings before the PTC. This is indeed the practice of the ICC where victims participate, and are heard, albeit in a regulated manner, at every stage of its proceedings, including provisional detention appeal hearings.⁵⁸

19. Rule 23 (1) (a) makes the civil parties eligible to participate in the criminal proceedings before the ECCC "by supporting the prosecution." Thus, even though civil parties do not attend the adversarial hearing⁵⁹ or are not eligible to appeal the provisional detention order,⁶⁰ they may certainly participate in the provisional detention appeal hearing before the PTC to support the prosecution.⁶¹ The Rules, *ex facie*, require that the civil parties can participate in all appeals heard by the PTC, but can only initiate appeals in a particular set of circumstances. A contrary interpretation would limit a civil party's right to be a *party* to a criminal proceeding, for its interest in the criminal proceeding would not be represented. The PTC would be making decisions on relevant issues without the assistance of one of the parties to the proceedings -

⁵⁶ E.g., Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (GA Res. 40/34 (1985)), Sub A.6 (b) (requiring that the views of the victims should be considered at appropriate stages of the proceedings).

⁵⁷ *Ogur v. Turkey*, (21594/93), ECHR 30, 92(1999); *Kelly et al v. The United Kingdom*, (30054/96), ECHR 324, 98 (2001). However, under the Rules of Procedure and Evidence of the International Criminal Tribunals for the former Yugoslavia ("ICTY") and Rwanda ("ICTR") and those of the Special Court for Sierra Leone ("SCSL") victims can only seek reparations before national jurisdictions after the conclusion of criminal proceedings before those international tribunals. See SCSL Rules of Procedure and Evidence, rule 105; ICTY and ICTR Rules of Procedure and Evidence, rule 106.

⁵⁸ ICC Rules of Procedure and Evidence, rule 119(3).

⁵⁹ Internal Rules, rule 63(1).

⁶⁰ A Charged Person may appeal against the order of provisional detention under Internal Rule 63(4) and the Co-Prosecutors may appeal against the order of provisional release under Internal Rule 74(2).

⁶¹ Indeed, there are many instances in the Internal Rules when certain parties are excluded or only consulted and are not allowed to participate fully in the proceedings. For example, even the Co-Prosecutors are excluded from initial appearances under Internal Rule 57(1) or only their opinion is sought under Internal Rule 64(1) on issues of bail. Yet, that does not deny them their status as *parties*.

which could amount to a *de facto ex parte* decision. More importantly, since the PTC, at any stage, can examine the regularity of the judicial investigation, denial of a right of hearing to the civil parties may seriously prejudice their rights as parties and may deprive the PTC of their assistance on important issues.⁶²

20. The recognition of victims as parties – and not mere objects – to all the stages of the proceedings is guided by sound legal and policy considerations. The victims are likely to be best informed about the nature and extent of the charged crimes. Their participation brings to the court first-hand knowledge of and a human perspective to those events. Specifically, they – more than anybody else – can inform the court of the issues of trauma of victims and witnesses, disturbance to public order, influencing of victims and witnesses, destruction of evidence; issues that are directly relevant to the consideration of provisional detention of the defendants. Their participation at this preliminary stage is even more important when the court makes a *prima facie* determination of issues rather than at the trial stage where it considers all the evidence upon the beyond reasonable doubt standard.⁶³ At a broader level, victims' participation brings credibility to criminal proceedings, plays a crucial educational role and contributes to reconciliation in the post-conflict societies like Cambodia.⁶⁴
21. In sum, the Co-Prosecutors submit that the Rules of this court provide the most detailed and inclusive regime for victims' participation as civil parties amongst international criminal jurisdictions.⁶⁵ However, to give full effect to this court's mandate, the PTC ought to weigh, on one hand the rights of potentially numerous victims to participate meaningfully in the proceedings – a right that is undeniably safeguarded in the Rules and recognized in human rights law – and the right of the defendants to fair and reasonably expeditious proceedings.

⁶² See the standard of appellate review in a provisional release application laid down by the PTC in the *Duch* case. *Case of Kaing Guek Eav alia Duch*, Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alia Duch, Investigation No. 001/18-07-2007-ECCC/OCIJ(PTC01), 3 December 2007, para 8. See also Code of Criminal Procedure, Cambodia, art. 261.

⁶³ Especially, when determining issues under Internal Rules 63(3)(a) and (b).

⁶⁴ See Stahn *et al* Article, fn. 10 (discussing the link between reconciliation and the participation of the victims as illustrated by the South African Truth and Reconciliation Commission where statements were gathered from approximately twenty-four thousand victims of human rights abuses).

⁶⁵ The Co-Prosecutors note that, although provided for in the law, this may not be a practice in Cambodia. However, in the interest of full realization of the rights of the civil parties under the Internal Rules and to uphold emerging international practice and standards - in particular that of the ICC – the PTC may consider granting the widest possible participation of civil parties in its proceedings, including during provisional detention appeals.

22. The Co-Prosecutors, therefore, invite the PTC to consider the following regime to regulate the participation of civil parties during provisional detention appeal hearings before it:

- i. all civil parties that have joined in the judicial investigation in which the appellant is being investigated may be considered eligible to participate in the provisional detention appeal hearing;
- ii. all civil parties wishing to participate in the provisional detention appeal hearing must file written responses to the appeal in compliance with the Practice Directions on the Filing of Documents. Upon receipt of the written responses, the PTC may ask one or more parties to choose a common representative (either a victim or a counsel) to address it;
- iii. the written responses must be factually and legally precise on the issues of why that particular civil party opposes or supports the case of the appellant; It may be open to the PTC to deem the written response of a civil party sufficient for the purposes of the hearing and, as such, not allow that party to make an oral representation, although that party may be allowed to be present in the courtroom;
- iv. it may be open to the PTC to refuse right of oral arguments to a civil party who, although is joined in the judicial investigation in which the appellant is being investigated, but has no relevant submission to make in respect of the particular case of that appellant;
- v. if a civil party is joined in the judicial investigation after the expiry of the period of filing of written response, the PTC may permit it to tender written arguments within forty-eight hours prior to the commencement of the provisional detention appeal hearing;
- vi. The PTC may also permit the civil parties to provide their written arguments to the Co-Prosecutors and then call upon the Co-Prosecutors to address it on salient features of those written arguments;
- vii. the civil parties may seek or be granted such protective measures as the PTC deems necessary;⁶⁶ and
- viii. in deciding on the extent of participation of civil parties during the provisional detention appeal hearings the PTC may consult⁶⁷ the Victims Unit and seek its opinion, as appropriate.


 YET Chakriya Robert PETIT
 Deputy Co-Prosecutor
 Co-Prosecutor

Signed in Phnom Penh, Kingdom of Cambodia on this twenty-second day of February 2008

⁶⁶ Consistent with the spirit of Internal Rule 29.

⁶⁷ This should be consistent, however, with the spirit of the Practice Direction on Victims Participation. See Practice Direction, art. 3.10.