

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

BEFORE THE PRE-TRIAL CHAMBER

Case No: 002/19-09-2007-ECCC/PTC
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 IENG Sary,
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 KHIEU Samphan
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**JOINT AND SEVERAL 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, IENG Thirith, and KHIEU Samphan (collectively, the “Defence”) hereby file their joint and several submissions pursuant to the ‘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”) of the Pre-Trial Chamber (the “PTC”).¹
2. For the reasons stated below, the Defence objects to the participation of civil parties in appeals related to provisional detention. Such participation is categorically prohibited by Cambodian law, and—assuming the application of international principles—without foundation given the absence of a demonstrable interest in the outcome of the proceedings.
3. Pursuant to the express terms of the Order, the instant submissions are limited to the question of civil-party participation in appeals related to provisional detention.

II. RELEVANT FACTS

4. To date, eight individuals have filed applications for recognition as civil parties pursuant to Rule 23 of the ECCC Internal Rules (the “Rules”).² The Greffiers of the Co-Investigating Judges have provisionally recognized four of these individuals “subject to any later decision of the Co-Investigating Judges”.³ The four (collectively, the “Applicants”) are not listed as witnesses in the Introductory Submissions or elsewhere.
5. On 16 January 2008, the PTC invited counsel⁴ for the Applicants to file pleadings with respect to Mr Nuon’s ‘Appeal Against Order of Provisional Detention’ (the “Appeal”).⁵ Although no such pleadings were filed, the Applicants requested

¹ Document No. C-11/36, 12 February 2008. The parties reserve their right to make individual submissions in response to submissions filed by the Office of the Co-Prosecutor and/or any *amici curiae*.

² See Document Nos. D-22/1, D-22/2, D-22/3, D-22/4, D-22/5, D-22/6, D-22/7, and D-22/8.

³ See Document Nos. D-22/1/1, D-22/2/2, D-22/6/2, and D-22/7/2. Although their identities have been made known to the Defence by the OCIJ, three of the Civil Parties have requested that their personal data remain confidential. See Document Nos. D-22/2/4, D-22/6/4, and D-22/7/4. SENG Chantheary has made no such request. See Document No. D-22/1/3.

⁴ All four Civil Parties are represented by counsel. See Document Nos. D-22/1/2, D-22/1/4, D-22/2/3, D-22/2/5, D-22/6/3, D-22/6/5, D-22/7/3, and D-22/7/5.

⁵ Document No. C-11/17 (the “Invitation”).

permission on 30 January 2008 to participate in the appeal hearing scheduled for 4 February 2008.⁶ The PTC subsequently circulated a document entitled 'Conduct of Criminal Proceedings' in which it was noted that submissions would be heard on the Appeal from the lawyers for the Applicants.⁷

6. Counsel for Mr Nuon filed a request to adjourn the hearing,⁸ and the PTC announced it would hear "submissions on the Request" at 9:30 a.m. on 4 February 2008.⁹ At that time, the lawyers for the Applicants were invited to comment on the request—notably, before Mr Nuon himself was permitted to speak. Each attorney simply repeated the arguments previously made by Co-Prosecutor CHEA Leang. Submissions on the Appeal itself were ultimately adjourned to 7 February 2007.
7. At the hearing of 7 February 2008 (the "Hearing"), following the objection of counsel for Mr Nuon, it was agreed that the lawyers for the Applicants would make submissions subject to a subsequent decision on the objection by the PTC. Again, counsel for the Applicants merely restated the arguments of the Office of the Co-Prosecutors (the "OCP") without demonstrating how their clients' interests were affected by the Appeal. The only submission to go beyond the OCP position belonged to Ms Seng herself, who specifically alleged that Mr Nuon was responsible for the loss of her family and others.

III. RELEVANT LAW

A. Criminal Procedure Code of the Kingdom of Cambodia

8. Article 2 of the Criminal Procedure Code of the Kingdom of Cambodia¹⁰ (the "CPC") provides as follows:

Criminal and civil actions are two separate kinds of legal actions.

The purpose of a criminal action is to examine the existence of a criminal offence, to prove the guilt of an offender, and to punish this person according to the law.

⁶ See Document Nos. D-22/1/3, D-22/2/4, D-22/6/4, and D-22/7/4.

⁷ Email correspondence from PTC to the various parties and participants, 31 January 2008.

⁸ Document No. C-11/25.

⁹ Document No. C-11/27, 'Public Notification Concerning Urgent Request for Adjournment of Appeal Hearing', 1 February 2008.

¹⁰ *N.B.* An unofficial English translation is used throughout these submissions.

The purpose of a civil action is for providing compensation for injuries to victims of an offence and to allow victims to receive sufficient moral reparations corresponding with the injuries they suffered.¹¹

9. In Cambodia, criminal actions are primarily “brought by prosecutors *for the general interest*”.¹² Once charges have been leveled by the prosecutor, a victim can file a petition with the investigating judge to become a civil party in the pending criminal action.¹³ Compensation—the sole purpose of a civil-party action under the CPC—will only be deemed appropriate after a criminal court “has looked at the elements characterizing the criminal offence and declared that the accused person is guilty”.¹⁴
10. The CPC explicitly prescribes the particular warrants (issued by the investigating judge) against which the prosecutor, the accused person, and any civil parties may appeal.¹⁵ The latter do not have the right to appeal against warrants for temporary detention or judicial supervision.¹⁶ Such appellate standing is reserved to the prosecutor and the accused person.¹⁷ Furthermore, neither the investigating judge nor the court of first instance is required to hear civil-party submissions prior to ordering the release or continued detention of an accused person;¹⁸ whereas they must hear from both the prosecutor and the accused person.¹⁹ In practice, the Defence knows of no case before a Cambodian court of law where a civil party has been permitted to participate in an appeal on the issue of provisional detention.

B. ECCC Internal Rules

11. Rule 23(1) provides as follows:

¹¹ The status of a civil party is addressed by CPC, Article 13. (“A civil action shall be brought by the victim of an offence. In order to be compensated, the injury must [*sic*]: A direct consequence of an offence; A complainant’s personal damage; and Really occurred. An injury can be the property or physical or moral damage.”)

¹² CPC, Article 4 (emphasis added). The “victims of a felony or misdemeanor” may indirectly instigate a criminal action by petitioning the investigating judge. *See* CPC, Articles 5 and 138. However, it is the prosecutor who formally brings the charges. *See* CPC, Article 139.

¹³ *See* CPC, Article 137.

¹⁴ CPC, Article 23.

¹⁵ *See* CPC, Articles 266–268.

¹⁶ *See* CPC, Article 268.

¹⁷ *See* CPC, Articles 266–267.

¹⁸ *See* CPC, Articles 206, 207, 211, 215, 216, 217, 306, and 307.

¹⁹ *Ibid.*

The purpose of a 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.

12. Pursuant to the Rules, only the OCP may initiate criminal proceedings, either “at [its] own discretion or on the basis of a complaint”.²⁰ The indirect right of victims to trigger prosecution under the CPC²¹ is not contained in the Rules. However, once a judicial investigation has begun, an alleged victim may apply to the Co-Investigating Judges (the “CIJs”) to be joined as a civil party.²²
13. With regard to the question of civil-party appellate standing, the Rules accord fully with the CPC. Rule 74(4)—which provides an exhaustive list of CIJ orders against which civil parties are permitted to appeal—does not include orders of provisional detention, provisional release, or bail. Further, Rule 82(5) provides: “All decisions of the [Trial] Chamber concerning provisional detention are open to appeal by the Accused or the Co-Prosecutors, as appropriate.” Civil parties do not enjoy a similar statutory right.

C. International Criminal Law

14. The only international criminal tribunal, other than the ECCC, to permit actions by victims is the International Criminal Court (the “ICC”). In this regard, Article 68(3) of the Rome Statute provides:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial [...].

Victims do not have an automatic right to participate in appeals related to provisional detention at the ICC; rather, they must first seek leave to do so.²³

²⁰ Rule 49(1).

²¹ See CPC, Articles 5 and 138.

²² See Rule 23(3).

²³ 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 (the “Lubanga Judgment of 13 February 2007”), paras. 38–40. This is based on the clear language of Article 82(1)(b) of the Rome Statute which provides only for prosecution and defence appeals as a matter of right:

15. In assessing the scope of Article 68(3), the ICC Appeals Chamber has held that the burden rests with the victims to demonstrate: (i) “whether and how [their] personal interests [...] are affected by [the] appeal”;²⁴ (ii) “why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented at [the particular] stage of the proceedings”;²⁵ and (iii) “why the presentation of such views and concerns would not be prejudicial to or inconsistent with the rights of the Defence”.²⁶
16. With respect to appeals on provisional detention, “[o]bservations to be received by the victims [should be] limited and [...] specifically relevant to the issues arising in the appeal rather than more generally”.²⁷ More to the point, “it is not appropriate either merely to repeat evidence that was before the Pre-Trial Chamber, or to introduce new evidence before the Appeals Chamber, without making any specific link as to how such material affects the Appeals Chamber’s determination of the issues raised on appeal”.²⁸
17. Even where victims have satisfied their initial burden—demonstrating the requisite personal interests, appropriateness of their participation, and lack of prejudice to the Defence—their submissions may ultimately prove unhelpful:

“Either party may appeal [...] [a] decision granting or denying release of the person being investigated or prosecuted”. (emphasis added) See also Jorda and de Hemptinne, ‘The Status and the Role of the Victim’ in Cassese *et al* (eds.), *The Rome Statue of the International Criminal Court: A Commentary*, Vol. II, p. 1406 (the victim “has no right of appeal and cannot, on that basis, present his arguments against the accused to the Appeals Chamber”); see also Roth and Henzelin, ‘The Appeal Procedure of the ICC’, in Cassese *et al* (op. cit.), p. 1551 (“Victims, civil parties and third parties affected by a decision cannot normally be considered as parties, in the strictest sense of the word, to an appeal against an interim decision under Article 82, unless such decisions affect their civil rights as envisaged by Article 82(4)/Article 75.”)

²⁴ *Situation in the Democratic Republic of Congo*, Case No. ICC-01/04, ‘Decision of the Appeal Chamber on the OPCV’s request for clarification and the legal representatives’ request for extension of time and Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the responses thereto by the OPCD and the Prosecutor’, 13 February 2008 (the “DRC Decision of 13 February 2008”), para. 1. *N.B.* “Clear examples of where the personal interest of victims are affected are when their protection is in issue and in relation to proceedings for reparations.” *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, ‘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 (the “Lubanga Decision of 13 June 2007”), para. 28 (holding that victims had no demonstrable interest in the preliminary question of whether the appeal of the confirmation of the charges was correctly brought).

²⁵ DRC Decision of 13 February 2008, para. 1.

²⁶ *Ibid.*

²⁷ Lubanga Judgment of 13 February 2007, para. 55.

²⁸ *Ibid.*, para. 71.

while the Appeals Chamber has noted the concerns expressed by the victims in relation to what they allege might happen if the Appellant were to be granted interim release, it has not found them to be of assistance in determining the specific grounds before it in the present appeal and therefore has not relied on those concerns in its determination of the merits of the current appeal.²⁹

18. In all cases, “an assessment will need to be made [...] as to whether the interests asserted by the victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor”.³⁰

IV. ARGUMENT

A. The PTC Has No Jurisdiction to Allow the Applicants to Participate in Appeals Related to Provisional Detention

19. The Invitation to the Applicants indicates that the PTC “has obtained the official acknowledgement from the Co-Investigating Judges concerning [their] civil party applications, *which have been approved*”.³¹ However, the Defence is unaware of any such approval by the CIJs and has only been provided with copies of letters to the four Applicants from LY Chantola, a CIJ greffier.³² Mr Ly’s letters nowhere state that formal decisions have been taken by the CIJs with respect to the applications. To the contrary, the text of the letters indicates that such decisions are yet to come:

It should be recalled that the Co-Investigating Judges may, at any time during the judicial investigation, make a formal decision with respect to the admissibility of your application, and reject it if they consider that you are not a victim or that the criteria set out in the Internal Rules and in the Practice Direction on victim participation are not fulfilled.³³

20. The Defence submits that such procedure is unacceptable. It simply cannot be the case that an applicant is presumed to have been joined as a civil party prior to a decision by the CIJs pursuant to the criteria contained in the Rules.³⁴ Furthermore, should the CIJs wish to hold civil-party applications in abeyance pending substantive review, greffiers are not authorized to provisionally grant them. Under the Rules, the presumption must be that joinder of civil parties is strictly contingent upon formal

²⁹ *Ibid.*, para. 72.

³⁰ Lubanga Decision of 13 June 2007, para. 28 (holding that victims had no demonstrable interest in the preliminary question of whether the appeal of the confirmation of the charges was correctly brought).

³¹ Document No. C-11/7 (emphasis added).

³² See Document Nos. D-22/1/1, D-22/2/2, D-22/6/2, and D-22/7/2.

³³ Document No. C-11/7 (emphasis added).

³⁴ Rule 23(2) outlines the criteria for civil-party status, and Rule 23(5) details the necessary content of a civil-party application.

review and acceptance of applications by the CIJs themselves.³⁵ Because this has yet to occur, the PTC has no jurisdiction to either invite the Applicants to participate in appeals related to provisional detention or to allow them to actually do so.

B. Civil-Party Participation in Appeals on Provisional Detention is Categorically Prohibited by Cambodian Law and the Rules

21. Taken together, the provisions of the CPC and the Rules dealing with the purpose of civil-party proceedings clearly demonstrate the subsidiary position of any such action vis-à-vis the underlying criminal prosecution. Under the CPC, civil action is expressly limited to seeking compensation and reparation.³⁶ And although the Rules sanction the additional objective of “supporting the prosecution”,³⁷ this general language must be read in the light of the specific provisions on appellate standing which do not afford civil parties the right to participate in appeals on provisional detention.³⁸
22. Rather than acknowledging a general right to participate in all aspects of the proceedings without restriction, Rule 23(1)(a) simply recognizes the supporting role of civil parties.³⁹ This additional language can also be understood as a verbal salve to the curtailment of civil parties’ ability to indirectly trigger criminal prosecutions under the CPC—a notion that was explicitly rejected by the drafters of the Rules.
23. The unambiguous statutory prohibition against civil-party participation in appeals on provisional detention is further reflected *in practice* before the courts of Cambodia. Because such restriction is not inconsistent with international standards, there is no need to look beyond the CPC and the Rules to international practice and principles.⁴⁰ As one commentator has noted with respect to civil-party participation in general: “solutions should be compatible with the internal

³⁵ Rule 23(3) requires potential civil parties to “apply to the Co-Investigating Judges”. The only reasonable interpretation of this language is that any decision on such applications will be a judicial one—that is one made by the CIJs themselves.

³⁶ CPC, Article 2.

³⁷ Rule 23(1)(a).

³⁸ Pursuant to the principle of *lex specialis derogat generali*, the general provision of Rule 23(1)(a) is overridden by the *lex specialis*, namely Articles 266–268 of the CPC and Rules 74(4) and 82(5).

³⁹ In other words, the Rule defines the purpose but not the scope of civil-party participation.

⁴⁰ See ECCC Law, Article 33 new.

logic of the civil law system in Cambodia and should not be taken as yet another opportunity to simply import wholesale the rules of international tribunals".⁴¹

C. The Applicants Have Failed to Demonstrate Their Personal Interests in Any of the Pending Appeals on Provisional Detention

24. Assuming, *arguendo*, this Chamber feels compelled to look beyond the unambiguous Cambodian law, the jurisprudence of the ICC is instructive. Its requirements for victim participation in various proceedings are consistent with the notion of participation as provided in Rule 23(1)(a), which necessarily presupposes—as a matter of logic—a demonstrable interest in the outcome of those proceedings. Simply put, the participation of victims in proceedings in which they have no interest is not permitted.
25. To date, the Applicants have not been required by this Chamber to make such a showing, nor have they done so on their own initiative. Rather, as noted above, the lawyers for the Applicants have simply regurgitated the positions of the OCP. Not one of the four Applicants has demonstrated whether and how his or her *personal interests* are affected by any of the pending appeals. Yet this is clearly a requirement under the jurisprudence of the ICC, which has explicitly criticized as inappropriate the mere repetition by victims of previously made submissions.⁴²
26. To the extent the Applicants have articulated *any* interests, they are ones shared by various members of the public and are in no way unique to the Applicants themselves. As such, these common concerns are capable of vindication by the OCP whose statutory role is to prosecute criminal actions “for the general interest”⁴³ and whose duty in this regard requires no civil-party support.⁴⁴

D. Civil-Party Participation in Appeals on Provisional Detention is Inconsistent with the Rights of the Accused Persons and the Practical Realities of the ECCC

⁴¹ David Boyle, ‘The Rights of Victims: Participation, Representation, Protection, Reparation’, *Journal of International Criminal Justice*, May 2006, 4 J. Int’l Crim. Just. 307, 309.

⁴² See Lubanga Judgment of 13 February 2007, para. 71.

⁴³ CPC, Article 4 (emphasis added). See also Lubanga Decision of 13 June 2007, para. 28.

⁴⁴ See Rule 23(1)(a). *N.B.* The law does not recognize a right to private revenge or to an *actio popularis*.

27. In determining the issue, this Chamber must be sensitive to the potential for civil-party involvement at the ECCC to negatively impact (i) the accused persons' right to a fair and expeditious trial; (ii) the principle of equality of arms; and (iii) the presumption of innocence. This Chamber is now presented with the opportunity to ensure that these fundamental rights are not unnecessarily subordinated to the perceived symbolic and/or historical considerations of civil-party participation.⁴⁵
28. In the context of large-scale crimes cases in general—and particularly one in which the number of alleged victims runs into the millions—there is justifiable concern that a mass of civil-party applications could considerably slow, not to say overwhelm, the expeditious progress of the criminal prosecution in violation of the accused persons' fundamental right to be tried without undue delay.⁴⁶ The conduct of the Hearing illustrates this point. Several hours of judicial time was spent on lengthy submissions which did not depart in any way from the OCP position. Had the Applicants required such time in order to outline a unique or novel proposition expressing their particular interests in the Hearing, the Defence could hardly argue that it was not time well spent. However, the record will reflect that nearly two hours was spent simply repeating previously articulated arguments.
29. Moreover, extensive civil-party participation at every stage of the proceedings threatens to place an unjust burden on the accused to respond to a multiplicity of opponents. Despite the repetition of the arguments, counsel for Mr Nuon was nevertheless required to evaluate the various submissions of the three lawyers for the Applicants and Ms Seng (herself a lawyer by profession) and consider whether to make further submissions in reply. With the potential for quite literally thousands of civil actions before the ECCC, one can only wonder how the Defence will manage in the future should the PTC continue to issue orders as open-ended as the Invitation.⁴⁷

⁴⁵ See, e.g., The Independent, 'After 30 years, victim of Khmer Rouge faces leader in court', 9 February 2008 ("It's extremely symbolic," Peter Foster, a tribunal spokesman, said. "We made history today."); UN News Service, 'Khmer Rouge victims participate in historic day at UN-backed tribunal', 4 February 2008 ("[Victims'] participation, through their lawyers, was described by the tribunal's Victims Unit as 'a historical day in international criminal law'.")

⁴⁶ See ECCC Law, Article 35 new (c). It bears noting that ECCC proceedings are already significantly behind schedule.

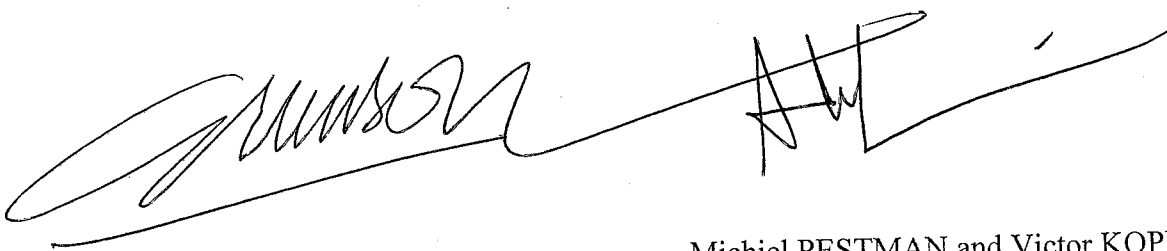
⁴⁷ See n. 5, *supra*.

30. Finally, unrestrained victim participation presents a real danger of injecting irrelevant and potentially prejudicial material into the proceedings. The Applicants' comments at the Hearing relating to Mr Nuon's alleged guilt rather than to any issue germane to the Appeal—in particular the submissions of Ms Seng herself⁴⁹—demonstrate the need for the PTC to ensure that civil-party submissions are both relevant and consistent with the rights of the accused persons. Although civil parties may enjoy a limited role in certain ECCC proceedings, it is submitted that the *primary* concern of this tribunal is the criminal prosecution of the accused persons in accordance with the law of Cambodia.⁵⁰ Ultimately the Defence submits that Ms Seng's remarks, however heartfelt, militate strongly against civil-party participation in appeals on provisional detention.

V. CONCLUSION

31. For the reasons stated above, the Defence requests the PTC to (i) exclude the Applicant's submissions from the record of the NUON Chea Appeal and (ii) preclude any further participation by the Applicants in future appeal proceedings related to provisional detention in accordance with the law of Cambodia and the Rules.

FOR NUON CHEA:



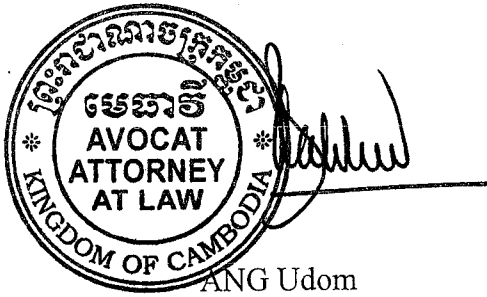
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Michiel PESTMAN and Victor KOPPE

⁴⁹ See The Independent, 'After 30 years, victim of Khmer Rouge faces leader in court', 9 February 2008 ("If Nuon Chea claimed he was not responsible, then who was for the loss of my parents and other victims' loved ones? [...] What we know is that Nuon Chea was the second leader after Pol Pot.")

⁵⁰ "The purpose of a [criminal] trial is to render justice, and nothing else; even the noblest of ulterior purposes [...] can only detract from the law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment." Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Epilogue (Penguin Books 1963).

FOR IENG SARY:

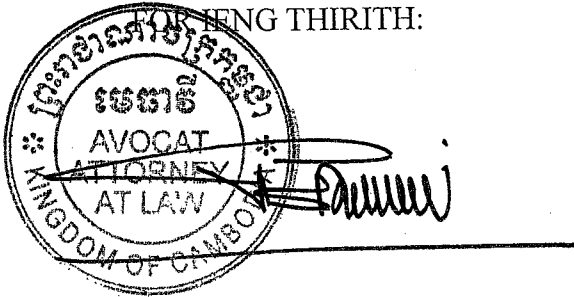


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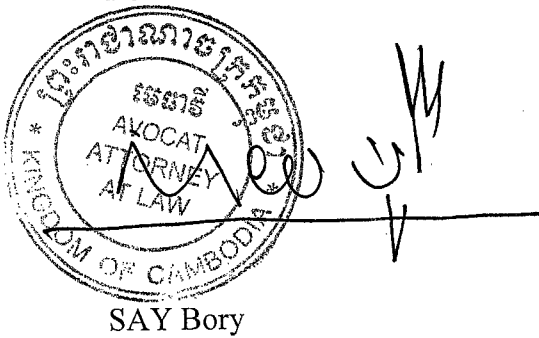


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