

BEFORE THE PRE-TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 004/1/07-09-2009-ECCC/OCIJ (PTC50) **Party Filing:** The Defence for IM Chaem**Filed to:** The Pre-Trial Chamber**Original language:** English**Date of document:** 21 August 2017**CLASSIFICATION****Classification of the document
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**IM CHAEM'S RESPONSE TO NATIONAL CIVIL PARTY CO-LAWYER'S REQUEST
FOR AN EXTENSION OF TIME AND FOR LEAVE TO FILE A RESPONSE TO THE
INTERNATIONAL CO-PROSECUTOR'S APPEAL OF CLOSING ORDER REASONS
IN ENGLISH WITH KHMER TO FOLLOW (D308/3/1/4)**

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The Co-Prosecutors:
CHEA Leang
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**All Civil Party Lawyers in
Case 004/1**

I. INTRODUCTION

1. Ms. IM Chaem, through her Co-Lawyers (the “Defence”), hereby submits this Response to the *National Civil Party Co-Lawyer’s Request for an Extension of Time and for Leave to file a Response to the International Co-Prosecutor’s Appeal of Closing Order (Reasons) in English with Khmer to Follow* (“Request”).¹
2. The Defence submits that both the Request and the National Civil Party Co-Lawyer’s Response to the Appeal against the Closing Order (Reasons) – yet to be filed – should be dismissed as procedurally defective due to lack of *locus standi*. Civil party applicants whose applications were rejected by the Co-Investigating Judges on 22 February 2017,² and who failed to challenge it, are no longer parties to the proceedings in Case 004/1. The group of civil party applicants that the National Civil Party Co-Lawyer represents (“Civil Party Applicants”) are therefore not entitled to be heard in Case 004/1.
3. Should the Pre-Trial Chamber find this Request and the Civil Party Applicants’ prospective Response to the Appeal of Closing Order (Reasons) admissible, the Defence reserves its right to file a Reply and to request additional time and pages in relation to same.

II. BACKGROUND

4. On 7 September 2009, the former International Co-Prosecutor Petit filed the Third Introductory Submission, opening a judicial investigation against Ms. IM Chaem.³ Supplementary Submissions were filed on 18 July 2011, 24 April 2014, 4 October 2015, and 20 November 2015, respectively.⁴

¹ National Civil Party Co-Lawyer’s Request for an Extension of Time and for Leave to file a Response to the International Co-Prosecutor’s Appeal of Closing order (Reasons) in English with Khmer to Follow, 15 August 2017, **D308/3/1/4**.

² Order on Admissibility of Civil Party Applications, 22 February 2017, **D307** (“Rejection Order”).

³ Co-Prosecutors’ Third Introductory Submission, 7 September 2009, **D1**.

⁴ Co-Prosecutors’ Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 18 July 2011, **D65**; Co-Prosecutors’ Supplementary Submission regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, **D191**; Response to Forwarding Order and Supplementary Submission regarding Wat Ta Meak, 4 August 2015, **D254/1**; Response to Forwarding Order dated 5 November 2015 and Supplementary Submission regarding the Scope of Investigation into Forced Marriage in Sectors 1 and 4, 20 November 2015, **D272/1**.

5. On 18 December 2015, the Co-Investigating Judges concluded the investigation against Ms. IM Chaem.⁵
6. On 22 February 2017, the Co-Investigating Judges issued the dispositive part of the Closing Order in Case 004/1 dismissing all charges against Ms. IM Chaem, with full reasons to follow.⁶ On the same day, the Co-Investigating Judges issued the Order on Admissibility of Civil Party Applications, rejecting all Civil Party Applications in Case 004/1 (“Rejection Order”).⁷
7. On 10 July 2017, the Co-Investigating Judges issued the full reasons of the Closing Order in Case 004/1 and dismissed all charges against Ms. IM Chaem.⁸
8. On 20 July 2017, the International Co-Prosecutor filed a Notice of Appeal against the Co-Investigating Judges’ Closing Order (Reasons),⁹ and on 9 August 2017, the Appeal was filed in both English and Khmer.¹⁰
9. On 15 August 2017, Civil Party Co-Lawyer SAM Sokong filed the Request in which he seeks an extension of time and leave to file in English first a Response to the International Co-Prosecutor’s Appeal of Closing Order (Reasons).¹¹ On 18 August 2017, the Pre-Trial Chamber instructed the parties in Case 004/1 to file any response to the Request by 1.00 pm on Monday, 21 August 2017.¹²

III. APPLICABLE LAW

10. Rule 75 of the Internal Rules states, *inter alia*:

⁵ Notice of Conclusion of Judicial Investigation Against IM Chaem, 18 December 2015, **D285**.

⁶ Closing Order (Disposition), 22 February 2017, **D308**.

⁷ Order on Admissibility of Civil Party Applications, 22 February 2017, **D307**.

⁸ Closing Order (Reasons), 10 July 2017, **D308/3** (“Closing Order (Reasons)”).

⁹ Appeal Register from the International Co-Prosecutor against the Co-Investigating Judges’ Closing Order (Reasons), 20 July 2017, **D308/3/1**.

¹⁰ International Co-Prosecutor’s Appeal of Closing Order (Reasons), 9 August 2017, **D308/3/1/1**.

¹¹ National Civil Party Co-Lawyer’s Request for an Extension of Time and for Leave to file a Response to the International Co-Prosecutor’s Appeal of Closing order (Reasons) in English with Khmer to Follow, 15 August 2017, **D308/3/1/4**.

¹² Email from Case File Officer to Parties in Case 004/1 entitled “NOTIFICATION: CASE FILE No. 004/1 - Pre-Trial Chamber’s Instructions to the Parties in Case File N° 004/1/07-09-2009-ECCC/OCIJ (PTC50)”, 18 August 2017 [attached as Annex A].

1. Except as otherwise provided in these [Internal Rules], any notice of appeal to the [Pre-Trial] Chamber must be filed with 10 (ten) days from the date that notice of the decision or order was received.

...

3. Submissions on appeal shall be filed by the appellant with the Greffier of the Chamber within 30 thirty days from the date that notice of the decision or order was received. Under exceptional circumstances the time limit may be extended.

11. Rule 39(1) of the Internal Rules provides:

All time limits set out in the applicable laws and these [Internal Rules], the applicable Practice Directions and, where appropriate, by decision of the judges, must be respected. Subject to this Rule, failure to do so shall lead to the invalidity of the action in question.

12. Practice Direction 9 of the Practice Direction on Filing of Documents provides:

A document may be filed outside the time limits as set out in Rule 39 of the Internal Rules. In such cases, the person filing the document shall indicate the reasons for the delay on the Filing Instructions. The Judges or Chamber before which the document is filed shall decide whether to accept the document despite its later filing.¹³

IV. RESPONSE

13. The Defence submits that the Request is procedurally defective. The Co-Investigating Judges rejected all civil party applications in Case 004/1 on 22 February 2017. None of the civil party applicants appealed the Rejection Order and their right to raise a challenge has now expired. Accordingly, the Civil Party Applicants lack *locus standi* to be heard in Case 004/1. Furthermore, as demonstrated below, the Civil Party Applicants are impermissibly seeking to file a *de facto* notice of appeal against the Closing Order (Reasons) in an untimely manner and in contravention with the Internal Rules. Any prospective “Response” to the Appeal of the Closing Order (Reasons) should therefore also be found inadmissible as procedurally defective.

¹³ Practice Direction on Filing of Documents before the ECCC (Rev. 8). Extraordinary Chambers in the Courts of Cambodia, 7 March 2012, Article 9.

The Civil Party Applicants lack standing to be heard in Case 004/1

14. In the Rejection Order, the Co-Investigating Judges unequivocally rejected all Civil Party Applications in Case 004/1 based on the following:

[W]e dismissed all charges in Case 004/1, because Im Chaem, the only charged person in this case, does not fall under the ECCC's jurisdiction. As a consequence, the Civil Party applications in Case 004/1 no longer have a claim against her under the law of the ECCC. Their applications must therefore be rejected.¹⁴

15. Pursuant to Rules 23 and 74 of the Internal Rules, the Co-Lawyers for the Civil Party Applicants were entitled to appeal the Rejection Order.¹⁵ However as supported by the International Criminal Court, victims participating in the proceedings must successfully address issues of the admissibility of their applications before they are entitled to participate in the substance of the proceedings.¹⁶ The Civil Party Applicants' failure to successfully challenge the Rejection Order – 177 days after the notification of the unchallenged order – amounts to an acceptance of a lack of *locus standi* to file the Request and be heard on the Closing Order (Reasons).

¹⁴ Rejection Order, **D307**, para. 11.

¹⁵ Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev.9), adopted on 12 June 2007 (as revised on 16 January 2015) ("Internal Rules"), Rules 23 *bis* (3) ["When issuing the Closing Order, the Co-Investigating Judges shall decide on the admissibility of all remaining Civil Party applications by a separate order. This order shall be open to expedited appeal by the parties or the Civil Party applicants as provided in Rule 77*bis*. ..."], 74(4)(a) ["Civil Parties may appeal against the following orders by the Co-Investigating Judges: a) refusing requests for investigative action allowed under these Rules"].

¹⁶ *Situation in the Democratic Republic of the Congo* (ICC-01/04-418), PTC I, Decision on the Requests of the OPCV, 10 December 2007, para. 16 ["[T]he Single Judge observes that not notifying the rule 89(1) observations does not unduly prejudice the applicants. Pursuant to rule 89(2) of the Rules, applicants are entitled to submit new applications should their applications be rejected. However, they are neither entitled to reply to the observations of the Prosecution and the Defence nor to request leave to appeal the decision of the Chamber on the merits of their applications."]. See also *Situation in the Democratic Republic of the Congo* (ICC-01/04-164-t(ENG)), PTC I, Decision on the Application by Applicants a/0001/06 to a/0003/06 for Leave to Respond to the Observations of the Prosecutor and Ad Hoc Counsel for the Defence, 7 July 2006, p. 3; *The Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06-936), TC I, Request for submissions on the subjects that require early determination, 18 July 2007, para. 5.

16. Further, even if the Civil Party Applicants had standing, the harm allegedly suffered does not relate to the charges alleged against Ms. IM Chaem.¹⁷ For all the reasons above, the Defence submits that the Request should be found inadmissible due to lack of *locus standi*.

The Civil Party Applicants' *de facto* notice of appeal against the Closing Order (Reasons) violates the Internal Rules

¹⁷ SAM Sokong, the National Civil Party Co-Lawyer, represents 58 Civil Party Applicants. A review of the applications of all Civil Party Applicants reveals that none of them relate to the charges against Ms. IM Chaem as set out in the Notification of Charges, i.e. crimes allegedly committed at Phnom Trayoung Security Centre or Spean Sreng Worksite. *See* Civil Party Application of Rob Hamill, 7 March 2011, **D5/2**; Civil Party Application of CHOENG Py, 14 August 2009, **D5/40**; Civil Party Application of CHEA Savy, 16 September 2009, **D5/43**; Civil Party Application of HE Phen, 15 October 2009, **D5/44**; Civil Party Application of KHAN Bun Roen, 3 September 2009, **D5/48**; Civil Party Application of SAO Lang, 3 July 2009, **D5/53**; Civil Party Application of NUON Yin, 14 May 2009, **D5/54**; Civil Party Application of Sim Khorn, 16 October 2009, **D5/56**; Civil Party Application of CHEA Heng, 10 October 2009, **D5/57**; Civil Party Application of KHEAV Bunthoe, 10 September 2009, **D5/58**; Civil Party Application of CHECH Sopha, 7 August 2009, **D5/66**; Civil Party Application of SANG Say, 9 August 2009, **D5/67**; Civil Party Application of CHHUM Vanny, 10 August 2009, **D5/68**; Civil Party Application of PENG San, 7 September 2009, **D5/71**; Civil Party Application of KEU Seung, 8 September 2009, **D5/72**; Civil Party Application of PHAN Sarang, 9 September 2009, **D5/73**; Civil Party Application of KOEM Pheng, 8 September 2009, **D5/75**; Civil Party Application of CHIEV Heng, 7 October 2009, **D5/80**; Civil Party Application of NHEL Y, 15 October 2009, **D5/90**; Civil Party Application of SEY Sang, 11 October 2009, **D5/92**; Civil Party Application of SUON Lov, 10 October 2009, **D5/93**; Civil Party Application of KEO Fao, 11 October 2009, **D5/96**; Civil Party Application of KHIEM Bo, 10 January 2009, **D5/98**; Civil Party Application of KAO Phary, 13 October 2009, **D5/99**; Civil Party Application of SEUN Deung, 6 September 2009, **D5/109**; Civil Party Application of VEN Van, 10 July 2009, **D5/111**; Civil Party Application of TIT Sophary, 9 July 2009, **D5/113**; Civil Party Application of LEY Hoeun, 9 July 2009, **D5/116**; Civil Party Application of DUONG Sean, 1 November 2008, **D5/135**; Civil Party Application of KIM Huoy, 28 October 2008, **D5/143**; Civil Party Application of BUOY Hauy, 28 October 2008, **D5/156**; Civil Party Application of HANG Nguon, 28 October 2008, **D5/158**; Civil Party Application of Timothy Scott DEEDS, 17 May 2011, **D5/313**; Civil Party Application of NAN Yem, 25 May 2009, **D5/991**; Civil Party Application of NGOV Nha, 23 August 2009, **D5/992**; Civil Party Application of NEANG Sakhan, 29 June 2009, **D5/1031**; Civil Party Application of PRUM Samon, 27 August 2009, **D5/1047**; Civil Party Application of SUM Yoem, 3 November 2008, **D5/1096**; Civil Party Application of CHEA Chanty, 5 November 2008, **D5/1097**; Civil Party Application of HAEY San, 12 October 2009, **D5/1098**; Civil Party Application of CHHAY Sok, 20 July 2008, **D5/1115**; Civil Party Application of SEV Ream, 30 April 2013, **D5/1116**; Civil Party Application of PEN Dy, 30 April 2013, **D5/1117**; Civil Party Application of THAV Nin, 30 April 2013, **D5/1146**; Civil Party Application of SAO Nimith, 13 August 2009, **D5/1233**; Civil Party Application of SIENG Chanthly, 20 December 2007, **D5/1234**; Civil Party Application of SAOM Oeun, 7 August 2009, **D5/1235**; Civil Party Application of PECH Sothea, 7 September 2009, **D5/1236**; Civil Party Application of SOK Soeun, 14 August 2009, **D5/1237**; Civil Party Application of PAT Sorm, 28 July 2009, **D5/1238**; Civil Party Application of NGAUK Van, 25 May 2007, **D5/1239**; Civil Party Application of MANN You Suh, 26 May 2008, **D5/1240**; Civil Party Application of EL Meu, 28 May 2008, **D5/1241**; Civil Party Application of MAO Ha, 18 June 2008, **D5/1242**; Civil Party Application of UN Ny, 13 July 2009, **D5/1395**; Civil Party Application of NGOUN Chhun Hay, 14 October 2009, **D5/1404**; Civil Party Application of MAO Seu Less, 9 December 2009, **D5/1405**; Civil Party Application of CHAO Lang, 28 May 2009, **D5/1406**.

17. Despite the language of the Request regarding an extension of time to “respond” to the Appeal of the Closing Order (Reasons), the Defence submits that the Civil Party Applicants, in fact, seek to file a *de facto* notice of appeal through the Request. This attempt effectively circumvents the legitimate procedural avenue opened to the parties for challenging the Closing Order’s findings.
18. The language of the Internal Rules is plain. Pursuant to Rule 74(4)(f) of the Internal Rules, *civil parties*, i.e. civil party applicants found admissible by a Co-Investigating Judges’ order, may appeal a Dismissal Order where the Co-Prosecutors have also appealed. However, the Internal Rules do not provide for civil party applicants found inadmissible by the Co-Investigating Judges the opportunity to respond to an appeal filed by the International Co-Prosecutor against a Dismissal Order, let alone to appeal a Dismissal Order if they have failed to challenge the order finding them inadmissible.
19. The Civil Party Applicants now seek to circumvent these strictures through the Request by claiming that they are “responding” to the Appeal of Closing Order (Reasons). This *de facto* notice of appeal is time-barred. Courts have rejected late filings in cases where the late filing resulted from a lack of diligence absent any good cause.¹⁸ Absent any further explanation, the National Civil Party Co-Lawyer’s failure to exercise the right to challenge the admissibility of the applications of the Civil Party Applicants may be attributable to a lack of diligence. In any event, no good cause exists or has been asserted in the Request. The Request does not provide any basis for a broad interpretation of the ECCC legal framework to admit the “Response” to the Appeal of the Closing Order (Reasons) in violation of the

¹⁸ *Case of MEAS Muth*, 003/07-09-2009-ECCC/OCIJ (PTC 06), Considerations of the Pre-Trial Chamber regarding the International Co-Prosecutor’s Appeal against the Decision on Re-Filing of Three Investigative Requests: Opinion of Judge PRAK Kimsan Judge NEY Thol and Judge HUOT Vuthy, 15 November 2011, **D26/1/3**, paras. 1-3 [where Judges PRAK, NEY, and HUOT voted to disallow the Appeal (of a decision holding that investigative requests were time-barred) due in part to the fact that, in their view, the International Co-Prosecutor had “failed to exercise his rights” under the Internal Rules]; *The Prosecutor v. Clément Kayishema and Obed Ruzindana* (ICTR-95-1-A), AC, Judgment (Reasons), 1 June 2001, paras. 44-45. *See also*, *Case of MEAS Muth*, 003/07-09-2009-ECCC/OCIJ (PTC 06), Considerations of the Pre-Trial Chamber regarding the International Co-Prosecutor’s Appeal against the Decision on Re-Filing of Three Investigative Requests: Opinion of Judges LAHUIS and DOWNING, 15 November 2011, **D26/1/3**, paras. 11-13 [where Judges LAHUIS and DOWNING voted to allow the Appeal due to perceived diligence on the part of the International Co-Prosecutor].

Internal Rules.¹⁹

20. Allowing the Civil Parties to file a submission which is untimely, and in violation of the Internal Rules would inhibit the expeditious and proper conduct of the proceedings in Case 004/1 and at the ECCC in general. *In fine*, to admit the Request and the foreshadowed Response to the Appeal against the Closing Order (Reasons) risks prejudicing the fair conduct of the proceedings and for the reasons outlined undermines the interests of justice in Ms. IM Chaem's case

V. RELIEF REQUESTED

For the reasons above, the Defence respectfully requests that the Pre-Trial Chamber finds both the Request and the prospective Civil Party Applicants' Response to the Appeal of the Closing Order (Reasons) inadmissible.

Respectfully submitted,



BIT Seanglim



Wayne JORDASH, QC

Co-Lawyers for Ms. IM Chaem

Signed on this 21st day of August, 2017

¹⁹ *See, generally, Case of NUON Chea et al.*, 002/19-09-2007-ECCC-PTC/OCIJ (PTC 104), Decision on KHIEU Samphan's Appeal Against the Closing Order, 21 January 2011, **D427/4/15**, paras. 20-21 [where the Pre-Trial Chamber declined to take a broad interpretation of the Internal Rules in favour of the Appellant, due in part to the lack of diligence on the part of the Appellant's Co-Lawyers].