

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

**FILING DETAILS**

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**INTERNATIONAL CO-PROSECUTOR'S REPLY TO IM CHAEM'S RESPONSE TO  
CIVIL PARTY CO-LAWYER'S REQUEST**

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**Distributed to:**

**Pre-Trial Chamber**  
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Judge HUOT Vuthy

**All Civil Party Lawyers  
in Case 004/1**

**Co-Lawyers for YIM Tith**  
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## I. INTRODUCTION

1. The International Co-Prosecutor (“Co-Prosecutor”) respectfully requests the Pre-Trial Chamber to reject Im Chaem’s response to the National Civil Party Co-Lawyer’s request for an extension of time to respond to the Co-Prosecutor’s appeal (“Im Chaem’s Response”).<sup>1</sup> Im Chaem’s Response rests on a misreading of the Internal Rules<sup>2</sup> and effectively seeks to deny the civil parties their right to be heard.

## II. SUBMISSION

### *i. Im Chaem incorrectly interprets the Rules*

2. Im Chaem conflates two different issues. The civil parties’ right to appeal the Co-Investigating Judges (“CIJs”) dismissal of their civil party applications pursuant to Rules 23bis(3), 77bis, and 74(4)(b) *is separate and distinct* from the civil parties’ right to appeal the Closing Order pursuant to Rule 74(4)(f). This is clear from the wording of the Rules.
3. The sole reason provided by the CIJs as to the dismissal of the civil parties in this instance was their finding that the ECCC lacked jurisdiction to try Im Chaem.<sup>3</sup> Unless the personal jurisdiction decision in the Closing Order (Reasons) was reversed, the civil parties simply had no grounds to object to the dismissal of their applications. In order for a civil party to successfully argue that their application is admissible, they first need to overturn the CIJs dismissal of the case – as without the latter, there can be no grounds for an admissibility appeal. Under the instant circumstances, it would have been futile for the civil parties to appeal the rejection of their applications unless and until there is a reversal of the underlying reason for that rejection, *i.e.*, the CIJs’ finding on personal jurisdiction.

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<sup>1</sup> **D308/3/1/5** 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), 21 August 2017. *See*, Email from the Pre-Trial Chamber of 21 August 2017 (instructing “the parties in Case 004/1 to file any reply to the Response by close of business on Wednesday 23 August 2017.” (emphasis omitted).

<sup>2</sup> Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015.

<sup>3</sup> **D307** Order on Admissibility of Civil Party Applications, 22 February 2017, para. 11.

4. Im Chaem acknowledges that the CIJs are obliged to decide upon the admissibility of civil party applications – at the latest – at the time of filing the Closing Order.<sup>4</sup> And the CIJs made clear that the civil party applications in this case were dismissed “[a]s a consequence” of the finding that Im Chaem “does not fall under the ECCC’s jurisdiction.”<sup>5</sup> Yet Im Chaem erroneously concludes that the civil parties do not have standing to appeal the Closing Order (Reasons) dismissal of the case because the civil parties have not appealed the dismissal of their applications. Im Chaem’s flawed interpretation is evident in her claim that the 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.<sup>6</sup>

5. Applying Im Chaem’s reasoning where the decision on admissibility comes at the same time as the Closing Order and is premised solely on the same ground as dismissal of the case as a whole – effectively disenfranchises these civil parties from their procedural rights. For the reasons outlined above, Im Chaem’s rationale would mean that a civil party could *never* appeal a closing order dismissal – where, by dint of that dismissal, the civil party application becomes inadmissible. Im Chaem is effectively seeking to deny the civil parties the only remedy that remains open to them, namely, to appeal the Closing Order (Reasons) pursuant to Rule 74(4)(f).
6. Im Chaem’s additional suggestion that the civil parties lack standing because the “harm allegedly suffered [by the civil parties] does not relate to the charges alleged against Ms. IM Chaem”<sup>7</sup> seeks to pre-judge one of the core issues of the appeal of the Closing Order (Reasons). As detailed by the Co-Prosecutor, criminal conduct alleged in an Introductory or Supplementary Submission need not be “charged” by the CIJs in order to form part of an indictment in the Closing Order.<sup>8</sup> Im Chaem also seeks to substitute her factual analysis of the civil party applications where no such determination was made by the CIJs.<sup>9</sup>

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<sup>4</sup> **D308/3/1/5** Im Chaem’s Response, fn. 15.

<sup>5</sup> **D307** Order on Admissibility of Civil Party Applications, 22 February 2017, para. 11 (emphasis added).

<sup>6</sup> **D308/3/1/5** Im Chaem’s Response, para. 18.

<sup>7</sup> **D308/3/1/5** Im Chaem’s Response, para. 16.

<sup>8</sup> **D308/3/1/1** International Co-Prosecutor’s Appeal of Closing Order (Reasons), 9 August 2017, paras 11-22.

<sup>9</sup> **D308/3/1/5** Im Chaem’s Response, fn. 17.

*ii. The Civil Parties have a right to participate in the appeal*

7. Rule 74(4)(f) provides the civil parties the right to participate in the appeal of a Closing Order dismissing a case. The only proviso is that the Co-Prosecutors must appeal the dismissal. Im Chaem's suggestion that the civil parties must file a notice of appeal in order to participate in appellate proceedings is not supported by a holistic interpretation of the Rules or by logic.
8. As the civil parties' right is contingent upon the Co-Prosecutors' appeal against a dismissal, unless the Co-Prosecutors file their notice of appeal early and it is notified prior to the deadline, the civil parties will not be aware of their opportunity to appeal until the deadline has passed. It cannot have been the plenary's intention that the civil parties would lose their sole and final opportunity to be heard on something as significant and definitive as a dismissal of the case in which they have come forward to share their experience of suffering because of a technical deadline failure. Im Chaem's suggestion of a lack of due diligence on the part of the civil parties is thus misplaced.<sup>10</sup>
9. Where a literal interpretation of a text is not definitive, international law mandates that it is interpreted "in light of its object and purpose".<sup>11</sup> Given the role and place of civil parties at the Court,<sup>12</sup> Rule 74(4)(f) must be interpreted to accord with the inclusive participatory scheme established by the Court and not, as Im Chaem argues, in a way as to exclude the civil parties from being heard.<sup>13</sup>

<sup>10</sup> **D308/3/1/5** Im Chaem's Response, para. 19.

<sup>11</sup> See, Articles 31(1), 32(b), Vienna Convention on the Law of Treaties, 115 U.N.T.S 331, signed 23 May 1969, entered into force 27 January 1980.

<sup>12</sup> See, Rule 23(1) "The purpose of 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" (emphasis added). See also, Rules 12, 12*bis*, 12*ter*, 23*bis*, 23*ter*, 23*quater*, 23*quinqies*, 59, 67(5), 74(3), 80(2), 88(1), 89*quater*(4), 91(1), 94(1)(a), 94(2), 100, 101(6)(g), 105(1)(c). See further, Article 36*new* of the ECCC Law, "The Extraordinary Chamber of the Supreme Court shall decide appeals made by the accused, the victims, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the trial court."

<sup>13</sup> See Rule 21(1) "The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations *shall be interpreted so as to always safeguard the interests of* Suspects, Charged Persons, Accused and *Victims* and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement" (emphasis added); Rule 21(1)(c) "The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings".

*iii. Im Chaem fails to substantiate that fair trial rights justify excluding the civil parties*

10. Im Chaem fails to substantiate her assertion that the interests of justice are prejudiced by the civil parties filing a response to the Co-Prosecutor's appeal.<sup>14</sup> To the contrary, the interests of justice favour the civil parties being afforded their right to participate in the appeal – the sole remaining opportunity they have to be heard in Case 004/01. That the Pre-Trial Chamber will be further informed by their views does not prejudice Im Chaem.
11. Notably, Im Chaem suggests that allowing the civil parties to participate in the appeal would “inhibit the expeditiousness” of the proceedings.<sup>15</sup> This is despite Im Chaem successfully requesting more than 300% additional time and a 50% increase in page limits to file her response to the Co-Prosecutor appeal.<sup>16</sup> Indeed, the National Civil Party Co-Lawyer is requesting much less time than Im Chaem requested for filing a response,<sup>17</sup> despite the significant deficit of resources between the civil parties and Im Chaem's defence team.
12. Additionally, Im Chaem reserves a “right” to seek an additional extension of time if the civil parties are permitted to file their response.<sup>18</sup> Having already received a significant extension of time (and page limits), this can only be seen as an attempt to slow the proceedings further. Despite Im Chaem's claimed lack of resources,<sup>19</sup> she filed a substantive response to the National Civil Party Co-Lawyer's request in two languages in less than three days. It appears, therefore, that Im Chaem's resources can be harnessed when it is deemed a matter of sufficient priority.

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<sup>14</sup> **D308/3/1/5** Im Chaem's Response, para. 20.

<sup>15</sup> **D308/3/1/5** Im Chaem's Response, para. 20.

<sup>16</sup> **D308/3/1/3** Decision on Im Chaem's Urgent Request for an Extension of Time and Pages to Respond to the Appeal of the Closing Order, 17 August 2017, para. 4.

<sup>17</sup> **D308/3/1/4** 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, para. 4. The National Civil Party Co-Lawyer requested until 8 September 2017 to file a response in English to the Co-Prosecutor's Appeal. Im Chaem requested an extension until 21 September 2017 and received an extension until 22 September 2017.

<sup>18</sup> **D308/3/1/5** Im Chaem's Response, para. 3.

<sup>19</sup> **D308/3/1/2** Im Chaem's Urgent Request for an Extension of Time and Pages to Respond to the International Co-Prosecutor's Appeal of the Closing Order (Reasons)(D308/3/1/1), 14 August 2017, paras 12-14.

**III. CONCLUSION**

13. For the foregoing reasons, the Co-Prosecutor respectfully requests that the Pre-Trial Chamber:

- (i) reject Im Chaem’s Response and permit the National Civil Party Co-Lawyer to file a response to the Co-Prosecutor’s appeal; and,
- (ii) classify this and related filings as public, as there is no reason justifying the maintenance of confidentiality.

Respectfully submitted,

Date	Name	Place	Signature
23 August 2017	Nicholas KOUMJIAN International Co-Prosecutor	Phnom Penh 	