



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Preliminaire

D308/3/1/8

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea

Case File N° 004/1/07-09-2009-ECCC/OCIJ (PTC50)

Before: Judge PRAK Kimsan, President
Judge Olivier BEAUVALLET
Judge NEY Thol
Judge Kang Jin BAIK
Judge HUOT Vuthy

Date: 29 August 2017

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PUBLIC REDACTED

DECISION ON THE NATIONAL CIVIL PARTY CO-LAWYER'S REQUEST REGARDING THE FILING OF RESPONSE TO THE APPEAL AGAINST THE CLOSING ORDER AND INVITATION TO FILE SUBMISSIONS

Co-Prosecutors

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of 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” filed on 18 August 2017 (the “Request”).¹

I. PROCEDURAL HISTORY

1. On 22 February 2017, the Co-Investigating Judges issued the disposition of their Closing Order dismissing all charges in Case File 004/1² and, the same day, rejected all Civil Party applications (the “Rejection Order”).³
2. On 10 July 2017, the Co-Investigating Judges issued the Closing Order (Reasons) (the “Closing Order”),⁴ against which the International Co-Prosecutor filed an appeal on 9 August 2017 (the “Appeal”).⁵
3. On 18 August 2017, the National Civil Party Co-Lawyer filed the Request. On 21 August 2017, the Co-Lawyers for ██████████ filed a response⁶ and, on 23 August 2017, the National Civil Party Co-Lawyer⁷ and the International Co-Prosecutor⁸ filed replies.

II. SUBMISSIONS

4. The National Civil Party Co-Lawyer requests, pursuant to Internal Rule 39(4), an extension of time until 8 September 2017 to respond to the Appeal and, pursuant to

¹ Case 004/1/07-09-2009-ECCC/OCIJ (“Case 004/1”), 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, 18 August 2017, D308/3/1/4 (“Request”).

² Case 004/1, Closing Order (Disposition), 22 February 2017, D308.

³ Case 004/1, Order on Admissibility of Civil Party Applications, 22 February 2017, D307.

⁴ Case 004/1, Closing Order (Reasons), 10 July 2017, D308/3.

⁵ Case 004/1, International Co-Prosecutor’s Appeal of Closing Order (Reasons), 9 August 2017, D308/3/1/1, notified on 10 August 2017.

⁶ Case 004/1, ██████████ 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, D308/3/1/5 (“Response”).

⁷ Case 004/1, National Civil Party Co-Lawyer’s Reply to ██████████ Response (D308/3/1/5) to the 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, 23 August 2017, D308/3/1/6 (“Civil Party Reply”).

⁸ Case 004/1, International Co-Prosecutor’s Reply to ██████████ Response to Civil Party Co-Lawyer’s Reply, 23 August 2017, D308/3/1/7 (“International Co-Prosecutor Reply”).



Article 7.2 of the Practice Direction on Filing of Documents, leave to file his response in English first, with Khmer translation to follow.⁹ He submits that the request for extension of time is justified by compelling reasons, taking into consideration the complexity of issues raised in the Closing Order and in the Appeal, as well as the diminished resources currently afforded to the Civil Party lawyers.¹⁰ He further contends that the request to file his response in English first is justified since the Interpretation and Translation Unit is unable to translate it before November 2017.¹¹

5. The Co-Lawyers for ██████████ respond that both the Request and prospective response of the National Civil Party Co-Lawyer to the Appeal should be dismissed due to lack of *locus standi*.¹² They submit that, since the Civil Party applicants represented by the National Civil Party Co-Lawyer failed to challenge the Rejection Order, they are no longer parties to the proceedings in Case 004/1 and thus not entitled to be heard.¹³ The Co-Lawyers further contend that, even if the Civil Party applicants had standing, the harm they allegedly suffered does not relate to the charges alleged against ██████████.¹⁴ In their view, the Request constitutes *de facto* an impermissible attempt to file an untimely notice of appeal against the Closing Order, in contravention with the Internal Rules.¹⁵

6. The National Civil Party Co-Lawyer disagrees that the failure to challenge the Rejection Order silenced all Civil Party voices from Case 004/1, since it rests entirely on the ECCC's lack of personal jurisdiction over ██████████ rather than on any deficiencies in the Civil Party applications.¹⁶ He replies that it was not realistically possible to challenge the admissibility of the Civil Party applications, given the legal basis of the Rejection Order and the fact that the legal justification underpinning it was not issued until 10 July 2017.¹⁷ He stresses the importance of participatory rights of Civil Parties, as recognised by the Supreme

⁹ Request, para. 1.

¹⁰ Request, para. 2.

¹¹ Request, para. 3.

¹² Response, paras 2, 13.

¹³ Response, paras 2, 13-15.

¹⁴ Response, para. 16.

¹⁵ Response, paras 13, 17-19.

¹⁶ Civil Party Reply, para. 4.

¹⁷ *Ibid.*



Court Chamber,¹⁸ and the importance to allow them, in the interests of justice, to be heard on issues that affect their interests.¹⁹ The National Civil Party Co-Lawyer further submits that his submission will not raise new grounds of appeal but rather address “the ECCC’s alleged exclusive jurisdiction in the portions of the [Closing Order], namely Section 2.1.1, that focus on the position of the ECCC within the Cambodian Legal System.”²⁰ According to him, the interests of the Civil Parties are deeply impacted by the conclusion that the establishment of the ECCC was intended to strip Cambodian national courts of jurisdiction over all other Khmer Rouge era crimes.²¹ In the alternative, he requests that the Pre-Trial Chamber permit to file a note to Case File 004/1 or invite to submit an *amicus curiae* brief.²²

7. The International Co-Prosecutor replies that the Co-Lawyers for ██████████ conflates the Civil Parties’ right to appeal the rejection of their applications pursuant to Internal Rules 23*bis*(3), 77*bis* and 74(4)(b) and their right to appeal a closing order pursuant to Internal Rule 74(4)(f).²³ In the present case, since the sole reason for the rejection of the Civil Party applications is the finding on personal jurisdiction, in the context of a dismissal, it would have been futile to appeal the Rejection Order²⁴ and concluding to the lack of standing to appeal the Closing Order would deny the only remedy that remains open to them.²⁵ The International Co-Prosecutor further submits that no factual determination was made on the Civil Party applications and that any finding as to the harm allegedly suffered would pre-judge core issues of the Appeal.²⁶ He finally contends that Internal Rule 74(4)(f) should be interpreted to accord with the inclusive participatory scheme of the ECCC, especially on something as significant and definitive as a dismissal of a case.²⁷

¹⁸ Civil Party Reply, paras 3, 5.

¹⁹ Civil Party Reply, para. 4.

²⁰ Civil Party Reply, para. 6.

²¹ Civil Party Reply, paras 6, 8.

²² Civil Party Reply, paras 9-10.

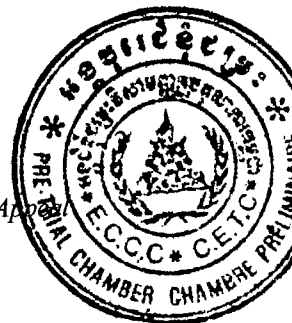
²³ International Co-Prosecutor Reply, para. 2.

²⁴ International Co-Prosecutor Reply, para. 3.

²⁵ International Co-Prosecutor Reply, para. 5.

²⁶ International Co-Prosecutor Reply, para. 6.

²⁷ International Co-Prosecutor Reply, paras 7-9.



III. DISCUSSION

8. The Pre-Trial Chamber recalls that Internal Rule 23*bis*(2) and 23*bis*(3) provides:

“2. A Victim who wishes to be joined as a Civil Party shall submit such application in writing [...]. The Co-Investigating Judges may reject Civil Party applications at any time until the date of the Closing Order. Such orders shall be open to expedited appeal to the Pre-Trial Chamber by the Civil Party applicant as prescribed by Practice Direction. Such appeals shall not stay the proceedings. *Unless and until rejected, Civil Party applicants may exercise Civil Party rights* [emphasis added].

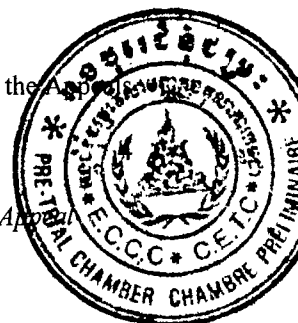
3. When issuing the Closing Order, the Co-Investigating Judges shall decide on the admissibility of all remaining Civil Party applications by a separate order. This order shall be open to expedited appeal by the parties or the Civil Party applicants as provided in Rule 77*bis*. Such appeals shall not stay the proceedings. [...]

9. Internal Rule 74(4)(b) and (f) further provides that Civil Parties may appeal against orders by the Co-Investigating Judges “declaring a Civil Party application inadmissible” and against “a Dismissal Order where the Co-Prosecutors have appealed”.

10. The Pre-Trial Chamber observes that the Civil Party applicants represented by the National Civil Party Co-Lawyer have neither filed an appeal against the Rejection Order pursuant to Internal Rules 74(4)(b) and 77*bis*, nor tried to file an appeal against the Closing Order pursuant to Internal Rule 74(4)(f). Rather, they request an extension of time to exercise their participatory rights by responding to the International Co-Prosecutor’s Appeal.

11. While the Pre-Trial Chamber is cognisant of the participatory rights of the Civil Party, including the right to respond and reply to other parties’ submissions on appeal and generally to “support[] the prosecution”, it notes that such procedural prerogative is available solely to Civil Parties who actually take part in the proceedings.²⁸ In particular, at the investigation stage, while Civil Party applicants are collectively assimilated to parties and enjoy Civil Party rights pursuant to Internal Rule 23*bis*(2), they may exercise participatory rights only “*until rejected*”. In the present circumstances, having been rejected and having failed to appeal the Rejection Order, the Civil Party applicants represented by the National Civil Party Co-

²⁸ Case 002/19-09-2007-ECCC/SC, Decision on Civil Party Lead Co-Lawyers’ Requests Relating to the Appeal Against the Closing Order and Invitation to File Submissions, in Case 002/01, 26 December 2014, F10/2, paras 11-14.



Lawyer can no longer be legally considered as parties to the proceedings and thus cannot exercise the procedural prerogative to file a response to the Appeal.

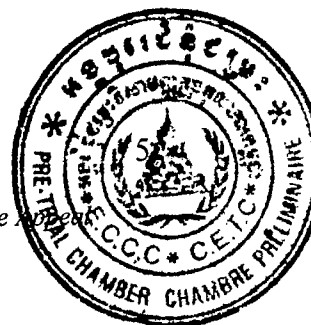
12. Nonetheless, the Pre-Trial Chamber acknowledges the particularities of the case and the fact that the Rejection Order is intrinsically linked to the Closing Order dismissing the case as a whole. It also finds that, considering the significance of the issues raised in the Closing Order and in the Appeal, the interests of justice favours affording the National Civil Party Co-Lawyer an opportunity to express the views of Civil Party applicants he represents, especially if his submissions are limited to the specific issue of the position of the ECCC within the Cambodian Legal System (Section 2.1.1 of the Closing Order).²⁹ It further agrees that making any finding on the link between the alleged harm suffered by the Civil Party applicants and the charges would be irrelevant at this stage.

13. In light of the foregoing, the Pre-Trial Chamber, relying on its inherent jurisdiction and on Internal Rule 33, invites the National Civil Party Co-Lawyer to file submissions not exceeding 15 pages limited to the specific issue of the position of the ECCC within the Cambodian Legal System (Section 2.1.1 of the Closing Order) by 8 September 2017, in English first with Khmer translation to follow. It further allows the parties to respond to the National Civil Party Co-Lawyer's submissions within 10 days from the notification of the submissions in English and Khmer.

FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

- **DENIES** the Request;
- **INVITES** the National Civil Party Co-Lawyer to file submissions not exceeding 15 pages limited to the issue of the position of the ECCC within the Cambodian Legal System (Section 2.1.1 of the Closing Order) by 8 September 2017, in English first with Khmer translation to follow at the earliest opportunity;

²⁹ See Civil Party Reply, paras 6-7.



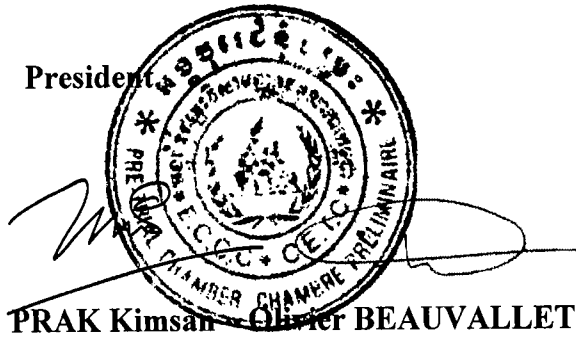
- **ALLOWS** the parties to file a 15 pages response to the National Civil Party Co-Lawyer's submissions within 10 days from the notification of the submissions in English and Khmer.

In accordance with Internal Rule 77(13), the present decision is not subject to appeal.

Phnom Penh, 29 August 2017

President

Pre-Trial Chamber



PRAK Kimsan ~~Oliver~~ BEAUVALLET NEY Thol Kang Jin BAIK HUOT Vuthy