

Victim participation and bias in the Cambodian Courts:

The Pre-Trial Chamber's decisions in the case against Nuon Chea

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The Pre-Trial Chamber (PTC) has recently delivered a number of interesting decisions in the Extraordinary Chambers in the Courts of Cambodia (ECCC). The tribunal was established to bring to trial Khmer Rouge leaders for their alleged role in the atrocities committed during the period of the Democratic Republic of Kampuchea (1975-1979). These decisions relate to appeals against provisional detention orders issued by the Co-Investigating Judges after the Co-Prosecutors filed their first introductory submission in July 2007. In the case of Kaing Guek Eav, better known as Duch, the warden of the notorious Tuol Sleng torture prison in Phnom Penh, the PTC dismissed the defendant's contention that he should be released because his rights were violated *before* he was transferred to the ECCC, and subsequently found the conditions for his provisional detention to be met (decision of 3 December 2007).¹ In the case of Nuon Chea, the party ideologue known as "Brother No. 2", whose case I will explore in this article, the PTC similarly found these conditions to be met (decision of 20 March 2008).²

In this commentary, I will not discuss the PTC's analysis of whether the conditions for provisional detention were indeed met, *i.e.*, the decision on appeal against the provisional detention order. Like most decisions of this nature, this analysis is primarily fact-based and does not raise salient legal issues. Instead, I will focus on more principle-based issues raised in two decisions of the PTC *pending* the appeal against the provisional detention order in the case of Nuon Chea. These decisions concern the right of victims to participate as civil parties in provisional detention appeals (decision of 20 March 2008) and the disqualification of one of the PTC judges, Ney Thol (decision of 4 February 2008).

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¹ PTC, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "Duch", Criminal Case File No. 001/18-07-2007-ECCC-OCIJ (PTC01), 3 December 2007. C. Ryngaert, 'The Doctrine of Abuse of Process: a Comment to the Cambodia Tribunal's Decisions in the Case against Duch (2007)', forthcoming in Leiden JIL (2008).

² PTC, Decision on Appeal against Provisional Detention Order of Nuon Chea, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC01), 20 March 2008.

Questions regarding victims' participation in pre-trial proceedings and regarding disqualification of a judge on the grounds of bias have arisen in other international(ised) criminal tribunals as well. This article will therefore discuss the relevant issues in a wider context, drawing both parallels and distinctions between the proceedings before the ECCC and the proceedings before other tribunals.

First, I will describe the important role which victims are allowed to play at the ECCC, and discuss the reparations that the tribunal could award. I will then discuss the right of civil party petition in appeals proceedings against provisional detention orders, as addressed by the PTC in its decision of 20 March 2008. Second, I will critically analyze the PTC's ruling of 4 February 2008, which followed the defence's application for the disqualification of Judge Ney Thol, that there could be no apprehension of bias on the part of Judge Ney Thol.

1. Decision on civil party participation in provisional detention appeals (20 March 2008)

a. The important role of victims in proceedings before the Cambodia Tribunal

As is well known, an international or internationalised criminal tribunal's success partly hinges on the participation of victims in its proceedings. This participation allows victims to make their voice heard and to be taken seriously. This can make the outcome of the trials more palatable to them, heal old wounds, and contribute to the reconciliation of victims and perpetrators. Through victim participation, criminal retributive justice may also become restorative justice.³ It was therefore no surprise that rules on victim participation were included in the ICC Statute in 1998.⁴ In International Criminal Court (ICC) proceedings, victims will play a much more prominent role than in the International Criminal Tribunal for the former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR) proceedings.

As far as the Cambodia Tribunal is concerned, victim participation is not included in the United Nations (UN)-Cambodia Agreement regarding the ECCC or in Cambodian law on the ECCC. This does not mean that victims are *a priori* precluded from participating in ECCC proceedings, however. On the contrary: the scope of victims' rights of participation in ECCC proceedings is in fact wider than in any other international criminal proceedings. Because the ECCC functions within the existing Cambodian court structure, the general Cambodian procedural rules regarding victim participation apply. These rules, borrowed

³ See *in extenso* Cambodian Human Rights and Development Association (ADHOC), 'Comment on the right of the civil party in the proceedings of the Extraordinary Chambers in the Courts of Cambodia', available at http://www.adhoc-chra.org/?fn=full_text&id=181.

⁴ Articles 68 and 75 of the ICC Statute.

from French criminal procedure, provide for extensive procedural rights for victims, such as the right of civil party petition for *any* victim of a crime coming within the jurisdiction of the Court.⁵ Victims may be joined as civil parties by applying to the Court's Co-Investigating Judges or the Trial Chamber.⁶ When participating as a civil party, the victim becomes a party to the criminal proceedings, meaning that they may be afforded protection by the Tribunal, are entitled to representation by a lawyer,⁷ and may request the Co-Investigating Judge to collect evidence on his or her behalf.⁸

Questions could, however, be raised as to the appropriateness and effectiveness of liberal rules of civil party participation when it comes to the prosecution of the sort of grave crimes over which the ECCC has jurisdiction. Would the system of civil party petition be viable for such crimes, which typically involve numerous victims? Would the Court risk being flooded with complaints? These concerns have been addressed in the ECCC Internal Rules (adopted in June 2007).⁹ While all victims are entitled to take civil action, *i.e.*, to participate in the criminal proceedings and to seek reparation, individual representation is strongly discouraged in order to prevent the Court from drowning in complaints. Common lawyers drawn from a list held by the ECCC's Victims Unit¹⁰ are expected to represent groups of civil parties. By default, the Co-Investigating Judges or the Chambers may organize such common representation.¹¹ Also, a group of victims may choose to organize their civil party action by becoming members of a victims' association. They will be represented by the association's lawyers.¹² These rules mirror the rules on victim representation contained in the Rules of Procedure and Evidence of the ICC.¹³ If the civil parties are grouped in or around a relatively small number of associations or lawyers under this system of common representation, and if the Victims' Unit works properly, victim participation in the Court's process appears manageable.¹⁴

⁵ Internal Rule 23 (2).

⁶ Internal Rule 23 (3)-(4).

⁷ Internal Rule 23 (6)-(7).

⁸ Internal Rule 59 (5).

⁹ As amended on 1 February 2008, available at <http://www.haguejusticeportal.net/eCache/DEF/8/574.html>; see for a comment: G. Acquaviva, 'New Paths in International Criminal Justice? The Internal Rules of the Cambodian Extraordinary Chambers', (2008) 6 JICJ 129.

¹⁰ The Victims Unit was established by Rule 12 of the Internal Rules.

¹¹ Internal Rule 23 (8).

¹² Internal Rule 23 (9).

¹³ Under Rule 90.2 of the ICC Rules of Procedure and Evidence, "[w]here there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims ... to choose a common legal representative or representatives." Under Rule 90.3, "[i]f the victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more legal representatives."

¹⁴ See also Acquaviva, *supra* n. 9, at 141.

b. Reparations to be awarded by the Cambodia Tribunal

One of the main purposes of a civil party action is, obviously, to obtain eventual reparation for the harm done.¹⁵ In view of the potentially high number of complaints, the extensive harm done, and the possible indigence of the convicted persons, it is unlikely that individual pecuniary damages, to be paid by the convicted persons, could be awarded. Instead, an ICC-style victims' trust fund, to which donors contribute for the benefit of the victims and their families,¹⁶ could be contemplated. Such a fund may not be devised to grant individual reparation, but rather to grant collective and even non-financial reparation. The construction of memorials and the provision of psychological services have been advanced as forms of collective reparation. Also, the transfer of any confiscated property to the fund has been advocated.¹⁷ However, when adopting its Internal Rules, the Court did not provide for the establishment of such a fund. Instead, it opted for a system of collective and moral reparations, to be awarded against, and borne by, the convicted persons.¹⁸ Reparations awarded by the ECCC will be mainly symbolic, and, according to the Internal Rules take the form of either an order to publish the judgment in any appropriate news or other media at the convicted person's expense, an order to fund any non-profit activity or service that is intended for the benefit of victims, or other appropriate and comparable forms of reparation.¹⁹ Under these rules, and in the absence of a trust fund, only to the extent that the convicted person has sufficient financial resources would reparations be awarded.²⁰

c. Civil party participation in provisional detention appeals

The Court's Internal Rules set out the precise implication of the mechanism of civil party petition, and the procedural effects it entails.²¹ While Rule 23 provides that the purpose of civil party action is to "[p]articipate in criminal proceedings", it is not entirely clear to what extent, and in what stages of the proceedings, civil parties may indeed exercise their right of participation. In the case against Nuon Chea, the question arose as to whether the civil parties could also participate in an appeal against a provisional detention

¹⁵ Internal Rule 23 (1) (b). The other purpose is to "[p]articipate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution."

¹⁶ Article 79 of the ICC Statute.

¹⁷ See D. Boyle, 'The ECCC: the Rights of Victims', (2006) 4 JICJ 307, 312.

¹⁸ Internal Rule 23 (11).

¹⁹ Internal Rule 23 (12).

²⁰ In fact, except for Duch, the 'candidates for prosecution' may indeed *have* sufficient resources. There is evidence that the Khmer Rouge have accumulated considerable wealth after being driven from power in 1979. This wealth was generated by the investment of funds provided by their foreign backers and by the sale of gemstones from the Pailin area in western Cambodia, which the Khmer Rouge controlled well into the 1990s. Possibly, Khmer Rouge funds belonging to convicted persons could be located and confiscated, and then used for the collective benefit of the victims, in essence, the entirety of Cambodia's people.

²¹ Internal Rule 23, as discussed at length in subsections 1(a) and 1(b).

order as issued by the Co-Investigating Judges. According to the Internal Rules, it was clear that the civil parties were not entitled to appeal themselves against the order.²² Yet Rule 23, which provides for civil party participation in “criminal proceedings”, did not seem to exclude that, once an appeal was filed, e.g., by the defence, the civil parties could make observations during hearings by the Pre-Trial Chamber. Indeed, Rule 23 does not distinguish between pre-trial and trial proceedings.

The PTC, hearing the *Nuon Chea* appeal, espoused a literal, teleological, and systemic interpretation of Rule 23 in order to reach the conclusion that civil parties were entitled to participation in all criminal proceedings, including appeals against provisional detention orders. In the PTC’s view, not only was this clear from the text of Rule 23, it was also borne out by the purpose of Cambodian reconciliation which civil party participation served.²³ In addition, the Cambodian Criminal Procedure Code specifically provides that parties, including civil parties, can file pleadings with the ‘Investigative Chamber’ hearing appeals against provisional detention orders.²⁴ It was on this Chamber that the PTC – which is, after all, a tribunal within the Cambodian legal system – was modelled, so that provisions in the Criminal Procedure Code of the Chamber could guide the PTC in understanding the procedures applicable to its own functioning.²⁵

After finding that under applicable Cambodian law and its rationale, civil parties could participate in PTC appeals against provisional detention orders, the PTC went on to review this outcome in light of international standards. This review process is suggested, although not mandated, by the UN-Cambodia Agreement, which states that “where there is a question regarding the consistency of [a relevant rule of Cambodian law] with international standards, guidance may also be sought in procedural rules established at the international level”.²⁶ It is to the PTC’s credit that it engaged in an international law analysis, because clearly, reliance on international procedural law may dispel any doubts as to the unfairness of the procedure before the ECCC. It should also be noted that in the ECCC provisional detention order of Duch (the first suspect against whom a judicial investigation was opened), and in the appeal against that order, abundant reference was made to international and foreign solutions, although this was mainly due to the lacunae of Cambodian law rather than its possible inconsistency with international norms.²⁷

²² Internal Rule 74 (4), *a contrario* (giving a limitative list of grounds for pre-trial appeals by civil parties).

²³ Decision on civil party petition, paras. 36-37.

²⁴ Articles 259 and 260 of the Cambodian Criminal Procedure Code. Decision on civil party petition, paras. 29 and 38.

²⁵ *Id.*; Article 2 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia (“Extraordinary Chambers shall be established in the existing court structure”), available at <http://www.haguejusticeportal.net/eCache/DEF/8/579.html>; Article 12.1 of the UN-Cambodia Agreement on the concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea (“The procedure shall be in accordance with Cambodian law.”), available at <http://www.haguejusticeportal.net/eCache/DEF/8/575.htm>.

²⁶ Article 12.1 of the UN-Cambodia Agreement.

²⁷ Office of the Co-Investigating Judges, Provisional Detention Order of Kaing Guek Eav alias “Duch”, 31 July 2007, available at http://www.eccc.gov.kh/english/cabinet/indictment/1/Order_of_Provisional_Detention-DUCH-EN.pdf; Pre-Trial Chamber, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias “Duch”,

The rules of international criminal procedure may not seem particularly supportive of the sort of expansive rights for victims granted by the ECCC procedural rules, however. As already noted, victims are entitled to more rights in ECCC proceedings than in any other international criminal proceedings.²⁸ It is no surprise then that the PTC, in its analysis of international standards, did not seek to rely on the norms and practice of victims' participation in international criminal tribunals (except for the ICC). Instead, it mainly sought guidance in two – non-binding – UN General Assembly Resolutions setting out the basic principles of justice for victims and their right to a remedy and reparation,²⁹ as well as in the statutes of courts in territories transitionally administered by the UN after violent conflicts, namely East Timor (administered by UNTAET) and Kosovo (administered by UNMIK).³⁰ The former provide for access to justice for victims of gross human rights violations, while the latter provide for victims' rights in the domestic – but internationally supervised – criminal process. However, none of the cited documents specifically provide for civil party participation in appeals against provisional detention orders.³¹ This does not imply that the PTC's legal analysis was flawed: those documents arguably provide evidence of an emerging principle of more expansive rights of victims in international(ised) criminal proceedings. This principle applies specifically to hybrid tribunals, such as the tribunals established for – and in – Kosovo, East Timor, Cambodia and Sierra Leone (although the latter tribunal was not cited by the ECCC as far as victim participation was concerned). Unlike the ICTR and the ICTY, those tribunals were established within the state where the atrocities took place specifically in order to involve the local victims to a much greater degree.³²

Criminal Case File No. 001/18-07-2007-ECCC-OCIJ (PTC01), 3 December 2007 (discussing the application of the 'abuse of process' doctrine).

²⁸ Acquaviva, *supra* n. 9, at 140.

²⁹ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the UN General Assembly, Resolution 40/34, 29 November 1985; Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly, Resolution 60/147, 16 December 2005. Decision on civil party petition, paras. 30-31, 40.

³⁰ See on these little known 'internationalised' or 'hybrid' courts: G. Naarden and J. Locke, 'Peacekeeping and Prosecutorial Policy: Lessons From Kosovo', (2004) 98 AJIL 727; D. Cohen, "'Hybrid' Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects For the Future', (2007) 43 Stan JIL 1.

³¹ The generally framed UN Decisions do not address specific forms of victims' participation in the criminal law process. Article 12.3 of UNTAET Regulation No. 2000/30, Transitional Rules of Criminal Procedure of East Timor, as cited by the PTC, for its part, merely states that "[a]ny victim has the right to be heard at a review hearing before the Investigating Judge, and at any hearing on an application for conditional release". The PTC appeal in the case against Nuon Chea related to a provisional detention order, and not to a conditional release order. Moreover, under ECCC Internal Rule 63 (1), the Co-Investigating Judges only hear "the Co-Prosecutors, the charged person and his or her lawyer", as admitted by the PTC in its Decision on civil party petition, para. 41. Only Article 80 of the Provisional Criminal Procedure Code of Kosovo, UNMIK/REG/2003/26, Official Gazette, 6 July 2003, available at <http://www.unmikonline.org/regulations/2003/RE2003-26.pdf>, may be viewed as supportive of civil party participation in appeals against provisional detention orders, where it provides that "[d]uring all stages of criminal proceedings, the injured party has the right to call attention to all facts and to propose evidence." The PTC did not, however, adduce evidence that the Kosovo courts have indeed interpreted this provision as authorizing 'injured parties' (the term used in the Kosovo Code) to submit oral or written statements to the pre-trial chamber in appeals against provisional detention orders.

³² *E.g.*, Cohen, *supra* n. 30, at 5-6.

In support of the principle of expansive victims' rights in international(ised) criminal proceedings, besides the previously discussed materials, the PTC also invoked Article 68 (3) of the ICC Statute.³³ At the same time, however, it clarified that ECCC Rule 23 has a wider scope than Article 68 (3) of the ICC Statute.³⁴ Indeed, whereas the latter provision stipulates that "the Court shall permit [the] views and concerns [of victims] to be presented and considered at stages of the proceedings determined to be appropriate by the Court", only "where the personal interests of victims are affected", the former provides that, once admitted, a civil party may participate in all stages of the proceedings without needing to demonstrate any special interest in any stage of the proceeding.³⁵ In this context, as far as victims' participation in appeals hearings on provisional detention is concerned, the ICC Appeals Chamber held in its *Lubanga* decision of 13 February 2007,³⁶ that, as could be derived from Article 68 (3) of the ICC Statute, in order for victims to participate in the appeal, an application seeking leave to participate in the appeal must be filed,³⁷ and that an application to participate "should include a statement from the victims in relation to whether and how their personal interests are affected ... as well as why it is "appropriate" for the Appeals Chamber to permit their views and concerns to be presented".³⁸ In its decision of 13 February 2007, the Appeals Chamber held that the personal interests of particular victims were indeed affected by the circumstances of the case.³⁹

It may be clear that, under ICC rules, the ability of victims to participate is not held to be automatic.⁴⁰ In contrast, under ECCC rules, in particular Rule 23 as interpreted by the

³³ Decision on civil party petition, paras. 32, 40.

³⁴ *Id.*, para. 49.

³⁵ *Id.*

³⁶ It should be noted that there is no evidence of a hearing of the victims by the Prosecutor or the ICC in relation to the issuance of the warrant for the arrest of Thomas Lubanga Dyilo; the arrest warrant, issued under seal, does not make reference to it. See preambular paragraphs *a contrario* of Pre-Trial Chamber I, Warrant of Arrest *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, 10 February 2006. One should realize that, under the ICC Statute, the provisional detention which follows the execution of the arrest warrant could not be appealed (Article 82 ICC Statute *a contrario*; there is in fact no such thing as an ICC 'order for provisional detention'). Instead, under Article 60 (2)-(3) of the ICC Statute, the arrested person may apply for interim release, and the Pre-Trial Chamber will periodically review its ruling on provisional release or detention. On 23 May 2006, Lubanga applied for interim release, Case No. ICC-01/04-01/06. In the proceedings relating to Lubanga's request, which was ultimately dismissed by the Pre-Trial Chamber, victims were allowed to play a role. Lubanga, ICC-01/04-01/06-586, Decision on the Application for the interim release of Thomas Lubanga Dyilo, 18 October 2006, making reference in the preambular paragraphs to the 'Observations des victimes a/0001/06, a/0002/06 et a/0003/06 sur la demande de mise en liberté introduite par la Défense', 9 October 2006, Lubanga, ICC-01/07-01/06-530.

³⁷ ICC Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, 13 February 2007, paras. 38-39.

³⁸ *Id.*, para. 44.

³⁹ *Id.*, para. 54. The decision of 13 February 2007 gives the reasons for the prior decision of the Appeals Chamber to grant victims the right to participate in the appeal. ICC Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, 12 December 2006, third and fourth decision.

However, in a related decision of 13 June 2007, with respect to the possibility to appeal the confirmation of the charges against Lubanga, the ICC Appeals Chamber concluded that Article 68 (3) of the ICC Statute *precluded* the participation of particular victims in appeals proceedings, as they failed to demonstrate that their personal interests were affected by the preliminary consideration of whether the appeal was correctly brought by the Appellant under Article 82 (1) (b) of the ICC Statute. ICC Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, 13 June 2007, paras. 21-30.

⁴⁰ *Contra* ICC Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, 13 February 2007, Dissenting Opinion of Judge Sang-Hyun Song Regarding the Participation of Victims

PTC, civil parties are *entitled* to participation. This does not imply that civil party participation in ECCC appeals proceedings on provisional detention is necessarily automatic. As the PTC pointed out in the *Nuon Chea* appeal, the Internal Rules also require that ECCC proceedings “be fair and adversarial and preserve a balance between the rights of the parties”.⁴¹ In this particular case, the PTC indicated that this balance had been preserved, as the charged person had the capacity to respond, and had indeed responded, to the written versions of the civil parties’ oral submissions.⁴²

The PTC’s decision does not guarantee future victim participation in other appeals, however. In the *Nuon Chea* appeal, the balance between the rights of parties may, given the circumstances, have been preserved. Yet especially if a considerable number of civil parties were to participate in the appeals proceedings, the balance may tip in favour of the defence. The PTC left this issue conspicuously open.⁴³ It is nonetheless clear from its decision that, while civil parties need not show any special interest, their participation in appeals proceedings relating to provisional detention is not automatic, therefore, as in all cases, a careful analysis balancing the rights of all parties and factoring in considerations of procedural efficiency⁴⁴ is called for. This non-automatic nature of victim participation in appeals proceedings makes the PTC’s reference to Article 68 (3) of the ICC Statute understandable; both Article 68 (3) ICC and ECCC Rule 23 *jo*. Rule 21 widen the scope of victim participation (as compared to previous criminal tribunals with an international component), yet require the courts to weigh the victims’ interests in participation with other interests militating enhanced victim participation. In *Nuon Chea*, this balancing act resulted in the victims being effectively entitled to participation.

Immediately after delivering its decision in *Nuon Chea*, the PTC allowed lawyers for the civil parties in the cases of Khieu Samphan and Ieng Tirth to file their responses, to the charged persons’ appeals briefs against the provisional detention order.⁴⁵ By limiting the length of the civil parties’ briefs, the PTC may have reconciled victims’ rights to

(holding that participation is not dependent upon an application by the victims and on subsequent authorization by the Appeals Chamber).

⁴¹ Decision on civil party petition, para. 43, citing Internal Rule 21 (1) (a).

⁴² Prior to the PTC hearing on 7-8 February 2008, the civil parties failed to submit written submissions. However, on 12 February 2008, the PTC issued a public order for all parties in all outstanding provisional detention appeals (*viz.*, not only the appeal by Nuon Chea) and invited *amici curiae* to file submissions on the issues related to civil parties raised in the hearing. The lawyers of the civil parties duly submitted a written version of their oral pleadings, to which the co-lawyers for three of the charged persons responded. *Id.*, paras. 8-9, 13, 16-18, 46.

⁴³ *Id.*, para. 48 (“The Pre-Trial Chamber has reflected upon the implications of its decision for the future. In exercising its jurisdiction, the Pre-Trial Chamber cannot speculate on facts that may or may not be presented to it in the future, as its jurisdiction is limited to only matters that have occurred and not those that may occur.”).

⁴⁴ *Id.*, para. 46 (“This [decision] does not foreclose the possibility that the Civil Parties will in the future be encouraged or required to join their submissions where they share the same views in order to enhance the efficiency of the proceedings.”).

⁴⁵ ECCC PTC, *Khieu Samphan*, 002/19-09-2007-ECCC/OCIJ (PTC 04), and *Ieng Tirth*, 002/19-09-2007-ECCC/OCIJ (PTC 02), Directions to civil parties on written submissions, 24 March 2008.

participate in the appeals procedures regarding the charged persons with the rights of the defence and considerations of procedural efficiency.

2. Decision on the disqualification of Judge Ney Thol (4 February 2008)

Before the PTC rendered its decision in the appeal against the provisional detention order in the case of Nuon Chea, the PTC heard the defence's application for disqualification of one of its Cambodian members, Judge Ney Thol. In the case of Duch, Judge Ney Thol recused himself,⁴⁶ probably because of his involvement as a judge in the Cambodian Military Court,⁴⁷ but in the case of Nuon Chea he did not. This may be explained by the fact that Duch was detained at the order of the Cambodian Military Court before being transferred to the ECCC, whereas Nuon was not detained under Cambodian authority before the ECCC Co-Investigating Judges' order for provisional detention of 19 September 2007. However, Ney Thol was and remains an officer in the Royal Armed Forces of Cambodia (RCAF), a member of the Cambodian People's Party (CPP) – the dominant political party in Cambodia – and a member of a Cambodian judiciary not particularly renowned for its independence. The co-lawyers of Nuon Chea believed this to be sufficient evidence of Ney Thol's partiality and bias, and therefore filed an application for his disqualification with the PTC,⁴⁸ which was seized to decide on the provisional detention of Nuon Chea.

Quite obviously, ECCC judges, like judges in other international(ised) criminal tribunals, and in any rule of law-based jurisdiction for that matter, are supposed to be impartial and independent in the performance of their functions.⁴⁹ However, in order to determine whether a judge fails to meet the requirements of impartiality and independence, a high standard applies. As held by the ICTY, the ICTR, and the Special Court for Sierra Leone (SCSL), judges are presumed to be impartial; this presumption ought to be displaced by the party moving for disqualification.⁵⁰ This appears only logical, since, if the threshold

⁴⁶ 6 November 2007, available at

http://www.eccc.gov.kh/english/cabinet/files/ptc/recusal_notification/061107.pdf.

⁴⁷ Open Society Justice Initiative, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: December 7, 2007 Update, at p. 8, available at www.osji.org/db/resource2/fs/?file_id=18923.

⁴⁸ Under ECCC Internal Rule 34.2, “[a]ny party may file an application for disqualification of a judge in any case in which the Judge has a personal or financial interest or concerning which the Judge has, or has had, any association, which objectively might affect his or her impartiality, or objectively gives rise to the appearance of bias.” See also Rules 556 and 557 of the Cambodian Code of Criminal Procedure. Regrettably, the ECCC has not made the defence brief public.

⁴⁹ Articles 3.3 *jo.* 7.2 of the UN-Cambodia Agreement; Article 10 of the Cambodian ECCC Law.

⁵⁰ ICTY, Appeals Chamber, *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgment, 21 July 2000, para. 196; ICTR, Trial Chamber, *Prosecutor v. Karemera, Rwamajuba, Ngirumpatse, Nzirorera*, 17 May 2004, para. 25; SCSL, *Prosecutor v. Norman*, SCSL-2004-14-PT, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers,

were lower, parties would routinely move for disqualification, and thereby hamper the efficient administration of justice.⁵¹

Because of the high standard of bias used in international criminal procedure, the parties moving for disqualification have not been particularly successful in their applications. In the *Furundžija* case, in which the accused was charged with, amongst others, rape as a war crime, the ICTY held that Presiding Judge Mumba's former involvement with the UN Commission on the Status of Women, which had called for the prosecution by the ICTY of mass rapes committed in the former Yugoslavia, would not "lead a reasonable observer, properly informed, to reasonably apprehend bias".⁵² In the *Karemera and others* case, the ICTR ruled that there was no reasonable suspicion of bias on the basis of certain decisions of the judges in the case against the accused.⁵³ And in the *Norman* case, the SCSL, which was called upon to decide whether the recruitment of child soldiers amounted to a crime under customary international law, held that Judge Winter's involvement in a UNICEF report and her participation in a Master's Programme on children's rights, did not demonstrate bias on her part.⁵⁴

In another case before the SCSL, however, the defendant moved successfully for the disqualification of Justice Robertson, who had written in a book that the Revolutionary United Front (RUF), to which the defendant belonged, was guilty of war crimes.⁵⁵ The ECCC PTC hearing the *Nuon Chea* appeal did, conspicuously, not cite this case. Neither did it refer to the *Čelebići* case, in which the ICTY Appeals Chamber implied that the exercise by a judge of any executive functions in his/her home state during the time he/she was also a judge of the Tribunal, could give rise to a reasonable apprehension of bias.⁵⁶ It transpires from the latter two cases that, while the threshold of impartiality/bias may be high, it is not insurmountable. Because of the politically fraught context in which

⁵¹ ICTY Appeals Chamber, *Prosecutor v. Delalić and others* ('*Čelebići*'), Judgment, IT-96-21-A, 20 February 2001, para. 707 ("The reason for this high threshold is that, just as any real appearance of bias on the part of a judge undermines confidence in the administration of justice, it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias."); *Furundžija*, *supra* n. 50, para. 197.

⁵² *Furundžija*, *supra* n. 50, paras. 195-215. This standard of bias, enunciated by the ICTY in para. 189, was relied on by the PTC in the case of Nuon Chea to determine Judge Ney Thol's bias. See Decision on application for disqualification, para. 20.

⁵³ *Supra* n. 50.

⁵⁴ *Supra* n. 50 (relying on *Furundžija* and *Karemera*).

⁵⁵ SCSL Appeals Chamber, *Prosecutor v. Sesay*, Decision on Disqualification of Justice Robertson from Appeals Chamber, SCSL-2004-15-PT058, 13 March 2004. Justice Robertson was not completely disqualified, but only from adjudicating on those motions involving alleged members of the RUF for which decisions are pending in the Appeals Chamber, and cases involving the RUF if and when they come before the Appeals Chamber. Decision, para. 18, reaff'd Appeals Chamber, SCSL-2004-15-PT140, Decision on defence motion seeking clarification of the decision on the disqualification of Justice Robertson from the Appeals Chamber, 25 May 2004, paras. 1-2.

⁵⁶ *Čelebići*, *supra* n. 51, paras. 684 and 685 *a contrario*. In *Čelebići*, the ICTY Appeals Chamber pointed out that Judge Odio Benito would not assume any executive functions in Costa Rica, where she was elected as a Vice President, until the completion of her duties as a member of the Trial Chamber hearing the *Čelebići* case. *Id.*

international(ised) criminal tribunals operate, and the role they are supposed to play in the entrenchment of the rule of law in post-conflict societies, judges may indeed justifiably be under special scrutiny;⁵⁷ so they should recuse themselves, or be disqualified if, as the ICTY held in *Furundžija*, “the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias”.⁵⁸

Relying on this *Furundžija* standard in the application for disqualification of Judge Ney Thol, the ECCC PTC pointed out that Judge Ney Thol “does not occupy his position as a Pre-Trial Chamber Judge of the ECCC in the capacity of an RCAF officer, but in his personal capacity”,⁵⁹ and that the evidence adduced by the defence was not sufficient to rebut the presumption of impartiality.⁶⁰ As to the submission that Judge Ney Thol was a member of the CPP, the PTC observed that this mere fact “does not give rise to the necessary inference that his decisions are politically motivated.”⁶¹ In addition, it held that a judge’s analysis in one case does not suggest bias in another case (as alleged by the defence), and that “general observations upon the alleged competence and motivation of the Cambodian judiciary as a whole ... are no evidence in respect of an apprehension of bias by Judge Ney Thol in this case of Nuon Chea”.⁶² The PTC therefore dismissed the application.

This decision is open to serious criticism, since the fact that Judge Ney Thol, while being an RCAF officer, occupied his position as a judge in the ECCC in his personal capacity is not necessary indicative of his impartiality. As the ICTY held in the *Čelebići* case, objective partiality could be found if a judge combines his position as a judge with an executive function in his home state. The question arises then whether a position as an officer in the Cambodian Army, which belongs to the Cambodian executive branch, is an executive position. Since Ney Thol has the rank of general in the Army, it could be argued that this may indeed well be the case; high-ranking army officers may have decision making powers comparable to those of their civilian peers.⁶³ Certainly in Cambodia, which lacks any tradition of judicial independence and where the ECCC’s Cambodian staff

⁵⁷ See also T. Meron, ‘Judicial Independence and Impartiality in International Criminal Tribunals’, (2005) 99 Am J Int’l L 359, 361.

⁵⁸ *Furundžija*, *supra* n. 50, para. 189, supported by Meron, *supra* n. 57.

⁵⁹ Decision on application for disqualification, para. 24, dismissing in para. 25 the comparison with the *Öcalan* case before the European Court of Human Rights. In this case, the European Court held that “certain aspects of the status of military judges sitting as members of the national security courts made their independence from the executive questionable.” *Öcalan v. Turkey*, Grand Chamber Judgment, 12 May 2005, para. 112, available at <http://www.echr.coe.int/echr/>. Unlike in *Öcalan*, the judge in *Nuon Chea* did not occupy his position as a judge in his capacity as a military officer, but in his personal capacity.

⁶⁰ *Id.*, para. 26.

⁶¹ *Id.*, para. 28.

⁶² *Id.*, paras. 31-32.

⁶³ Compare Open Society Justice Initiative, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia, February 2008 Update, p. 8, available at http://www.osji.org/db/resource2?res_id=104050 (noting that “the chamber did not explain how potential concerns raised by Ney Thol’s continuing service as a military general and as head of the military court were overcome by the fact that he was formally “serving in his personal capacity””).

members are inevitably political appointees⁶⁴ in whom the patriotic duty of finishing off the Khmer Rouge has been instilled,⁶⁵ Ney Thol's dual loyalty raises serious concerns.⁶⁶ It may appear then that the well-established presumption that judges are impartial and independent – a presumption which developed in mature legal systems and was subsequently applied to international criminal justice mechanisms – should not readily be transposed to judicial proceedings conducted in struggling, undeveloped legal systems such as Cambodia's.⁶⁷ In such systems, the argument that professional judges “can disabuse their minds of any irrelevant personal beliefs or predispositions”⁶⁸ may ring hollow.

No evidence of *concrete* bias against Nuon Chea was, however, submitted to the ECCC PTC. Because of this failure to adduce sufficient evidence, the PTC, citing existing case-law,⁶⁹ dismissed Nuon Chea's application for the disqualification of Judge Ney Thol.⁷⁰ The PTC may have feared that deciding otherwise, notably by taking into account the general (pitiful) situation of the judiciary in Cambodia and the role previously played by Ney Thol as a member of the judiciary in certain cases, would have opened the door for the disqualification of the entire – politically appointed – Cambodian side.⁷¹ This may have amounted to a repudiation of the very hybrid nature of the ECCC, with a preponderance of the Cambodian side, as agreed by the Cambodian Government and the United Nations.⁷² In

⁶⁴ See on the weakness and corruption of the Cambodian legal system, and the fears of partiality this elicits, *inter alia*, P.M. Wald, 'Iraq, Cambodia, and International Justice', (2005-06) 21 Am U Int'l L Rev 541, 554; Open Society Justice Initiative (ed.), *The Extraordinary Chambers*, New York, Open Society Justice Initiative, 2006, pp. 34 and 105; M. Lieberman, 'Salvaging the Remains: The Khmer Rouge Tribunal on Trial', (2005) 186 Mil L Rev 164, 173; S. Linton, 'Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers', (2006) 4 JICJ 327, 329 (the latter writing about the “catastrophic state” of the Cambodian legal and judicial system).

⁶⁵ Ph. Ambach, 'Die “Extraordinary Chambers in the Courts of Cambodia” – endlich Gerechtigkeit? Das lange Tauziehen zwischen den Vereinten Nationen und Kambodscha um wirkungsvolle internationale Strafgerichtsbarkeit', (2006/3) Humanitäres Völkerrecht 168, 171 n. 3 (characterizing prosecution as a tactical tool employed by the Cambodian Government to finish off the Khmer Rouge); Linton, *supra* n. 64, at 339.

⁶⁶ Ney Thol's current membership of the CPP and his previous membership of the Central Committee of the CPP may raise some concerns, but do not, in themselves, warrant disqualification. See Decision on application for disqualification, paras. 28-29. Compare however (in general): Linton, *supra* n. 64, at 334 (urging adoption of statutory provisions prohibiting the serving judges from being members of the political parties) however, combined with his continuing high-ranking military position, they do.

⁶⁷ See also Open Society Justice Initiative, *supra* n. 63, at p. 10 (noting that the presumption “is unfortunately open to perennial doubt in Cambodia”).

⁶⁸ *Furundzija*, *supra* n. 50, para. 197.

⁶⁹ Decision on application for disqualification, paras. 19-20, relying on case-law of the international criminal tribunals.

⁷⁰ *Id.*, para. 34 (concluding).

⁷¹ The Cambodian judges are appointed by the ‘Supreme Council of the Magistracy’ (Article 11 of the Cambodian Law on the Establishment of the ECCC), itself a politically appointed body. Linton, *supra* n. 64, at 332.

⁷² Concerns over the lack of independence of the Cambodian judiciary prompted the Group of Experts in 1999 to propose an entirely international tribunal. See Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135, 18 February 1999, annexed to Identical Letters Dated 15 March 1999 from the Secretary General to the President of the General Assembly and the President of the Security Council, A/53/850 and S/1999/231, 16 March 1999. Because of strong opposition by the Cambodian Government, this proposal was shelved in favour of a hybrid court “owned” by Cambodia. See for the

this context, it is not surprising that the PTC emphatically stated that the ECCC “is a separate and independent court with no institutional connection to any other court in Cambodia”.⁷³ The ECCC, being a Cambodian court but nevertheless operating, under international supervision, at arm’s length from the ordinary Cambodian courts, may indeed be tainted by political influence-peddling to a far lesser degree than Cambodian courts in general. This appearance of impartiality may allow the ECCC to end the prevailing culture of impunity and serve as a beacon for the entrenchment of the rule of law in Cambodia.⁷⁴

Even in the ECCC, however, justice will only appear to be done if the judges’ connection to the government is not “so strong as to prompt a reasonable observer to question the judge’s ability to render an impartial [or independent/unbiased] judgment.”⁷⁵ The PTC’s statement in the case of Nuon Chea that there could be no “apprehension of bias [on the part of Judge Ney Thol] by an objective observer informed of all circumstances of the matters put before the PTC”,⁷⁶ is, in view of Ney Thol’s important military role, surely open to debate. Additionally, the objective bias test, as developed by the international criminal tribunals, does not exclude the possibility that the circumstances under which the ECCC proceedings against Nuon Chea take place “would lead a reasonable observer, properly informed, to reasonably apprehend bias” (*i.e.*, the *Furundžija* test cited above). While the test does not allow for the disqualification of a judge on the basis of a position taken in a prior case,⁷⁷ it is not far-fetched to submit that a reasonable observer might apprehend bias if confronted with the evidence of Ney Thol’s dual loyalty.⁷⁸

One can, nevertheless, take comfort in the fact that, as Meron has observed, any bias could be corrected by the ‘multi-judge’ character of court panels. This internal mechanism – the participation of several judges in decision-making – could ensure that the biased judge does not influence the final outcome of the court’s deliberations.⁷⁹ Under ECCC law, decisions can only be taken by affirmative vote of at least four judges.⁸⁰ This means that, even if all three Cambodian judges were biased, a ‘biased’ decision could only be taken if

negotiating history of the ECCC: the contributions of C. Etcheson, ‘A “Fair and Public Trial”: a Political History of the Extraordinary Chambers’, and D. PoKempner, ‘The Khmer Rouge Tribunal: Criticisms and Concerns’, in Open Society Justice Initiative, *supra* n. 64. The least one can say is that the UN did not wholeheartedly support the current court structure, in which Cambodian judges, perceived as lacking independence, make up the majority of the judges. See Report of the UN Secretary General on the Khmer Rouge Trials, UN Doc. A/57/769, 31 March 2003.

⁷³ Decision on application for disqualification, para. 30.

⁷⁴ See also Open Society Justice Initiative, *supra* n. 64, at 57-58; Lieberman, *supra* n. 64, 169.

⁷⁵ Meron, *supra* n. 57, 366.

⁷⁶ Decision on application for disqualification, para. 34.

⁷⁷ SCSL, *Prosecutor v. Sesay and others*, SCSL-04-15-T, Decision on Sesay and Gbao Motion for voluntary withdrawal or disqualification of Hon. Justice Bankole Thompson from the RUF case, 6 December 2007, para. 93 (noting that “the fact that a judge has heard evidence and taken a position in different cases arising out of the same evidence is not a cause for disqualification”).

⁷⁸ See also Open Society Justice Initiative, *supra* n. 63, at p. 10.

⁷⁹ Meron, *supra* n. 57, 361. See also *Sesay and others*, *supra* n. 77, para. 90 (in the context of the presumption of impartiality, considering “it significant that the Judges of the Trial Chamber sit as a panel of three judges”).

⁸⁰ Article 4 of the UN-Cambodia Agreement.

at least one international judge voted in favour.⁸¹ This ‘supermajority’ mechanism allows for the damage to be limited if Ney Thol, or other Cambodian judges, are biased. In fact, this mechanism was precisely engineered to compensate for lingering doubts about the independence and impartiality of the Cambodian judiciary. If Cambodian judges indeed turn out to be political instruments, it can only be hoped that international judges are able to withstand pressure brought to bear on them by their Cambodian peers. One is tempted to conclude that, in the final analysis, and given the reputation of the Cambodian judiciary, the fairness of the ECCC proceedings may mainly hinge on the integrity of the minority UN side of the tribunal.

3. Concluding observations

In the case of Nuon Chea, the Pre-Trial Chamber of the ECCC addressed a number of challenging conceptual questions. Its decisions will reverberate beyond the specific case of Nuon Chea. This has already been evidenced by the PTC’s decision to allow civil parties to participate in appeals proceedings against other accused, in the wake of its refusal of Nuon Chea’s request to preclude the participation by the civil parties in proceedings related to provisional detention. Similarly, the PTC’s holding in the case of Nuon Chea that there could be no reasonable apprehension of bias on the part of Judge Ney Thol may preclude future challenges of the independence and impartiality of the ECCC’s judges. Its decision confirms the assertion that the dual loyalty of a judge (as both a judge and a military official) does not create an apprehension of bias.

While the latter decision may be controversial, it is hardly surprising in view of the negotiating history of the ECCC. Problems of bias were in fact known, notably by the UN, at the time of drafting of the Court’s statute. A conscious decision was nevertheless taken to press ahead, at the behest of a ‘Group of Interested States’, with the establishment of the ECCC as a hybrid tribunal dominated by the Cambodian judges. It was clear from the outset that such a tribunal would not be able to fully deliver in terms of impartiality and independence, and therefore it is not reasonable to expect the Court to second-guess the essentially political decision to set up a flawed tribunal regardless.⁸² It was obviously useful for the ECCC to couch its reasoning in legal terms, relying on the high standard of bias that ought to be met before a judge could be disqualified, itself a rather uncontroversial standard developed by the international criminal tribunals.

The problem of victim participation, highlighted by the PTC’s 20 March 2008 decision, could have been anticipated (but was not) at the time of drafting. A role for victims was only included in the Internal Rules adopted in mid-2007, and no budgetary provision for a

⁸¹ The (Pre-)Trial Chamber is composed of five judges, of whom three are Cambodian judges, and two foreign judges. See Article 9 of the Cambodian Law on the Establishment of the ECCC.

⁸² Linton, *supra* n. 64, at 330 (“In truth, nothing more could be done to reverse some of the policy decisions [relating to impartiality and independence] that have been taken ...”).

victims unit was initially made.⁸³ At the time of writing, the victims unit was still operating on a very tight budget, with the hope that additional funds would soon be allocated. In terms of concrete participation of civil parties in the proceedings, Internal Rule 23 limits itself to stating, without further elaboration, that civil parties can indeed participate in criminal proceedings. As demonstrated by the case of Nuon Chea, it was a challenge for the PTC to reconcile this amorphous participatory right with the due process rights of the defence and considerations of delaying the process. On 4 February 2008, the PTC handed down a fair judgment by granting civil parties the right to participate in appeals hearings related to provisional detention orders, after ensuring that the defence had indeed been able to respond to the civil parties' written submissions. This balancing act was partly informed by ICC practice, yet it should be noted that, unlike the victims in ICC proceedings, the civil parties in ECCC proceedings are not required to establish that their personal interests are affected. This makes the ECCC a unique experiment in victims' participation in international criminal justice, and an improbable justice model of how the participation of victims could very practically be given shape.

⁸³ Open Society Justice Initiative, Memorandum to the Group of Interested States, 'Critical Issues Surrounding the Fundraising Drive of the ECCC', 16 November 2007, available at http://www.justiceinitiative.org/db/resource2?res_id=103943.