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BEFORE THE PRE-TRIAL CHAMBER**

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**Joint Civil Parties' Co-Lawyers' Observations on Application for
Reconsideration of Civil Party's Right to Address the Chamber**

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I. Introduction

1. On 1 July 2008, the Pre- Trial Chamber (“PTC”) issued a decision on preliminary matters raised by the Co-Lawyers for the Civil Parties (“*Decision on preliminary matters*”) denying the request of one Civil Party “*to speak in person although represented by a lawyer.*”¹

The PTC referred to its previous direction² and confirmed its opinion by reference to Rule 77 (10) Internal Rules (“IR”).

2. On 1 July 2008, after the aforementioned decision, one Civil Party dismissed her Co-Lawyer and requested to speak in person for 10 minutes, within the time limit granted to the Civil Party-side by the PTC and on the relevant subject-matter of the principle of *ne bis in idem*. The PTC carried out another decision³ (“*Decision on Unrepresented Civil Party’s rights*”) and denied the request of Civil Parties to address the Court in person. The PTC referred again to Rule 77(10) IR and was of the opinion that “[...] *specific provisions are contained in the Internal Rules for the pre-trial phase regarding the Civil Parties and their lawyers. Internal Rule 77 (10) prescribes that only lawyers for civil parties have the right to make brief oral observations during pre-trial appeals.*”

3. Judge Rowan Downing made a Dissenting Opinion⁴ and expressed his view that this Civil Party should be granted the right to address the Court in person. He stated a conflict between Rule 77 (10) IR, which seems to restrict, by only mentioning Civil Party’s Co-lawyers, observations before the PTC, and Rule 23 IR, giving the Civil Party the right to appear. Furthermore, he was of the opinion that according to Rule 21 (1) (a) “it would be unfair [...] not to permit this Civil Party to address the Court.”

¹ Case of Ieng Sary No. 002/19-09-2007-ECCC-OCIJ(PTC03), Decision on Preliminary Matters by the lawyers for the Civil Parties in Ieng Sary’s Appeal against Provisional Detention Order, para 7; ERN 00198102-00198104

² Case of Ieng Thirith No. 002/19-09-2007-ECCC-OCIJ(PTC02), Directions on Civil Party Oral Submissions during the Hearing of the Appeal against Provisional Detention Order, 20 May 2008, ERN 00189459-00189460, Document No. C 20/1/21.

³ Case of Ieng Sary No. 002/19-09-2007-ECCC-OCIJ(PTC03), Decision of 1 July 2008 on the Civil Party’s Request to Address the Court in Person, ERN 00198495-00198497.

⁴ see supra note 3, page 3

4. On 2 July 2008 the concerned Civil Party filed an application⁵ of reconsideration on the Decision on Unrepresented Civil Party's Rights ("*Application*"). This Application was validly filed on 4 July 2008. It contained additional facts regarding her initial grant of power of attorney to her lawyer, a document where she had explicitly expressed to the Co-Investigating Judges her desire to be able to represent herself *or* be represented by her lawyer. Thus, she did not waive her right to represent herself by signing a power of attorney.
5. The hearing concluded on 3 July 2008.

II. Scope of the Civil Party's Application

6. The concerned Civil Party submitted her request to speak in person on 2 July 2008 in English. Finally, the Application was validly filed in two languages in accordance with the Practice Directions on 4 July 2008. At the moment of the (still invalid) submission on 2 July 2008, the Civil Party requested to reconsider the Decision on Unrepresented Civil Party's rights and to allow her to address her observations on the issue of *ne bis in idem*.
7. The PTC presently considers the Application *at this stage*, after the hearing, as a request to re-open the hearing to hear the Civil Party.
8. We submit that the Civil Party's Application should *instead* be read as seeking a declaratory decision on Civil Party's participation rights before the PTC, *rather* than a re-opening of the hearing.

The Civil Party has a legitimate interest that this issue be decided by the PTC.

9. In general, if the decision on a request is overdue and there is a risk of a future repetition of a violation of rights, a party may seek relief in getting a declaratory decision to determine its rights.

Thus, at this stage of the proceedings, the Application of the Civil Party should be read as a request to declare that both in accordance with the Rules and in the light

⁵ Case of Ieng Sary No. 002/19-09-2007-ECCC-OCIJ(PTC03), Application of Reconsideration on Civil Party's Right to Address Pre-Trial Chamber, ERN 00198482-00198487

of the general principle of Civil Party participation, a Civil Party is allowed to represent him or herself with or without a lawyer before the PTC.

10. As the hearing is already closed, a re-opening would constitute an inappropriate use of time, energy and resources. Likewise, considering that the valid request was filed after the hearing, it would not be appropriate or proportionate to re-open the hearing. The Civil Parties are interested in an expeditious trial. Thus, at this stage the Civil Party's rights in Pre-Trial hearings should be determined in a general declaratory decision to grant relief to the Civil Party's Application.

III. Relevant Law

- .11. Rule 23 (1) IR is the basic rule concerning the Civil Parties involvement in the proceedings before the ECCC. This rule states that

“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.
b) [...]”

This rule does not set forth a differentiation between Civil Party actions during the trial proceedings and those during the pre-trial proceedings.

Rule 23 (7) IR stipulates:

“Any Victim participating in proceedings before the ECCC as a Civil Party has the right to be represented by a national lawyer, or a foreign lawyer in collaboration with a national lawyer, as follows [...]”

Rule 21 IR states:

“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 [...]”

In this respect

a) ECCC proceedings shall be fair [...]”

IV. Arguments

12. The Pre-Trial Chamber argues in its Decision on Unrepresented Civil Party's rights on 1 July 2008 that the exclusion of Civil Parties from oral statements is demanded by Rule 77 (10) IR: *"The system of the Internal Rules is clear. Specific provisions are contained in the Internal Rules for the pre-trial phase regarding the Civil Parties and their lawyers. Internal Rule 77 (10) prescribes that only lawyers for civil parties have the right to right to make brief oral observations during pre-trial appeals."*⁶

The Pre-Trial Chamber mainly refers to the regulation provided by the following sentence of Rule 77 (10) IR:

"After the co-rapporteurs have read their report, the Co-Prosecutors and the lawyers for the parties may present brief observations."

13. As only the lawyers of the Parties are mentioned in this clause, the PTC concludes that a direct participation of a Civil Party is excluded. However, this legal opinion adopts a highly restrictive interpretation of 77(10) IR that we believe is inconsistent with the interpretative method proposed by other IRs, and does not recognize any shortcomings in the drafting of Rule 77 (10) IR. If the proceedings were strictly held on the basis of the literal wording of Rule 77 (10) IR, the appellant himself would also be forbidden to give an oral statement. The Pre-Trial Chamber was undoubtedly right when it did not take this legal standpoint and offered Ieng Sary to speak in the hearing on 30 June 2008.
- There are also other contradictions within the system of the Internal Rules which imply that these Rules are not as clear as claimed by the Decision on Unrepresented Civil Parties.⁷

⁶ see supra note 3, page 2, para 3

⁷ So for example Rule 94 (1) a) IR allows only the lawyers for the Civil Parties to give a closing statement. In contrast, Rule 94 (2) IR allows *Civil Parties* to give rebuttal statements to the closing statements of the other parties. Additionally, this rule is in contradiction to Article 335 of the Criminal Procedure Code of Cambodia which allows Civil Parties *and* their lawyers to give closing statements.

14. According to Rule 23 (7) IR, Civil Parties have the right to be represented by a lawyer. As this rule proclaims a *right* and not an obligation to have a legal representative, it is logical that Civil Parties may participate personally without a legal representative at every stage of the proceedings. It is understood that a meaningful participation is only possible if Civil Parties are allowed to give oral statements, also during pre-trial proceedings.
- Excluding Civil Parties from those procedural actions would be a restriction of their rights granted in Rule 23 (1) IR, where no restriction of participation is set forth.
- Furthermore, the PTC affirmed in its Decision⁸ on Civil Party's rights that Civil Parties are allowed to participate in Provisional Detention Appeals.
- In fact, the decision of the PTC by 1 July 2008 would mean that Civil Parties have an *obligation* to be represented in order to possess their participation rights. The consequence of this is in stark contrast with the Rule 23 (7) IR, which merely grants civil parties the *right* to a lawyer.
15. As long as the ECCC does not provide funds for legal representation of Civil Parties, it would be unjust for the PTC to require that Civil Parties exercise their rights only through a Co-Lawyer.
16. However, if a Civil Party has chosen to be represented by a lawyer, this does not mean that he or she waives the right to speak in the hearings as provided by Rule 23 (1) IR. The drafters intended this legal representation to be an improvement of the Civil Parties legal status, and therefore 23(1) IR ought not to be interpreted as a strict exclusion from personal and direct involvement in the hearings.⁹
17. Thus, the Co-Lawyers of the Civil Parties submit that the PTC ought to take a more systematic and teleological interpretation of the contradictory language of Rule 77 (10) IR, which has to be read in light of the general principle of granting Civil Parties full procedural rights as Parties.

⁸ Case of Nuon Chea no. 002/19-09-2007-ECCC-OCIJ(PTC01), ERN 00172886-00172906; C 11/53

⁹ In other civil law systems for instance in France, Germany Spain and Italy civil parties keep their rights to participate actively and their right to speak beside their lawyer. They do not loose their rights by signing a power of attorney.

18 Finally, this method of interpretation we propose is also supported by Rule 21 (1) IR, which gives a general guideline on how to interpret relevant law, stating that the proceedings have to be carried out in a fair manner safeguarding the interests of the Charged Person and the Victims.

As the PTC has paid respect to this interpretation guideline in regard to the rights of the appellant, it should also pay respect to the rights of victims as Civil Parties.

19. In order to avoid Civil Parties appearing before the Court without legal representative or alternatively dismissing their Co-Lawyer with the aim of being allowed to speak, the PTC should not differentiate at this point between Represented and Unrepresented Civil Parties.

20. The Co-lawyers of the Civil Parties observe that the PTC decisions from 1 July 2008 show that the PTC fears that a possible increasing number of Civil Parties could lead to obstructions of the proceedings, especially if a direct and personal oral participation would be granted.

21. However, those concerns are unjustified. The Co-Lawyers of the Civil Parties fully support the idea of *time regulations* during the hearings and they see it as their important duty to coordinate oral submissions of the Civil Parties, if there are any. As there is an overall time limit for the Civil Parties' oral participation, an oral statement by one or several Civil Parties could *never* lead to a delay of the hearings.

It is necessary that the PTC regulates the proceedings and set up time, page, and topic limitations during the hearings. Within this scope however, it will be the full responsibility of the Civil Parties and their Co-Lawyers to organize their oral submissions.

22. Conclusion


Civil Parties have a right to participate actively in the proceedings which includes addressing the PTC in person. They keep this right even if they are represented by a lawyer. The PTC should read the concerned Application as a request to a declaratory decision.

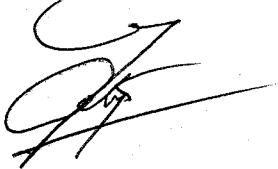
Therefore, the Civil Parties' Co-Lawyers request,

1. to state that the Application has to be understood as a request to determine Civil Parties' general participation rights
2. To declare that Civil Parties have the right to address the PTC in person regardless if they have a representative.

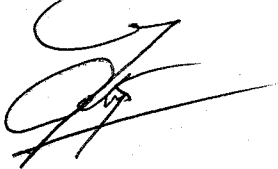
Respectfully submitted by
Co-Lawyers for the Civil Parties

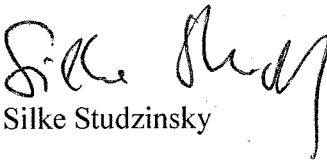
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Signed in Phnom Penh,
 On 17 July 2008