

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

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**CO-PROSECUTORS' RESPONSE TO AN APPLICATION FOR RECONSIDERATION
OF THE PRE-TRIAL CHAMBER'S DECISION REGARDING
A CIVIL PARTY'S RIGHT OF AUDIENCE**

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I. INTRODUCTION

1. The Pre-Trial Chamber has directed the parties to respond to an Application by one civil party ("Applicant") seeking a reconsideration of the Chamber's decision regarding the purported denial of her right of audience in person.¹ The Chamber has noted that this Application, validly filed only after the conclusion of the hearing, should be treated as a request for reopening the hearing to hear the Applicant.²
2. The Co-Prosecutors submit that the principle of fair trial includes the right of the parties to participate and be heard in their own case. However, this right is not absolute. A court may regulate the exercise of this right.
3. The facts of the Application do not call for a reopening of the provisional detention appeal hearing. It should be declared as closed. However, for the purposes of future hearings, the Pre-Trial Chamber may consider laying down guidelines for civil party participation to balance the rights of potentially numerous victims to meaningfully participate in the proceedings with the right of the defendants to fair and expeditious proceedings. These guidelines may include the regulated right of a legitimately unrepresented civil party to address the Chamber in person.

II. APPLICATION FOR RECONSIDERATION

Reconsideration Of Decisions Is Permissible Only Under Certain Circumstances

4. The Applicant has asked the Pre-Trial Chamber to reconsider its decision regarding her right of audience in person.³ International courts have settled the law on the question of reconsideration of decisions, especially, by judicial bodies of last resort like this Chamber. For example, the International Court of Justice ("ICJ") reconsiders its decisions only on the discovery of a decisive fact that was unknown to it and the moving

¹ *Case of Ieng Sary*. Directions to Parties Concerning Application For Reconsideration Of Civil Party's Right To Address The Chamber, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), 8 July 2008, ERN 001986932-001986933, C22/I/56 [hereinafter Directions].

² Directions, para. 5.

³ *Case of Ieng Sary*. Application of Reconsideration on Civil Party's Right To Address Pre-Trial Chamber, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), 2 July 2008, ERN 00198482-00198487, C22/I/53.

party at the time of the decision.⁴ In *Barayagwiza*, the Appeals Chamber of the International Criminal Tribunal for Rwanda ("ICTR") identified the following four conjunctive factors that must be met before the Tribunal reviewed its decision:

- i. There must be a new fact.
- ii. The new fact must not have been known to the moving party at the time of the original proceedings.
- iii. The lack of discovery of the new fact must not have been due to the lack of due diligence of the moving party.
- iv. The moving party must show that the new fact could have been a decisive factor in reaching the original decision.⁵

5. The Civil Party's Application does not satisfy the *Barayagwiza* tests. In particular:

- i. It does not bring any new fact to the attention of the Chamber that was not on the case file before the impugned decision. The Application states that the new fact pertains to the interpretation of the conditions of her power of attorney in favor of her counsel. The power of attorney has been on the case file since 30 January 2008 and hence is not *new*. Therefore, there is nothing in the Application that the Applicant did not know at the time of the original decision of 1 July 2008
- ii. The terms of the power of attorney were known to the Applicant at the time of the original decision.
- iii. As there is no new fact in the Application, the due diligence test is inconsequential to this determination.
- iv. Again, since there is no new fact in the Application, the question of its being a decisive factor in the original decision does not arise.

6. Therefore, the Co-Prosecutors request the Pre-Trial Chamber to dismiss the Application.

⁴ Statute of the International Court of Justice, Annex to the UN Charter, Article 61(1).

⁵ *Prosecutor v. Barayagwiza*, Decision on Prosecutor's Request for Review or Reconsideration, Case No. ICTR-97-19-AR72, 31 March 2000, para. 37-39.

III. LAW ON REPRESENTATION

Right Of A Party (Including A Civil Party) To Fair Trial Is Guaranteed

7. The Pre-Trial Chamber has found that Internal Rule 77(10) ("Rules")⁶ does not permit a civil party to address the Chamber in person.⁷ Mindful of this holding, the Co-Prosecutors submit the following statement of law to assist the Pre-Trial Chamber in the determination of the Application.
8. In *Nuon Chea*,⁸ the Pre-Trial Chamber took note of Article 33 (new) of the ECCC Law, which provides that this Court shall ensure that its proceedings are fair and expeditious, and are conducted with full respect for the rights of the defendants and for the protection of victims and witnesses.⁹
9. International tribunals, similar to this Court, have also recognized that the right to a fair trial includes the ability of a party to participate fully in its own case. Generally, this right includes a right to self-representation. In *Milosevic*, the International Criminal Tribunal for the former Yugoslavia ("ICTY") refused to impose a counsel on the defendant, stating that it would not do so against his wishes, and that it was not normally appropriate to do so.¹⁰ Again, in *Seselj*, the ICTY held that the defendant is entitled to conduct his own defence. Interference with this right should be limited.¹¹ It found that human rights norms guarantee both a right of self-representation *and* a right to legal assistance.¹²

⁶ ECCC Internal Rules, Rev.1.1 2008 [*hereinafter* Rules].

⁷ *Case of Ieng Sary*. Decision on Preliminary Matters Raised by the Lawyers for the Civil Parties in Ieng Sary's Appeal Against Provisional Detention Order, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), 1 July 2008, ERN 00198102, C22/I/46, para. 8 [*hereinafter* Decision on Preliminary Matters].

⁸ *Case of Nuon Chea*. Decision on Civil Party Participation in Provisional Detention Appeals, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 01), 20 March 2008, ERN 00172866-00172906, C11/53, para. 19 [*hereinafter* Decision on Civil Party Participation].

⁹ ECCC Law, art. 33(new).

¹⁰ *Prosecutor v. Milosevic*, Reasons for Decision on Assignment of Defence Counsel, Case No. IT-02-54-T, 22 September 2004, para. 7 [*hereinafter* Milosevic Decision].

¹¹ *Prosecutor v. Seselj*, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj With His Defence, Case No. IT-03-67-PT, 9 May 2003, para. 15 [*hereinafter* Seselj Decision].

¹² Seselj Decision, para. 18.

Right Of Self-Representation Is Not Absolute

10. The right of self-representation, however, is not absolute.¹³ For example, certain civil law jurisdictions commonly allow mandatory assignment of counsel.¹⁴ In many cases, the right of self-representation did not prevent international tribunals from imposing a standby counsel.¹⁵ On one occasion, the ICTY defined the role of standby counsel to include, in exceptional circumstances, the ability to take over the defence from the self-represented defendant, if the defendant was “engaging in disruptive conduct requiring his removal from the courtroom”.¹⁶
11. Self-representation may also be denied, and counsel mandatorily imposed, where the interests of justice so require.¹⁷ The phrase “interests of justice” has a broad scope. It includes the right of a fair trial, which is not only a fundamental right of the defendant but is also a fundamental interest of a criminal tribunal.¹⁸ Recognizing this in *Milosevic*,¹⁹ the ICTY stated that its own jurisprudence, as also that of other international tribunals, acknowledges that it may be appropriate for a tribunal to insist that counsel, rather than the defendant, present the evidence, and that such a decision should occur on a case-by-case basis.²⁰

A Party Can Share Hearing Time With Her Counsel

12. A tribunal, such as this Court, has the power to permit a counsel either to conduct a case in its entirety or to permit a defendant also to participate by presenting some parts in person. What arrangements should be put in place is for the tribunal to determine having regard to all the surrounding circumstances including the circumstances in which the proceedings are taking place and the personal circumstances of the defendant.²¹ In contrast, the Special Court for Sierra Leone (“SCSL”) has recognized that there may be

¹³ Seselj Decision, para. 20.

¹⁴ Seselj Decision, para. 16.

¹⁵ Seselj Decision, para. 15.

¹⁶ Seselj Decision, para. 30.

¹⁷ Seselj Decision, para. 20.

¹⁸ Seselj Decision, para. 21.

¹⁹ *Milosevic v. Prosecutor*, Decision on the Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, Case No. IT-02-54-AR73.7, 1 November 2004, para. 16.

²⁰ *Milosevic* Decision, para. 38.

²¹ *Milosevic* Decision, para. 36.

circumstances where it is appropriate for a tribunal to insist that only a counsel presents a case and not the defendant. Circumstances in which such a course is appropriate may have to be determined on a case-by-case basis having regard to factors such as the ability of the defendant to conduct his case as well as his attitudes and actions.²²

Rights Of Defendants Are Persuasive In Determining Rights Of Civil Parties

13. The Pre-Trial Chamber has found that parties in proceedings before it have different positions and that there is no general principle that all parties should be treated the same way.²³ As such, the law cited above, concerning the rights of a defendant, may not be equally applicable to the case of the civil parties. The Co-Prosecutors, however, submit that the law applicable before this Court recognizes the importance of victim participation and affords them rights equal to all other parties. For example, Rule 21, embodying *fundamental principles*, states in pertinent part that:

“The applicable (law) 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 and adversarial and preserve a balance between the rights of the parties....
- c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings...”

14. Highlighting the importance of the civil parties, the Pre-Trial Chamber has recognized that, pursuant to Rule 23(1)(a), civil parties can participate in *all* criminal proceedings, including appellate proceedings before it.²⁴

15. Given the special role of civil parties recognized by this Court, the Co-Prosecutors submit that the Pre-Trial Chamber view the legal principles governing the defendant’s right to self-representation as instructive in its determination of the rights of the civil parties in proceedings before it.

²² *Prosecutor v. Norman et al*, Decision on the Application of Samuel Hinga Norman for Self-Representation Under Article 17(4)(d) of the Statute of the Special Court, Case No. SCSL-04-14-T, 8 June 2004, para. 8.

²³ Decision on Preliminary Matters, para. 3, 4.

²⁴ Decision on Civil Party Participation, para. 36.

Right Of Audience Balanced With The PTC's Power To Regulate Its Proceedings

16. This Court is the first and the only international or internationalized tribunal that has accorded the status of a party to victims of crimes.²⁵ In contrast, the International Criminal Court ("ICC") only considers the victims as *participants* and hears their views whenever they are "determined to be appropriate."²⁶
17. This Court's recognition of victims as parties in all the stages of the proceedings is based on sound legal and policy considerations. The victims are likely to be those best informed about the nature and extent of the crimes. Their participation brings to this Court first-hand knowledge of those events. Specifically, they – more than anybody else – can inform the Court of the extent of trauma, disturbance to public order, influencing of victims and witnesses, destruction of evidence; issues that are directly relevant to the pre-trial proceedings. Their participation at this stage is more relevant when the Court makes a *prima facie* determination of issues rather than at the trial stage where it considers all the evidence upon the *beyond reasonable doubt* standard.²⁷ At a broader level, victims' participation brings credibility to criminal proceedings, plays a crucial educational role and contributes to reconciliation in a post-conflict society.²⁸
18. However, to give full effect to this Court's mandate, the Pre-Trial Chamber ought to weigh, on one hand, the rights of potentially numerous victims to participate meaningfully in the proceedings – a right that is undeniably safeguarded in the Rules and recognized in human rights law – and, on the other hand, the right of the defendants to fair and expeditious proceedings. International jurisprudence and national practice provide that the courts can regulate the participation of civil parties at all stages of the proceedings to strike a judicious balance between these imperatives.²⁹ The Co-Prosecutors request that the Pre-Trial Chamber interpret the extent of participation of

²⁵ Rules, Glossary, def. of *Party*.

²⁶ Rome Statute of the International Criminal Court, art. 68(3).

²⁷ Especially, when determining issues under Rules 63(3)(a) and (b).

²⁸ See generally C Stahn, H Olasolo & K Gibson, *Participation of Victims in Pre-Trial Proceedings of the ICC*, 1 April 2006, Journal of International Criminal Justice 42 (219) [hereafter Stahn *et al* Article] fn. 10.

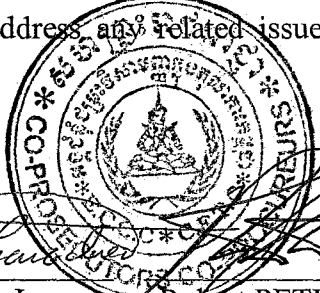
²⁹ Stahn *et al* Article, p. 2-3.

civil parties (including their right to address it in person) in similar terms.³⁰ Any actual or potential contradiction between the substantively expansive Rule 23(7) and the procedurally restrictive Rule 77(10) ought to be resolved in favor of the participation of a civil party. While the rights of oral audience of the victims can be limited to ensure that no abuse of the judicial process occurs, fear of this abuse alone is not sufficient to warrant an extinguishment of their rights.³¹

IV. REQUEST

19. The Co-Prosecutors submit that the facts contained in the Application do not justify a reopening of the provisional detention and jurisdictional appeal hearing. Therefore, they request that the Pre-Trial Chamber declare the hearing as closed.
20. The Co-Prosecutors, however, submit that for the purposes of future hearings, the Pre-Trial Chamber may consider laying down guidelines for civil party participation to balance the rights of potentially numerous victims to participate meaningfully in the proceedings with the right of the defendants to fair and expeditious proceedings. These guidelines may include the regulated right of a legitimately unrepresented civil party to address this Chamber in person.
21. The Co-Prosecutors note that that next Judges' Plenary is expected to be convened in September 2008, and it may be called upon to address any related issue through its rulemaking powers.

Respectfully submitted,



CHEA Leang Robert PETIT
Co-Prosecutor Co-Prosecutor

Signed in Phnom Penh, Kingdom of Cambodia on this seventeenth day of July 2008.

³⁰ Pursuant to rule 21, 23 etc.

³¹ See generally, Nina H B Jorgensen, *The Problem of Self Representation at International Criminal Tribunals*, ICJ 41 (64), 1 March 2006, p. 8.