

Extraordinary Chambers in the Courts of Cambodia

Pre-Trial Chamber

Criminal Case File No. 002/19-09-2007-ECCC/OCIJ (PTC01)

PRE-TRIAL CHAMBER

Before:

Judge PRAK Kimsan, President
 Judge Rowan DOWNING
 Judge NEY Thol
 Judge Katinka LAHUIS
 Judge HUOT Vuthy

Date:

21 February 2008

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 du dossier: SANN RADA

**APPLICATION OF THE REDRESS TRUST (REDRESS), THE INTERNATIONAL
 FEDERATION OF HUMAN RIGHTS (FIDH) AND AVOCATS SANS FRONTIERES
 (ASF) TO PRESENT AN AMICUS CURIAE SUBMISSION**

AMICUS CURIAE SUBMISSION OF THE APPLICANTS

Co-Prosecutors

CHEA Leang
 Robert PETIT

Charged Person

NUON Chea

Lawyers for the Civil Parties

HUONG Kim Suon
 LOR Chunthy
 NY Chandy

Co-Lawyers

SON Arun
 Michiel PESTMAN
 Victor KOPPE

ឯកសារដើម
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 du dossier: SANN RADA

THE APPLICANTS

I. The parties to this *amicus curiae* application have a wealth of experience in helping and representing individuals and communities as they deal with the legacy of violations of serious violations of human rights and humanitarian law.

i. **The Redress Trust (REDRESS)** is an international nongovernmental organisation with a mandate to seek justice and redress for victims of torture and related international crimes. It has accumulated a wide expertise on the rights of victims of torture and other serious violations of human rights and humanitarian law to gain both access to the courts and redress for their suffering, and has advocated on behalf of victims from all regions of the world. It has wide expertise on the various facets of the right to reparation for victims of torture under international law, including the ability of victims to participate in proceedings affecting their interests. It regularly undertakes (at domestic and international level) cases on behalf of individual survivors and assists those representing such individuals. REDRESS has extensive experience of interventions before national and international courts and tribunals, including the United Nations' Committee against Torture and Human Rights Committee, the European Court of Human Rights, the Inter-American Commission for Human Rights, the Special Court of Sierra Leone and the International Criminal Court. Of particular relevance to this intervention is the fact that REDRESS has developed a wide expertise on the rights of victims to participate in proceedings before the International Criminal Court.

ii. **The International Federation for Human Rights (FIDH)** is an international nongovernmental organisation with a mandate to defend all human rights enshrined in the Universal Declaration of Human Rights. In particular FIDH supports victims of international crimes in the fight against impunity, thereby contributing to truth, justice and reparation for victims. FIDH advocates for the elaboration of international standards on the protection of the rights of victims of international crimes. FIDH is also involved in legal proceedings, representing victims or acting in its own name. FIDH currently provides legal representation and assistance to victims and NGOs in 20 ongoing criminal proceedings on the basis of universal and extraterritorial jurisdiction, and participates as 'civil party' in proceedings in France. FIDH also supports victims before regional human rights bodies (European Court of Human Rights, Interamerican Commission of Human Rights and the African Commission of Human Rights) and the International Criminal Court (ICC). FIDH has developed a wealth of expertise on the rights of victims to participate in proceedings concerning crimes under international law, both in proceedings before national courts and the ICC.

iii. **Avocats Sans Frontières (ASF)** with headquarters in Belgium, is an international non-governmental organisation composed mainly but not exclusively of lawyers and jurists. The mission of the organisation is to independently contribute to the creation of fair and equitable societies, in which the law and its institutions serve society's most vulnerable groups. The organisation aims to realise this objective through field interventions in the judicial sphere in general, and in the area of international legal assistance and legal services in particular. ASF has long-term projects in Rwanda, Burundi, the Democratic Republic of Congo, Uganda and in East Timor, as well as thematic projects on the prevention of torture, international justice and the globalisation of justice. ASF's international justice programme strongly focuses on the complementarity principle of the Rome Statute through capacity building of national judicial and civil society actors as well as activities of legal aid to victims and legal representation. ASF also provides legal representation to the first three victims which have been accepted as participants in the case against Thomas Dyilo Lubanga at the International Criminal Court. In this regard, ASF's lawyers have developed an important expertise regarding victims' right in ICC proceedings.

THE APPLICATION UNDER RULE 33 OF THE INTERNAL RULES

1. The Applicants present this submission in accordance with Rule 33 of the Internal Rules and in response to the 12th February 2008 order of the Pre-Trial Chamber (C11/36) inviting *amicus curiae* submissions. The Applicants seek to make written observations only, and these are set out in this submission, below.
2. The purpose of this submission is to assist the Pre-Trial Chamber in its consideration of the nature and extent of participation of civil parties in proceedings and in particular in proceedings dealing with appeals of detention orders. The Applicants are well placed to assist the Pre-Trial Chambers in the proper determination of this issue currently before the ECCC. Their experience of working with victims of the kinds of crimes coming within the jurisdiction of the ECCC provides them with an understanding of the general concerns and perspectives civil parties may have at different phases of proceedings, and makes them well-placed to convey to the ECCC some of the legal and policy considerations that the ECCC should be mindful of in considering the issue of civil party participation. Furthermore, the Applicants' recognised experience and expertise in promoting victims' rights in national and international contexts, including the International Criminal Court, provides them with a special ability to provide observations to the ECCC on the extent and scope of civil parties' participatory rights as has been recognised in national law and practice, and as has been dealt with by applicable regional and international standards. Jurisprudence and practice relevant to the question of the participation of victims of crimes under international law in legal proceedings extends beyond the jurisprudence of the ad hoc or specialised international criminal tribunals to the domains of national criminal law and civil claims for reparations, human rights jurisdictions and administrative investigative processes.
3. It is submitted that the ramification of a ruling by the ECCC on the participation of civil parties in proceedings will quite patently have a wider impact than simply the effect upon the present parties and it is therefore appropriate that the Pre-Trial Chamber is presented with a wide range of perspectives.

THE APPLICANTS' INTEREST IN THE ISSUE OF THE PARTICIPATION OF CIVIL PARTIES

4. The matter of the participation of civil parties in proceedings and in particular in proceedings dealing with appeals of detention orders raises important issues concerning the rights of key beneficiaries of the ECCC to have effective access to it. Specifically, this matter raises the appropriate interpretation of Rule 23 of the Internal Rules, including the nature, operation and scope of the procedural right for civil parties to present their views and concerns.
5. The Applicants seek to provide the ECCC with observations concerning the legislation and jurisprudence of various countries, relevant jurisprudence from international courts as well as applicable international standards. As the procedural rights of victims recognised in the Law on the Establishment of the Extraordinary Chambers and the Internal Rules differ significantly from those afforded to victims before the International Criminal Court and other internationalised tribunals, there is no exact international precedent for the ECCC to turn to and thus in its consideration of the issue the ECCC should benefit from a wide array of sources.

SPECIFIC ISSUES THE APPLICANTS SEEK TO ADDRESS

6. The Applicants' submission will cover the following specific areas:

- 6.1 The ability for civil parties to participate in the early proceedings of the ECCC, including proceedings dealing with appeals of detention orders, serves an important purpose consistent with the ECCC Internal Rules;
- 6.2 The ability for civil parties to participate in the early proceedings of the ECCC, including proceedings dealing with appeals of detention orders, is consistent with international and national standards and practice
- 6.3 The participation of civil parties in appeals of detention orders does not violate defence rights.

THE ABILITY FOR CIVIL PARTIES TO PARTICIPATE IN THE EARLY PROCEEDINGS OF THE ECCC, INCLUDING PROCEEDINGS DEALING WITH APPEALS OF DETENTION ORDERS, SERVES AN IMPORTANT PURPOSE CONSISTENT WITH THE ECCC INTERNAL RULES

7. It is clear from both the Internal Rules and the Cambodian Code of Criminal Procedure that proceedings dealing with appeals of detention orders must include the attendance of the civil party.
8. The ability for civil parties to participate in proceedings of the ECCC is enshrined in Rule 23 of the ECCC Internal Rules which sets out the purposes of a civil party action: to
 - "a) Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution; and b) Allow Victims to seek collective and moral reparations."
9. Thus, Victims having the status of civil parties are recognised in accordance with Rule 23(6)(a) as a party to the criminal proceedings. Having the status of "party" to the criminal proceedings (before the ECCC as well as before the ordinary Cambodian Courts) confers general rights on individuals having this status, largely similar to those afforded to the charged person or the accused.¹
 - Before the Pre-Trial Chamber, pursuant to Rule 75(3) of the Internal Rules, when an appeal is filed, the Registrar 'shall immediately notify the other parties and transmit a copy of the submissions.'
 - Pursuant to Rule 77(3) of the Internal Rules, when the President of the Pre-Trial Chamber has set a hearing date, the Registrar shall notify 'the Co-Investigating Judges, the parties and their lawyers'.
 - Pursuant to Rule 77 (4) of the Internal Rules, 'the Co-Prosecutors and the lawyers for the parties' are allowed to consult the case file up until the date of the hearing. 'They must file their pleadings with the Registrar of the Chamber as provided in the Practice Direction on filing of documents. The Registrar shall record the date of receipt on pleadings and immediately place them in the case file'.

¹ For instance, within the Internal Rules, the civil party may: be represented by a lawyer (R. 23, 83); request the Co-Investigating Judges to interview him or her, question witnesses, go to a site, order expertise or collect other evidence on his or her behalf (R.59); shall receive a copy of the closing order (R.67); appeal before the Pre-Trial Chamber (R.74); summon witnesses (R.80); make rebuttal or closing statements (R.94); have a decision on their claims (R.100). Within the Cambodian code of criminal procedure, during the investigation stage, the 'civil party' may be accompanied or represented by a lawyer (Art. 150); request the investigating judge to question him/her, question witnesses, interrogate the accused person, request a confrontation or go to the site (Art. 134); ask the President of the Pre-Trial Chamber to close the investigation (Art. 286); request the investigating judge to order an expert witness or a complement of expertise (Art. 162); submit a complaint to the Investigation Chamber and can appeal against the decision of the investigating judge or his/her warrants (Art. 268). During the trial, the civil party may: summon witnesses (Art.298); make written statements and submit all documents that he/she thinks will help to ascertain the truth (Art. 334); make brief statements and rebuttal statements, after the hearing (Art. 335). After the trial, the civil party can make a petition to set aside a judgment decided in his/her absence (Art. 363), appeal to the Court of Appeal (Art. 402) or to the Supreme Court (Art. 418).

- These general provisions for the Pre-Trial Chamber proceedings have no specific limitation regarding an appeal against a provisional detention order and/or the civil party. Moreover, these provisions should be interpreted with regards to the Cambodian Code of criminal procedure.²
 - The new Cambodian Code of Criminal Procedure, promulgated on 10 August 2007, provides, pursuant to Article 258, that the notification of the date of the hearing should be made to the charged person, the civil party and their lawyers.³
 - Regarding attendance during the hearing, the new Code delegates to the Pre-Trial Chamber, the decision as to whether to order the attendance of the parties, 'including the detained person' (Art. 260(3)). Thus, the Cambodian Code provides the possibility of the civil party to attend the hearing before the Pre-Trial Chamber.
 - The Internal Rules 'shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims' (Rule 21(1)) and shall be 'fair and adversarial and preserve a balance between the rights of the parties'(Rule 21(1)(a)) at any stage of the proceedings.
10. Consequently, even though the Internal Rules do not mention specifically the attendance of the civil party before the Pre-Trial Chamber, such attendance is consistent with ordinary Cambodian criminal procedure.
11. There is no limitation specified in the Internal Rules as to specific hearings or proceedings in which civil parties may participate. Similarly, Cambodian criminal procedure does not impose limitations on the hearings or proceedings in which civil parties may participate.⁴ Furthermore, as "parties" to proceedings, there is no obligation on those granted the status of civil parties to apply to the ECCC for specific participatory rights in respect of specific hearings. This is consistent with the Internal Rules which provide in Rule 23 (4) that:
- "4. A Victim may submit a Civil Party application up until the opening of proceedings before the Trial Chamber. Such application shall be in writing and filed with the Greffier of the Trial Chamber and shall be placed on the record of proceedings. A Victim who has filed a Civil Party application during the investigation *shall not be required to renew the application before the Chambers.*" [emphasis added]
12. The ability for victims to participate as civil parties also recognises the relevance of giving voice to victims' unfiltered concerns and perspectives. It will have an important impact on the broader involvement in, and interest and understanding of, victims in the ECCC as an institution, and in victims' active contribution to the successful realisation of the ECCC's mandate. Equally, it recognises the importance of affording a process in which the harm victims suffered is formally acknowledged by the ECCC.
13. In addition, the ability for civil parties to participate in proceedings dealing with appeals of detention orders serves the specific purpose of enabling civil parties to present their views and concerns on issues relating to detention, including, but not limited to, issues relating to how provisional release may impact on their physical and psychological protection and security, including information on intimidation or reprisals, in addition to the other criteria set out in Rule 63(3)(b) of the Internal Rules.
14. The iteration of the above purposes acknowledges the important contribution that individuals with first-hand knowledge of the crimes can have on the proceedings. Victims are likely to be best informed about the crimes that took place and their ability to participate broadens the information available to the Pre-

² The Cambodian Code of Criminal Procedure is the basis of the Internal Rules. According to the preamble, the purpose of the Internal Rules is 'to consolidate applicable Cambodian procedure for proceedings before the ECCC and, pursuant to Articles 20 new, 23 new, and 33 new of the ECCC Law and Article 12(1) of the Agreement, to adopt additional rules where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with International standards.'

³ Article 258 : 'la notification est faite au mis en examen non détenu, à la partie civile et aux avocats'.

⁴ While there is no specified limitation in the Internal Rules or in the Cambodian Code of Criminal Procedure relating to civil parties' ability to participate in proceedings, there is a limitation regarding their ability to lodge appeals. For instance, civil parties may appeal before the Supreme Court 'only where the Co-Prosecutors have appealed' and only in respect of their civil interests (Rule 105 of the Internal Rules). According to the Cambodian Code of Criminal Procedure, civil parties can only appeal the Trial Chamber's decision in respect of their civil interests (Art. 375).

Trial Chamber. This constitutes an important check on the otherwise sole perspective of the Prosecutor, and is particularly relevant at the earliest phases of the investigation when the focus and orientation of investigations will have lasting impact. The inclusion of victims' views at this early stage will aid the ECCC to avoid some of the challenges faced by the international ad hoc and specialised criminal tribunals in respect of narrow first indictments that ignored key crimes such as sexual violence that came to characterise the conflicts. At the ICTR, the need for the Prosecutor to withdraw and amend his first indictment in the Akayezu case following pressure from NGOs, could have been avoided had victims been able to express their concerns regarding sexual violence during the earliest phases of proceedings. Similarly, the absence of victim participation at the Special Court for Sierra Leone meant that the Prosecutor's initial indictment of the CDF did not include crimes of sexual violence. Four months before the trial commenced the prosecution sought to amend its indictment to include charges of rape, sexual slavery, other inhumane acts such as forced marriage and outrages upon personal dignity,⁵ however the Trial Chamber refused leave to amend the indictment resulting in the 'silencing' of victims of sexual violence in that trial.⁶ The ICC Prosecutor's decision to temporarily suspend the further investigation into other potential charges against Thomas Lubanga Dyilo until after the confirmation hearing,⁷ coupled with its contention that applicants to participate in the case against Thomas Lubanga Dyilo must be linked to the current charges,⁸ if correct, underscores the importance of the participation of victims in the earliest phases.

15. The failure of the Law on the ECCC or the Internal Rules to specifically confer rights on civil parties to participate in Pre-Trial Chamber hearings is not fatal to their participation in same, given their recognition as parties to proceedings as a whole. Even in the International Criminal Court, in which victims who are accorded the ability to participate in proceedings in a more restricted manner than the ECCC (victims are not "parties" to proceedings before the ICC), the Court has recognised that participation is generally applicable throughout proceedings under the guise of Article 68(3) of the ICC Statute, and is not limited to those instances in which participatory rights are specifically mentioned.⁹ Moreover, Regulation 86(8) of the Regulations of the Court¹⁰ regarding the Participation of victims in the proceedings, stipulates that 'A decision taken by a Chamber under rule 89 [of the Rules of Procedure and Evidence, ICC-ASP/1/3] shall apply throughout the proceedings in the same case'.
16. Given the real and substantial connection between the safety and security of victims and their willingness to come forward as civil parties, affording civil parties the ability to participate in proceedings dealing with appeals of detention orders serves the overall purposes of civil party actions as set out in Rule 23, reproduced in paragraph 14 above.

THE ABILITY FOR CIVIL PARTIES TO PARTICIPATE IN THE EARLY PROCEEDINGS OF THE ECCC, INCLUDING PROCEEDINGS DEALING WITH APPEALS OF DETENTION ORDERS, IS CONSISTENT WITH INTERNATIONAL AND NATIONAL STANDARDS AND PRACTICE

National standards

17. The ability for victims to participate in criminal proceedings varies significantly from country to country depending on the legal tradition. In countries with a civil law or 'inquisitorial' tradition, such as Cambodia, the ability for victims to participate as 'civil parties' is commonplace. In such cases, as in

⁵ Decision on Prosecution Request for Leave to Amend the Indictment, SCSL-04-14 (CDF), 20 May 2004.

⁶ War Crimes Studies Centre (2005). Silencing Sexual Violence: Recent Developments in the CDF case at the Special Court for Sierra Leone. S. Kendell & M. Staggs, UC Berkeley.

⁷ ICC-01/04-01/06 of 28 June 2006.

⁸ ICC-01/04-01/06 of 6 June 2006.

⁹ See, Decision of Pre-Trial Chamber I, Situation in the Democratic Republic of Congo, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC/01/04 dated 17th January 2006.

¹⁰ Regulations of the Court ICC-BD/01-01-04.

Cambodia, victims are recognised as parties to the criminal process with all the attendant rights and obligations.

18. In general terms, certain countries which afford the possibility for victims to participate as civil parties enable participation throughout the proceedings, including in proceedings dealing with appeals of detention orders. However, there are certain restrictions on which parties may *initiate* (as opposed to *participate in*) appeals, as in Cambodia, and in most cases, civil parties are not afforded the right to appeal a detention order,¹¹ though this does not prevent them from participating in proceedings dealing with appeals of detention orders. Moreover, the French Code of Criminal Procedure, on which Cambodian criminal procedure is based, provides, as in the Internal Rules of the ECCC, for a notification of the date of the hearing before the Pre-trial Chamber through the General Prosecutor to 'each party and their lawyers'.¹² Regarding the hearing before the Pre-Trial Chamber (*Chambre d'instruction*), the new Article 199(2) of the French Code of Criminal Procedure provides that, in the case of an appeal against a provisional detention order, it should take place in public unless the public prosecutor, the accused or 'the civil party' request it *in camera* at the beginning of the hearing.¹³ The understanding of this latter article, combined with the constant practice before the French Courts¹⁴, infers that the civil party is attending the hearing even if, as in Cambodia or before the ECCC, the civil party is not able to appeal before the *Cour de Cassation* against any decision regarding the detention of the charged person.¹⁵
19. Even in common law countries without the *partie civile* system, states regularly recognise victims' right to a review mechanism to challenge the state's decision not to prosecute or to dismiss a case, to initiate criminal proceedings when the state refuses to prosecute, and to participate either as private or subsidiary prosecutors during the investigation and trial. In addition, certain jurisdictions recognise the right of victims to be notified of the defendant's release on bail and to be present and to testify at detention hearings.¹⁶

International Standards

20. International standards acknowledge the relevance and importance of victim participation throughout the proceedings, affirming procedural rights to victims in respect of prosecutions. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power requires that "the views and concerns of victims be presented and considered at appropriate stages of the proceedings where their personal interests are affected."¹⁷ The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, recognise that victims' right to a remedy and reparations includes, *inter alia* "equal and effective access to justice."¹⁸ Other international treaties and standards which refer specifically to the right of victims to participate in criminal proceedings

¹¹ See, for example, Article 186 of the French Code of Criminal Procedure which provides that: "...The civil party may file an appeal against orders refusing the investigation, against discharge orders and against orders affecting his civil claims. However, in no case may he appeal against an order or the provisions of an order made in respect of the detention of the person under judicial examination or in respect of judicial supervision. The parties may also file an appeal against an order by which the judge has ruled upon his jurisdiction, either on his own motion, or upon an objection made to his jurisdiction."

¹² Art. 197(1) CPP: 'Le procureur général notifie par lettre recommandée à chacune des parties et à son avocat la date à laquelle l'affaire sera appelée à l'audience.'

¹³ Article 199 CPP: 'En matière de détention provisoire, et par dérogation aux dispositions du premier alinéa, si la personne mise en examen est majeure, les débats se déroulent et l'arrêt est rendu en audience publique. Toutefois, le ministère public, la personne mise en examen ou la partie civile ou leurs avocats peuvent, avant l'ouverture des débats, s'opposer à cette publicité si celle-ci est de nature à entraver les investigations spécifiques nécessitées par l'instruction, à porter atteinte à la présomption d'innocence ou à la sérénité des débats ou à nuire à la dignité de la personne ou aux intérêts d'un tiers, ou si l'enquête porte sur des faits visés à l'article 706-73'.

¹⁴ For instance, the *Cour de cassation* recalled that the accused should have the right to speak after the civil party (*Cour de cassation, chambre criminelle, Audience publique du 28 septembre 1983, N° de pourvoi : 83-93215; Cour de cassation, chambre criminelle, Audience publique du 16 February 2005, N° de pourvoi : 03-82504*)

¹⁵ *Cour de cassation, chambre criminelle, audience publique du 25 novembre 1991, N° de pourvoi : 91-85225*

¹⁶ See, for example, s. 518(1)(d.2) of the Canadian Criminal Code.

¹⁷ General Assembly resolution 40/34 of 29 November 1985, para 6(b).

¹⁸ Adopted by General Assembly resolution 60/147 of 16 December 2005 at para. 11(a).

include: the *Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children*;¹⁹ the *Resolution on Children as victims and perpetrators*,²⁰ which recommends that "8. ... States, in a manner consistent with the procedural rules of national law and the administration of justice, with regard to children, should enable children to participate, as appropriate, in criminal justice proceedings, including the investigative stage and throughout the trial and post-trial process period, to be heard and given information about their status and any proceedings that might subsequently take place;" the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;²¹ and the *European Union Council Framework Decision to improve victims' standing in criminal proceedings*.²²

Regional Courts

21. Regional courts have equally recognised victims' procedural rights during criminal proceedings. The Inter-American Court of Human Rights has recognised, for example, that the right to a fair trial includes victims' relatives' right to judicial guarantees, and specifically to a criminal investigation for the purpose of identifying and, when appropriate, prosecuting and punishing those responsible.²³ The European Court of Human Rights has equally recognised that in all cases "there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."²⁴ The European Court of Human Rights has further noted that the right to a fair trial "includes the right of the parties to the trial to submit any observations that they consider relevant to their case. The purpose of the Convention being to guarantee not rights that are theoretical or illusory but rights that are practical and effective ..., this right can only be seen to be effective if the observations are actually "heard".²⁵

The International Criminal Court

22. The International Criminal Court is the sole international criminal jurisdiction which affords victims the right to participate in proceedings not only as witnesses to the crimes but as actors with independent interests. Article 68(3) of the ICC Statute provides that:

"3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence."

Article 68 (3) has been held to be a transversal provision relating to all stages of the ICC's proceedings.²⁶

¹⁹ Art. 6 (2)(b) provides that victims shall be assisted in presenting their views and concerns to be considered at "appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence."

²⁰ Adopted by the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders [Cairo, April 29 - May 8, 1995, U.N. Doc. A/CONF.169/16, 12 May 1995].

²¹ Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 9842, U.N. GAOR, 55th Sess., Annex, Agenda Item 114(c), U.N. Doc. A/RES/55/89 (2000). These prescribe that victims and their legal representatives have rights to be informed of and to have access to any hearing and to any relevant information about the investigation, including the right to present other evidence.

²² This Decision urges Member States to ensure that victims have a real and appropriate role in its criminal legal system; safeguard the possibility for victims to be heard during the proceedings and to supply evidence; afford victims, who have the status of parties or witnesses, reimbursement of expenses incurred in their participation. Recommendation of the Committee of Ministers, 724th meeting of the Ministers' Deputies, Doc. No. R (2000) 19 (2000).

²³ Blake, Case No. 36, Inter-Am. C.H.R., ¶¶ 96-97 (1998).

²⁴ Hugh Jordan, 1020 Eur. Ct. H.R., ¶ 109; McKerr, 34 Eur. H.R. Rep., ¶ 115; Kelly, 2004 Eur. Ct. H.R., ¶ 98; Shanaghan, 1814 Eur. Ct. H.R., ¶ 92.

²⁵ Perez v France Application no. 47287/99, 12 February 2004, ¶ 80.

²⁶ Decision of Pre-Trial Chamber I, Situation in the Democratic Republic of Congo, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC/01/04 dated 17th January 2006.

23. In addition to the general provisions relating to victims' right to participate in proceedings, the International Criminal Court specifically provides, *inter alia*, for the participation of victims in proceedings relating to the imposition or amendment of detention orders. Rule 119 (3) of the ICC's Rules of Procedure and Evidence provide:

"Before imposing or amending any conditions restricting liberty, the Pre-Trial Chamber shall seek the views of the Prosecutor, the person concerned, any relevant State and victims that have communicated with the Court in that case and whom the Chamber considers could be at risk as a result of a release or conditions imposed."

24. The matter of victim participation in proceedings relating to the appeal of detention orders was specifically considered in relation to the case against Mr. Thomas Lubanga Dyilo. In the judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "*Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo*",²⁷ the Appeals Chamber determined that for victims to participate in an appeal under article 82 (1) (b) of the ICC Statute, an application seeking leave to participate in the appeal must be filed. An application by victims seeking leave to participate in an appeal pursuant to article 82 (1) (b) of the Statute should include a statement in relation to whether and how their personal interests are affected by the particular appeal, as well as why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented. The Appeals Chamber found that this requirement arose from the specific wording of Article 68 (3) of the Statute.²⁸ This provision is more restrictive than the ECCC procedures for the involvement of civil parties in proceedings, given that victims are not recognised as "parties" to proceedings, and it reflects the special balance between civil and common law traditions evidenced in the ICC Statute. As civil parties are recognised as "parties" in the criminal proceedings in the ECCC framework, there is no requirement for them to present separate applications to present their views and concerns in particular hearings. Indeed, the Internal Rules of the ECCC imply that once an applicant is recognised as a civil party there is no need for him or her to submit subsequent applications at later phases of the proceedings.²⁹

25. In the judgment on the appeal of Mr. Thomas Lubanga Dyilo referred to above, the Appeals Chamber noted as follows :

"The Appeals Chamber was not persuaded by the submissions of the Appellant that the victims did not have any right to participate in appeals relating to determinations of whether or not a person subject to a warrant of arrest should be granted interim release. While it is correct that rule 118 does not make any specific reference to victims, the Appeals Chamber deemed the provisions of article 68 (3) to enable it to permit the views and concerns of victims to be expressed at stages of the proceedings that it determined appropriate.

The Appeals Chamber also did not accept the submission of the Appellant that, by allowing the victims to participate, the Appellant was facing two prosecutors. Victims can, in principle, participate if their personal interests are affected and the Appeals Chamber considers their participation to be appropriate. It is for the Appeals Chamber to ensure that the manner of their participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. In the present case the Appeals Chamber did not regard the participation of the victims to conflict with these principles..."³⁰

²⁷ Judgment of the Appeals Chamber, ICC-01/04-01/06-824 of 13 February 2007.

²⁸ *Ibid*, at paras. 39-40. "It is apparent that the requirement under article 68 (3) that victim participation shall be permitted "at stages of the proceedings determined to be appropriate by the Court" mandates a specific determination by the Appeals Chamber that the participation of victims is appropriate in the particular interlocutory appeal under consideration. It follows that an application from victims seeking leave to participate is required in order to enable the Appeals Chamber appropriately to make that determination." [para. 40]

²⁹ Rule 23(4) provides that "...[a] Victim who has filed a Civil Party application during the investigation shall not be required to renew the application before the Chambers."

³⁰ Judgment of the Appeals Chamber, ICC-01/04-01/06-824 of 13 February 2007, at paras. 54-55.

Therefore the Appeals Chamber recognised that victim participation in appeals relating to detention orders was not inappropriate as a matter of principle. Indeed, as a matter of fact, the Appeals Chamber allowed victims to participate in that interlocutory appeal on detention although it did not find the submissions of the victims to be of assistance in determining the specific grounds before it. The Appeals Chamber noted as follows in paragraphs 69 to 72 of its judgment on the appeal of Mr Thomas Lubanga Dyilo referred to above:

"The Appeals Chamber refers to its Decision of 12 December in which it granted the victims the right to participate in this appeal "for the purpose of presenting their views and concerns respecting their personal interests in the issues raised on appeal" (emphasis added).

Three specific issues are raised by the Appellant in the current appeal: (i) the obligation to review the detention of a suspect periodically pursuant to article 60 (3) of the Statute; (ii) whether the Pre-Trial Chamber was correct in its determination, pursuant to article 60 (4) of the Statute, that the Appellant had not been detained for an unreasonable period due to inexcusable delay by the Prosecutor; and (iii) whether the Pre-Trial Chamber took into account irrelevant factors, or failed appropriately to apply the principles of necessity and proportionality, in determining whether the Appellant should be granted interim release.

The victims did not make any explicit link between their submission and the specific issues raised on appeal. In so far as their concerns purport to provide evidence of why interim release should not be granted to the Appellant, the Appeals Chamber considers that the nature of this appeal is corrective and limited to the specific grounds of appeal raised. It is not a rehearing of the original request for interim release. For that reason, in the context of the present appeal, it is not appropriate either merely to repeat evidence that was before the Pre-Trial Chamber, or to introduce new evidence before the Appeals Chamber, without making any specific link as to how such material affects the Appeals Chamber's determination of the issues raised on appeal.

For the above reasons, while the Appeals Chamber has noted the concerns expressed by the victims in relation to what they allege might happen if the Appellant was to be granted interim release, it has not found them to be of assistance in determining the specific grounds before it in the present appeal and therefore has not relied on those concerns in its determination of the merits of the current appeal. In those circumstances, the Appeals Chamber has necessarily also disregarded the response of the Appellant to those concerns".³¹

Thus, not only did the Appeals Chamber allow the victims to participate in the appeal related to the detention of Mr Thomas Lubanga Dyilo, but it did also expressly take note of the concerns expressed by the victims in that appeal. If the Appeals Chamber decided not to rely on those concerns for the determination of the merits of the appeal, this is only due to the very nature of the appeal process before the International Criminal Court, which is purely corrective as stated by the Appeals Chamber, and to the fact that the observations of the victims were not linked to the issues raised on appeal. This can not be seen in any way as a restriction of the victims' rights to participate in appeals proceedings, especially on detention matters.

26. Article 68 (3) of the ICC Statute has to date, been interpreted in the jurisprudence of the Court to enable victims to participate *inter alia*, in the earliest phases of proceedings prior to the issuance of an indictment³² and in proceedings relating to the confirmation of charges.³³ Victim participants have equally made observations on the applicant for release filed by the Defence.

³¹ *Id.*, at paras 69-72.

³² Decision of Pre-Trial Chamber I, Situation in the Democratic Republic of Congo, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC/01/04 dated 17th January 2006.

³³ Decision on the Arrangements for Participation of Victims A/0001/06, A/0002/06 and A/0003/06 at the Confirmation Hearing, ICC-01/04-01/06-462 of 22 September 2006.

THE PARTICIPATION OF CIVIL PARTIES IN APPEALS OF DETENTION ORDERS DOES NOT VIOLATE DEFENCE RIGHTS

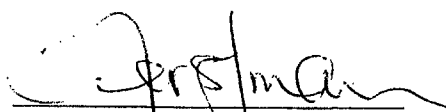
27. It is submitted that the participation of civil parties in appeals of detention orders is not prejudicial to the rights of the accused and a fair and impartial trial.
28. In considering whether the participation of civil parties would be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial, it is submitted that the ECCC should be mindful that the views and concerns of the civil parties relating to such interlocutory appeals do not relate to the procedural rights regarding questions pertaining to the guilt or innocence of any suspect or accused person or to the credibility of Prosecution witnesses. Any possibility of prejudice is entirely context and case specific, based upon the particular charges and evidence tendered. Provided that a particular intervention does not expressly or impliedly point to the particular guilt of an accused in respect of actual charges, it is difficult to see how any prejudice might arise.
29. Pre-Trial Chamber I of the International Criminal Court, in its 3rd December 2007 relating to the situation in Darfur, noted that:

Under rule 86(2) of the Regulations of the Court: "in situation and case proceedings before the Pre-Trial Chamber [...] the fact that one or several natural or legal persons may be entitled to the procedural status of victim is not, per se, prejudicial to the Defence"³⁴

30. Indeed, given their status as parties to the proceedings, the ability for civil parties to present their views and concerns is both appropriate and consistent with a fair and impartial trial, which entails respect not only of defence rights, but the rights of all parties, including civil claimants.³⁵ While in certain circumstances, it may be appropriate for the ECCC to take measures to ensure that the participation of civil parties is being conducted efficiently³⁶, this is purely a matter of the modalities of participation which should be considered on a case by case basis within the relevant proceedings, rather than pre-emptively through the limitation of the rights of civil parties as a whole. To arbitrarily deny civil parties from the opportunity to present their views and concerns at this vital stage which affects their personal interests would indeed be contrary to the principles of justice and fairness.

All of which is respectfully submitted.

Signing on behalf of the Applicants (Amici), REDRESS, FIDH and ASF


Carla Ferstman, Director, REDRESS

Dated this 21st February 2008

At: London, United Kingdom

³⁴ Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, ICC-02/05 of 3 December 2007.

³⁵ See, the jurisprudence of the European Court of Human Rights, *supra* at n. 24.

³⁶ E.g. rule 28.3 of the Internal Rules of the ECCC which provide for the possibility of common legal representation.