

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

Case No: 002/19-09-2007-ECCC/OCIJ (PTC03)
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APPLICATION FOR DECLARATIVE RELIEF FOR CIVIL PARTY TO SPEAK IN
PERSON, NOT FOR RE-HEARING

Filed by:
Civil Party
Theary Chan SENG

Filed to:
Pre-Trial Chamber
Judge PRAK Kimsan
Judge Rowan DOWNING
Judge NEY Thol
Judge Katinka LAHUIS
Judge HUOT Vuthy

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I. INTRODUCTION

1. On 8 July 2008, the Pre-Trial Chamber (“PTC”) issued “Directions to Parties Concerning Application for Reconsideration of Civil Party’s Right to Address the Chamber” (“**Directions for Reconsideration**”), which states that the Civil Party’s Application for Reconsideration “should at this state be read as a request to re-open the hearing to hear the Civil Party.”
2. I, Theary C. Seng, as a Civil Party (“**the Applicant**”), would like to clarify that I am not seeking to re-open the hearing, but instead requesting **Declarative Relief**. It is true that a re-hearing would redress the fact that the Applicant’s recognized interests as a Party¹ to the Ieng Sary pre-trial hearing were not represented by herself or her lawyer. However, in accord with the PTC’s “interests of ensuring expeditious proceedings”, and in light of the fact that the hearing has already come to a close, re-opening this hearing would constitute an inefficient use of time, energy and resources. Therefore, the Applicant is requesting redress in the form of Declarative Relief.

II. FACTS

3. On 25 September 2007, the Civil Party filed an Application in person that was accepted by the greffiers of the Office of the Co-Investigating Judges (“**OCIJ**”) of the Extraordinary Chambers in the Courts of Cambodia (“**ECCC**”). It was placed in case file No. 002/19-09-2007-ECCC/OCIJ that same day.²

¹ IR 23(6)(a): “When joined as a Civil Party, the Victim becomes a party to the criminal proceedings.”

² *Status of Civil Party Petition of Chan Theary Seng*, 20 November 2007. It should be noted that the original document was received on 20 September 2007 at 2 p.m. by Nup Sothunvichet, acting case file officer (one day after the arrest and detention of Mr. Nuon Chea, Sept. 19).

4. On 28 December 2007, the Applicant was informed by the OCIJ greffiers, via her personal email address on file, of the provisional detention hearing of Mr. NUON Chea in the PTC scheduled for 4 February 2008.
5. On 31 January 2008, Co-Investigating Judges YOU Bunleng and Marcel LEMONDE recognized Mr. NY Chandy as the Applicant's legal representative. In documents dated 30 January 2008, the Applicant expressly (i) reserved her right "*to represent myself and/or have my lawyer represent me at all stages... particularly... in the Pre-Trial Chamber*" and (ii) stating her intention "*to be a representative for a group of victims who were orphaned during the Khmer Rouge years.*"
6. Prior to the re-scheduled hearing on 7 February 2008, an updated version of the "Conduct of Criminal Proceedings" was distributed to the parties, indicating the names of the four lawyers for the then four Civil Parties, stating that they would be allowed to make oral submissions of up to thirty minutes each.
7. The Applicant first addressed the PTC on 8 February 2008, at the start of the 2nd day of the hearing on provisional detention. On this occasion, the Applicant spoke for 20 of the 30 minutes allocated to her and her lawyer. Afterwards, ECCC Public Affairs officials Dr. Helen JARVIS, Mr. Peter FOSTER, and Mr. REACH Sambath hailed this address as historic and unprecedented in the history of international law.
8. In her speech, the Applicant acknowledged that allowing victims to participate directly as parties could be "administratively messy," but stated that "*despite this risk, the participation of victims reflects the Court's confidence and belief in victims, that their interests be counted, that their voices be heard.*" The Applicant then went on to declare that victims/Civil Parties need to "*protect this confidence and trust of us in this process*" and to understand that the Court must maintain order and decorum. The rule of law and defense rights must be

respected. The Applicant then reiterated that she was addressing the PTC as a victim/Civil Party in two capacities: first, as a private citizen, and second, "*as a representative of victims generally who do not have a voice... the Orphans Class.*"

9. The Applicant spent about half of the allocated time emphasizing these preliminary points before arguing that the provisional detention of Mr. NUON Chea was justified.
10. The second occasion that the Applicant addressed the PTC was at the provisional detention hearing of Mr. KHIEU Samphan on 23 April 2008 (immediately following that of Mr. NUON Chea). The Applicant responded directly in person to defense lawyer Jacque VERGES' assertion that he could not defend his client until all ECCC documents had been translated into French: "*Mr. KHIEU Samphan, the gentlemen – your Khmer and foreign lawyers – it is of fundamental importance that you do not forget this principle: We must not let the perfect be the enemy of the good; we must be reasonable; we must use common sense.*" After stating this in Khmer, the Applicant emphasized the principle in English and sat down.
11. On both occasions, the Court and all Parties recognized and accepted the Applicant addressing the Court directly. In particular, it should be recalled that (i) on the 1st occasion, ECCC Public Affairs officials publicly acknowledged that it was historic and unprecedented, and; (ii) on the 2nd occasion, Mr. KHIEU Samphan's lawyers reacted with surprise when the Court inquired if they would object to the Applicant addressing the PTC directly. The lawyers asked, "Hasn't this issue already been decided in the NUON Chea hearing?"³ They had clearly accepted that the Applicant, as a recognized Party to the proceeding, implicitly has the right to address the PTC.

³ *Decision on Civil Party Participation in Provisional Detention Appeals of Nuon Chea*, PTC, 20 March 2008, ERN00172886.

12. It should also be noted that on the two occasions the Applicant addressed the PTC in person she had legal representation present in Court.
13. The Applicant could not attend the IENG Thirith provisional detention hearing on 21 May 2008 in person, but was represented in court by her lawyer. The previous day, 20 May 2008, the PTC issued directions that all oral submissions on behalf of the Civil Parties pursuant to Internal Rule (“**IR**”) 77(10) shall be made by the lawyers for the Civil Parties (“**Directions on Oral Submissions**”)⁴.
14. The next hearings that the Applicant attended were on 30 June 2008 for Mr. Ieng Sary. On 1 July 2008, the PTC issued a Decision on preliminary matters raised by the Co-Lawyers for the Civil Parties denying the request of the Applicant “*to speak in person although represented by a lawyer*”⁵ (“**Decision on Preliminary Matters**”). The PTC referred to its previous 20 May 2008 Directions on Oral Submissions and based its decision on IR 77(10), which states that at the PTC, after the co-rapporteurs have read their report, “*...the lawyers for the parties may present their brief observations.*”
15. On 1 July 2008, after the aforementioned Decision, the Applicant dismissed her lawyer, informed the PTC that she no longer has legal representation, and requested that she be allowed to speak in person for 10 minutes (within the time limit granted to the Civil Parties by the PTC), and on the relevant subject-matter of the principle of *ne bis in idem*. The PTC issued another decision⁶ (“**Decision on Unrepresented Civil Party’s Rights**”) and denied the request of the Applicant to address the Court in person. The PTC referred again to IR 77(10).

⁴ 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/I/21.

⁵ 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.

⁶ 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.

16. Judge Rowan DOWNING wrote a Dissenting Opinion⁷ and expressed his view that the Applicant should be granted the right to address the Court in person. He noted that there was an apparent conflict between IR 23 (giving the Civil Party the right to appear) and IR 77(10) (restricting observations being made before the PTC by a Civil Party to “lawyers for the Parties”). He went on to state the *“possible effect of a decision in this matter could be the extinguishment of her right to bring a claim against the Charged Person under IR 23(1)(b)”* and consequently *“would be unfair, pursuant to the fundamental principles of IR 21(1)(a), not to permit this Civil Party to address the Court.”*
17. On 2 July 2008, the Applicant submitted to the PTC the English version of an application⁸ for reconsideration on the Decision on Unrepresented Civil Party's Rights ("**Application for Reconsideration**") during the hearing of Mr. IENG Sary. This Application for Reconsideration was validly filed on 4 July 2008 following the submission of the Khmer version on the afternoon of 3 July 2008. This Application noted that in her initial grant of power of attorney, the Applicant had expressly stated to the Co-Investigating Judges her desire to be able to represent herself *or* be represented by her lawyer, thus, fully retaining her right to address the Court directly.
18. The Applicant is a Civil Party who seeks to represent the Orphans Class. She has spoken widely on this issue in interviews, columns, radio programs, and forums, as well as with regular Cambodians throughout the country. She has received overwhelming interest from potential members who desire to be under her representation in this Orphans Class. Furthermore, the Applicant is conducting full-day and half-day seminars for this Orphans

⁷ see supra note 3, page 3.

⁸ 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.

Class all over Cambodia, beginning in Phnom Penh on April 19⁹, Koh Kong on June 7, and in the near future after each subsequent CSD Public Forum on "Justice & National Reconciliation." These will take place in Pailin and Battambang on July 18 and 19, Takeo on August 1, and Kampong Cham on August 30, among others. The Applicant also plans to conduct seminars when overseas in the United States in August 2008, and hopefully in Australia and France toward the end of this year and the beginning of next year.

19. The Applicant plans to have between 50 and 100 victims under her representation in this Orphans Class.

III. RELEVANT LAW

A. *ECCC Internal Rules*

20. **ECCC Internal Rule 21**

21(1) 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.

21(1)(a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties.

21(1)(c) The ECCC shall ensure that [victims'] rights are respected throughout the proceedings...

21. **ECCC Internal Rule 23**

23(1) The purpose of Civil Party action before the ECCC is to:

23(1)(a) Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC.

⁹ 19 April 2008 at the Center for Social Development, 8 a.m. to 5:30 for 30 interested applicants, with approximately 10 CSD staff assisting with questions and application completing of applicants.

23(1)(b) Allow victims to seek collective and moral reparations...

23(6)(a) When joined as a Civil Party, the Victim becomes a party to the criminal proceedings.

23(7) ...a Civil Party has the right to be represented by a national lawyer, or a foreign lawyer...

22. **ECCC Internal Rule 77**

77(10) After the co-rapporteurs have read their report, the Co-Prosecutors and the lawyers for the parties may present brief observations.

B. PTC Decisions and Directions

23. **20 March 2008 ECCC Pre-Trial Chamber: Decision on Civil Party Participation in Provisional Detention Appeals:**

(36) The PTC finds the text of IR (23)(1)(a) is clear in its wording that Civil Parties can participate in all criminal proceedings, which includes the procedure related to appeals against provisional detention before the PTC.

(37) The PTC notes that the inclusion of Civil Parties in proceedings is in recognition of the stated pursuit of national reconciliation.

(38) In the CPC, there is a provision in Articles 259 and 260 for the Civil Parties related to participation in appeals against detention orders. Reading IR 23(1) in the light of the CPC means that the wording envisages participation of Civil Parties during the proceedings of the ECCC, including appeals against provisional detention orders.

24. **20 May 2008 ECCC Pre-Trial Chamber: Directions on Civil Party Oral Submissions During the Hearing of the Appeal Against Provisional Detention Order:**

(1) The ECCC finds that in the interests of ensuring expeditious proceedings and relevant submissions, and to avoid disruptions to the hearing...

25. **1 July 2008 Pre-Trial Chamber's Decision on Preliminary Matters Raised by the Lawyers for the Civil Parties in IENG Sary's Appeal:**

(5) Related to jurisdictional issues, the PTC considers that the Civil Parties have a direct interest which is separate from that of the Prosecution. If the PTC were to determine that there is no right to commence a criminal action against the Charged Person, the result might be that the Civil Parties have no possibility left to claim their damages as Civil Parties.

26. **3 July 2008 Pre-Trial Chamber's Oral Decision of 1 July on Civil Party's Request to Address Court in Person:**

(3) The PTC finds that the Civil Party is not permitted to address the Court in person. 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. IR 77(10) prescribes that only lawyers for civil parties have the right to make brief oral observations during pre-trial appeals.

27. **Dissenting Opinion of Judge Rowan Downing:**

(3) We are advised that the Civil Party has dismissed her lawyer and thus no longer has representation before the Pre-Trial Chamber. I would be prepared to provide the right of this Civil Party, in this particular instance, to appear for herself and address the Court on the jurisdictional issues before the Chamber, notwithstanding the restrictions found in Internal Rule 77(10). I do this on the basis that one possible effect of a decision in this matter could be the extinguishment of her right to bring a claim against the Charged Person under IR 23(1)(b).

(4) As a consequence, in my view, it would be unfair, pursuant to the fundamental principles of IR 21(1)(a), not to permit this Civil Party to address the Court.

C. Cambodian Law

28. **ECCC Internal Rules Preamble:**

... (t)he ECCC have adopted the following Internal Rules, the purpose of which is to consolidate applicable Cambodian procedure for proceedings before the ECCC...

29. **Cambodian Criminal Procedural Code (“CPC”), Part III: Hearing the Statement of Civil Party, Article 150**

A civil party *may* be assisted by a lawyer.

...the investigating judge may interview the civil party without summoning the lawyer if the civil party expressly waives his right to his lawyer’s presence.

30. **CPC Article 259**

Parties and their lawyers may submit their briefs to the court clerk. The parties and their lawyers shall be permitted to submit their briefs until the commencement of the hearing.

31. **CPC Article 260**

The Investigation Chamber may summon the parties...to appear in person...

III. ARGUMENT

32. The Applicant submits that she should be permitted to address the Court in person. This is in accord with IR 23, as well as the general purposes stated in IR 21(1)(a) and the Court’s own understanding of the importance of civil party participation as outlined in the 20 March 2008 *Decision on Civil Party Participation in Provisional Detention Appeals*. In addition, Cambodian domestic law, which serves as a guide to the Court on procedural issues, allows a Civil Party to participate without representation. Finally, in this particular case, in which a Civil Party has been permitted to speak on more than one occasion and is now without the benefit of counsel, it is especially appropriate to allow participation. The direct voice of the Civil Party, addressing the factual and legal issues under deliberation, resonates differently than that of her lawyer. In light

of this situation, the Applicant humbly petitions the Court to reconsider its 1 July 2008 decision denying the Civil Party the right to address the Court.

IR 77(10) should be interpreted in light of IR 23(1), IR 21(1)(a), and the purposes of Civil Party participation as stated in 20 March 2008 Decision on Civil Party Participation in Provisional Detention Appeals

33. The Court has based its decision to exclude the Civil Party from direct participation in the pre-trial on IR 77(10), which states that “the Co-Prosecutors and the lawyers for the parties may present brief observations.” The Court has interpreted this to mean that *only* the Co-Prosecutors and lawyers may speak. We submit, however, that in light of other provisions of the IRs as well as the Court’s own decision on Civil Parties’ participation in the pre-trial phase, IR 77(10) should be read broadly to implicitly include Civil Parties as well as their lawyers. This is consistent with the Court’s approach in its 20 March 2008 *Decision on Civil Party Participation in Provisional Detention*, in which it found that Civil Parties have the right to participate in provisional detention hearings even though there is no explicit text specifying this right. The Court found that such a right existed nevertheless by interpreting IR 23(1) in light of the purposes of the ECCC, including national reconciliation, as well as domestic and international practice.

34. We ask that the Court take a comprehensive and contextual approach to interpretation here as well. As the Court itself noted in its 20 March 2008 *Decision on Civil Party Participation in Provisional Detention Appeals* (paragraph 36), IR 23(1)(a) states that civil parties “have active rights to participate starting from the investigative stages of the procedure.” The *Decision* goes on to cite both national and international support for this proposition. All of the reasons given by the Court in this decision apply equally to the case at hand. The Applicant has no representation and no way of asserting her right as a Civil Party to participate in the pre-trial phase. As Judge Downing’s DISSENT argued, there is even the risk that the Civil Party’s right to bring a claim against the Charged Person might be extinguished if she is not allowed to participate in the pre-

trial stage. In sum, we submit that the denial of this Civil Party's right to participate in the pre-trial hearing is contrary to the meaning of IR 23(1) and inconsistent with the Court's own decision on Civil Party participation.

35. As well as being contrary to IR 23(1), denial of a Civil Party's right to address the Court is also problematic in view of IR 21(1)(a), which provides a guarantee of fairness and a balance between the rights of the parties. If the Civil Party without representation is denied the right to participate, this puts her at a serious disadvantage relative to the other Parties and is fundamentally unfair. The possible extinguishment of the right under IR 23(1)(b) to bring a claim against the Charged Person is just one example of the unfairness that could result from denying the Civil Party the right to participate. Another consequence would be in effect to *force* all Civil Parties to find legal representation; this not only seems at odds with the text of IR 23(7), which gives Civil Parties the *right* to a lawyer but makes no mention of this being *required*, but is also an unfair imposition. A mentally competent adult should not be forced to accept representation in order to assert her fundamental right to participate as a Civil Party. The Court has found that Civil Parties have the right to participate in pre-trial hearings. It is only fair that this same right be granted to those Civil Parties who do not have the benefit of counsel.

Domestic Analogy

36. As stated in paragraph 38 of the Court's 20 March 2008 *Decision* on Civil Party participation in provisional detention appeals:

In the CPC, there is a provision in Articles 259 and 260 for the Civil Parties related to participation in appeals against detention orders. Reading IR 23(1) in light of the CPC means that the wording envisages participation of Civil Parties during the proceedings of the ECCC, including appeals against provisional detention orders.

37. Furthermore, the Preamble to the ECCC Internal Rules states, "the ECCC have adopted the following Internal Rules, *the purpose of which is to consolidate applicable Cambodian procedure for proceedings before the ECCC...*"

38. In domestic law, there is no occasion where a Civil Party *needs* a lawyer, only that a Civil Party “may be assisted by a lawyer” (CPC §150). Additionally, Article 150 of the CPC states “the investigating judge may interview the civil party without summoning the lawyer if the civil party expressly waives his right to his lawyer’s presence.”

39. Given that the ECCC has guaranteed Civil Party participation in pre-trial hearings and has the purpose of consolidating Cambodian procedure for proceedings before the ECCC, the application of domestic law clearly guarantees the civil party’s right to forego representation and participate directly in the proceedings.

Procedural Concerns with the Civil Party

40. In its 20 May 2008 *Decision*, the ECCC found against direct Civil Party participation “in the interests of ensuring expeditious proceedings and relevant submissions, and to avoid disruptions to the hearing...” However, the interest of the Court in maintaining order in pre-trial hearings can and should co-exist harmoniously with the Civil Party’s right to speak directly.

41. The Court ensures that pre-trial hearings are conducted in a fair and efficient manner with time limits set for oral submissions from all three parties. Once the defense and prosecution have spent the allocated time presenting their case in the manner of their choosing, it flows logically that the Civil Party should be able to do the same. Parties can object and the Court reserves the right to curtail any irrelevant or repetitive submissions regardless of who is speaking. Given the Court’s ability to manage the proceedings, it should not matter whether a lawyer or a Civil Party speaks during the allocated time.

42. Furthermore, the Applicant addressed the Court directly in the ECCC pre-trial hearings of NUON Chea and KHIEU Sampan. Her oral submissions were relevant, direct, brief, and in no way a detriment to the proceedings. Given the Court’s guarantee of Civil Party participation in pre-trial hearings, there is no justifiable reason to disallow the Applicant from addressing the Court directly.

43. The Applicant is very much aware of the risks and concerns associated with Civil Party participation. She is doing everything to assure that Civil Parties' voices and interests are represented while preserving the decorum, expediency, and fairness of the hearings. Accordingly, the Applicant is working to form the Orphans Class and has been encouraging other civil society organizations and interested parties to form other groups and classes, as provided for in the Victims' Application Form (a box to tick for "Lawyer" or "Representative").

44. It may also help for the Court to consider controlling the number of speaking representatives from each party. Given that the defense and prosecution each have two attorneys present in the courtroom, perhaps the Civil Parties, no matter how many there are, should also be limited to two speaking representatives on any given day. The Civil Parties would then decide internally how and who would use the allocated speaking time, helping to mainstream the Civil Parties' voice.

IV. CONCLUSION

45. The Civil Party should be allowed to address the Court directly. This is in accord with the purposes of Civil Party participation, including national reconciliation, as outlined in IR 21(1), IR 23, and the Court's own decision on 20 March 2008. The Civil Party's voice resonates differently than that of her lawyer. Moreover, the Applicant is seeking to be a Representative of the Orphans Class, a category encouraged administratively and provided for on the Victims Application Form. In addition, under Cambodian domestic law, which serves as a procedural guide for the ECCC, Civil Parties can participate without the assistance of a lawyer during all stages of the judicial process. Finally, the interest of the Court in maintaining order can co-exist with the Civil Party's right to speak directly. We therefore request that the Court grant Declarative Relief for the Civil Party to speak in person.

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Respectfully Yours,



Theary C. SENG
Civil Party

Phnom Penh
July 17, 2008