

Civil Party's Repeated Attempts to Address Bench and Poor Management of Proceedings Force Worrying Precedent for Victim Participation Before the ECCC

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The Pre-Trial Hearing on the Appeal by Ieng Sary Against the Order of Provisional Detention of June 30th to July 3rd, 2008, saw the establishment of two worrying precedents for direct victim participation in proceedings before the Extraordinary Chambers. First, on July 1st, the Judges of the Pre-Trial Chamber issued a decision that civil parties represented by counsel may not speak in person during pre-trial appeals and only through their legal representatives. Second, on July 2nd, the very same Judges eroded the right of victims to participate directly further still by ruling that unrepresented parties may not make oral submissions during pre-trial appeals. For victims' rights advocates, this week's decisions have come as a surprise.

These decisions contradict the Court's earlier practice and procedural rules. In an earlier pre-trial hearing on Nuon Chea's appeal against provisional detention, a civil party represented by counsel was allowed to speak freely during the proceedings. Furthermore, as a general principle, the Court's Internal Rules do not require a civil party to be represented by counsel and clearly establish the right of civil parties to participate with or without the assistance of a lawyer and, thus, to address the bench. Rule 23(7) provides that "[a]ny 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..."

Until this week, the Pre-Trial Chamber had been very supportive of victim participation in proceedings. In a decision issued on March 20th, 2008, the Judges had adopted an expansive interpretation of the civil parties' right to participate, stating that the Internal Rules are "clear in [their] wording that Civil Parties can participate in all criminal proceedings..." and that "Civil Parties have active rights to participate starting from the investigative stage of the procedure" (para. 36). In holding that civil parties have a right to participate in appeals against provisional detention, the Judges rejected the argument of the Co-Lawyers that civil parties may only participate in proceedings on the merits and not in pre-trial proceedings.

Victims' rights advocates welcomed the Pre-Trial Chamber's decision and expressed considerable optimism for the involvement of civil parties in future proceedings. The International Federation for Human Rights (FIDH), for example, hailed the decision as "a landmark decision in international criminal justice and a major achievement for victims of gross human rights violations, whose voices have long gone unheard." Especially considering the establishment of a Victims Unit and the drive by local NGOs (including DC-Cam) to collect complaints and civil party applications from survivors, the Chamber's July 1st and 2nd decisions limiting civil party participation proved rather unexpected.

It appears that this sea change in the Chamber's attitude towards civil party participation can be attributed, at least in large part, to: (a) multiple forceful attempts by one civil party to invoke in practice the broad participation rights found in the Internal Rules; and (b) the Chamber's own poor management of the civil parties' oral submissions.

The repeated attempts made by one civil party to invoke the broad participation rights found in the Rules during the pre-trial hearing appear to have soured the Judges' view of civil parties as a whole. The civil party in question had previously been allowed to speak during the hearing on Nuon Chea's appeal against provisional detention. At that time, rather than addressing the relevant issue of provisional detention, she used the opportunity to address other issues and even to advertise a book published by her organization. Appropriately, in its Decision, the Pre-Trial Chamber described her submissions as "amount[ing] to a victim statement" and did not take them into account in deciding the appeal.

During this week's pre-trial hearing, on June 30th, the same civil party – then represented by counsel – requested once again to be heard. Without waiting to hear whether her request was granted, she proceeded to address the bench. Obviously displeased by her failure to wait for their decision, the Judges stopped her and refused to allow her to speak until they issued a decision. When, on July 1st, they denied her request to speak directly, she dismissed her lawyer and requested that she be heard as an unrepresented civil party. Most worryingly, the Judges once again refused her request, seemingly irritated by her repeated requests. Eventually, the civil party left the courtroom, vowing not to return until "[she has] a voice."

Undoubtedly, the civil party raised an important issue with respect to the ability of civil parties to participate directly. Rule 23(7) lays down a clear general principle that civil parties may participate without a legal representative. In refusing her request, the Judges relied on Rule 77(10), which provides that, in pre-trial appeals, "the Co-Prosecutors and the lawyers for the parties may present brief observations." This provision, however, clearly contradicts the general principle in Rule 23(7) and constitutes, most likely, a failure by the drafters to anticipate the participation of unrepresented civil parties. Thus, the refusal of the unrepresented civil party's right to speak for herself was not in accordance with the Rules.

Worryingly for victims' rights, the Judges appear not to have based their decisions upon a correct reading of the Rules, but upon their disinclination to hear once again from this individual civil party. Tellingly, the separate opinion delivered by Judge Rowan Downing – in opposition to that of his fellow international Judge, Katinka Lahuis – warned that it would be "unfair" not to allow the unrepresented civil party to speak, as this could possibly lead "to the extinguishment of her rights to bring a claim under Rule 23(1)(b)." This sets a worrying precedent for the future conduct of proceedings, as unrepresented civil parties will now be precluded from speaking in pre-trial appeals.

Thus, despite seeking to further victims' rights, this civil party has done victims a great disservice by demanding a robust scheme for civil party participation so early in the proceedings. Despite being the first international criminal proceedings in which victims may participate as full parties, the Judges had – until this time – adopted a very progressive approach. When, however, the civil party sought to force their hand, the Judges responded negatively to her forceful tactics and restricted opportunities for direct participation for *all* civil parties. The civil party should have avoided exacerbating the Judges' concerns about the disruption caused by the civil party procedure.

The Judges' frustration with the civil party procedure can be attributed not only to the behavior of individuals, but also to their poor own management of the proceedings. To those at the hearing, the Judges appeared to be unfamiliar with the appropriate procedure for the conduct of the proceedings (as evidenced by their uncertainty as to which party should

be making submissions at a given time). Although there were six civil party lawyers present, the Judges made no attempt to regulate the number allowed to speak – until, that is, international Co-Lawyer Michael Karnavas questioned the effect of multiple submissions in support of the Co-Prosecutors on the equality of arms.

Inevitably, the civil party procedure will remain chaotic unless the Judges take the initiative to streamline it. As pointed out in the Co-Lawyers' Joint Submissions of February 22nd, the expediency of proceedings may be compromised if the number of civil parties increases. In its Decision of March 20th, the Pre-Trial Chamber refused to provide guidance in the event of such, as it “cannot speculate on facts that may or may not be presented to it in the future...” (para. 48). As the number of civil parties has increased and additional groups of lawyers are expected to join the proceedings, the Rules and Procedure Committee should adopt a practice direction providing precise guidelines on the procedures for civil party participation.

In conclusion, it can be said that the Pre-Trial Chamber has set a very worrying precedent for direct participation in proceedings by civil parties. While limited to pre-trial appeals, the decisions of July 1st and 2nd impose very significant restrictions upon the rights of civil parties to participate. The ramifications of these decisions will extend not only to future proceedings before the ECCC, but may affect the models adopted for victim participation in future internationalized tribunals. As the civil party procedure remains in its nascent stage, the parties and Chambers alike should give greater consideration to the impact of their decisions to ensure maximum civil party participation and the expediency of proceedings.

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