



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

C22/1/68

អង្គបុរេជំនុំជម្រះ

PRE-TRIAL CHAMBER
CHAMBRE PRELIMINAIRE

Criminal Case File N° 002/19-09-2007-ECCC/OCIJ (PTC03)

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

Date: 28 August 2008

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PUBLIC

DECISION ON APPLICATION FOR RECONSIDERATION OF CIVIL PARTY'S RIGHT TO ADDRESS PRE-TRIAL CHAMBER IN PERSON

Co-Prosecutors

CHEA Leang
Robert PETIT
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William SMITH
TAN Senarong
Anees AHMED

ឯកសារច្បាប់តាមប្រព័ន្ធគ្រប់គ្រងឯកសារ
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Charged Person

IENG Sary

Lawyers for the Civil Parties

HONG Kim Suon
LOR Chunthy
NY Chandy
KONG Pisey
Silke STUDZINSKY
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Co-Lawyers for the Defence

ANG Udom
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1. **THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of the “Application of Reconsideration on Civil Party’s Right to Address Pre-Trial Chamber” filed by the Civil Party Theary Chan Seng on 4 July 2008 (“Application for Reconsideration”).
2. The Application for Reconsideration was handed to the Pre-Trial Chamber by the Civil Party Theary Chan Seng in English on 2 July 2008 during the hearing of the Charged Person’s provisional detention appeal which concluded on 3 July 2008. The Civil Party left the courtroom pending the filing of her Application for Reconsideration and a decision upon it. The Application for Reconsideration was validly filed in accordance with the Practice Direction on the Filing of Documents before the ECCC when the Khmer version was available on 4 July 2008.
3. In its “Directions to Parties concerning Application for Reconsideration of Civil Party’s Right to Address the Chamber” of 8 July 2008, the Pre-Trial Chamber stated that the Application for Reconsideration should at this stage be read as a request to reopen the hearing to hear the Civil Party.¹

I. BACKGROUND

4. The Pre-Trial Chamber sets out the background to the current decision in full in order to demonstrate the evolution of civil party participation before the Pre-Trial Chamber at the ECCC.
5. In its “Decision on Civil Party Participation in Provisional Detention Appeals” of 20 March 2008,² the Pre-Trial Chamber established that the participation of Civil Parties in provisional detention appeals, both in writing and orally, is authorised and that ECCC procedures must allow for such participation.³ The Pre-Trial Chamber in addition made it clear that preserving a balance between the procedural rights of the parties was an important and ongoing process. At the same time, an overly prescriptive procedure was not favoured.⁴

¹ Directions to Parties concerning Application for Reconsideration of Civil Party’s Right to Address the Chamber, 8 July 2008, C22/I/56, para. 5.

² Decision on Civil Party Participation in Provisional Detention Appeals, 20 March 2008, C11/53 (Civil Party Participation Decision”).

³ Civil Party Participation Decision, para. 42.

⁴ Civil Party Participation Decision, para. 43.



6. In its “Decision on Appeal against Provisional Detention Order of Nuon Chea”, also of 20 March 2008,⁵ the Pre-Trial Chamber referred to its separate Decision on Civil Party Participation in Provisional Detention Appeals and noted that the submissions made by the Civil Party Theory Chan Seng “largely amounted to a victim statement” and that this part of her submission was not taken into account in deciding the appeal.⁶
7. Prior to the hearing on the provisional detention appeal of Khieu Samphan, scheduled for 23 April 2008, it was conveyed by email to the lawyer for the Civil Party Theory Chan Seng, Ny Chandy, that the Pre-Trial Chamber was of the view that only the lawyers for the civil parties may make submissions and that it was not anticipated that his client would be permitted to make submissions herself. The lawyer acknowledged receipt of the correspondence of the Pre-Trial Chamber prior to the hearing.
8. During the hearing on the provisional detention appeal of Khieu Samphan, the Civil Party Theory Chan Seng began to address the Chamber in person but was interrupted by the judges who asked the other Parties if they had any objection.⁷ The Civil Party made clear that she wanted to make one remark. Neither the Co-Lawyers for the Charged Person nor the Co-Prosecutors objected. The Pre-Trial Chamber permitted the Civil Party to make her remark.
9. Prior to the hearing on the provisional detention appeal of Ieng Thirith, scheduled for 21 May 2008, the Pre-Trial Chamber stated its view that only the lawyers for the Civil Parties were permitted to make oral observations. In its “Directions on Civil Party Oral Submissions During the Hearing of the Appeal against Provisional Detention Order” of 20 May 2008,⁸ (“Directions on Civil Party Oral Submissions”), the Pre-Trial Chamber found that “in the interests of ensuring expeditious proceedings and relevant submissions, and to avoid disruptions to the hearing”⁹ it was appropriate to issue further directions to the Civil Parties participating in the appeal. The Pre-Trial Chamber cited Internal Rules 23(7), 77(4) and 77(10) which refer to the participation by civil parties through their lawyers, and noted with reference to fair trial principles that the Defence should be aware of the contents of the civil parties’ oral submissions in advance of the hearing. In addition, the Pre-Trial Chamber took into consideration the technical nature of the written pleadings of all Parties. The Pre-Trial Chamber

⁵ Decision on Appeal against Provisional Detention Order of NUON Chea, 20 March 2008, C11/54 (“Decision on Nuon Chea’s Provisional Detention Appeal”).

⁶ Decision on Nuon Chea’s Provisional Detention Appeal, para. 6.

⁷ Note that this hearing was held *in camera*.

⁸ Directions on Civil Party Oral Submissions during the Hearing of the Appeal against Provisional Detention Order, 20 May 2008, C20/I/21 (“Directions on Civil Party Oral Submissions”).

⁹ Directions on Civil Party Oral Submissions, para. 1.



therefore found that the Internal Rules should be read to provide that Civil Parties who have elected to be represented by a lawyer shall make their brief observations related to the appeal through their lawyers.

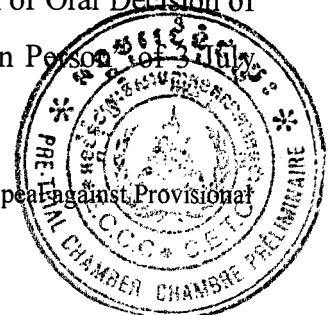
10. The Civil Party Theory Chan Seng was not present at the hearing on the provisional detention appeal of Ieng Thirith and was represented by her lawyer.
11. Prior to the hearing on the provisional detention appeal of Ieng Sary, scheduled for 30 June 2008, the Pre-Trial Chamber received the "Civil Party Co-Lawyers' General Observations" of 16 June 2008 ("Observations").¹⁰ In these Observations, the Co-Lawyers submitted that the Pre-Trial Chamber's Directions on Civil Party Oral Submissions discriminated against the Civil Parties with respect to their procedural rights to participate in proceedings. In its "Decision on Admissibility of Civil Party General Observations" of 24 June 2008,¹¹ the Pre-Trial Chamber stated that it may issue such procedural directions as it deems appropriate to manage the proceedings and that these directions are not open to appeal but may be open to reconsideration if new or particular circumstances are presented. The Chamber found that the Observations did not raise specific arguments for a reconsideration of the Directions on Civil Party Oral Submissions and that they were inadmissible in this respect.
12. At the commencement of the hearing on the provisional detention appeal of Ieng Sary on 30 June 2008, the lawyers for the Civil Parties again raised the issue of civil parties being permitted to speak in person as a preliminary matter. In the "Decision on Preliminary Matters raised by the Lawyers for the Civil Parties in Ieng Sary's Appeal against Provisional Detention Order" of 1 July 2008,¹² the Pre-Trial Chamber stated: "Previously, the Pre-Trial Chamber directed that a Civil Party is not permitted to speak in person and reasoned this by reference to Internal Rule 77(10). No new arguments have been raised which would lead to other findings of a general nature".¹³
13. Notwithstanding this decision, on 1 July 2008, the international co-lawyer representing certain Civil Parties indicated that Civil Party Theory Chan Seng would speak in person on the issue of *ne bis in idem*. The Pre-Trial Chamber was advised that the Civil Party Theory Chan Seng had dismissed her lawyer. In an oral decision which was later reduced to writing and published as the "Written Version of Oral Decision of 1 July 2008 on the Civil Party's Request to Address the Court in Person"¹⁴

¹⁰ Civil Party Co-Lawyers' General Observations, 16 June 2008, C22/I/38.

¹¹ Decision on Admissibility of Civil Party General Observations, 24 June 2008, C22/I/41.

¹² Decision on Preliminary Matters raised by the Lawyers for the Civil Parties in Ieng Sary's Appeal against Provisional Detention Order, 1 July 2008, C22/I/46 ("Decision on Preliminary Matters").

¹³ Decision on Preliminary Matters, para. 8.



2008¹⁴ (“Decision on Request to Address the Court in Person”), a majority of the Pre-Trial Chamber ruled that the Civil Party was not permitted to address the Court in person. The majority stated: “The system of the Internal Rules is clear. Specific provisions are contained in the Internal Rules for the pre-trial phase regarding the Civil Parties and their lawyers. Internal Rule 77(10) prescribes that only lawyers for civil parties have the right to make brief oral observations during pre-trial appeals.”¹⁵ Judge Rowan Downing appended a dissenting opinion, stating that there appeared to be a conflict between Internal Rules 23 and 77(10). In this particular instance, where the Civil Party had dismissed her lawyer, Judge Downing would have been prepared to allow her to address the Court on the jurisdictional issues, since one possible effect of a decision on the appeal could be the extinguishment of the right to bring a claim against the Charged Person.¹⁶

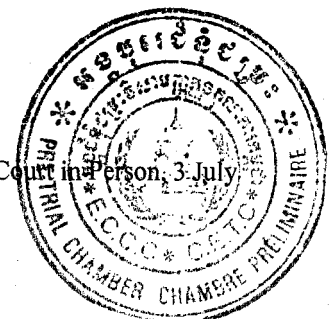
II. THE APPLICATION FOR RECONSIDERATION

14. In her Application for Reconsideration, the Civil Party Theory Chan Seng requests a reconsideration of the Decision on Request to Address the Court in Person on the basis that the Chamber had an incomplete factual record when it made this decision. She indicates that in her letter and Power of Attorney asking the Co-Investigating Judges to recognize Ny Chandy as her lawyer, she expressly stated that she would like to represent herself and/or that her lawyer could represent her at all stages of the legal proceedings. She notes that she dismissed her lawyer on grounds of ineffective representation.
15. The Civil Party Theory Chan Seng further makes reference to the fact that she was permitted to address the Pre-Trial Chamber in person in the Nuon Chea and Khieu Samphan appeal hearings and assures the Chamber of the relevance of any submissions. In addition, she relies upon the views expressed in the dissenting opinion of Judge Downing.

¹⁴ Written Version of Oral Decision of 1 July 2008 on the Civil Party’s Request to Address the Court in Person, 3 July 2008, C22/I/54 (“Decision on Request to Address the Court in Person”), 3 July 2008

¹⁵ Decision on Request to Address the Court in Person, para. 3.

¹⁶ Decision on Request to Address the Court in Person, page 3.



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III. FURTHER DIRECTIONS OF THE PRE-TRIAL CHAMBER

16. On 8 July 2008, the Pre-Trial Chamber permitted the other Parties to respond to the Application for Reconsideration.¹⁷
17. On 14 July 2008, after receiving a letter on behalf of three unrepresented Civil Parties in the Co-Investigating Judges' Case File 001, the Pre-Trial Chamber, recognising the potential impact of its decision on the Application for Reconsideration on as yet unrepresented Civil Parties, opened the opportunity to file submissions to those Civil Parties (or potential Civil Parties) as well as to the other Charged Persons.¹⁸
18. Responses were received by the Co-Prosecutors,¹⁹ jointly by the other Civil Parties involved in the Charged Person Ieng Sary's provisional detention appeal²⁰, and jointly by three unrepresented Civil Parties in Case File 001.²¹ No submissions were received on behalf of the Charged Person Ieng Sary or any other Charged Person.
19. On 18 July 2008, the Civil Party Theary Chan Seng filed an "Application for Declarative Relief for Civil Party to Speak in Person, not for Re-Hearing".²² This Application was found to be inadmissible by the Pre-Trial Chamber²³ on the basis that it set out extensive arguments in support of the Application for Reconsideration and that: "Affording other parties the opportunity to respond may not be read as an invitation to the moving party to present a new application on the issue already under consideration by the Chamber or additional arguments in support of the Original Application".²⁴

IV. SUBMISSIONS OF THE PARTIES IN RESPONSE

20. The co-lawyers for the Civil Parties involved in the Charged Person's provisional detention appeal submit that the Application for Reconsideration should be read as seeking a declaratory decision on civil party participation rights before the Pre-Trial

¹⁷ Directions to Parties concerning Application for Reconsideration of Civil Party's Right to Address the Chamber, 8 July 2008, C22/I/56, and CORRIGENDUM to Directions to Parties concerning Application for Reconsideration of Civil Party's Right to Address the Chamber, 9 July 2008, C22/I/58.

¹⁸ Further Directions concerning Application for Reconsideration of Civil Party's Right to Address the Chamber, 14 July 2008, C22/I/59.

¹⁹ Co-Prosecutors' Response to an Application for Reconsideration of the Pre-Trial Chamber's Decision regarding a Civil Party's Right of Audience, 17 July 2008, C22/I/61.

²⁰ Joint Civil Parties' Co-Lawyers' Observations on Application for Reconsideration of Civil Party's Right to Address the Chamber, 17 July 2008, C22/I/60.

²¹ Response of Three Unrepresented Civil Parties to the Application for Reconsideration of Civil Party's Right to Address the Chamber, 20 July 2008, C22/I/63.

²² Application for Declarative Relief for Civil Party to Speak in Person, Not for Re-Hearing, 17 July 2008, C22/I/62.

²³ Decision on Admissibility of Application for Declarative Relief for Civil Party to Speak in Person, Not for Re-Hearing, 22 July 2008, C22/I/64 ("Decision on Admissibility of Application for Declarative Relief").

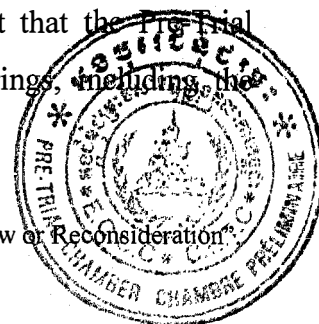
²⁴ Decision on Admissibility of Application for Declarative Relief, para. 4.



Chamber rather than a reopening of the hearing. They argue that the Pre-Trial Chamber adopted a highly restrictive interpretation of Internal Rule 77(10) which is inconsistent with the interpretive method proposed by other Internal Rules and does not recognise any shortcomings in the drafting of Rule 77(10). An analogy is drawn with the ability of the Charged Person to make a statement. The co-lawyers note that Rule 23(7) refers to the right of a civil party to be represented by a lawyer rather than an obligation to have a lawyer. Such an obligation, it is argued, would be unjust in the absence of funds for legal representation being provided by the ECCC. The co-lawyers submit that choosing to be represented does not imply a waiver of the right to speak personally, as legal representation was intended by the drafters of the Internal Rules to be an improvement of the civil parties' legal status. The lawyers urge the Pre-Trial Chamber to adopt a systematic and teleological interpretation of the Rules having reference also to Internal Rule 21(1). Finally, the co-lawyers note that the time regulations imposed during hearings mean that allowing civil parties to speak in person will not result in any delay to the proceedings.

21. The Co-Prosecutors argue, with reference to international jurisprudence on the question of reconsideration or review of previous decisions, in particular the *Barayagwiza* case,²⁵ that the test for reconsideration is not satisfied and the Application for Reconsideration should be dismissed. The Co-Prosecutors make further arguments related to the right to self-representation and the limitations to this right, stating that the Court has the power to permit a defendant to participate in person or to order that a case be conducted entirely by the lawyer, depending on the circumstances. According to the Co-Prosecutors, the jurisprudence on self-representation by defendants may be instructive in determining the rights of civil parties. The Co-Prosecutors emphasise that the Chamber should regulate the participation of civil parties, including the right to address the Chamber in person, so as to strike a judicious balance between the rights of potentially numerous victims to participate meaningfully in the proceedings and the right of the defendants to fair and expeditious proceedings. They note that any contradiction between Internal Rules 23(7) and 77(10) should be resolved in favour of the participation of a civil party. Finally, the Co-Prosecutors submit that the facts of the Application for Reconsideration do not call for a reopening of the hearing but that the Pre-Trial Chamber may consider laying down guidelines for future hearings, including the

²⁵ *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, "Decision on Prosecutor's Request for Review or Reconsideration", 31 March 2000.



regulated right of a legitimately unrepresented civil party to address the Chamber in person.

22. The unrepresented Civil Parties submit that the Application for Reconsideration should be granted and the hearing reopened so that the Civil Party Theory Chan Seng may be heard. They argue that Internal Rule 23(1)(a), as supported by Internal Rule 23(8), does not require participation to occur through a legal representative and that the Internal Rules impliedly permit civil parties to elect to represent themselves. Noting that Internal Rule 77(10) refers to brief observations by lawyers for the parties, the unrepresented Civil Parties submit that as parties to the proceedings, they must be capable of exercising all functions accorded to the other parties, even if unrepresented. The unrepresented Civil Parties note that the Cambodian Criminal Procedure Code mirrors the Internal Rules in the sense of providing that brief oral submissions may be made by the lawyers at the pre-trial stage, while expressly providing for oral submissions by civil parties (whether or not represented) at the trial stage. It is noted that neither the Cambodian nor the French procedural code addresses the issue of unrepresented civil parties at the pre-trial stage. The unrepresented Civil Parties submit that represented civil parties should be precluded from making oral submissions in person in pre-trial appeals in accordance with the intentions of the drafters of the Internal Rules, and that this does not violate their right to present their views and concerns or encourage them to dismiss their lawyers in order to speak in person. However, the unrepresented Civil Parties argue that a correct reading of the Internal Rules accords unrepresented civil parties (who may be unrepresented through lack of funds rather than by choice) the same rights as other civil parties. The unrepresented Civil Parties urge the Pre-Trial Chamber to compensate for guaranteeing the rights of increasing numbers of civil parties by managing the proceedings robustly to ensure their expeditious conduct.

23. While the Co-Lawyers for the Charged Person did not file a response, the international Co-Lawyer submitted during the hearing that a provisional detention appeal was not the place for civil parties to give testimony. He argued at a later stage that although the Defence fully supported the rights of civil parties to be heard and represented, the system of the Internal Rules was designed to allow civil parties, through legal representatives, to pool their resources.

24. The Pre-Trial Chamber notes that the concerns raised by unrepresented civil parties will be addressed in a separate Direction.



V. THE APPLICATION FOR RECONSIDERATION

25. The Application for Reconsideration may only succeed if there is a legitimate basis for the Pre-Trial Chamber to reconsider its previous decisions.²⁶ The Appeals Chamber of the ICTY has held that a Chamber may “always reconsider a decision it has previously made, not only because of a change of circumstances but also where it is realised that the previous decision was erroneous or that it has caused an injustice.”²⁷ This has been described as an inherent power²⁸ and is particularly important for a judicial body of last resort like the Pre-Trial Chamber. A change of circumstances may include new facts or arguments.²⁹ The standard for reconsideration has also been described as follows: “a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases ‘if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice.’”³⁰
26. The Pre-Trial Chamber finds that no new facts, arguments or change of circumstances have been put forward in the Application for Reconsideration. The Power of Attorney Letter of 30 January 2008 and Lawyer’s Recognition Decision of 31 January 2008 attached to the Application are not new and were already in the Case File well before the Pre-Trial Chamber’s Decision on Request to Address the Court in Person.
27. Further, the Civil Party Theary Chan Seng has not demonstrated that the decision has, in its effects, caused her an unexpected result leading to an injustice.
28. The existence of a Dissenting Opinion does not in itself justify reconsideration. Neither does the fact that the Civil Party prefers the reasoning contained in the Dissenting Opinion.

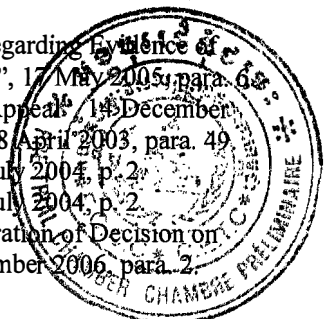
²⁶ *Prosecutor v. Milošević*, IT-02-54-T, “Decision on Prosecution Motion for Reconsideration regarding Evidence of Defence Witnesses Mitar Balevic, Vladislav Jovanovic, Vukasin Andric, and Dobre Aleksovski”, 17 May 2005, para. 63.

²⁷ *Prosecutor v. Galić*, IT-98-29-AR73, “Decision on Application by Prosecution for Leave to Appeal”, 13 December 2001, para. 13, and *Prosecutor v. Mucić et al.*, IT-96-21-Abis, “Judgment on Sentence Appeal”, 8 April 2003, para. 49.

²⁸ *Prosecutor v. Galić*, IT-98-29-A, “Decision on Defence’s Request for Reconsideration”, 16 July 2004, p. 2.

²⁹ *Prosecutor v. Galić*, IT-98-29-A, “Decision on Defence’s Request for Reconsideration”, 16 July 2004, p. 2.

³⁰ *Prosecutor v. Milutinović et al.*, IT-05-87-T, “Decision on Prosecution Motion for Reconsideration of Decision on Prosecution Motion for Additional Trial-Related Protective Measure for Witness K56”, 9 November 2006, para. 2.



THEREFORE, THE PRE-TRIAL CHAMBER HEREBY

- (1) Denies the Application for Reconsideration on Civil Party's Right to Address the Pre-Trial Chamber filed by the Civil Party Theary Chan Seng.
- (2) Decides that the hearing will not be reopened. ni

Phnom Penh, 28 August 2008

President of the Pre-Trial Chamber



PRAK KIMSAN