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Philipps Universität Marburg

Prof. Dr. Christoph Safferling, LL.M., Philipps-Universität - 35032 Marburg

Faculty of Law
Institute for Criminal Sciences
Research and Documentation Center for War Crimes Trials (ICWC)
Prof. Dr. Christoph Safferling, LL.M.
Whitney R. Harris International Law Fellow
Robert H. Jackson Center, Jamestown, N.Y.

E-Mail: christoph.safferling@staff.uni-marburg.de
Sek.: Mrs. Ziegler
Tel.: + 49 (0) 6421 28-23120
Fax: + 49 (0) 6421 28-21728
E-Mail: vstr@staff.uni-marburg.de
Anschrift: Universitätsstraße 6
35032 Marburg
Web: www.uni-marburg.de/fb01
Az.:

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

On 12 February 2008 the Pre-Trial Chamber in the Extraordinary Chambers in the Courts of Cambodia issued a Public Order on the Filing of Submissions on the Issue of Civil Party Participation in Appeals Against Provisional Detention Order and an Invitation to *Amicus Curiae*.

In my capacity as Professor of Criminal Law, Criminal Procedure and International Law and the Director of the Research and Documentation Center for War Crimes Trials (ICWC) at the Philipps-University of Marburg, Germany, I hearby submit the following *Amicus Curiae* brief according to Rule 33 of the ECCC Internal Rules.

The question of law arising out of the above named decision of the Pre-Trial Chamber concerns the participation of civil parties, i.e. victims and their legal representatives, in the pre-trial proceedings, namely the hearing concerning the appeal against the issuance of a detention order by the Co-investigation Judge. I will address the question in general from two different angles. At

first, I want to inform the Pre-Trial Chamber on the German law in this regard (below I.). The German criminal law system is a Continental European system, and thus in principle similar to the Cambodian system. Secondly, I want to describe the proceeding before the International Criminal Law (ICC) according to the Rome Statute (below II.). Finally, I will submit a recommendation as to how to solve the question at hand, relying on general and specific grounds (below III).

I.

According to German criminal procedure a civil party to the criminal trial does not have the right to be present or submit statements of any kind during a hearing addressing pre-trial detention.

1.

The right to participate in prosecution for the victim as a civil party is laid down in parts two and three of the fifth book of the German Code of Criminal Procedure ("Strafprozessordnung")[1]. According to Section 395 (1) of the German Code of Criminal Procedure any civil party may join a public prosecution as a so-called "Nebenkläger", i.e. a private accessory prosecutor. The victim may also claim compensation before the criminal court by virtue of Section 403 of the German Code of Criminal Procedure. Section 406 g (1) of the German Code of Criminal Procedure grants the right to presence to such a private accessory prosecutor but only for the trial hearings ("Hauptverhandlung"). This right to participate does however not pertain to a pre-trial hearing concerning pre-trial detention. Such a hearing ("Haftprüfung") is foreseen in Section 118a of the German Code of Criminal Procedure, where the right to presence of the victim or his representative is not mentioned (see the decision of the District Court (Landgericht) Freiburg, 21.12.2006, 3 Qs 129/06; see also Meyer-Goßner, StPO, 50th ed. 2007, § 118 a MN 1; Boujong, in: Karlsruher Kommentar, StPO, 5. Auflage, § 118 a MN 1 i .V. m. § 115 MN 19).

[1] An English translation is available at: http://www.iuscomp.org/gla/statutes/StPO.htm

2.

The reason for this restrictive view on civil party participation is to be seen in the fact that pre-trial detention does not affect the position of the victim. It serves the goal to ensure the presence of the suspect or the accused person at trial and prevent the suspect from influencing the investigation in a negative way. Pre-trial detention might also be relevant for hindering further criminal behaviour by the suspect. This means that the main purpose of the pre-trial detention and the appeals procedure against the detention order lies in the protection of the interests of the investigation and the harbouring of the alleged perpetrator. It serves interests of justice and the efficiency of the judiciary, and does not serve private needs.

The civil party to a criminal trial, however, is a purely private person and is not called upon to protect the interests of justice or the interests of the investigation. The question of whether or not the alleged perpetrator should be detained does therefore not affect the legal position of the victim as a civil party to the prosecution (similarly: Higher Regional Court ("Oberlandesgericht") Karlsruhe, Neue Juristische Wochenschrift 1974, 658; Oberlandesgericht Frankfurt/Main, Strafverteidiger 1995, 594; Hilger in: Löwe- Rosenberg, § 114 MN 37).

In addition, the rights of the accused are severely endangered, if at the hearing pertaining to the question of pre-trial detention, a civil party is present which is not objective but is foremost interested in securing the conviction of the accused and gain monetary compensation. The right to liberty of the suspect, who still is to be presumed innocent, is too important at this stage of the trial.

3.

We can thus summarize the German position in this way that according to the German Code of Criminal Procedure neither the victim nor his or her legal representative has a right to be present or participate in the proceedings regarding pre-trial detention of the suspect.

II.

The ICC employs a different and more extensive method towards victims' participation.

1.

In Article 68 (3) the Rome Statute of the ICC this general approach is being laid down:

> "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."

This means that the ICC procedure is inclusive with a view to the interests of the victims and participation is possible, if (1) the personal interests of the victims are concerned and (2) the right of the accused and a fair and impartial trial is not being hampered.

The Rules of Procedure and Evidence foresee victims' participation at different stages; in principle, obligations to inform the victim on the prosecution arise from the earliest stage of the investigation on. Even in the phase before a prosecution can be started by virtue of Article 15 (3) Rome Statute, the prosecutor must inform the victim according to Rule 50 (3). Article 19 (3) and Rule 59 give to the victim the right to submit written statements to the Pre-Trial Chamber during the pre-trial phase as concerns the question of jurisdiction. The victim must be informed about the results of the investigation and the confirmation hearing by virtue of Rule 92. At the confirmation and trial hearings, finally, the victim has the right to be present and the right to submit statements. The right to participate actively in the hearings might however be restricted to a legal representative of the victim(s) (Rule 91). In a way, the victim's representative gains a role similar to that of a party to the trial (see Safferling, "Das Opfer völkerrechtlicher Verbrechen", in: 115 Zeitschrift für die Gesamte Strafrechtswissenschaft 352, 377 (2003) with further references). This specific role is restricted to the adversarial part of the entire proceedings, i.e. the hearings. Whenever the rights of the accused are endangered by the presence of the victims' representative the Chamber may exclude the representative.

From these general provisions the conclusion can be drawn, that the victim has a right to be informed from the very beginning of the investigation onwards. The victim also has a right to submit written statements at every stage of the proceedings. A right to active participation and to be present however is limited to the stage of the confirmation and trial hearings, which have an adversarial structure.

2.

A precise rule is missing concerning the participation in the hearing as to the pre-trial detention. The review proceeding concerning the question of pre-trial detention is laid down in Rule 118:

Rule 118

> Pre-trial detention at the seat of the Court
>
> 1. If the person surrendered to the Court makes an initial request for interim release pending trial, either upon first appearance in accordance with rule 121 or subsequently, the Pre-Trial Chamber shall decide upon the request without delay, after seeking the views of the Prosecutor.
>
> 2. The Pre-Trial Chamber shall review its ruling on the release or detention of a person in accordance with article 60, paragraph 3, at least every 120 days and may do so at any time on the request of the person or the Prosecutor.
>
> 3. After the first appearance, a request for interim release must be made in writing. The Prosecutor shall be given notice of such a request. The Pre-Trial Chamber shall decide after having received observations in writing of the Prosecutor and the detained person. The Pre-Trial Chamber may decide to hold a hearing, at the request of the Prosecutor or the detained person or on its own initiative. A hearing must be held at least once every year.

The wording of Rule 118 pertains to the Prosecutor and the detained person only. One can conclude therefore that a participation of a civil party is excluded; otherwise one would have expected that the victim be mentioned next to the Prosecutor, which is not the case.

However, the Appeals Chamber of the ICC has ruled otherwise. In the decision in the case of *Prosecutor v. Thomas Lubanga Dyilo*, Case No. 01/04-01/06 (OA7) of 13 February 2007, the Appeals Chamber has admitted victims' representative to the interlocutory appeal against the decision on interim release by the Pre-Trial Chamber according to Article 82 (1) (b) Rome Statute. The decision was founded on Article 68 (3) Rome Statute, which pertains the participation of victims at any stage of the proceedings. The Appeals Chamber held that the question of participation at the appeals stage is separate from the issue of participation at the level of first instance (ibid. para. 43). At the same time the Appeals Chamber denies any right to automatic participation of the victim. This means that the victim must at first prove a "personal interest" in the participation according to Article 68 (3) Rome Statute (ibid. para. 44), and thereby "apply" to be recognised as party to the appeals process (this is contested by Judge Sang-Hyun Song in his Separate Opinion). Even if these formal requirements were not clear from the Rome Statute and the Rules of Procedure and Evidence, in future cases the Appeals Chamber will insist on an application for leave of appeal within a time limit.

If the victim can prove "personal interests", the victim can in general participate in the appeals proceedings regarding the question of interim release of the accused (para. 54). There is no further specification as to why the victims do have "personal interests" or as to what would establish "personal interests". The Appeals Chamber furthermore saw no conflict with the rights of the accused; the issues to be discussed were strictly limited to the questions raised in the appeal's brief (para. 55).

3.

The decision of the Appeals Chamber is clearly focused on Article 68 (3) Rome Statute. The Appeals Chamber gives Article 68 (3) prevalence over Rule 118 at least as regards appeals proceedings by virtue of Article 81 (1) (b) Rome Statute. However, Article 68 (3) is a novelty to most criminal procedural systems. Through this norm victims' participation becomes a main issue for the entire prosecution process. At any stage of the proceeding, the victim may – through his or her counsel – participate in the process and thus influence the outcome not only of the entire trial but also of specific secondary questions like the decision on pre-trial detention of the alleged offender. Sadly, the Appeals Chamber did not elaborate on the danger that an excessive victims' participation can pose to the suspect; nor does the decision discuss what difference it may make whether the proceeding is purely in writing or a hearing is being held by virtue of Rule 156 (4).

In any case it must be kept in mind that the Rome Statute is a new procedural strategy with no tradition yet. The incorporation of civil party participation in an excessive way is an unusual step and does not mirror national experiences and traditions.

III.

1.

According to my view, it is not advisable to allow civil party participation in proceedings regarding pre-trial detention. As mentioned above, pre-trial detention is a matter of interests of justice (see Safferling, Towards an International Criminal Procedure (2003) 137). It is highly questionable whether victims can contribute to the issue of whether detention of the suspect is necessary to ensure the proper administration of the trial. It must furthermore be taken into ac-

count that the suspect still enjoys the right to liberty and security of person (e.g. Article 5 European Convention in Human Rights; Art. 9 International Covenant on Civil and Political Rights) and is at this early stage of the trial to be presumed innocent (e.g. Article 6 (2) European Convention on Human Rights; Article 14 (2) International Covenant on Civil and Political Rights). In substance pre-trial detention can be defined as the detention of an innocent, which can only be justified by the special interests of the community in an effective investigation of the criminal offence (see German Federal Constitutional Court (Bundesverfassungsgericht), Decision of 15 December 1965 in: Reports of the Bundesverfassungsgericht (BVerfGE) 19, 342 at 348). It is therefore necessary to have a sober and objective view on the suspect, whereas the victim is naturally biased against the charged person. The victim has an interest in securing a conviction for the accused and rightly so. At the stage of the trial, where the guilt of the accused is being determinated, the victim can act as an additional (private) prosecutor. However, the question of pre-trial detention has only a minor relation to the actual outcome of the trial.

2.

In addition, according to Rule 23 of the ECCC Internal Rules, civil party participation in the trial is clearly aiming at gaining compensation for the harm done to the victim. Under these circumstances it is even more questionable why the victim should participate in proceedings pertaining to pre-trial detention. The outcome of such a hearing has no value as regards the claim to reparation.

This view is buttressed by the ECCC Internal Rules. Rule 81 regarding pre-trial detention does not mention any Civil Party participation. According to Rule 82 Civil Party participation is limited to the trial. As regards an appeals proceeding, the admissibility of a Civil Party-appeal according to Rule 105 (1) (c) is limited to interests according to Rule 23, and in addition, is only admissible in the case of an appeal by the Co-prosecutor. This shows that the Civil Party does not have the same standing as the defendant or the prosecutor.

Above all the appeal against the detention order is regulated in an entirely different way from an "ordinary" appeal against the conviction. In Rule 63 (4) the appeal against the detention order issued by the Co-investigating Judge is directed to the Pre-Trial Chamber. Thus, Rule 109, which allows participation in the appeals proceedings for all parties, i.e. including Civil Parties, is not applicable at this stage.

3.

The aim of any criminal trial is the determination of the guilt of the accused; pre-trial detention is merely an instrument to allow such a trial to go ahead in the presence of the person charged. At the ICC the aim of the trial is also to give to the victims a forum to bring their suffering to public attention. This is a new approach to criminal procedure, relying on the psychological hypotheses that the integration into a criminal trial process has a cathartic effect. Even if such an effect can be achieved, I cannot see how a civil party participation can contribute to the hearing on interim release for the accused. I would thus not allow civil parties to the hearing on provisional detention.

Marburg, 20 February 2008

Christoph Safferling