

**BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC

Party Filing: Civil Party Lead Co-Lawyers

Filed to: Trial Chamber

Original Language: English

Date of Document: 8 October 2014

CLASSIFICATION

Classification of the document:

Public

suggested by the filing party:

សាធារណៈ/Public

Classification by Chamber:

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:



**CIVIL PARTY LEAD CO-LAWYERS' URGENT REQUEST TO MAKE OPENING
REMARKS ON BEHALF OF THE CONSOLIDATED GROUP OF CIVIL PARTIES**

Filed by:

Lead Co-Lawyers for Civil Parties

PICH Ang
Marie GUIRAUD

Co-Lawyers for Civil Parties

CHET Vanly
HONG Kim Suon
KIM Mengkhy
LOR Chunthy
MOCH Sovannary
SIN Soworn
SAM Sokong
VEN Pov
TY Srinna
Emmanuel ALTIT
Olivier BAHOUgne
Laure DESFORGES

Before:

Trial Chamber

Judge NIL Nonn, President

Judge YOU Ottara

Judge YA Sokhan

Judge Jean-Marc LAVERGNE

Judge Claudia FENZ

Distribution to:

Office of the Co-Prosecutors

CHEA Leang
Nicholas KOUMJIAN
YET Chakriya
William SMITH

The Accused:

Ferdinand DJAMMEN NZEPA
Elodie DULAC
Isabelle DURAND
Françoise GAUTRY
Emmanuel JACOMY
Martine JACQUIN
Michael Y. LIU
Daniel LOSQ
Christine MARTINEAU
Lyma NGUYEN
Mahesh RAI
Julien RIVET
Nushin SARKARATI
Beini YE

KHIEU Samphan
NUON Chea

Co-Lawyers for the Defence:

SON Arun
Victor KOPPE

KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN

Civil Party Lawyers:

I. INTRODUCTION

1. The Civil Party Lead Co-Lawyers (“Lead Co-Lawyers”) seek *de novo* consideration of their request to make brief opening remarks at the start of the substantive hearings. The Lead Co-Lawyers assert that consideration of their request on this matter is warranted, given that there has been a change in circumstances, and a denial of this request would pose a substantial prejudice to the interests of the consolidated group of civil parties which could not be effectively remedied through appeal.
2. There is a firm legal basis that supports the Lead Co-Lawyers’ request and provides a foundation upon which to grant it, grounded primarily in the spirit of Internal Rules 85 and the Civil Parties’ distinct role and interests as a rights-bearing party to the proceedings. Accordingly, the Lead Co-lawyers request the President and the Chamber to provide them the opportunity to make brief (45 minutes) preliminary remarks on 17 October 2014 on:
 - a) The composition of the consolidated group of civil parties and the various interests the Lead Co-Lawyers are tasked to represent in case 002/02;
 - b) The manner in which Civil Parties intend to participate in the criminal proceedings by supporting the Prosecution, whilst bearing in mind the need for an expeditious trial within the particular context of the Extraordinary Chambers in the Courts of Cambodia (ECCC); and
 - c) The unique perspective and contributions the Civil Parties intend to bring to the substantive hearings in case 002/02.

II. PROCEDURAL HISTORY

3. On 16 March 2009, group 2 of the civil party lawyers in Case 001 sought that the Trial Chamber grant them the opportunity to make an opening statement on behalf of their civil parties.¹
4. On 27 March 2009, the Trial Chamber denied this request primarily on the grounds that no such right existed in the Cambodian Code of Criminal Procedure or the

¹ Urgent Request of Co-Lawyers for Civil Parties concerning their right to submit an Opening Statement during the Substantive Hearing, Case 001/18-07-2007-ECCC/TC, **E23**, 16 March 2009.

Internal Rules and that the Civil Parties do not have an autonomous role to play at the opening stage of trial proceedings.²

5. On 2 November 2011, the Civil Party Lead Co-Lawyers in Case 002/01 requested the opportunity to make brief preliminary remarks on behalf of civil parties—remarks which they submitted would give voice to the Civil Parties to express their “views and concerns” in the proceedings.³
6. On 15 November 2011, the Trial Chamber denied this request on the ground that “there is no legal basis in the ECCC legal framework for granting the Co-Lawyers’ request.”⁴
7. On 22 November 2011, at the start of the substantive hearings in Case 002/01, the national Lead Co-Lawyer, Mr. Ang Pich, made an oral request to the Trial Chamber seeking the opportunity for Civil Parties to make a statement.⁵ In the same hearings, the Nuon Chea Defense expressed its support for the Civil Parties’ request.⁶ The Chamber denied the request.⁷
8. On 19 September 2014, the Trial Chamber notified the Parties that the initial segment of the evidentiary hearings in Case 002/02 would commence on 17 October 2014 and that, pursuant to Internal Rule 89*bis*, the Co-Prosecutors would be afforded an opportunity to make a brief opening statement and the Accused and/or their lawyers, a brief response.⁸

III. DISCUSSION

9. The Lead Co-Lawyers incorporate by reference the relevant arguments contained in their previous filings on opening remarks.⁹

² Decision on the Request of the Co-Lawyers for Civil Parties Group 2 to Make an Opening Statement during the Substantive Hearing, Case 001/18-07-2007-ECCC/TC, **E23/4**, 27 March 2009.

³ Lead Co-Lawyers’ and Civil Party Lawyers’ Request to Make Brief Preliminary Remarks on Behalf of Civil Parties after Co-Prosecutors’ Opening Statement, Case 002/19-09-2007-ECCC/TC, **E131/4**, 2 November 2011, para. 17 (hereinafter “Civil Parties’ Second Request”).

⁴ Trial Chamber Memorandum: Response to Lead Co-Lawyers’ and Civil Party Lawyers’ Request to Make [sic] Brief Preliminary Remarks on Behalf of Civil Parties (E131/4), **E131/4/1**, 15 November 2011.

⁵ Trial Transcript, Case 002/19-09-2007-ECCC/TC, **E1/14.1**, 22 November 2011, p. 68-69.

⁶ *Ibid.*, p. 76 (stating “we think [the civil parties] [...] should have been given the opportunity to speak even for a couple of minutes.”).

⁷ *Ibid.*, p. 69-70.

⁸ Scheduling Order for Hearing on the Substance in Case 002/0, Case 002/19-09-2007-ECCC/TC, **E316**, 19 September 2014 (hereinafter “Scheduling Order”).

⁹ See Civil Parties’ Second Request, paras. 24 and footnote 13.

A. *De novo consideration of the Civil Parties' request for brief opening remarks is admissible on the basis that there has been a change in circumstances.*

10. The Trial Chamber has ruled that it will not entertain motions for reconsideration, but “may reconsider an issue anew where justified by new circumstances.”¹⁰ Since the issuance of the Trial Chamber’s decision on the Civil Parties’ request to make brief preliminary remarks, the Chamber has issued several decisions on which clarify the nature and composition of the consolidated group of civil parties in Case 002.¹¹ Furthermore, the Trial Chamber has planned for an opening hearing for Case 002/02,¹² and the Supreme Court Chamber has given clear indication that this trial constitutes a new trial in the severed Case 002.¹³
11. In light of these developments, the Civil Parties submit herein, that in order to ensure the meaningful participation of civil parties in these proceedings and honor the fundamental principles of transparency, information sharing and victim rights, it is essential that the Lead Co-Lawyers have the opportunity to offer brief opening remarks pertaining to the specific roles and interests of civil parties in the Case 002/02 proceedings.

B. *De novo consideration the Civil Party's request for brief opening remarks is further warranted in order to avoid incurable prejudice to the Civil Parties.*

12. The Chamber’s decisions denying Civil Party requests for the right to make brief opening remarks pose a substantial prejudice to the interests of the consolidated group of civil parties which cannot be remedied through appeal. As developed in the instant motion, civil parties have a very particular role and interests in proceedings before the ECCC¹⁴—neither of which are fully encompassed in the interests advanced and role carried out by the Co-Prosecutors.

¹⁰ See e.g. Decision on Khieu Samphan’s Request to Postpone the Commencement of Case 002/02, Case 002/19-09-2007-ECCC/TC, **E314/5**, 19 September 2014, para. 5; and Decision on Ieng Sary’s Request for Reconsideration of the Trial Chamber Decision on the Accused’s Fitness to Stand Trial and Supplemental Request, Case 002/19-09-2007-ECCC/TC, **E238/11/1**, 19 December 2012, para. 7.

¹¹ Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, Case 002/19-09-2007-ECCC/TC, **E284**, 26 April 2013, para. 158.

¹² See Scheduling Order, p. 2.

¹³ Decision on Khieu Samphan’s Immediate Appeal against the Trial Chamber’s Decision on Additional Severance of Case 002 and Scope of Case 002/02, Case 002/19-09-2007-ECCC/TC, **E301/9/1/1/3**, 29 July 2014, para. 42.

¹⁴ See e.g., *infra*. at paras. 18-19 and 24.

13. Furthermore, the Internal Rules do not provide for an appeal on this matter at this stage of proceedings¹⁵ and limit the Civil Parties right of appeal after the judgment is rendered.¹⁶ Even if the Civil Parties were able to lodge an appeal after the judgment were rendered, there would be no means by which to effectively remedy the prejudice already occurred, as the opportunity to make preliminary remarks would have been irrevocably lost. Consequently, the Civil Parties submit that it is incumbent upon the Trial Chamber to give *de novo* consideration to this matter and render a decision prior to the start of the substantive hearings in Case 002/02, in order to avoid an irreparable prejudice to the civil parties to these proceedings.

C. *Civil parties are victims whose rights must be respected throughout proceedings before the ECCC.*

14. As defined in the glossary to the Internal Rules, the term “Civil Party” refers to a “*victim* whose application to become a Civil Party has been declared admissible by the Co-Investigating Judges or the Pre-Trial Chamber in accordance with these IRs.”¹⁷

15. Internal Rule 21(1) provides that “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*.”¹⁸ Internal Rule 21(1)(c) further provides that “the ECCC shall ensure that [*victims*] [...] rights are respected throughout the proceedings.”¹⁹

D. *The Civil Parties are a full party to the proceedings whose rights must be taken into account and protected by the Trial Chamber.*

16. As stated in the glossary to the Internal Rules, “Party refers to the Co-Prosecutors, the Charged Person/Accused and the Civil Parties.”²⁰ Indeed, at the ECCC, Civil Parties are on an equal footing with the Co-Prosecutors and the Accused, and they enjoy a broad

¹⁵ Rule 104, Internal Rules (Rev. 8), Extraordinary Chambers in the Courts of Cambodia, 3 August 2011, (hereinafter “Internal Rules”) (stipulating that appeals at the trial stage may only be made on the following matters: “a) decisions which have the effect of terminating the proceedings; b) decisions on detention and bail under Rule 82; c) decisions on protective measures under Rule 29(4)(c); and d) decisions on interference with the administration of justice under Rule 35(6)” and that all others will be dealt with after the rendering of the Trial Chamber judgment.).

¹⁶ Internal Rule 105 (conditioning the Civil Parties’ right of appeal to the Trial Chamber judgment (on matters other than reparation) on whether the Prosecutors lodge an appeal).

¹⁷ Internal Rules, p. 80 (emphasis added).

¹⁸ Internal Rule 21 (emphasis added).

¹⁹ Internal Rule 21(1)(c) (emphasis added).

²⁰ Glossary, Internal Rules, p. 81 (emphasis added).

range of the procedural rights which attach to party status, including *inter alia*: the right to present evidence,²¹ to propose and examine witnesses, experts and civil parties²² and to make closing statements.²³

17. Furthermore, Internal Rule 21(1)(a) sets out the positive obligation of the Trial Chamber to ensure that “ECCC proceedings [are] fair and adversarial and preserve a balance between the *rights of the parties*.”²⁴

E. The unique role and contribution of Civil Parties in proceedings necessitates that they have the opportunity to make brief opening remarks.

18. Whereas the Prosecution’s role is to exercise public action by the “prosecution of crimes within the jurisdiction of the ECCC,”²⁵ the Civil Parties’ role in ECCC proceedings is to “participate in criminal proceedings [...] by supporting the prosecution” and to seek reparations.²⁶ Concerning the Civil Parties’ role to “support,” it must be understood in the sense of supporting the act of prosecuting (i.e. public action), rather than the Prosecutors themselves.²⁷ As discussed below, this is the only reasonable understanding of the rule in light of the Civil Party Lead Co-Lawyers mandate vis-à-vis civil party interests.

19. The Civil Party Lead Co-Lawyers are charged with the *specific* mandate to “represent the interests of the consolidated group of Civil Parties,”²⁸ in contrast to the Co-Prosecutors, who are charged to represent the “*general* interests of society”—a group within which victims are understood to be included, among all others.²⁹ A point the Trial Chamber itself makes clear in noting that “[a] Prosecutor represents the community, not individual or sectional interests.”³⁰ The Chamber has further acknowledged the unique nature of Civil Party action before the ECCC by

²¹ Internal Rules 80 and 87.

²² Rule 91(2).

²³ Internal Rule 94.

²⁴ Internal Rule 21(1)(a) (emphasis added).

²⁵ Internal Rule 49.

²⁶ Internal Rule 23.

²⁷ Notably, there is little room for debate when a comparison is made between the French and English versions of the rule wherein the reference is not to the office or entity charged with prosecuting, but to the act of prosecution: “soutien à l’accusation.” *Ibid.*

²⁸ Internal Rule 12ter(5)(a).

²⁹ Article 4, Cambodian Code of Criminal Procedure, 2007 (emphasis added). *See also*, Decision on Motion for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing, Case 001/18-07-2007-ECCC/TC, E72/3, 27 March 2014, para. 20.

³⁰ *Ibid.*, para. 21.

distinguishing their role from that of the Prosecution in noting “[e]ach party has a distinct role, in keeping with their particular interests and responsibilities at trial.”³¹

20. Accordingly, the Lead Co-Lawyers’ request does not seek to obtain the same right to opening statements that have been afforded the other parties, nor does it seek to usurp or duplicate the role of the prosecution. The proposed content of their remarks, as described in the present motion, detail the unique objectives and contribution to the proceedings that they foresee their remarks will achieve. The Lead Co-Lawyers seek to secure an opportunity to speak at the beginning of trial precisely because the Civil Parties play a distinct role and have interests in these proceedings that go beyond the “general interests” of the public, instead being focused on the specific interests of civil parties.

F. The dual nature of Civil Party action before the ECCC requires that the Civil Parties be granted the opportunity to make brief opening remarks.

21. As stated in Internal Rule 23(1), the purpose of civil party action before the ECCC is to: “a) *Participate* in criminal proceedings [...] by supporting the prosecution; **and** b) Seek collective and moral reparations [...]”³² Though the Lead Co-Lawyers have had the opportunity to provide an initial specification of the substance of the reparation awards they intend to seek, in denying them the opportunity to make opening remarks, they are also denied the opportunity to explain the way in which they intend to participate in criminal proceedings in case 002/02—the other, equally important prong of their two-fold mandate before the ECCC.

G. Civil Parties, victims and the general public enjoy the fundamental right to be informed about the proceedings and civil party action in a way that explicitly that address their particular interests.

22. Internal Rule 21 sets out as fundamental principles that the legal certainty and *transparency* of the proceedings will be guaranteed³³ and that the “ECCC shall ensure that victims are kept *informed* [...] throughout the proceedings”.³⁴ The Chamber itself has emphasized these principles through *sui generis* mechanisms such as the “key documents hearings,” which the Chamber has justified on the basis of providing a

³¹ See e.g. *Ibid.*, para. 27.

³² Internal Rule 23(1) (emphasis added).

³³ Internal Rule 21(1) (emphasis added).

³⁴ Internal Rule 21(1)(c) (emphasis added).

“greater measure of public accountability” to the trial proceedings.³⁵ Article 34 *new* of the Law on the Establishment of the ECCC further recalls that the “trials shall be public and open to representatives of foreign States, of the Secretary-General of the United Nations, of the media and of national and international non-government organizations.”³⁶ Moreover, as recalled on the ECCC website, the Court itself asserts that “[t]hese trials are for the people of Cambodia.”³⁷

23. Taken together, the Lead Co-Lawyers contend that an important underlying rationale of these principles and practices is to maximize the positive impact of the ECCC and its proceedings on the public by rendering fair and efficient justice, safeguarding the legitimacy of the proceedings and maximizing the restorative benefits³⁸ of the criminal justice process.
24. Moreover, the Lead Co-Lawyers submit that an indispensable aspect of promoting transparency, informing victims and fully realizing the potential of victim participation in these proceedings is to ensure that the actors specifically tasked with representing civil parties—the Lead Co-Lawyers—are permitted to inform them and the general public of the manner in which they envisage civil party participation in the trial, the interests that they represent and the perspective that they bring to the proceedings.
25. By granting the Lead Co-Lawyers an opportunity to intervene briefly, at what is one of the most important and most closely-followed moments in the trial proceedings, the Chamber would also send a clear message to the general public, the civil parties and victims themselves that victim experiences are acknowledged and that their participation is valued. For example, the messages conveyed throughout the proceedings, beginning with the presence or absence of civil party and victim concerns at the start of trial, affects their perceptions of the value placed on their participation in the proceedings and, consequently, what reparative benefit the proceedings might have

³⁵ Trial Chamber Memorandum: Scheduling of Hearing on Oral Evidence (13-16 February 2012), Case 002/19-09-2007-ECCC/TC, **E170**, 9 February 2012, para. 2.

³⁶ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (as amended), 27 October 2004.

³⁷ Available at: <http://www.eccc.gov.kh/cn/faq/who-can-attend-trials> (accessed 26 September 2014).

³⁸ The foundations for the restorative aspect of the ECCC’s mission can be found both in the inclusion of reparations within the Court’s mandate and in the preamble to the Agreement, recognizing “the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and *national reconciliation*, stability, peace and security.” See Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003, p. 1, Resolution 57/228B of the United Nations General Assembly (emphasis added).

for them or society.³⁹ These perceptions of the Court's valorization of their concerns also impacts whether civil parties, victims and the general public perceive the proceedings as being legitimate.

H. The spirit of Internal Rule 85 suggests that the President, in consultation with the other judges of the Trial Chamber, has discretionary power to grant the Lead Co-Lawyers request.

26. Internal Rule 85 provides the President of the Trial Chamber substantial discretion in the conduct of hearings. This includes the obligation to “guarantee the free exercise of defence rights” and the power, in consultation with the other judges, to “exclude any proceedings that unnecessarily delay the trial, and are not conducive to ascertaining the truth.”⁴⁰ The Lead Co-Lawyers argue that the spirit of this rule, which grants ample discretion to the Chamber to oversee the conduct of hearings and emphasizes the relationship between the conduct of hearings and the ascertainment of the truth, provides an adequate foundation upon which the Chamber may grant their request.

IV. CONCLUSION

27. For the reasons outlined above, the Lead Co-Lawyers submit that the interests of justice require that they be granted the opportunity to make brief opening remarks. In granting this request, the President of the Trial Chamber would:

- a) Safeguard the interests of civil parties and victims and make sure their rights are respected throughout the proceedings;
- b) Acknowledge that the Civil Parties are an autonomous party, distinct from the Prosecution;
- c) Allow the Civil Party Lead Co-Lawyers to highlight the duality of Civil Party action before the ECCC by outlining the way they intend to participate in the evidentiary proceedings—that is, by bringing a unique perspective and contributing to the ascertainment of the truth; and

³⁹ This follows on the principle that, particularly in the context of mass crime, reparation and restorative outcomes are achieved not just through the granting of reparation requests at the end of proceedings (assuming that point is reached), but also through the criminal proceedings themselves. This is also a highly salient rationale for the substantive participation of victims in the proceedings before international criminal and international human rights courts.

⁴⁰ Internal Rule 85.

- d) Increase the legitimacy and the reparative benefit of the proceedings for the civil parties, victims and general public.

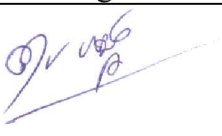
28. Finally, in the overall context of the proceedings, the time requested by the Civil Party Lead Co-Lawyers to make brief opening remarks—45 minutes—will not pose an undue delay to the expeditious administration of justice in Case 002/02.

IV. REQUEST

WHEREFORE, the Civil Parties respectfully request that the President, in consultation with the other judges of the Trial Chamber and through the exercise of his discretion founded in Internal Rule 85:

- **ADMIT** the instant request; and
- **GRANT** the Civil Party Lead Co-Lawyers request to make a brief opening remarks on the first day of the substantive hearings in Case 002/02.

Respectfully submitted,

Date	Name	Place	Signature
8 October 2014	PICH ANG Lead Co-Lawyer	Phnom Penh	
	Marie GUIRAUD Lead Co-Lawyer	Phnom Penh	