

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

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**LEAD-CO-LAWYERS' AND CIVIL PARTY LAWYERS' REQUEST TO MAKE BRIEF  
PRELIMINARY REMARKS ON BEHALF OF CIVIL PARTIES AFTER CO-  
PROSECUTORS' OPENING STATEMENT**

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**Before:**

**Trial Chamber**

Judge NIL Nonn, President  
Judge Silvia CARTWRIGHT  
Judge YA Sakhon  
Judge Jean-Marc LAVERGNE  
Judge YOU Ottara

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## I. PROCEDURAL AND FACTUAL BACKGROUND

1. On 18 October 2011, the Trial Chamber issued the “Scheduling Order for Opening Statements and hearing on the Substance in Case 002” (“*Order*”).<sup>1</sup> In its Order, the Chamber grants the Co-Prosecutors the opportunity to make a brief opening statement, for a maximum of two days, in relation to all charges and factual allegations in the indictment against the Accused, in accordance with Internal Rule (“*IR*”) 89 *bis*. The Trial Chamber allowed the Accused or their Co-Lawyers to respond to the opening statement, with half a day for each Defence team to respond.<sup>2</sup>
2. The Trial Chamber noted in its Order that pursuant to IR 89 *bis*, opening statements or responses by the Lead Co-Lawyers “are not contemplated and will not be authorized”<sup>3</sup>.

## II. PRELIMINARY REMARKS

3. Before starting with the arguments, a reflection on Case 001 is warranted: The Civil Parties emphasize that they are conscious that the Trial Chamber, in Case 001, considered the request of Civil Party Lawyers to make an *opening statement* and denied this request.<sup>4</sup> They are also aware that the Trial Chamber reiterated in Case 002 that it will not authorize an opening statement or a response.
4. However, it is worthy to shed light on the ‘reasons’ for the denial of the request, as well as on the nature of an opening statement.

### *Reasons for denial of an opening Statement in Case 001*

5. The main grounds for the refusal to grant Civil Parties an opening statement were:
  - (i) Cambodian procedural law (acknowledged by the Trial Chamber as the priority source of law<sup>5</sup>), in the relevant Cambodian Criminal Procedure Code (“*CPC*”), does not confer upon Civil Parties the right to make an opening statement in criminal proceedings<sup>6</sup>, and that

<sup>1</sup> *Case against Nuon Chea et al.*, Case no. 002/19-09-2007-ECCC/TC, Scheduling Order for Opening Statements and Hearing on the Substance in Case 002, 18 October 2011, E131.

<sup>2</sup> *Ibid.*, at p.2.

<sup>3</sup> *Ibid.*, at p.3.

<sup>4</sup> *Case against Kaing Guek Eav*, Case no. 001/18-07-2007-ECCC/TC, Decision on the request of the Co-Lawyers for Civil Parties Group 2 to Make an Opening Statement During the Substantive Hearing, 27 March 2009, E23/4. The request itself can be found under E23.

<sup>5</sup> *Ibid.*, para. 8.

<sup>6</sup> *Ibid.*, para. 7.

Civil Parties’ Request to make Preliminary Remarks after the OCP Opening Statement.

(ii) IR 89 *bis* (2)<sup>7</sup>, which was adopted on 5 September 2008 by the third plenary, does not grant an opening statement to Civil Parties but only to the Co-Prosecutors, and the right to respond by the Accused or his/her lawyers<sup>8</sup>. The Chamber describes the opening statement as being limited to “a brief explanation of, and response to, the charges against the Accused, respectively. The Civil Parties, whose responsibility in relation to the charges is to support the prosecution, accordingly have no autonomous role to play at this stage of the proceedings”<sup>9</sup>.

6. Lead Co-Lawyers and Civil Party Lawyers submit that the first ground is not a consistent application of principles in the Cambodian law. The governing civil law procedure in Cambodia does not permit an opening statement. Therefore, none of the parties are granted this right. A consistent application of principles of the CPC would thus also not allow the Prosecution and the Defense from giving an opening statement/response.
7. The second argument leads to a circular conclusion, in part: the Judges of the Trial Chamber were part of the plenary which decided to introduce the right to an opening statement into the Internal Rules and arbitrarily included it, contrary to the provisions and spirit of the CPC only for two of the three parties. The second reason defining the Opening Statement for the Prosecution, that such statements are to be limited to address the charges and for the Defense to respond thereto, does not give the Civil Parties any role in this procedure. This reason fundamentally expresses a misunderstanding of the purpose of civil party action. Civil Parties need also to build their case, make submissions on evidence and have a significant interest in the charges with regard to a guilty verdict, proper sentencing and reparation.

#### ***The Internal Rules and their amendments***

8. The wording in the Decision of the Trial Chamber in Case 001 demonstrates that the Chamber considers both, the Prosecutions’ and Defense’/Accused statement as *opening statements* – despite the wording of the Internal Rules granting the Defense a right to respond. Any such ‘response’ is, *de facto*, an opening statement, simply as a result of the expected opposing positions of the Prosecution and the Defense.

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<sup>7</sup> Lead Co-Lawyers and Civil Party Lawyers add here in brackets “this Internal Rule that the same Chamber together with other Judges has adopted” which well demonstrates the circular reasoning.

<sup>8</sup> *Ibid.*, para. 9.

<sup>9</sup> *Ibid.*, para. 9.

Civil Parties’ Request to make Preliminary Remarks after the OCP Opening Statement.

9. In addition, the amendments to the Internal Rules, through the plenary decisions of the Judges, show, with regard to the introduction of IR 89 *bis* that the Internal Rules have deviated over the years, from the CPC, although the purpose and limitations on the IRs provide that the IRs are, “to *consolidate* the applicable Cambodian procedure”, that being the CPC [emphasis added]
10. In general, the adoption of Internal Rules and, subsequently, the substantive curtailing of (Civil Party) rights has been justified by this Court through the necessity to deal with the *specificities* of the ECCC proceedings, be it with regard to the high number of victims or the complexity of the case(s).<sup>10</sup> Nevertheless, the unchanged Preamble of the Internal Rules sets clear limits to a ‘consolidation’ of the CPC. Any substantive changes **without necessity** are not contemplated.
11. The adoption *per se* of the right to an opening statement is not justified by the specificity of this Court. Nor is it otherwise necessary. It is even less comprehensible, *if* adopted, to limit this right to two parties only, in a three-party system. Any such practice is a major deviation from a “consolidation” of the Internal Rules.

***The definition and nature of an opening statement***

12. Black's Law Dictionary, describes the opening statement of counsel in the *common law* as:
 

“At the outset of a trial, an advocate's statement giving the fact-finder a preview of the case and of the evidence to be presented.”<sup>11</sup>
13. The opening statement and its purpose is also described as follows:
 

“The primary purpose of an opening statement is to apprise the trier of fact, whether jury or court, of the issues in question and to summarize the evidence that the party intends to offer during the trial. The Supreme Court has characterized an opening statement as ‘ordinarily intended to do no more than to inform the jury on a general way of the nature of the action and defense so that they may better be prepared to understand the evidence’[...].”<sup>12</sup>

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<sup>10</sup> See for example the ruling of the Trial Chamber in case 001, Decision on Civil Party Co-Lawyers Joint request for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, 9 October 2009, E72/3, para.12:

“The Civil Party model developed in the ECCC Internal Rules is based upon, but is not identical to, Cambodian criminal procedure. It must be consistent with the specific nature of criminal proceedings before the ECCC, mainly, the trial of persons who were senior leaders and were most responsible for the national and international crimes committed against millions of people between 17 April 1975 and 6 January 1979 in Cambodia. In this context, features of more traditional Civil Party models, devised for less complex proceedings with fewer victims, required adaptation.

<sup>11</sup> Black’s Law Dictionary, Eighth Edition.

<sup>12</sup> Thefreedictionary.com, The opening statement, quoting *Best v. District of Columbia*, 291 U.S. 411, 54 S. Ct. 487, 78 L. Ed. 882 [1934]), at <http://legal-dictionary.thefreedictionary.com/opening+statement>. Civil Parties’ Request to make Preliminary Remarks after the OCP Opening Statement.

14. Following this, the classical opening statement as it is settled in the common law is related to (i) *summarize evidence* that is intended to tender, (ii) *inform* the jury or judges on the general nature and facts of the *respective* case, and (iii) submit any other issues of the case involved. The aim is to put the jury and the judges, who do not know the case file and the evidence that will be presented, in the position to best understand the case theory and angle of the case according to the prosecutor and defense.
15. Lead Co-Lawyers and Civil Party Lawyers note that Civil Parties have a right before the ECCC to submit and introduce evidence and (to speak in the ‘common-law language’), to ‘build their case’. They therefore qualify *equally* to make an opening statement.
16. However, in this request, the Lead Co-Lawyers and Civil Party Lawyers aim to clearly distinguish their role from the role of the Co-Prosecutors, who are required to prove the case to the standard, “beyond a reasonable doubt”, and “to outline the evidence on which they rely”. Despite our opinion that Civil Parties have a right to an opening statement at the ECCC, Lead Co-Lawyers and Civil Party Lawyers want to avoid any overlapping with the opening statement of the OCP.
17. Therefore, the Civil Party Lawyers, rather than requesting for a right to make an opening statement, request, **instead**, for an opportunity to make a **brief preliminary remark on the views and concerns of the Civil Parties**, presented by the Lead Co-Lawyers, who may delegate this task to Co-Lawyers for Civil Parties, on behalf of the consolidated group.

### III. ARGUMENT

#### *The right to a brief preliminary remark according to IR 21*

18. Civil Parties are substantive parties to the proceedings, and thus, have an important role, being vested with significant procedural rights. In addition, the ECCC is mandated to grant victims who are civil parties, an effective remedy and access to justice. It is echoed everywhere that this Court is built for the victims of the Khmer Rouge regime. In particular, the mandate is focused around civil parties. This important role must be reflected in all steps taken by the Court, in accordance with IR 21 (1), including:
  - (i) safeguarding the *interests* of victims;
  - (ii) guaranteeing fair proceedings; and
  - (iii) respecting the rights of victims.

19. Lead Co-Lawyers and Civil Party Lawyers submit that it is clearly in accordance with the *interests* of Civil Parties (victims), and in the interests of *fair proceedings* and the *rights* of civil parties (victims) that a brief preliminary remark be allowed. These remarks will be distinct from any opening statement of the Co-Prosecutors but will reflect the views and concerns of the victims.
20. The Co-Prosecutors do not represent the victims and are unable to submit specific or adequate statements on behalf of the civil parties. Moreover, their role is taken up in proving the case – a distinct role from the civil parties’ role.
21. For a court which considers itself to be the mechanism of justice for victims, hearing the Civil Parties’ voice on the opening of the hearing is an indispensable ingredient if the court is to have any legitimacy for victims. Many victims have long awaited this opportunity.
22. The Civil Parties, the Lead Co-Lawyers, and Civil Party Lawyers call on the Trial Chamber to permit them to deliver a brief (30 minute) statement on behalf of the consolidated group of Civil Parties on their concerns and views, which will have a significant symbolic impact on all victims.. The preliminary remarks aim to make the “consolidated group” of all Civil Parties visible and give them a face.
23. This request is not only in accordance with Internal Rule 21, it also reflects a minimum standard of the rights afforded to victims, for the Trial Chamber to consider in an exercise of its ultimate discretion. The right to express victims’ views is strongly reflected in the Basic Principles for Victims of gross Human Rights violations<sup>13</sup> and underlies the role that Civil Parties have in this proceedings. To give only one example, the Civil Parties, according to IR 94, are heard first within the submissions of the closing statements.

***The practice of the International Criminal Court***

24. In contrast to the limitations set by the Trial Chamber on civil party procedural rights, the Lead Co-Lawyers and Civil Party Lawyers recall that even the participants before the International Criminal Court (“ICC”) may have the right to an “opening statement”, according to Rule 89 (1) of the *Rules of Procedure and Evidence* of the ICC – even though the substantive rights held by victims at the ICC are far fewer and less substantive than the

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<sup>13</sup>*Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, 16 December 2005.

rights of civil parties at the ECCC. The practice since the first trial (*Lubanga*)<sup>14</sup> has shown that this right was granted in all subsequent cases and that it is crucial, well perceived by the victims and in their affected communities and gives them a voice from the beginning, in the proceedings.

25. There is no justification or legal basis to deviate from this well accepted practice at a Court where victims have a party status. It remains uncertain, at present, whether this “first” trial will end in a final judgment – this uncertainty presents even stronger grounds to grant Civil Parties the right to make preliminary remarks at the beginning of the First Trial. Such an occasion would be a welcomed symbolic message, and long-awaited day for all victims.

*The experience from Case 001*

26. In Case 001, the request of Co-Lawyers for Civil Parties to submit an opening statement was rejected. However, the opening statements of the Co-Prosecutors did not reflect the concerns of the civil parties, in full. This is not unexpected since the mandate of the Prosecution is distinct and it is not the Prosecutors’ role to reflect the views and concerns of Civil Parties.
27. Consequently, in Case 001 Civil Parties and their lawyers were left unsatisfied, having heard the submissions of the other two parties, and having been silenced from submitting **their** observations that were meaningful for them. Given the many rights that Civil Parties have before the ECCC, the denial of a public statement at this occasion is disproportional and unnecessary, given that this would hold so much weight for such a large composition of civil parties.

*No prejudice for the Accused*

28. Granting the Civil Parties the right to have a voice and express the meaning inherent in these proceedings for 30 minutes will not prejudice the Accused.
29. The civil parties’ preliminary remarks will be distinct from any statements made by the Prosecution, as they will simply be a message publicly relayed to all Civil Parties, victims, Cambodian society and the world at large, that victims have an independent and distinguishable voice in a judicial proceeding in which they hold high stakes.

Therefore, Lead Co-Lawyers and Civil Party Lawyers respectfully request the Trial Chamber

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<sup>14</sup> See Trial Report, 26 January 2009, <http://www.lubangatrial.org/2009/01/30/lubanga-trial-wcek-1-prosecutors-stumble-out-of-the-gate/>, (visited on 13 March 2009).

Civil Parties’ Request to make Preliminary Remarks after the OCP Opening Statement.



To grant Civil Parties the right to preliminary remarks of 30 minutes after the opening statement of the Co-Prosecutors.

Respectfully submitted,

Date	Name	Location	Signatures
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