



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber

Chambre de première instance

សំណុំរឿងលេខ: ០០១/១៨ កក្កដា ឆ្នាំ ២០០៧-អវតក/អជសដ

Case File/Dossier N° 001/18-07-2007-ECCC/TC

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Before:

Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge THOU Mony

Date:

27 March 2009

Classification:

PUBLIC

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DECISION ON THE REQUEST OF THE CO-LAWYERS FOR CIVIL PARTIES GROUP 2 TO MAKE AN OPENING STATEMENT DURING THE SUBSTANTIVE HEARING

Co-Prosecutors

CHEA Leang
Robert PETIT

Accused

KAING Guek Eav alias DUCH

Lawyers for the Civil Parties

KONG Pisey
HONG Kimsuon
YUNG Phanit
KIM Mengkhy
MOCH Sovannary

Alain WERNER
Brienne McGONIGLE
Annie DELAHAIE
Philippe CANONNE
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Lawyers for the Defence

KAR Savuth
François ROUX



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Silke STUDZINSKY
Martine JACQUIN
Pierre Olivier SUR

Elizabeth RABESANDRATANA
Karim KHAN

The Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia;

BEING SEISED of Case File No. 001/18-07-2007-ECCC/TC pursuant to the “Decision on Appeal Against the Closing Order Indicting Kaing Guek Eav Alias Duch,” rendered orally by the Pre-Trial Chamber on 5 December 2008 and filed in Khmer on 9 December 2008 (“Decision”);

NOTING the Direction regarding Opening Statements during the Substantive Hearing of Trial Chamber dated 10 March 2009¹;

HAVING RECEIVED the Urgent Request of Co-Lawyers for Civil Parties Concerning the Right to Submit an Opening Statement During the Substantive Hearing to the Trial Chamber, dated 17 March 2009 (“Request”)²;

NOTING the Direction setting time limits for the filing of responses by the parties to the urgent request filed the by Civil Parties (Group 2) to make an opening statement during the substantive hearing, dated 20 March 2009 (“Direction”)³;

NOTING the responses of the Office of the Co-Prosecutors and the Defence, filed in opposition to the Request;

FURTHER NOTING that no other party filed a response in within the prescribed time limit;

HAVING CONSIDERED the Request for Civil Parties Group 2 for the Trial Chamber to grant the Co-Lawyers the right to make an opening statement during the substantive hearing;

PURSUANT TO Rule 89 *bis* of the Internal Rules;

HEREBY DECIDES AS FOLLOWS:

¹ See E19.

² See E23.

³ See E23/1.



BACKGROUND

1. On 10 March 2009, the Trial Chamber issued a Direction Regarding Opening Statements, which stipulated that the Co-Prosecutors and the Defence could present brief opening statements, each of no more than two hours in length, on the charges at the substantive hearing. In its Direction, the Chamber noted that, pursuant to Rule 89*bis* of the Internal Rules, the Co-Lawyers for the Civil Parties did not have the right to respond to the opening statement of the Co-Prosecutors or the Defence.

2. On 17 March 2009, the Co-Lawyers for the Civil Parties (Group 2) filed an urgent request to permit the Co Lawyers for Civil Parties to make an opening statement in response to that of the Co-Prosecutors. They submit that Civil Parties should be granted this right on grounds that the Internal Rules cannot restrict the rights of the Civil Parties. They contend that Rule 89*bis* of the Internal Rules, by not granting equal right to the parties, is contrary to Cambodian criminal procedure and, by implication, to proceedings before the ECCC. This exclusion also contravenes Rule 21(1) of the Internal Rules, which requires that a balance between the rights of the parties be preserved. The right to make an opening statement also stems from the Civil Parties' status as a party to criminal proceedings, recognized within Rule 23(6)(a) of the Internal Rules and as illustrated by the practice of the International Criminal Court. Finally, they contend that the omission of a right in Rule 89*bis* for Civil Parties, which is not in keeping with the overall spirit of the Civil Parties' role before the ECCC, may reflect a drafting or editorial error.

3. Both the Defence and the Co-Prosecutors oppose the Request. They submit that the omission of civil parties from Rule 89*bis* was not the result of an error. The Defence note, to the contrary, that this Rule was expressly considered during the ECCC Plenary Session of March 2009, which resulted in a decision to limit the right to make an opening statement solely to the Co-Prosecutors and the Defence. The Co-Prosecutors respond that while civil parties have extensive rights before the ECCC, those rights are not identical to those of the Co-Prosecutors or Defence.



DELIBERATIONS

4. Neither Rule 89*bis* of the Internal Rules nor the applicable Code of Criminal Procedure grant to Civil Parties the right to make opening statements. The Chamber notes that Rule 2 of the Internal Rules states that “[w]here in the course of ECCC proceedings a question arises which is not addressed by these IRs, [...] the Chambers shall decide in accordance with Article 12(1) of the Agreement and Articles 20 new, 23 new, 33 new or 37 new of the ECCC Law as applicable, having particular attention to the fundamental principles set out in Rule 21 and the applicable criminal procedural laws [...].”

The Fundamental Principles in Rule 21 of the Internal Rules:

5. This Rule stipulates only that any applicable provisions or Practice Directions of the ECCC shall be interpreted so as to always safeguard the interests of Suspects and Victims and to preserve a balance between the rights of the parties.

6. It is undisputed that civil parties are parties to the proceedings pursuant to Sub-Rule 23(6)(a) of the Internal Rules. However, the rights of Civil Parties differ in certain respects from those of other parties. Civil parties for example, have the right to claim reparations, but are limited in their role during proceedings to supporting the Prosecution.⁴ The Civil Parties therefore do not have identical rights to those enjoyed by the Defence or the Co-Prosecutors.

The Applicable Criminal Procedure Code:

7. The Chamber notes that the applicable Criminal Procedure Code, particularly the 2007 Code of Criminal Procedure of the Kingdom of Cambodia, also does not confer upon Civil Parties the right to make an opening statement in criminal proceedings.

The Agreement and ECCC Law:

8. The Trial Chamber further notes that both Article 12(1) of the Agreement and Article 33 of the ECCC Law grant priority to the applicable domestic law. Where

⁴ Rule 23(1) of the Internal Rules.

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domestic law does not deal with a particular matter, or where there is a question regarding the consistency of such a rule with international standards, guidance may be sought in procedural rules established at the international level.

9. Rule 89bis(2) of the Internal Rules states that “[b]efore any Accused is called for questioning, the Co-Prosecutors may make a brief opening statement of the charges against the Accused. The Accused or his/her lawyers may respond briefly.” This Rule confers the right to make opening statements exclusively upon the Co-Prosecutors, the Accused or his or her lawyers. Opening statements are further 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 against the Accused is to support the prosecution, accordingly have no autonomous role to play at this stage of the proceedings.

Alleged editorial error in the Internal Rules

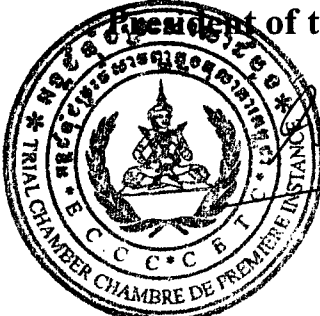
10. The Internal Rules reflect a careful balancing of the rights of the various parties in view of the differing roles of the Co-Prosecutors, Defence and the Civil Parties. The contention that the present Rule 89bis reflects an error in drafting or editing of the Rules is ill-conceived. Rule 89bis(2) in its current form was expressly considered at the ECCC Plenary Session, which concluded on 6 March 2009. There is no error or oversight requiring the corrective intervention of the Trial Chamber.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

DENIES the Request. *gs. NUN*

Phnom Penh, 27 March 2009

President of the Trial Chamber



gs. NUN

Nil Nonn