

**BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**CIVIL PARTY LEAD CO-LAWYERS' REQUESTS RELATING TO THE APPEALS
IN CASE 002/01**

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Before:

Supreme Court Chamber

Judge KONG Srim, President
Judge A. KLONOWIECKA-MILART
Judge SOM Sereyvuth
Judge C.N. JAYASINGHE
Judge MONG Monichariya
Judge YA Narin
Judge Florence Ndepele MUMBA

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I. INTRODUCTION

1. The Civil Party Lead Co-Lawyers (“Lead Co-Lawyers”), with this motion, declare their intention to respond to the prospective Appeal Briefs due to be filed by the defence of Nuon Chea and Khieu Samphan (“the Defence”) as well as by the Co-Prosecutors. A denial of this avenue would pose a substantial prejudice to the interests of the consolidated group of civil parties on appeal, as well as on trial in Case 002/02.
2. The Civil Parties are a distinct rights-bearing party to the proceedings. The Lead Co-Lawyers intend to respond to, *inter alia*, the alleged errors of fact and law concerning the evidence provided by the Civil Parties. Additionally, the Lead Co-Lawyers reserve their right to file a brief clarifying their position concerning the Appeal Brief filed by the Co-Prosecutors.

II. PROCEDURAL HISTORY

3. On 7 August 2014, the Trial Chamber issued judgement in Case 002/01 (“Judgement”), convicting both the accused of the crimes against humanity of extermination, persecution on political grounds, and other inhumane acts, sentencing them each to life imprisonment.¹
4. On 29 September 2014, Nuon Chea and Khieu Samphan (“Co-Accused”) also filed their respective notices of appeal against the Judgement raising both errors of law and errors of fact in the Judgement concerning, *inter alia*, the legitimacy and fairness of the proceedings, use of evidence, and wilful killing of civilians during the Phase I population movement, amongst others.²
5. On 29 September 2014, the Co-Prosecutors also filed their notice of appeal against the Judgement outlining the grounds of appeal that they seek to raise before the Supreme Court Chamber.³ They assert that the Trial Chamber erred in deciding to exclude consideration of JCE III while deciding on the culpability of the Co-Accused.⁴

¹ Case 002/01 Judgement, **E313**, 7 August 2014.

² See Notice of Appeal against the Judgement in Case 002/01, **E313/1/1**, 29 September 2014 (“Nuon Chea Notice of Appeal”); Déclaration d’appel de la Défense de M. Khieu Samphân contre le jugement rendu dans le procès 002/01, **E313/2/1**, 29 September 2014 (“Khieu Samphan Notice of Appeal”).

³ Co-Prosecutors’ Notice of the Appeal of a Decision in Case 002/01, **E313/3/1**, 29 September 2014 (“Co-Prosecutors’ Notice of Appeal”).

⁴ *Ibid.*, paras. 6-8.

6. On 2 October 2014, Nuon Chea Defence filed a request for extension of time and page limits for filing appeals against the Judgement⁵ followed by a similar request by the Khieu Samphan defence on 6 October 2014.⁶ On 16 October 2014, the Co-Prosecutors filed a consolidated response to both these requests⁷ to which each accused replied on 20 and 21 October 2014, respectively.⁸ On 31 October 2014, the Supreme Court Chamber granted, in part, the Co-Accused's request for extension of time to file their respective appeal briefs.⁹
7. Nuon Chea and Khieu Samphan are required to file their respective appeal briefs no later than 29 December 2014 whereas the Co-Prosecutors' Appeal Brief is due on 28 November 2014.¹⁰ Additionally, this Chamber has ordered the Co-Prosecutors to file their consolidated response no later than 30 days after the notification of the Khmer versions of Nuon Chea's and Khieu Samphan's appeal briefs, whichever is notified last.¹¹

III. DISCUSSION

A. Civil Parties enjoy a right to respond to the errors raised by the Defence on appeal.

8. Rule 105 of the Internal Rules provides that the Civil Parties may [only] appeal the decision on reparations and where the Co-Prosecutors have appealed, they may appeal the verdict.¹² Whilst the Civil Parties have a limited right to appeal, there exists no such restriction on the right to respond to the appeal briefs filed by the respective parties to the trial.
9. It is the fundamental principle at the ECCC to ensure that victims' rights are respected *throughout* the proceedings;¹³ the applicable ECCC law, Internal Rules as well as the

⁵ Second Request for Extension of Time and Page Limits for Filing Appeals against the Trial Judgement in Case 002/01, **F6**, 2 October 2014.

⁶ Demande urgente de la Défense de M. KHIEU Samphân aux fins de prorogation du délai et d'extension du nombre de pages du mémoire d'appel, **F7**, 6 October 2014.

⁷ Co-Prosecutor's Response and Request on Case 002/01 Appeal and Response Brief Extensions, **F7/1**, 16 October 2014.

⁸ Reply to the Co-Prosecutor's Response Concerning Page and Time Extensions in Connection with Appeal Briefs, **F7/1/1**, 20 October 2014; Réplique et réponse de la Défense de M. KHIEU Samphân aux « Co-Prosecutor's Response and Request on Case 002/01 Appeal and Response Briefs Extensions », **F7/1/2**, 21 October 2014.

⁹ Decision on Motions for Extension of Time and Page Limits for Appeal Brief and Responses, **F9**, 31 October 2014 ("Decision on Extension dated 31 October 2014").

¹⁰ Decision on Extension dated 31 October 2014, para. 23.

¹¹ *Ibid.*, para. 23.

¹² Internal Rule 105(1)(c).

¹³ Internal Rules, Rule 21(c) (emphasis added).

Practice Direction are required to be interpreted in a manner so as to always safeguard the interests of not only the suspects, accused, charged persons, but also the victims.¹⁴ Civil Parties before the ECCC are victims whose application to become a Civil Party has been declared to be admissible by the Co-Investigating Judge or the Pre-Trial Chamber.¹⁵

10. Significantly, Civil Parties are a party to the proceedings just like the Accused and the Co-Prosecutors¹⁶ and the ECCC is mandated to preserve a balance between the rights of the parties.¹⁷ At this juncture, both the Co-Prosecutors as well as the Co-Accused have filed their respective notices of appeal, which, if ruled upon by the Supreme Court Chambers, will affect the rights of the civil parties in respect of Case 002/01 as well as have potential implications for Case 002/02.
11. One of the core functions of the Lead Co-Lawyers is to represent the interests of the consolidated group of Civil Parties “during the trial stage and beyond.”¹⁸ While Rule 12 *ter* (3) concerning internal organisation is limited to the representation of Civil Party interests at trial, the provision emphasises the need for the Lead Co-Lawyers to ensure effective representation of the Civil Parties during the trial stage and *beyond*.¹⁹
12. In fact, save the explicit restriction in Rule 105, the Civil Party action encompasses participation in “criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC”,²⁰ which, when read with Article 36 *new* of the ECCC Law, extends to appeals before the Supreme Court Chamber.²¹ The Lead Co-Lawyers submit that in the absence of an express prohibition, the Civil Parties are entitled to respond to the Defence appeal briefs before the Supreme Court Chamber.
13. Of the 223 grounds of appeal, the Nuon Chea Notice of Appeal enumerates approximately 80 grounds of appeal that relate directly to a variety of evidence provided by Civil Parties. These

¹⁴ Internal Rules, Rule 21.

¹⁵ *Ibid.*, p. 80 “Civil Party”.

¹⁶ *Ibid.*, p. 81 “Party”.

¹⁷ *Ibid.*, Rule 21(a).

¹⁸ *Ibid.*, Rule 12 *ter* (5)(b).

¹⁹ See *Ibid.*, Rule 12 *ter* (1), 12 *ter* (5)(b) (emphasis added).

²⁰ *Ibid.*, Rule 23(1)(a).

²¹ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 27 October 2004, Article 36 *new*.

grounds relate, *inter alia*, to reliance on civil party testimonies,²² written records of interview of civil parties,²³ civil party applications,²⁴ victim impact testimonies,²⁵ DC-CAM statements,²⁶ and victim complaints.²⁷

14. This is in addition to their blanket challenge relating to the erroneous reliance by the Trial Chamber on civil party applications and victim complaints while inadequately or incorrectly assessing its probative value.²⁸
15. Of the errors so claimed, Ground 34 directly concerns the Civil Parties as it relates to the admissibility and probative value accorded by the Trial Chamber to civil party testimony.²⁹ Under this Ground, they also allege that the Trial Chamber erred in relying on victim impact testimony for the truth of its contents throughout the Judgement.
16. Nuon Chea Defence also allege errors concerning legitimacy and fairness of the proceedings during trial, *inter alia*, related to Nuon Chea's right to confront the evidence against him,³⁰ which includes written record of interviews, civil party applications, and victim impact testimonies, amongst others.

²² Ground 48 (Denise Affonco, D22/36); Grounds 49, 134, 170 (Pin Yathay, D22/3649); Ground 78 (Yim Sovann, D22/109); Ground 80 (Mom Samoeurn, D22/11); Ground 81 (Chum Sokha, D22/110); Ground 120 (Lay Bony, D22/111); Grounds 115, 161 (Pech Srey Phal, D22/209); Ground 169 (Toeng Sokha, D22/3286).

²³ Ground 50 (Khoem Nareth, D22/92); Ground 51 (Sot Sem, D22/106); Grounds 52, 111 (Seang Chan, D22/121); Ground 53 (Khiev Horn, D22/65); Ground 99 (Khen Sok, D22/78); Ground 127 (Chum Sokha, D22/110); Ground 158 (Kong Vach, D22/131).

²⁴ Ground 55 (Sot Sem, D22/106); Ground 56 (Pok Sa Em, D22/247); Ground 57 (Suong Khit, D22/309); Ground 58 (Mea Chhin, D22/39); Ground 59 (Sen Sophon, D22/1232); Ground 60 (Chey Yeun, D22/1242); Grounds 61, 90, 105 (Pal Rattanak, D22/1341); Ground 62 (Yann Nhar, D22/2751); Ground 64 (Meas Mut, D22/161); Grounds 65, 129 (Beng Boeun, D22/222); Ground 68 (Khoem Naret, D22/92); Ground 70 (Hum Ponak, D22/350); Ground 83 (Meas Saran, D22/118); Ground 84 (Morm Phai Buon, D22/1968); Ground 85 (Kung Narin, D22/524); Ground 89 (Phuong Phalla, D22/345); Grounds 91, 141 (Ly Ream, D22/2690); Grounds 95, 142 (Sam Pha, D22/2953); Ground 96 (Sen Virak, D22/35); Ground 103 (Eam Tres, D22/1239); Ground 104 (Both Soth, D22/1240); Ground 112 (Sau Sary, D22/2499); Ground 118 (Rou Ren, D22/129); Ground 121 (Chhor Dana, D22/2); Ground 138 (Phat Han, D22/343); Grounds 143, 152 (Soth Navy, D22/2090); Ground 147 (Toch Monin, D22/16); Ground 158 (Kong Vach, D22/131); Ground 159 (San Mom, D22/2800); Ground 167 (Dy Roeun, D22/2068).

²⁵ Ground 77 (Chheng Eng Ly); Ground 79 (Thouch Phandarasar, D22/189); Ground 133 (Seng Sivutha, D22/3804); Ground 156 (Bay Sophany); Ground 160 (Chan Socheat, D22/3858); Ground 162 (Aun Phally).

²⁶ Ground 102 (Khat Khe); Ground 139 (Chim Morn).

²⁷ Ground 63 (Ean Teang); Ground 71 (Phuong Mom); Grounds 72, 94 (Sun Henri); Grounds 92, 128 (Tieng Sokhom); Ground 93 (Chou Kim Lan); Ground 106 (Prum Sokha); Ground 107 (Mey Nary); Ground 113 (Kim Sarou); Ground 114 (Sao Theoun); Ground 117 (Phan Yim); Ground 144 (Loas Vannan); Ground 145 (Preab Ken); Grounds 146, 153 (Kem Kuon); Ground 164 (Treh Eal).

²⁸ See Nuon Chea Notice of Appeal, Ground 32 (iv). See also Ground 35.

²⁹ Nuon Chea Notice of Appeal Ground 34.

³⁰ See Nuon Chea Notice of Appeal, Grounds 11, 28, and 29.

17. Khieu Samphan Defence raise similar errors in relation to the use of victim impact testimony by the Trial Chamber,³¹ admission and use of written record of interview in place of oral testimony³² and accepting written record of interview without cross-examination.³³ They allege errors concerning the definition and availability of JCE, especially the existence of extended form of JCE in 1975³⁴ and the characterisation of the events of the Phase I population movements, Toul Po Chrey, and the Phase II population movements as Crimes Against Humanity.³⁵
18. The Lead Co-Lawyers submit that these allegations of errors, especially concerning the elements of crimes against humanity as well as its constituent crimes raised by both the accused, concern the Civil Parties inasmuch as the evidence provided by them was made the basis of the factual and legal findings by the Trial Chamber.³⁶
19. Notwithstanding the merits, every appeal is a new stage in a criminal proceeding governed by the possibility of the verdict being overturned and/or the evidence being re-characterised by the appellate bench. In either case, denying a party to the proceeding the right to respond at this stage could not only injure interests of the Civil Parties in Case 002 but also the spirit of the victim participation championed at the ECCC.

B. Civil Parties reserve their right to file a brief clarifying their position on Co-Prosecutors' Appeal Brief.

20. Whilst not appealing the dispositive part of the Judgement, the Co-Prosecutors seek declaratory relief concerning the applicability of the third form of joint criminal liability ("JCE III") as a mode of liability before the ECCC.³⁷ It seeks legal guidance from the Supreme Court Chamber on this account pleading that "it is necessary to provide legal guidance to the Trial Chamber which – given the particularly limited scope of interlocutory

³¹ Khieu Samphan Notice of Appeal, para. 23.

³² *Ibid.*, para. 22.

³³ *Ibid.*, para. 55.

³⁴ *Ibid.*, para. 44.

³⁵ *Ibid.*, paras. 99-100 (Phase I population movements), paras. 112-113 (Toul Po Chrey), paras. 130-131 (Phase II population movements).

³⁶ See also Nuon Chea Notice of Appeal, Grounds 172-175 (Murder and Extermination); Grounds 179-182 (other inhumane acts through forced transfer); Grounds 183-185 (Enforced Disappearance); Grounds 186-188 (treatment of "New People"); Grounds 190-197 (Persecution).

³⁷ See Co-Prosecutors' Notice of Appeal, paras. 2-3, and 10.

appeal during ECCC trial proceedings – would otherwise never be in a position to apply JCE III because of the factual impossibility of satisfying requirements of adequate notice to the Accused.”³⁸

21. The Lead Co-Lawyers hereby notify the Chamber that they reserve the right to file a brief clarifying their position on the Co-Prosecutors Appeal Brief in order to effectively represent their opinion at this stage whilst the matter is still under consideration on appeal in Case 002/01.

C. It is in the interests of justice that the Civil Parties be granted a timeline similar to that afforded the other parties for the formulation of their response to the appeals briefs.

22. The Practice Direction on Filing Documents currently specifies a 10-day time limit for filing response briefs before the Supreme Court Chamber.³⁹ However, Rule 39 of the Internal Rules authorises the judges to set time limits for written submissions relating to an appeal, taking into account the circumstances of the case⁴⁰ and extend them upon the request of the concerned party.⁴¹
23. Furthermore, the Practice Direction requires the time limits to commence on the first calendar day following the day of service of the notification of the document in Khmer and one other official language of the ECCC.⁴² As highlighted by the current Chamber in their Decision of Extension dated 31 October 2014, the “Khmer version of any filing before the ECCC is [...] a crucial component of the proceedings at this Court, as international and national elements of each organ must work together”.⁴³
24. The Lead Co-Lawyers are obligated to ensure effective organisation of Civil Party representation during trial stage and beyond, whilst balancing the rights of all parties and the need for an expeditious trial.⁴⁴ The Lead Co-Lawyers submit that it would be in the interest of the civil parties, for the reasons outlined above, and in the interest of efficient management

³⁸ *Ibid.*, para. 9.

³⁹ Practice Direction on Filing Documents before the ECCC./Rev.8 (“Practice Direction”), Article 8.3.

⁴⁰ Internal Rules, Rule 39(2).

⁴¹ Internal Rules, Rule 39(4)(a).

⁴² Practice Direction, Articles 7.1 and 8.5.

⁴³ Decision on Extension dated 31 October 2014, para. 21.

⁴⁴ Internal Rules, Rule 12 *ter* (1).

of the time of the court to respond to the appeal briefs within the timeframe suggested by the Chamber in their Decision on Extension dated 31 October 2014.⁴⁵

25. In the present case, it is vital that the Civil Parties and their representatives have an opportunity to understand and formulate their views on the various grounds of appeal raised by the Defence and the Co-Prosecutors before responding to the appeal briefs. Not only is this true of the Defence appeal briefs, which will contain detailed analytical arguments about the legal and factual errors in the Judgement, but also of the Co-Prosecutors Appeal Brief, which will be replete in very nuanced discussions of international law and theory.
26. The national Lead Co-Lawyer for the Civil Parties and more than a majority of the Civil Party lawyers work in Khmer and would be in a position to contribute to this exercise once the Khmer version is available. The Lead Co-Lawyers would be able to hold meaningful discussions with the Civil Parties and their representatives only upon receiving the appeal briefs in Khmer. If this request were not granted, it would cause substantial and unwarranted prejudice to the Civil Parties.
27. In light of this, the Lead Co-Lawyers request an opportunity to a consolidated Response Brief to the Appeal Briefs from the Defence 30 days from the filing of the respective briefs after the notification of the Khmer version, whichever is notified last.
28. The Lead Co-Lawyers submit that the grant of such a request will only further the interests of the Civil Parties as an equal stakeholder in the judicial process without compromising the currency of time and the prompt adjudication of the appeal before the Supreme Court Chamber.

D. An extension of the page limit for the Civil Parties' Response Brief is justified to allow them sufficient time and space to meaningfully plead.

29. As per the Practice Direction, the length of any document filed to the Supreme Court Chamber may not exceed 30 pages in English or French, unless otherwise ordered.⁴⁶ The Supreme Court Chamber has granted an extension of page limits to the Defence, in light of the fact that their respective appeals will be “extensive, requiring sufficient time and space to

⁴⁵ Decision on Extension dated 31 October 2014, para. 23.

⁴⁶ Practice Direction, Article 5.2.

meaningfully plead”.⁴⁷ Consequently, a proportionate extension has also been granted to the Co-Prosecutors for their consolidated response.⁴⁸

30. The Lead Co-Lawyers will not be responding to every ground of appeal raised by the Defence but will limit themselves to only those that affect the rights and interests of the Civil Parties. From the preliminary assessment of the grounds of appeal notified in their respective notices of appeal, there are over a hundred grounds that directly affect the Civil Parties. By a conservative estimate, this number accounts for approximately one third of the total grounds of appeal sought to be raised by the Defence collectively.
31. The Lead Co-Lawyers are mindful that, of these grounds, there are some that overlap in the two Notices of Appeal and/or relate to the same set of findings in the Judgement.⁴⁹
32. Based on this estimate, the Lead Co-Lawyers consider that an extension of 60 pages to the already existing allowance of 30 pages is adequate. This would allow the Lead Co-Lawyers 90 pages to respond to the two Defence appeal briefs totalling 520 pages.

E. The length and complexity of the Civil Parties’ Response Brief justifies its filing in a single language with translation to follow at the earliest opportunity.

33. Article 7.2 of the Practice Direction allows the Chamber to authorise a party to file a document in French or English in the first instance in exceptional circumstances, provided a Khmer translation is filed before the Chamber at the first opportunity. The Lead Co-Lawyers submit that, in the present case, exceptional circumstances exist to justify the filing of the above-mentioned Civil Party briefs in either English or French, with Khmer translation to follow. The present situation is exceptional considering that the response briefs for Case 002/01 will be prepared alongside trial preparation for Case 002/02 and will require timely adjudication. As mentioned above, the briefs will contain a comprehensive response to the grounds of appeal raised by the Defence for which the time period is very limited.

⁴⁷ Decision on Extension dated 31 October 2014, para. 13.

⁴⁸ Decision on Extension dated 31 October 2014, para. 17. *See also Ibid.*, p. 10 (stipulating “Co-Prosecutor’s consolidated response may not exceed 280 page, with no page restrictions on its Khmer equivalent”).

⁴⁹ *See e.g.*, Grounds relating to use of victim impact testimony: Nuon Chea Notice of Appeal, Ground 34; Khieu Samphan Notice of Appeal, para. 23. Grounds relating to law concerning Crimes Against Humanity: Nuon Chea Notice of Appeal, Grounds 45-47; Khieu Samphan Notice of Appeal, Grounds 42-43. Grounds relating to JCE: Co-Prosecutors Grounds of Appeal; Nuon Chea Notice of Appeal, Ground 198.


34. Therefore, the Lead Co-Lawyers request the Chamber to grant leave under Article 7.2 of the Practice Direction to file the respective briefs in one language, with Khmer translation to follow at the earliest opportunity. The Lead Co-Lawyers submit that this grant would not adversely affect the timely and expeditious nature of the proceedings.
35. In conclusion, the opportunity for the Civil Parties to respond to the appeal briefs by the Defence as well as the Co-Prosecutors, along with the extension of time and page-limits with the leave to respond in one language, optimises the rights of all the parties and the need for expeditious proceedings within the unique ECCC context.

IV. REQUEST

WHEREFORE, the Civil Parties respectfully request that the Supreme Court Chamber:

- (1) **ALLOW** the Lead Co-Lawyers to file a consolidated response brief to the Defence appeal briefs no later than 30 days after their notification in Khmer, in English or French; and
- (2) **RECOGNIZE** the Lead Co-Lawyers' reservation of their right to file a brief clarifying their position on the Co-Prosecutors Appeal Brief no later than 30 days after its notification in Khmer, and in English or French;
- (3) **GRANT** the Lead Co-Lawyers an extension of 60 pages for their consolidated response brief to the Defence appeal briefs, inclusive of footnotes, in English or French; and
- (4) **GRANT** the Lead Co-Lawyers leave to file in one language, with Khmer translation to follow at the earliest opportunity.

Respectfully submitted,

Date	Name	Place	Signature
24 November 2014	PICH ANG Lead Co-Lawyer	Phnom Penh	
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