

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

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**CIVIL PARTY LEAD CO-LAWYERS REPLY TO NUON CHEA DEFENCE
RESPONSE TO CPLCL'S REQUESTS RELATING TO 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. On 3 December 2014, the Nuon Chea Defence responded to the Civil Party Lead Co-Lawyers' requests relating to appeals in Case 002/01 ("Lead Co-Lawyers" and "Request" respectively).¹ The Lead Co-Lawyers hereby reply to the Nuon Chea Response pursuant to Article 8.4 of the Practice Direction for the Filing of Documents Before the ECCC.² The Lead Co-Lawyers sought and obtained leave to file this response in a single language.³

2. The Nuon Chea Defence argues, *inter alia*, that Civil Parties are not on an "equal footing" with the other parties and their participation on appeal would improperly transform the Lead Co-Lawyers into a second prosecution, violating Nuon Chea's right to a fair trial. Accordingly, they request the Supreme Court Chamber to dismiss the Request in full, and if granted, to require it to be filed in both English and Khmer in addition to awarding further time allowance for preparation of their oral arguments.

3. As elaborated below, the Nuon Chea Response is based on a misinterpretation of the role of the Lead Co-Lawyers and Civil Party participation during the appellate stage.

II. REPLY

4. Para. 2 of the Nuon Chea Response claims that the Request is based on an "implicit assumption" that Civil Parties are equal to the other parties in Case 002. The Lead Co-Lawyers submit that the definition of the term "Party" in the Internal Rules leaves no doubt that Civil Parties are included within the meaning of the term.⁴ It is clarified that "equal footing" does not imply that the roles of the Co-Prosecutors and the Civil Parties are identical and/or interchangeable but merely that, by virtue of being a "Party" to the proceedings, Civil Parties hold an equal standing.⁵ Further, the Nuon Chea Defence make a reference to a prior unrelated request by the Lead Co-Lawyers before the Trial Chamber in Case 002/02 concerning the provisions to make opening remarks on behalf of the consolidated group of

¹ Nuon Chea's Response to the Civil Party Lead Co-Lawyers' Requests relating to the Appeals in Case 002/01, F10/1, 3 December 2014 ("Nuon Chea Response").

² Practice Direction, ECCC/01/2007/Rev.8.

³ See Email from the Senior Legal Coordinator, Chambers to the parties, 5 December 2014.

⁴ Internal Rules, p. 81 "Party".

⁵ As opposed to the victims' participation at the International Criminal Court ("ICC") where the Victims, if not appearing as witnesses, are not parties to the proceedings but "participants".

Civil Parties. The Lead Co-Lawyers do not see how the rationale pleaded in those particular circumstances on trial is relevant to the Request.⁶

5. In para. 3, the Nuon Chea Defence claims that the said assumption plainly contradicts Cambodian law, ECCC jurisprudence, the Internal Rules as well as the practice at other international tribunals such as the International Criminal Court (“ICC”). In respect of the ECCC jurisprudence, the Lead Co-Lawyers would like to refer the Supreme Court Chamber to the arguments made in paras 8-12 of their Request.⁷ The Request is not inconsistent with Cambodian law, which, in fact, contemplates for a more pervasive role of Civil Parties during appeal proceedings.⁸ Lastly, despite the fact the ICC does envisage victim participation within its structure, there are stark dissimilarities between victims’ representation at the ICC and the ECCC; its practice cannot be likened, let alone considered as a precedent to the ECCC in this particular context.

6. In paras 3 and 4, the Nuon Chea Defence also argue that the Trial Chamber decision in Case 001 settled conclusively that civil parties do not enjoy a general right of equal participation with the Co-Prosecutors. The Lead Co-Lawyers submit that the Nuon Chea Defence ignore the context leading up to this decision in which, the Trial Chamber was concerned with the role of Civil Parties in sentencing during *trial* proceedings. Nevertheless, the Lead Co-Lawyers agree with the essence of the opinion expounded in that decision and submit that it is not contrary to the Request as it recognised the role of the Civil Parties to support the prosecution acknowledging that each party has a “distinct role, in keeping with their particular interests and responsibilities at trial”.⁹ Furthermore, the decision was rendered

⁶ The Lead Co-Lawyers would like to point out that the request to make opening remarks on behalf of the consolidated group of civil parties was rejected by the Trial Chamber solely on grounds that no explicit provisions existed in the current Internal Rules. The Trial Chamber did not render any decision on the role of the Lead Co-Lawyers in that respect during trial or appeal. *See* Decision on Civil Party Lead Co-Lawyers’ Request to Make Opening Remarks, **E316/1**, 14 October 2014.

⁷ *Citing to* Internal Rules 21(1)(a), 12 *ter* (1), 12 *ter* (5)(b), 23(1)(a) read with Article 36 *new* 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, NS/RKM/1004/006.

⁸ *See* Code of Criminal Procedure of the Kingdom of Cambodia, Articles 375 (civil parties entitled to appeal the civil matter of the case), 391 (civil parties allowed to file before the court of appeal), 388 (summoning of Civil Parties for Appeal Hearing), 394 (hearing of Civil parties on appeal).

⁹ 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, Case No. 001/18-07-2007/ECCC/TC, **E72/3**, 9 October 2009, para. 25.

in 2009; the role of Civil Parties underwent significant changes following the amendments after September 2009, most notable of which being the right of the Civil Parties to appeal the verdict where the Co-Prosecutors' have appealed.¹⁰ Therefore, employing this decision to restrict the rights of the Civil Parties on appeal is unfitting.

7. In para. 5, the Nuon Chea Defence anticipate that if the Lead Co-Lawyers were permitted to respond to all such grounds relating to Civil Parties' rights and interests, it would result in the "Defence facing two parties each advancing distinct cases as to Nuon Chea's guilt" thereby improperly transforming the Lead Co-Lawyers into a second prosecution thus violating Nuon Chea's right to a fair trial. The Lead Co-Lawyers emphasize that the Civil Parties are not asserting their right to appeal where it does not exist but simply the right to respond to the appeal briefs only inasmuch as it affects their rights and interests. This is not tantamount to additional prosecution in the same way that their participation during trial – involving forwarding list of witnesses, providing oral testimony on factual allegations, examine witnesses, giving closing submissions – is not considered additional prosecution. The consolidated group of Civil Parties, represented by the Lead Co-Lawyers, participate in the criminal *action* « *action publique* » led by the Prosecution against the accused and do not execute a parallel criminal *case* against them. To the degree that the Supreme Court Chamber may rule on the characterisation and effects – legal and factual – of the evidence provided by the Civil Parties, the Lead Co-Lawyers maintain a responsibility to respond to the relevant grounds of appeal.

8. In para. 5, the Nuon Chea Defence claim that the Co-Prosecutors did not suggest that they would leave it to the Lead Co-Lawyers to offer the sole responses to all grounds that may affect the civil parties' rights and interests. The Lead Co-Lawyers submit that the Nuon Chea Defence misconstrue the mandate of Co-Prosecutors, who are not obliged to appeal or respond to grounds relating to the function and relevance of the evidence provided by the Civil Parties. In the event that the Co-Prosecutors do not address the approximately 80 grounds of appeal in their response brief, the Civil Parties would have no occasion to represent their interests. This would greatly undermine the spirit of civil party representation

¹⁰ Cf. Internal Rule 105(1)(c) in Internal Rules (Rev. 6), 17 September 2010 with Internal Rule 105(1)(c) in Internal Rules (Rev. 4), 11 September 2009.

at the ECCC and negate its purpose. The Nuon Chea Defence disregards that Ground 34 (along with Grounds 11, 28, and 29) of their Notice of Appeal directly concerns the character and value of civil party testimony as well as victim impact testimony for which the primary responsibility to respond lies with the Lead Co-Lawyers.¹¹ Responding to the challenges to the Civil Parties evidence on appeal follows naturally from the fact that Lead Co-Lawyers participate in evidentiary hearings and make final submissions on behalf of the Civil Parties.

9. In para. 6 (a), the Nuon Chea Defence contend that the Lead Co-Lawyers' requests relating to extension of time limit and filing the Response Brief in one language are contradictory. The Nuon Chea Defence conflate the responsibility to consult Civil Parties with the coordination of Civil Parties' representation during trial. The Lead Co-Lawyers are authorised to represent the interests of the consolidated group of Civil Parties.¹² This necessitates consultation with the Civil Party Lawyers before the Lead Co-Lawyers make submissions in court. As stated in the Request, the Lead Co-Lawyers can obtain the views of the Civil Party Lawyers only after the Khmer version of the Appeal Brief is made available. However, it is the Lead Co-Lawyers, after having formed a united opinion based on those views, that bear the ultimate responsibility to the court for the overall advocacy, strategy and in-court presentation of the interests of the consolidated group of Civil Parties.¹³ For this purpose, filing in one language with the Khmer translation to follow at the earliest opportunity is not prejudicial to the interests of the Civil Parties or the Nuon Chea Defence and presents a reasonable balance of both the exigencies of time and fairness.

III. REQUEST

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

- (1) **ALLOW** the Lead Co-Lawyers' request to respond to the appeal briefs filed by the respective Co-Accused; and


¹¹ See also Grounds 11, 28 and 29 concerning the violation of the right of the accused to confront evidence against him, including, *inter alia*, civil party applications, victim impact testimonies and other evidence provided by the Civil Parties.

¹² Internal Rule 12 *ter* (5)(a).

¹³ Internal Rule 12 *ter* (5)(b).

(2) **GRANT** the Lead Co-Lawyers' request to file the consolidated response brief in English with Khmer translation to follow at the earliest opportunity.

Respectfully submitted,

Date	Name	Place	Signature
9 December 2014	PICH ANG Lead Co-Lawyer	Phnom Penh	
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