

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

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**CIVIL PARTY LEAD CO-LAWYERS' RESPONSE TO DEFENCE APPEALS  
AGAINST TRIAL JUDGEMENT 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  
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## II. INTRODUCTION

1. On 7 August 2014, the Trial Chamber rendered its Judgement in Case 002/01 convicting Nuon Chea and Khieu Samphân (“Co-Accused” or “Appellant” collectively) of crimes against humanity of extermination (encompassing murder), persecution on political grounds, and other inhumane acts (comprising forced transfer, enforced disappearances and attacks against human dignity) committed within the territory of Cambodia between 17 April 1975 and the end of 1977, sentencing them both to life imprisonment.<sup>1</sup>
2. On 29 September 2014, the Co-Accused filed their respective notice of appeal against the Judgement before the Supreme Court Chamber.<sup>2</sup> On 29 December 2014, the Appellant filed their appeal briefs (“Defence Appeal Briefs” collectively).<sup>3</sup> On 24 April 2015, the Co-Prosecutors filed their response brief (“OCP Response Brief”).<sup>4</sup>
3. On 24 November 2014, the Civil Party Lead Co-Lawyers (“Lead Co-Lawyers”) requested from the Supreme Court Chamber an opportunity to file a response brief addressing the alleged errors claimed by the Appellants in the Judgement concerning the evidence provided by the civil parties.<sup>5</sup> This request was granted in part on 26 December 2014 allowing the Lead Co-Lawyers to file a consolidated response to the Defence Appeal Briefs confined to grounds directly affecting civil parties’ rights and interests and endeavouring to avoid repetitiveness and overlap with issues already covered by the OCP Response Brief.<sup>6</sup>
4. Since the OCP Response Brief comprehensively addresses certain Grounds of Appeal from both the Defence appeals, the Lead Co-Lawyers focus solely on the grounds of appeal pertaining to the core legal issues affecting civil party evidence.

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<sup>1</sup> Case 002/01 Judgement, **E313**, 7 August 2014, pp. 622-623 (“Judgement”).

<sup>2</sup> 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 Samphân Notice of Appeal”).

<sup>3</sup> Nuon Chea’s Appeal against the Judgement in Case 002/01, **F16**, 29 December 2014 (“Nuon Chea Appeal Brief”); Mémoire d’appel de la Défense de M. KHIEU Samphân contre le jugement rendu dans le procès 002/01, **F17**, 29 December 2014 (“Khieu Samphân Appeal Brief”).

<sup>4</sup> Co-Prosecutors’ Response to Case 002/01 Appeals, **F17/1**, 24 April 2015 (“OCP Response Brief”).

<sup>5</sup> Civil Party Lead Co-Lawyers’ Requests Relating to the Appeals in Case 002/01, **F10**, 24 November 2014.

<sup>6</sup> Decision on Civil Party Lead Co-Lawyers’ Requests Relating to the Appeals in Case 002/01, **F10/2**, 26 December 2014, para. 17 (“Decision on LCL Request re Appeals”).

### III. SUMMARY OF ALLEGATIONS

5. The Appellants allege both errors of law and errors of fact in the Judgement concerning, *inter alia*, the legitimacy and fairness of the proceedings, the use of evidence, and the wilful killing of civilians during the Phase I population movement, amongst others.

6. Of the errors claimed by the Nuon Chea Defence, Grounds 32 and 34 directly concern the civil parties as they relate to the admissibility and probative value accorded by the Trial Chamber to civil party evidence.<sup>7</sup> The first limb of Ground 32 relates to out-of-court statements being admitted and subsequently used and relied upon in the Trial Judgement, including, civil party applications.<sup>8</sup> Under Ground 34, they allege that the Trial Chamber erred in relying on civil party statement of suffering, impact testimony and civil party testimony for its factual findings throughout the Judgement.<sup>9</sup> In addition to arguing the limited nature of civil party participation, the Nuon Chea Defence also challenge the practice of civil parties not being required to take an oath.<sup>10</sup>

7. The Khieu Samphân Defence raise similar errors in relation to the use of victim impact testimony by the Trial Chamber,<sup>11</sup> the admission and use of written statements in place of oral testimony<sup>12</sup> and the acceptance of civil party information contained in written record of interview and civil party applications without cross-examination.<sup>13</sup>

### IV. STANDARD OF REVIEW

8. The Nuon Chea Defence plead for *de novo* appellate review by challenging the standard of review set in the *Duch* Appeal Judgement, raising arguments relating to the collective interpretation of Article 12(1) of the ECCC Agreement, Article 9 *new* of the ECCC Law and Internal Rule 104(1).<sup>14</sup>

9. At the outset, the Lead Co-Lawyers agree with and defer to the OCP Response Brief in relation to the standards concerning departure from previous determination i.e. that the

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<sup>7</sup> Nuon Chea Appeal Brief, Ground 34.

<sup>8</sup> *Ibid*, paras 155-165.

<sup>9</sup> *Ibid*, paras 187-196.

<sup>10</sup> *Ibid*, paras 197-206.

<sup>11</sup> Khieu Samphân Appeal Brief, para. 30.

<sup>12</sup> *Ibid*, paras 29, 117.

<sup>13</sup> *Ibid*, para. 117.

<sup>14</sup> Nuon Chea Appeal Brief, paras 2-12.

Nuon Chea Defence fails to raise cogent reasons for departure from the standard of appeal set out in the *Duch* Appeal Judgement.

10. The Lead Co-Lawyers submit that the Supreme Court Chamber when elaborating on the standard of appeal in *Duch* Appeal Judgment was well-informed of the need to give precedence to and harmonize appellate proceedings at the ECCC with the Cambodian law.<sup>15</sup> The resulting interpretation vested the Supreme Court Chamber with the procedural liberties ensuing from its partial character as a Criminal Chamber of the Court of Appeal. Namely, the Supreme Court Chamber is empowered to examine evidence and call or admit new evidence to determine an issue,<sup>16</sup> whilst retaining its ability to “encompass the grounds for a request for cassation”.<sup>17</sup> In this respect, the Supreme Court Chamber maintains coherence with the procedural rights that would be available to the parties before the Criminal Chamber of the Court of Appeal.

11. On substantive rights, Article 9 *new* of the ECCC Law created a situation which Cambodian law does not deal with i.e. defining the subject-matter jurisdiction of the Supreme Court Chamber, naturally because such a chamber does not exist in its system. Therefore, in keeping with Article 12(1) of the ECCC Agreement, Article 33 *new* of the ECCC Law and “the purposes of the Internal Rules”,<sup>18</sup> the *Duch* Appeal Judgment resolved this by importing the standards to be applied to grounds of appeal under international law. The Lead Co-Lawyers submit that such a result does not run counter to the ordinary meaning and/or object and purpose of Article 12(1) as alluded to by the Nuon Chea Defence.

## V. PRELIMINARY MATTERS

12. First, the Appellants take a piecemeal approach in isolating selected pieces of evidence, facts, and conclusions without consideration of the contextual findings made by the Trial Chamber. As discussed below in detail, the respective appeal briefs simply claim an

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<sup>15</sup> See Case 001, Appeal Judgement (SCC), 3 February 2012, paras 11-13 (“*KAINING Guek Eav* Appeal Judgement”), paras 11-13.

<sup>16</sup> Internal Rules 104(1), 108(7). See also Decision on Part of Nuon Chea’s Third Request to Obtain and Consider Additional Evidence in Appeal Proceedings of Case 002/01, **F2/4/2**, 16 March 2015; Interim Decision on Part of Nuon Chea’s First Request to Obtain and Consider Additional Evidence in Appeal Proceedings of Case 002/01, **F2/4/3**, 1 April 2015.

<sup>17</sup> *KAINING Guek Eav* Appeal Judgement, para. 13.

<sup>18</sup> *Ibid*, para. 13.

error of law and fact without articulating the reasoning behind the challenge. It is often apparent that the Appellants seek to substitute their own interpretation of evidence adduced at trial as the sole reasoning for challenging the Trial Chamber's findings.

13. It is not debated that the Judgement relies on civil party evidence in making factual findings. However, the Lead Co-Lawyers note the attempt the Nuon Chea Appeal makes to dress a certain number of singular instances of reliance and/or reference as separate grounds of appeal notwithstanding that Ground 34 seeks to challenge "[e]ach such reference" to civil party testimony.<sup>19</sup> Often these "grounds" are not so much as challenges but mere disagreements that the Appellant entertains with the mention of a civil party's name in the discussion of evidence.

14. Second, reliance (as opposed to reference) must be an "unreasonable assessment of the facts of the case" for it to be considered as amounting to an error of fact.<sup>20</sup> Black's Law Dictionary defines "reliance" as "[a] state where something or someone is dependent on another being for support or other reason." The present response uses the term "reliance" when the Trial Chamber has made a certain piece of evidence a basis for rendering a factual or legal finding whereas the term "reference"<sup>21</sup> has been used to include instances where the

<sup>19</sup> Nuon Chea Appeal Brief, para. 187.

<sup>20</sup> *Prosecutor v. Gotovina and Markač*, IT-06-90-A, Appeal Judgement, 16 November 2012, para. 50 citing *Kayishema and Ruzindana* Appeal Judgement, para. 119 and *Aleksovski* Appeal Judgement, para. 63.

<sup>21</sup> Merriam Webster Dictionary defines "refer" as "to direct attention usually by clear and specific mention" or "to have recourse". Oxford English Dictionary – reference | ref(ə)rəns [noun the action of mentioning or alluding to something: he made reference to the enormous power of the mass media | references to Darwinism and evolution. • a mention or citation of a source of information in a book or article. • a book or passage cited with a reference. 2 use of a source of information in order to ascertain something: popular works of reference | [as modifier ]: a reference work. • the sending of a matter for decision or consideration to some authority: he demanded the immediate reference of the whole dispute to the United Nations. 3 a letter from a previous employer testifying to someone's ability or reliability, used when applying for a new job. verb [ with obj. ] provide (a book or article) with citations of authorities: each chapter is referenced, citing literature up to 1990. PHRASES for future reference for use at a later date: she lodged this idea in the back of her mind for future reference. See further refer |ri'fər| verb (refers, referring, referred) 1 [no obj.] (refer to) mention or allude to: the reports of the commission are often referred to in the media | New York, referred to as the Big Apple. • [ with obj. ] (refer someone to) direct the attention of someone to: I refer my colleague to the reply that I gave some moments ago. • (refer to) (of a word or phrase) describe or denote; have as a referent: the term "rhetoric" almost invariably refers to persuasion. 2 [ with obj. ] (refer something to) pass a matter to (another body, typically one with more authority or expertise) for a decision: disagreement arose and the issue was referred back to the Executive Committee. • (refer someone to) send or direct someone to a medical specialist: she was referred to a clinical psychologist for counseling. • [ no obj. ] (refer to) read or otherwise use (a source of information) in order to ascertain something; consult: I always refer to a dictionary when I come across a new word. 3 [ with obj. ] (refer something to) archaic trace or attribute something to (someone or something) as a cause or source: the God to whom he habitually referred his highest

Judgement only discusses or mentions a particular piece of evidence. The language in the Nuon Chea Appeal fails to distinguish between the two. It often points out “references” in the Judgement and urges the reader to treat them as errors of fact and errors of law.

15. Third, the errors alleged by the Appellants can be categorised into those relating to use by the Trial Chamber of unsworn civil party testimony, civil party applications, written records of interviews of civil parties and civil party impact testimony. Detailed responses on merits of these categories of errors are set forth later in Section VI of the present brief. However, the Lead Co-Lawyers submit that a substantial portion of the errors raised by the Appellants do not fulfil the standard of appellate review and therefore, they should be dismissed as such without consideration on the merits. The grounds of appeals containing those errors have been noted below as (i) being procedurally defective, (ii) having no impact on the conviction or sentence, (iii) challenging Trial Chamber’s reliance on individual pieces of evidence, or (iv) waived.

**A. Grounds of Appeal that are procedurally defective**

16. Lead Co-Lawyers submit that certain grounds of appeal in the Defence Appeal Briefs do not fulfil the requirements of Internal Rule 105(3) that the appeal brief must set out the arguments and authorities in support of *each* of the grounds in accordance with Rule 105(2)(a) and (c).

17. The Defence Appeal Briefs pleads many errors of fact and law that are incoherent, or fail to set out the substance of any Ground of appeal with sufficient particularity so much so that the Lead Co-Lawyers request that the Supreme Court Chamber find them inadmissible as being procedurally defective.<sup>22</sup>

18. The Nuon Chea Defence raised several grounds in its Notice of Appeal that were not set out in its Appeal Brief.<sup>23</sup> The Lead Co-Lawyers submit that these grounds should be dismissed by the Supreme Court Chamber as procedurally deficient even though Nuon Chea

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<sup>22</sup> See *KAINING Guek Eav* Appeal Judgement, para. 41 relying on Internal Rule 111(2).

<sup>23</sup> See *infra* para.21.



requests that those errors that are not sufficiently substantiated should not accordingly be considered as having been waived.<sup>24</sup>

19. Some of those grounds relate to use and reliance on certain civil party applications and civil party impact testimony. Whilst these grounds are subsumed in their challenge *per se* to the use and reliance on civil party evidence,<sup>25</sup> the Lead Co-Lawyers submit that when they are raised before the Supreme Court Chamber as individual grounds of appeal independent of the blanket challenge, they must fulfil the criteria mentioned above.

20. Because of this lack of development and substantiation, the Defence Appeal Briefs do not afford an opportunity to know the nature of the challenges as to each of these grounds. Therefore, Lead Co-Lawyers are not able to meaningfully respond to these alleged errors. For this reason, the Lead Co-Lawyers urge that these Grounds of Appeal be dismissed for lack of specificity and/or incoherence.<sup>26</sup>

21. The Lead Co-Lawyers submit that mere assertions that the Trial Chamber erred are insufficient and for this reason, they may be removed from an examination on merit.<sup>27</sup> Therefore, the Lead Co-Lawyers request the Supreme Court Chamber to dismiss the alleged errors in the Nuon Chea Appeal Brief that are plainly undeveloped:<sup>28</sup> Ground 70 (Hum Ponak, Civil Party Application); Ground 84 (Morm Phai Buon, Civil Party Application); Ground 85 (Kung Narin, Civil Party Application); Ground 91 (Ly Ream, Civil Party Application); Ground 95 (Sam Pha, Civil Party Application); Ground 96 (Sem Virak, Civil Party Application); Ground 138 (Phat Han, Civil Party Application); Ground 141 (Ly Ream, Civil Party Application); Ground 142 (Sam Pha, Civil Party Application); Ground 158 (Kong Vach, Civil Party Application and Written Record of Interview); Ground 159 (San Mom, Civil Party Application); Ground 167 (Dy Roeun, Civil Party Application).

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<sup>24</sup> Nuon Chea Appeal Brief, para. 1.

<sup>25</sup> *Ibid*, paras 75-82.

<sup>26</sup> *KAINING Guek Eav Appeal Judgement*, para. 42 (“The decisive question will always be whether an appellant has pleaded his case in a manner that enables an opposing party to know the case it has to meet, and enables the Supreme Court Chamber to identify and rule upon the issues in dispute. Whether that test is met will depend on the circumstances and, in particular, on the nature of the challenge to the Trial Chamber’s judgement.”).

<sup>27</sup> *Prosecutor v. Milorad Krnojelac*, IT-97-95-A, Judgement, 17 September 2003, para. 25 (“*Krnojelac Appeal Judgement*”).

<sup>28</sup> *KAINING Guek Eav Appeal Judgement*, para. 20.

## **B. Grounds of Appeal that have no impact on the conviction or sentence**

22. The Lead Co-Lawyers submit that arguments which do not have potential to cause the impugned decision to be reversed or revised may be immediately dismissed and need not be considered on merits.<sup>29</sup>

23. The Defence Appeal Briefs contain a series of claims of errors that do not explain how those errors impact the verdict. With respect to the numerous Grounds of Appeal raised in the Nuon Chea Appeal Brief concerning the Phase I movement, it is claimed that the Trial Chamber made their conclusions based on “anecdotal”<sup>30</sup> evidence which “do not support the general nature of the conclusion”.<sup>31</sup> Similarly, the Khieu Samphân Appeal Brief does not demonstrate how the alleged errors could have the effect of invalidating the verdict and/or would lead to a contrary reading of the evidence and conclusions arrived at in the Judgement.

24. The Supreme Court Chamber is not required to consider alleged errors that do not have any bearing on the conviction or the sentence.<sup>32</sup> Merely asserting an erroneous factual finding without sufficiently demonstrating that it is one on which the Chamber relied for a conviction fails to discharge the Appellants’ burden.<sup>33</sup> The Lead Co-Lawyers submit that these grounds of appeal should be dismissed without consideration on the merits.

25. Even in cases where the Defence Appeal Briefs have attempted to reason that a particular factual finding could potentially overturn the key findings the Trial Judgement, it has been held that as long as the factual findings supporting the conviction and sentence are sound, errors related to other factual conclusions do not have any impact on the judgement.<sup>34</sup>

Consequently, following Grounds of Appeal outlined in Nuon Chea Appeal Brief may be dismissed by the Supreme Court Chamber without consideration on merits:<sup>35</sup>

Ground Ground 55 (Sout Sem, Civil Party Application); Ground 56 (Pok Sa Em, Civil Party

<sup>29</sup> *Ibid*, para. 20.

<sup>30</sup> Nuon Chea Appeal Brief, para. 426.

<sup>31</sup> Nuon Chea Notice of Appeal, para. 6.

<sup>32</sup> See Internal Rule 105(3): “The notice shall, in respect of each ground of appeal, specify the alleged errors of law invalidating the decision and alleged errors of fact which occasioned a miscarriage of justice” (emphasis added). See also *Prosecutor v. Radoslav Brđanin*, IT-99-36-A, Judgement, 3 April 2007, para. 21 (“*Brđanin Appeal Judgement*”); *Prosecutor v. Mitar Vasiljević*, IT-98-32-A, Judgement, 25 February 2004, paras 20-21.

<sup>33</sup> *Brđanin Appeal Judgement*, para. 22.

<sup>34</sup> *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, IT-95-13/1-A, 5 May 2009, para. 232 (“*Mrkšić Appeal Judgement*”) (citing *Struger Appeal Judgement*, para. 19; *Brđanin Appeal Judgement*, para. 21).

<sup>35</sup> *KAING Guek Eav Appeal Judgement*, para. 20.

Application); Ground 57 (Suong Khit, Civil Party Application); Ground 58 (Mea Chhin, Civil Party Application); Ground 59 (Sen Sophon, Civil Party Application); Ground 60 (Chey Yeun, Civil party Application); Ground 61 (Pal Rattanak, Civil Party Application); Ground 62 (Yann Nhar, Civil Party Application); Ground 64 (Meas Mut, Civil Party Application); Ground 65 (Beng Boeun, Civil Party Application); Ground 68 (Khoem Naret, Civil Party Application); Ground 80 (Mom Sam Oeurn, Testimony of Civil Party); Ground 83 (Meas Saran, Civil Party Application); Ground 89 (Phuong Phalla, Civil Party Application); Ground 90 (Pal Rattanak, Civil Party Application); Ground 103 (Eam Tres, Civil Party Application); Ground 104 (Both Soth, Civil Party Application); Ground 105 (Pal Rattanak, Civil Party Application); Ground 112 (Sau Sary, Civil Party Application); Ground 118 (Rou Ren, Civil Party Application); Ground 121 (Chhor Dana, Civil Party Application); Ground 129 (Beng Boeun, Civil Party Application); Ground 143 (Soth Navy, Civil Party Application); Ground 147 (Toch Monin, Civil Party Application); Ground 152 (Soth Navy, Civil Party Application).

**C. Grounds of Appeal that challenge the Trial Chamber's reliance on individual pieces of evidence**

26. The Appellants allege on several occasions errors relating to isolated pieces of evidence and submit that the Supreme Court Chamber should reassess them individually. The Appellants merely dispute the Chamber's reliance on one of several pieces of evidence to establish a certain fact, but fail to explain why the conviction cannot be sustained on the basis of the remaining evidence. The Lead Co-Lawyers submit that these grounds also warrant a dismissal without consideration on the merits.

27. Further, the Appellants fail to show how the Trial Chamber's factual findings are contrary to the testimony given by the civil parties. Even in cases where the Appellants address errors relating to sole reliance on civil party evidence, they fail to show how the Trial Chamber erred in such reliance. Unsubstantiated assertions that the testimony of a witness (in this case civil parties) is inconsistent with the conclusions of the Chamber absent a demonstrable miscarriage of justice are also liable to be dismissed.<sup>36</sup>

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<sup>36</sup> See for example *Brđanin* Appeal Judgement, para. 28.

28. In this respect, the Lead Co-Lawyers urge the Supreme Court Chambers to dismiss the following Grounds of Appeal: Ground 78 (Yim Sovann, Testimony of Civil Party); Ground 81 (Chum Sokha, Testimony of Civil Party); Ground 98 (Kim Vandy, Testimony of Civil Party); Ground 120 (Lay Bony, Testimony of Civil Party); Ground 134 (Pin Yathay, Civil Party Testimony); Ground 161 (Pech Srey Phal, Civil Party Testimony); Ground 169 (Toeng Soka, Civil Party Testimony); Ground 170 (Pin Yathay, Civil Party Testimony). Further, the Lead Co-Lawyers further request the Supreme Court Chamber to dismiss the grounds challenging the sole reliance on civil party applications, namely: Ground 55 (Sout Sem, Civil Party Application); Ground 56 (Pok Sa Em, Civil Party Application); Ground 57 (Suong Khit, Civil Party Application); Ground 58 (Mea Chhin, Civil Party Application); Ground 59 (Sen Sophon, Civil Party Application); Ground 60 (Chey Yeun, Civil party Application); Ground 61 (Pal Rattanak, Civil Party Application); Ground 62 (Yann Nhar, Civil Party Application); Ground 64 (Meas Mut, Civil Party Application); Ground 65 (Beng Boeun, Civil Party Application); Ground 68 (Khoem Naret, Civil Party Application); Ground 80 (Mom Sam Oeurn, Testimony of Civil Party); Ground 83 (Meas Saran, Civil Party Application); Ground 89 (Phuong Phalla, Civil Party Application); Ground 90 (Pal Rattanak, Civil Party Application); Ground 103 (Eam Tres, Civil Party Application); Ground 104 (Both Soth, Civil Party Application); Ground 105 (Pal Rattanak, Civil Party Application); Ground 112 (Sau Sary, Civil Party Application); Ground 118 (Rou Ren, Civil Party Application); Ground 121 (Chhor Dana, Civil Party Application); Ground 129 (Beng Boeun, Civil Party Application); Ground 143 (Soth Navy, Civil Party Application); Ground 147 (Toch Monin, Civil Party Application); Ground 152 (Soth Navy, Civil Party Application).

**D. Grounds of Appeal that have been waived**

29. In conformity with the case-law of the international tribunals, a party is required to represent their objections or contentions formally during trial if and when time arises, either during trial or pre-trial phases of the proceedings.<sup>37</sup> If a party did not raise an objection

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<sup>37</sup> *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, IT-04-82-A, Judgement, 19 May 2010, paras 185, 244 (“*Bošković and Tarčulovski Appeal Judgement*”) (citing *Krajisnik Appeal Judgement*, para. 654, *Čelebići*

before the Trial Chamber, in the absence of exceptional circumstances, it may result in the party having waived his/her right to raise the issue as a valid Ground of appeal.<sup>38</sup> For the purposes of the present appeal, these contentions relate to unsworn testimony of civil parties raised in Nuon Chea Appeal Brief, use and reliance on civil party applications, and use and reliance on victim impact testimony for facts. The Appellants cannot remain silent on a matter only to return on appeal to seek a trial *de novo* and neither can they take a position opposed to the one taken during trial.

30. The Lead Co-Lawyers note that the ability to file interlocutory appeals is limited in the ECCC framework, and therefore, the jurisprudence of the ICTY and ICTR on the issue of waiver may not be wholly applicable. However, the Lead Co-Lawyers plead that certain grounds be dismissed as being waived for instances where the Defence had adequate opportunity to make their position known during trial when the issues were live before the Trial Chamber and litigated upon at length.

31. These specifically relate to reliance on civil party testimony for facts, as elaborated in Section VI(C), where Nuon Chea Defence themselves proposed Civil Parties for presenting facts before the Trial Chamber and did not file their opposition to the practice of civil parties not taking oath.

32. Ground 34; Ground 77 (Chheng Eng Ly, Victim Impact Testimony); Ground 78 (Thouch Phandarator, Victim Impact Testimony); Ground 133 (Seng Sivutha, Victim Impact Testimony); Ground 156 (Bay Sophany, Victim Impact Testimony); Ground 160 (Chan Socheat, Victim Impact Testimony); Ground 162 (Aun Phally, Victim Impact Testimony); Ground 189.

## VI. SUBMISSIONS

33. The Lead Co-Lawyers hereby respond to the specific grounds of appeal raised by the Appellants in Sections VI (B)-(D). The Lead Co-Lawyers urge that Sections VI (B)-(D) be read in conjunction with the general response elaborated in Section VI(A) that addresses

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Appeal Judgement, para. 640; *Furundzija* Appeal Judgement, para. 174; *Tadic* Appeal Judgement, para. 55; *Akayesu* Appeal Judgement para. 361).

<sup>38</sup> See for example *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A, Judgment, 1 June 2001, para. 113. The principle of waiver was also affirmed by ICTY Appeals Chamber in the *Čelebići* Appeal Judgement at para. 640, the *Furundzija* Appeal Judgement at para. 174, and the *Tadić* Appeal Judgement at para. 55.

alleged errors raised by the Nuon Chea Appeal Brief with respect to the limited role of civil parties in the ECCC procedural scheme.

#### A. General Response

34. The Nuon Chea Appeal argues that there is an “unambiguous” distinction between a “witness” and a “civil party” under both Cambodian law and the Internal Rules.<sup>39</sup> It asserts that the role of civil parties in trials before the ECCC is limited: “[t]he interests of civil parties ‘are principally the pursuit of reparations’” citing a decision in Case 001 concerning sentencing. It adds further that Internal Rule 23 does not confer a general right of equal participation with the Co-Prosecutors.<sup>40</sup> It cites the Supreme Court Chamber’s decision granting the Lead Co-Lawyers the right to respond to appeals in Case 002/01 to argue that the role of Civil Parties is “subsidiary” and not “alternative” to the Co-Prosecutors.<sup>41</sup> It adds that the Trial Chamber’s reliance on Civil Parties’ statements of suffering and impact testimony was inconsistent with the practice followed at the International Criminal Court (“ICC”),<sup>42</sup> International Criminal Tribunal for the former Yugoslavia (“ICTY”)<sup>43</sup> and at the domestic level in Australia, Canada, New Zealand, the United States and Israel.<sup>44</sup> It argues that “[i]nternational standards uniformly distinguish between the statements given only for the purpose of proving victim impact and evidence relevant to the substance of the charges. In many domestic jurisdictions, victim impact statements are not even allowed until the sentencing phase, which takes place only if and after the accused is convicted.”<sup>45</sup>

35. The Lead Co-Lawyers agree with the Nuon Chea Appeal that the role of the Civil Parties is distinct from that of witnesses, however, the Lead Co-Lawyers note their reliance on the Supreme Court Chamber’s decision that the role of civil parties is “subsidiary – not alternative – to the Co-Prosecutors”.<sup>46</sup> The full terminology used by the Supreme Court Chamber is that “the Civil Party *action* is subsidiary – not alternative – to the Co-

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<sup>39</sup> Nuon Chea Appeal Brief, para. 197.

<sup>40</sup> *Ibid*, para. 198.

<sup>41</sup> *Ibid*, para. 198.

<sup>42</sup> *Ibid*, para. 188.

<sup>43</sup> *Ibid*, para. 192.

<sup>44</sup> *Ibid*, para. 188.

<sup>45</sup> *Ibid*, para. 188.

<sup>46</sup> Nuon Chea Appeal Brief, para. 198 citing to Decision on LCL Request re Appeals, para. 12.

Prosecutors” not their role.<sup>47</sup> In respect of the role of Civil Parties, the Lead Co-Lawyers’ position and the decision of the Supreme Court Chamber is concurrent: the Civil Parties and the Co-Prosecutors hold a distinct role but enjoy an equal standing as a “party”.<sup>48</sup>

36. The Lead Co-Lawyers note that their unique role naturally implies participation in evidentiary and substantive hearings. In order to “[p]articipate in criminal proceedings *against* those responsible for crimes within the jurisdiction of the ECCC”,<sup>49</sup> the Internal Rules have afforded Civil Parties with a distinct set of participatory rights, including the one of presenting evidence, as any other Party.<sup>50</sup>

37. Further, the Lead Co-Lawyers note that the Nuon Chea Defence derived support for their argument from a decision on *sentencing* in Case 001. It is uncontroversial at the ECCC that seeking a sentence is the sole prerogative of the Co-Prosecutors.<sup>51</sup> Therefore, the Lead Co-Lawyers urge that this decision be read in that context. Further, the Lead Co-Lawyers submit that decision is not opposed to the practice currently permitted and followed by the Trial Chamber in Case 002/01:

“The clear policy reason for this right of participation is that it is in the interests both of the Cambodian community, as represented by the Co-Prosecutors, and of the Civil Parties themselves to obtain a decision on the criminality of the actions of the Accused. Civil Parties have the right to seek reparations upon a conviction of the Accused. As previously noted, this provision must be interpreted restrictively, and does not confer a general right of equal participation with the Co-Prosecutors. [...] Each party has a distinct role, in keeping with their particular interests and responsibilities at trial.”<sup>52</sup>

38. The Nuon Chea Defence argues further that “where such [civil party] testimony constitutes a key source of evidence to prove the substance of the crimes charged, civil party lawyers indeed transform into ‘additional prosecutors’”.<sup>53</sup> The Lead Co-Lawyers submit that the Internal Rule 23 provide for two platforms for Civil Party action (i) public action of

<sup>47</sup> Decision on LCL Request re Appeals, para. 12 (emphasis added). The Lead Co-Lawyers also note the use of word in the French version of the decision “*complémentaire*” and the Khmer version “បន្តិកបន្តួច”.

<sup>48</sup> *Ibid*, para. 15. See further Internal Rules, p. 80 “Civil Party”, p. 81 “party”.

<sup>49</sup> Internal Rule 23(1)(a) (emphasis added).

<sup>50</sup> Internal Rule 80(1).

<sup>51</sup> See *example* Internal Rules 105(1)(c), 113.

<sup>52</sup> 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, E72/3, 9 October 2009, paras 25, 27.

<sup>53</sup> Nuon Chea Appeal Brief, para. 200.

prosecution and (ii) pursue a civil claim on reparations.<sup>54</sup> The first is exercised by “participat[ing] in criminal proceedings” by “supporting the prosecution”. The Lead Co-Lawyers submit that it is this very fact that predicates their ability to give evidence against those responsible for crimes within the jurisdiction of the ECCC. However, the nuance that the Appellant does not address is that such support is aimed at supporting the singular act of “prosecution” rather than to add to the *Office* of the Co-Prosecutors.<sup>55</sup> The contention that Civil Party Lawyers are additional prosecutors is a tempting conclusion but an inaccurate representation of the rules. The Civil Party Lead Co-Lawyers are charged with the specific mandate to represent the interests of the consolidated group of Civil Parties 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, amongst all others.

39. Whether civil parties present facts and evidence before the Chamber, either in the form of civil party applications and/or in-court examination, they do so from the standpoint of a party to the proceedings, the same way as an Accused is entitled to. The Appellant’s repeated misunderstanding of the nature and scope of Civil Party participation before and during the trial cannot by itself be sufficiently pleaded as grounds for invalidating a judgement. In their appeals, the Appellants fail to establish what prejudice occurred to them on this account, when in fact, as elaborated below, they were afforded repeated opportunity to challenge the admissibility and provenance of civil party evidence and present arguments to the Chamber as to its probative value.

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<sup>54</sup> For further guidance on the nature of the two actions *see* 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, E72/3, 9 October 2009, Judge Lavergne dissent, para. 7: “While criminal and civil actions differ in purpose, they have much in common from a procedural standpoint, in particular, because Civil Parties are themselves parties in both types of proceedings. They have a stake in the outcome of the criminal case in that they obviously have an interest in a finding of guilt against the Accused since the alleged offences may also be the cause of the harm they suffered. The law grants them rights that enable them to intervene directly in the criminal proceedings. Through their complaints and denunciations, they can trigger a criminal action. Through their requests for investigative action during the judicial investigation, they can influence the investigations undertaken and even move the proceedings in a different direction. By their attendance at the trial, they participate, *inter alia*, in the oral arguments concerning the Accused’s criminal responsibility. In this context, they participate in the adversarial discussion on evidence produced in court. They can lead additional evidence and contribute to the proceedings, notably by giving a concrete picture of the harmful consequences of the alleged offences.”

<sup>55</sup> Internal Rule 23(1)(a): “Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution”.



a) *International Law*

40. In response to the claim in the Nuon Chea Appeal that the evidence provided by the Civil Parties is limited to the assessment of reparations, the Lead Co-Lawyers submit that the ICC jurisprudence is in conformity with the ECCC law in that it is the role of the Chamber to “separate the evidence that relates to the charges from the evidence that solely relates to reparations”.<sup>56</sup> The Lead Co-Lawyers add that this leaves the Chamber the liberty to utilise the facts contained therein to prove allegations against the Accused following an adversarial challenge.

41. The Nuon Chea Appeal mischaracterises the ICTY Appeals Chamber holdings in the decisions in the *Delić* case<sup>57</sup> and the *Prlić* case<sup>58</sup> to draw analogy between the ICTY and ECCC concerning evidence being used solely for the purpose that it has been specified for. First, both these cases cited in the Nuon Chea Appeal refer to instances where the documents tended to be used before the Chamber during cross-examination by the prosecution were not on their list pursuant to Rule 65ter, a provision akin but not identical to Internal Rule 80. The ICTY Appeals Chamber in *Delić* had found that the Trial Chamber had erred in “not specifying the purpose for which the *Exhibits* were admitted”<sup>59</sup> and in *Prlić* was seized of the issue “whether the Trial Chamber erred by finding that the Prosecution is allowed to adduce *fresh evidence* after the closure of its case-in-chief, if the admittance of such evidence is justified”.<sup>60</sup>

42. Second, on principle of notice and adversarial debate, the Lead Co-Lawyers refer to their response in Section VI(C)(3) in respect of Civil Party Testimony. In respect of statements of suffering and impact testimony, the Lead Co-Lawyers submit that the Civil Party Applications of Civil Parties who appeared in court had been included in the Rule 80 list submitted by the Lead Co-Lawyers. The facts contained therein were subjected to

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<sup>56</sup> *Prosecutor v. Lubanga*, Decision on Victims’ Participation, 18 January 2008, ICC-01/04-01/06-1119, para. 121.

<sup>57</sup> Nuon Chea Appeal Brief, fns 525-526.

<sup>58</sup> *Ibid*, fn. 524.

<sup>59</sup> *Prosecutor v. Rasim Delić*, Decision on Rasim Delić Interlocutory Appeal Against Trial Chamber’s Oral Decisions on Admission of Exhibits 1316 and 1317, IT-04-83-AR73.1, 15 April 2008, para. 23 (emphasis added).

<sup>60</sup> *Prosecutor v. Prlić et al.*, Decision on the Interlocutory Appeal Against the Trial Chamber’s Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, IT-04-74-AR73.14, 26 February 2009, para. 19 (emphasis added).

scrutiny at the admissibility stage and during their in-court examination.<sup>61</sup> If facts not contained in their respective civil party applications emerged for the first time during their in-court examination, *all* parties were given full opportunity to examine them – at one instances, this resulted in a Civil Party being recalled to be examined on those particular facts.<sup>62</sup>

43. Third, the Lead Co-Lawyers submit that the procedural unfairness caused to the accused cannot be judged on the criteria outlined by the ICTY Appeals Chamber as the evidentiary procedure and hearings are fundamentally different from the one at the ECCC.<sup>63</sup>

*b) Domestic law*

44. The Nuon Chea Appeal invokes by inferences the provisions applicable in Australia, Canada, New Zealand, United States<sup>64</sup> and Israel to argue that “victim impact statements are not even allowed until the sentencing phases, which takes place only if and after the accused is convicted” and such “testimony is ipso facto inadmissible in relation to the substance of the charges because it is given after this issue is determined”.<sup>65</sup>

45. The Lead Co-Lawyers submit that the proceedings before the ECCC are governed by Cambodian Law for the interpretation of which French law can be used.<sup>66</sup> Reference to a list of countries that largely follow common law demonstrates the flaw in their argument.

46. Under the Cambodian Code of Criminal Procedure, there is no distinction between statements given for the purpose of proving impact/suffering and evidence relevant to the substance of the charges. All types of evidence are admissible as a matter of principle during a criminal trial, and no rule restricts the manner in which civil parties can be heard by the judges.<sup>67</sup> The judges in Cambodian courts are bound to “listen to the statements of civil

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<sup>61</sup> See Section VI (D).

<sup>62</sup> T. 23 November 2012, E1/146.1, p. 105; see also *infra* paras 122-124.

<sup>63</sup> At the ICTY, the Prosecutor conducts the investigations and it is only after the close of the Prosecution case that the Defence case begins, therefore the notice requirements and disclosure obligations are dissimilar from those at the ECCC. See ICTY Rules of Procedure and Evidence, Rules 65ter(G) and 85(A) *cf.* Internal Rule 80.

<sup>64</sup> Nuon Chea Appeal Brief, para. 188. The Lead Co-Lawyers note that the article cited in the Nuon Chea Appeal discusses the use of victim impact evidence only in the context of US capital cases, rather than regular criminal proceedings.

<sup>65</sup> *Id.*

<sup>66</sup> See example *KAINING Guek Eav* Appeal Judgement, para. 31.

<sup>67</sup> Article 321 Cambodian Court of Criminal Procedure: “Unless it is provided otherwise by law, in criminal cases all evidence is admissible. The court has to consider the value of the evidence submitted for its

parties, civil defendants, victims, witnesses and experts in the order which he deems useful.”<sup>68</sup>

47. Similarly, French law does not put any restrictions on the extent or content of civil party testimony during trial – these statements may go to the charges alleged and/or impact of crimes.<sup>69</sup> Neither does it distinguish between the stages of establishing guilt and sentencing.<sup>70</sup> Therefore, the references to domestic practices in the Nuon Chea Appeal do not aid or further the discussion, which the Lead Co-Lawyers submit is clear and unambiguous in the provisions of the ECCC Law and Cambodian Law.

### **B. Admissibility and reliability of civil party applications (Ground 32)**

48. The Appellants claim errors of law in the Trial Chamber’s reliance on civil party applications. The Nuon Chea Appeal alleges that the Chamber “relied extensively on civil party applications [...] without any consideration of the dubious circumstances under which they were created.”<sup>71</sup> The Khieu Samphân Appeal contends that the Trial Chamber committed an error in considering civil party applications as evidence to make conclusions in the Judgement, without giving the Defence an opportunity to cross-examine those Civil Parties.<sup>72</sup> It also alleges that the Trial Chamber committed an error in not realising the precise criteria for admissibility and reliance of documentary evidence, including civil party applications.<sup>73</sup> It adds that the Trial Chamber erred in law by admitting these documents in place of oral testimony a few days before the Closing Briefs were due.<sup>74</sup>

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examination, following the judge’s intimate conviction. The judgment of the court may be based only on the evidence included in the case file or which has been presented at the hearing”.

<sup>68</sup> Article 326 of the Code of Criminal Procedure of the Kingdom of Cambodia stipulates that: “The presiding judge shall listen to the statements of civil parties, civil defendants, victims, witnesses and experts in the order which he deems useful.”

<sup>69</sup> Article 346 of the French Code of Criminal Procedure: “When the investigation made in the course of the hearing is ended, the civil party or his advocate is heard. The public prosecutor makes his submissions. The accused and his advocate present their defence arguments. The civil party and the public prosecutor may reply, but the accused and his advocate will always have the final word”. This is unlike witnesses, who are requested to testify only “in respect of the matters alleged against the accused, or in respect of his personality or morality” (Article 331 French Code of Criminal Procedure).

<sup>70</sup> Article 362 of the French Code of Criminal Procedure provides that “where a positive answer is made on guilt, [...] the assize court then deliberates without interruption on the form of the sentence”.

<sup>71</sup> Nuon Chea Appeal Brief, para. 165.

<sup>72</sup> Khieu Samphân Appeal Brief, para. 468.

<sup>73</sup> *Ibid*, para. 16.

<sup>74</sup> *Id*.

49. Both Appellants often categorise civil party applications to be in the same group as victim complaints and written records of interview.<sup>75</sup> The Lead Co-Lawyers hereby respond to the allegations raised by them specifically against civil party applications.<sup>76</sup>

50. The Lead Co-Lawyers submit that the Internal Rule 23 *bis* (4) is clear that the civil party applications must contain, in particular, the details of the status as a Victim, “specify the alleged crime” and attach any evidence of the injury suffered, or “tending to show the guilt of the alleged perpetrator”.

51. When deciding on the admissibility of victims as Civil Parties, the Office of the Co-Investigative Judge considered these applications and admitted some victims as Civil Parties only after it was “satisfied that facts alleged in support of the application are more likely than not to be true”.<sup>77</sup> Those that were not admitted were further considered on the basis of their merits at the appellate stage.<sup>78</sup>

52. During the trial stage, the Trial Chamber considered the civil party applications that were appended in the Lead Co-Lawyers’ Documents and Evidence List<sup>79</sup> and determined their admissibility as evidence just like it did with every piece of documentary evidence sought to be admitted by other parties. The Trial Chamber was cognizant and mindful of the “circumstances in which they were recorded” in its assessment of the probative value of the evidence in the Judgement.<sup>80</sup>

53. The alleged “dubious circumstances” under which civil party applications were created were therefore considered and accounted for during this three-staged process. Following that, in court, the Lead Co-Lawyers often put these civil party applications before the Chamber during the in-court examination of witnesses, experts, and civil parties and

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<sup>75</sup> See example Nuon Chea Appeal Brief, para. 163; Khieu Samphân Appeal Brief, para. 468.

<sup>76</sup> Since the Lead Co-Lawyers did not rely on victim complaints in their Closing Brief as did the OCP, the Lead Co-Lawyers will not respond to the alleged error in the use of victim complaints as evidence. Furthermore, the Lead Co-Lawyers are only mandated to represent the consolidated group of Civil Parties before the Trial Chamber and not victims.

<sup>77</sup> Internal Rule 23 *bis* (1). See example D394-D425.

<sup>78</sup> See example Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, **D404/2/4**, 24 June 2011; Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, **D411/3/6**, 24 June 2011.

<sup>79</sup> Civil Party Lead Co-Lawyers’ Rule 80 Summaries and Expert Qualifications With Points of the Indictment, Including Confidential Annexes. **E9/8**, 23 February 2011; see also Confidential Annex I – Updated Witness, Civil Party and Expert Lists, **E305/7.1.1**, 9 May 2014.

<sup>80</sup> Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents before the Trial Chamber, **E96/7**, 20 June 2012, para. 29.

during the key documents presentation hearings. The circumstances of their creation, their relevance and probative value was therefore, available for discussion and argument before the Trial Chamber.

54. Further, when ruling on the admissibility of written documents, the Trial Chamber emphasised that “opportunity for confrontation” is a relevant consideration in assessing the probative value and weight to be accorded, if any.<sup>81</sup> The Trial Chamber considered the “statements” to be “cumulative of each other and/or other evidence, including the live evidence of witnesses and Civil Parties, already on record and are prima facie relevant to proof of matters within the scope of Case 002/01 *other than acts and conducts of the Accused as charged.*”<sup>82</sup> Contrary to what is alleged by the Nuon Chea Appeal Brief, “the circumstances under which they were taken” was considered in assigning weight, if any, in the verdict.<sup>83</sup>

55. The Lead Co-Lawyers submit that the Trial Chamber was clear and coherent with respect to the criteria for admissibility especially in light of Rule 87(1) which provides that all evidence is admissible and its subsequent assignment of probative value in its final assessment of the evidence.

56. The criteria was reiterated by the Trial Chamber when the Judgement elaborated that the various factors that it considered when assigning probative value to the evidence included “the circumstances surrounding the creation or recording of evidence, whether the original or a copy was admitted, legibility, discrepancies with other versions, deficiencies credibly alleged, whether the parties had the opportunity to challenge the evidence and other *indicia* of reliability including chain of custody and provenance.”<sup>84</sup>

57. Furthermore, *all* parties were at liberty to employ these civil party applications during their examinations either to verify the information contained therein or to confront the witnesses, experts and civil parties. Lastly, when the Lead Co-Lawyers presented certain civil party applications during the Key Documents Presentation hearings, the parties were

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<sup>81</sup> Decision on Objections to the Admissibility of Witnesses, Victim and Civil Party Statements and Case 001 Transcripts Proposed by the Co-Prosecutors and Civil Party Lead Co-Lawyers, **E299**, 15 August 2013, p. 11.

<sup>82</sup> *Ibid*, para. 26.

<sup>83</sup> *Ibid*, para. 26.

<sup>84</sup> Judgement, para. 34.

given further opportunity to comment on their probative value before the Chamber, an opportunity that they failed to use.<sup>85</sup>

58. The Lead Co-Lawyers submit that the Appellants allegation that the Trial Chamber could not use these documents as evidence is unfounded. Not only did the Trial Chamber decide on their admissibility as evidence on the Case-File<sup>86</sup> but it was also free to assess the weight and probative value of the evidence presented before it as it deemed fit,<sup>87</sup> subject to the general principle that the Trial Chamber exercise “its duty to independently and appropriately weigh all evidence presented and to safeguard the fairness of trial proceedings”.<sup>88</sup>

59. The Lead Co-Lawyers submit that when they proposed civil party applications in their Documents and Evidence List before the Trial Chamber, it was categorically made clear that these would be used to prove allegations in the Closing Order.<sup>89</sup> The Lead Co-Lawyers contended that they should be considered relevant as they related to a material issue found in the indictment, a criteria which has been accepted in international criminal law jurisprudence.<sup>90</sup> The Lead Co-Lawyers grant that civil party applications, in themselves, are not outcome-determinative of the judgement. Therefore, when they did go into acts and conducts of the Accused, the Lead Co-Lawyers proposed their authors i.e. the Civil Parties to

<sup>85</sup> See example T. 13 June 2013, E1/207.1; T. 24 June 2013, E1/211.1; T. 26 June 2013, E1/212.1; T. 26 June 2013, E1/213.1; T. 8 July 2013, E1/219.1.

<sup>86</sup> Decision on Objections to the Admissibility of Witnesses, Victim and Civil Party Statements and Case 001 Transcripts Proposed by the Co-Prosecutors and Civil Party Lead Co-Lawyers, E299, 15 August 2013, paras 26-28, p.23.

<sup>87</sup> See Case 001 Judgement, E188, 26 July 2010, para. 42 (“*KAING Guek Eav* Trial Judgement”); see also Decision on Admissibility of Material on the Case File as Evidence, E43/4, 26 May 2009, para. 7; Decision on Parties Requests to Put Certain Materials Before the Chamber Pursuant to Internal Rule 87(2), E176, 28 October 2009, para. 3; Decision on the Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, E96/7, 20 June 2012, p. 18; T. 20 March 2012, E1/51.1, p. 53; T. 18 October 2012, E1/134.1, p. 90.

<sup>88</sup> Decision on Request to Recall Civil Party TCCP-187, for Review of Procedure concerning Civil Parties’ Statements on Suffering and Related Motions and Responses, E267/3, 2 May 2013, para. 22 (“The Trial Chamber indicates that in the current case it will follow the same approach in exercising its duty to independently and appropriately weigh all evidence presented and to safeguard the fairness of trial proceedings. Therefore the weight to be given to Civil Party testimony will be assessed on a case-by-case basis in light of the credibility of that testimony.”).

<sup>89</sup> See *infra*, paras 86

<sup>90</sup> *Prosecutor v. Prlić et al.*, IT-04-AR73.13, Decision on Jadranko Prlić’s Consolidated Interlocutory Appeal against the Trial Chamber’s Orders of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009, para. 17; see also *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-AR73, Decision on Appeals by Pauline Nyiramasuhuko and Arsene Shalom Ntahobali on the Decision on Defence Urgent Motion to Declare Parts of Evidence on Witnesses RZ and ABZ Inadmissible, 2 July 2004, para. 15.

be called to testify. The Trial Chamber considered that should such Civil Parties not testify, their evidence on the acts and conducts would be considered inadmissible.<sup>91</sup> The Lead Co-Lawyers submit that this practice was in accordance with the requirements of fair trial.<sup>92</sup>

60. The Lead Co-Lawyers therefore, submit that the Trial Chamber was well within its discretion to admit and rely on civil party applications to make factual findings establishing the allegations relating to the crime bases. The Lead Co-Lawyers submit that civil party applications, in and of themselves, have not been used to characterise the criminal liability of the Accused unless they were corroborated by live evidence as to those matters.

61. The Lead Co-Lawyers submit that the Appellants have failed to indicate in what way the Trial Chamber was misdirected as to the principles to be applied when assessing civil party applications. The Lead Co-Lawyers assert that the Appellants have not demonstrated if and how the Trial Chamber gave weight to irrelevant and inadmissible pieces of evidence when making findings in the Judgement.

62. The “striking” example used in the Nuon Chea Appeal to reveal the errors made by the Trial Chamber is in finding that “those who refused to leave Phnom Penh or obey orders during the evacuation were ‘shot and killed on the spot’”.<sup>93</sup> The Lead Co-Lawyers draw the attention of the Supreme Court Chamber to paragraph 474 of the Judgement where it is clear that the sentence quoted in the Nuon Chea Appeal is not a “finding” of the Trial Chamber but a discussion of evidence *recounting* what numerous civil parties and victims relating to forced transfer and allegations of murder and attacks on human dignity as crimes against humanity:

Khmer Rouge soldiers also threatened to kill those who refused to follow their instructions and leave. Numerous civil parties and victims recounted how those who did not immediately obey were shot and killed on the spot. In particular, Civil Party Denise AFFONÇO described how a school friend of hers who stayed to wait for her husband was killed on the spot, and Civil Party PIN Yathay recounted how a soldier had shot a boy who had sought to return home to collect something, stating “this is what happens to recalcitrants”. The written eyewitness accounts of other individuals also tell of such

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<sup>91</sup> Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents before the Trial Chamber, **E96/7**, 20 June 2012, paras 21-22; *see also* Decision on Objections to the Admissibility of Witnesses, Victim and Civil Party Statements and Case 001 Transcripts Proposed by the Co-Prosecutors and Civil Party Lead Co-Lawyers, **E299**, 15 August 2013, paras 26-27.

<sup>92</sup> *See also Prosecutor v. S. Milošević*, IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator’s Evidence, 30 September 2002, para. 27.

<sup>93</sup> Nuon Chea Appeal Brief, para. 165.

killings. That those who resisted the evacuation were shot was further corroborated by SUM Chea, a Khmer Rouge soldier.<sup>94</sup>

63. Based on the evidence discussed in this paragraph and those following, the Trial Chamber concluded that the Khmer Rouge “threatened them with death and actually shot those who did not follow orders immediately”;<sup>95</sup> “numerous victims who refused to leave their homes in Phnom Penh, as well as those who did not immediately follow the instructions of Khmer Rouge soldiers during the march out of the city were shot and killed on the spot”;<sup>96</sup> “[a]t least two million people in Phnom Penh were forcibly evicted from their houses by Khmer Rouge soldiers at gunpoint with almost no prior warning and in terrifying and violent circumstances”;<sup>97</sup> and “[t]he majority witnessed beatings, shootings and killings and saw countless dead bodies lying along the roads as they exited Phnom Penh”.<sup>98</sup> It is apparent from these findings that the Trial Chamber did not merely rely on the “twenty-six accounts cited by the Trial Chamber [including] eighteen [...] civil party applications” amongst others.<sup>99</sup>

64. Similarly, the Nuon Chea Appeal alleges an error in fn. 1810 of the Judgement that cites Civil Party Application E3/5084 in “finding” that the Khmer Rouge did not provide any food on the boat during Forced Transfer II.<sup>100</sup> The Lead Co-Lawyers submit that this is not a factual conclusion reached by the Trial Chamber but a citation to evidence which was in fact made on the basis of findings found later, for example in paras 632,<sup>101</sup> 633,<sup>102</sup> 635,<sup>103</sup> 641<sup>104</sup>

<sup>94</sup> Judgement, para. 474 (internal citations omitted) (emphasis added).

<sup>95</sup> *Ibid*, para. 548 (citing to para. 474).

<sup>96</sup> *Ibid*, para. 553 (citing to paras 474, 486).

<sup>97</sup> *Ibid*, para. 563 (citing to paras 464, 468, 471-474).

<sup>98</sup> Judgement, para. 563 (citing to paras 473-474, 486, 489-491, 497-498).

<sup>99</sup> Nuon Chea Appeal Brief, para. 165.

<sup>100</sup> *Ibid*, paras 163, 165; *see also ibid*, 430.

<sup>101</sup> Citing to the evidence discussed in Judgement, paras 582, 589, 591, 594-595, 597-599, 601, 609, 611-612, 617, 623, 625 of the Judgement, the Trial Chamber found that “Khmer Rouge guards provided no assistance and often no information as to their destination. People were frightened and lived in a state of terror, unwilling or unable to disobey or question orders.”

<sup>102</sup> Citing to the evidence discussed in Judgement, paras 595 and 599, the Trial Chamber found that “[m]any were not returned to their homes or were not transferred to the destination they were told they would be sent to.”

<sup>103</sup> Citing to evidence discussed in Judgement, paras 591-601, 607-609, 611-612, 617-620, 622-623, 625-626, the Trial Chamber found that “[p]eople were crowded into trucks, trains and carts, or forced to walk, without hygiene facilities.

<sup>104</sup> Citing to the evidence discussed in Judgement, paras 593, 595, 599, 601, 609, 611, 614, 618, 623, 625, the Trial Chamber found that “[t]hese deprivations of liberty were accompanied by a deliberate refusal to provide accurate information regarding the fate or whereabouts of the persons concerned, with Khmer Rouge soldiers and officials providing no or false information concerning their fate or destination.”



and 851<sup>105</sup> of the Judgement. The Lead Co-Lawyers add that where the findings tied to E3/5084 relating to “insufficient food”,<sup>106</sup> “failure to provide assistance”,<sup>107</sup> and deaths “due to starvation”<sup>108</sup> were made, the Judgement also referred to the extensive evidence aiding that conclusion.

65. Therefore, the Lead Co-Lawyers submit that the Trial Chamber did not commit any error in admitting civil party applications for proof of fact and further relying on them as cumulative to the oral testimony and other evidence on record. The Lead Co-Lawyers add that both Defence teams were given opportunities at various stages of the proceedings to object and challenge the information contained in civil party applications. Regardless, the Lead Co-Lawyers submit that the Trial Chamber adhered to appropriate standards when assessing the probative value of civil party applications and did not err in exercising its judicial discretion in this regard.

### ***1. Individual Responses***

66. Regarding Ground 56 of the Nuon Chea Appeal concerning Pok Sa Em’s Civil Party Application (D22/247), Ground 57 relating to Suong Khit’s Civil Party Application (D22/309), Ground 58 relating to Mea Chhin’s Civil Party Application (D22/39) and Ground 59 relating to Sen Sophon’s Civil Party Application (D22/1232), the Lead Co-Lawyers refer to the Co-Prosecutors’ Response concerning Sot Sem, Chey Yeun, Yann Nhor, Pal Rattanak, Meas Mut, Beng Boeun, and Khoem Nareth.<sup>109</sup>

67. Concerning Ground 118 of the Nuon Chea Appeal concerning Rou Ren’s Civil Party Application,<sup>110</sup> the Lead Co-Lawyers submit that the Ground does not challenge a finding but

<sup>105</sup> Also citing to evidence discussed in Judgement, paras 591-595 to find that “[t]housands of people were moved by boat, truck and train to, from and past Phnom Penh, a city otherwise largely deserted.”

<sup>106</sup> Judgement, para. 635 citing to paras 591-595, 600 finding that “[d]uring stops, they had to sleep on the ground open to the elements and were provided no mosquito nets, bedding and insufficient food.”

<sup>107</sup> Judgement, para. 646 finding that people died as a result of the inhumane conditions in which they were moved, including as a result of indifference and failure to provide any assistance. The Trial Chamber further noted that “[t]he exact number of deaths during movement of the population (phase two) is unknown.”

<sup>108</sup> Judgement, para. 647 referring also to 592, 594-595, 597-598.

<sup>109</sup> See OCP Response Brief, paras 154, 242 (Chey Yeun); paras 154, 161, 167, 172, 239 (Pal Rattanak); para. 153 (Yann Nhar); paras 153-154 (Meas Mut); paras 153-154, 167 (Beng Boeun); paras 154, 396 (Khoem Naret); para. 154 (Sot Sem).

<sup>110</sup> Nuon Chea Appeal Brief, para. 596.

a discussion of evidence by the Trial Chamber on Khmer Republic soldiers being killed.<sup>111</sup> Regardless, the account provided by Rou Ren, despite being hearsay, is corroborated by other evidence referred to by the Judgement generally in respect of Khmer Republic soldiers being killed.<sup>112</sup>

68. Concerning Ground 53 of the Nuon Chea Appeal relating to Khiev Horn's Written Record of Interview,<sup>113</sup> the Lead Co-Lawyers submit that the Ground does not challenge a finding by the Trial Chamber but a discussion of evidence by the Trial Chamber.<sup>114</sup> Regardless, it is incorrect that Khiev Horn was only among the two "witnesses" who reported the killings in the course of the evacuation.<sup>115</sup> The Lead Co-Lawyers submit that her statement to the OCIJ was cumulative to the live and documentary evidence before the Trial Chamber and was considered as such.

69. In respect of the remaining individual challenges to reliance on Civil Party Applications<sup>116</sup> and Written Records of Interview,<sup>117</sup> the Lead Co-Lawyers defer to the OCP Response Brief.

### C. Civil Party Testimony (Ground 34)

70. The Nuon Chea Appeal alleges that the Civil Party testimony lacks the appropriate safeguards intended to protect the integrity of the evidence because of the fact that (i) they do not take an oath before the Chamber;<sup>118</sup> (ii) civil parties are entitled to meet freely with their

<sup>111</sup> See Judgement, para. 508.

<sup>112</sup> *Ibid.*, fn. 1521.

<sup>113</sup> Nuon Chea Appeal Brief, para. 304.

<sup>114</sup> See Judgement, para. 474.

<sup>115</sup> *Ibid.*, fn. 1404 which lists documentary evidence to that effect. In the same paragraph (para. 474), the Judgment discusses both live and documentary evidence concerning this matter.

<sup>116</sup> See OCP Response Brief, paras 154, 242 (Chey Yeun); paras 154, 161, 167, 172, 239 (Pal Rattanak); para. 153 (Yann Nhar); paras 153-154 (Meas Mut); paras 153-154, 167 (Beng Boeun); paras 154, 396 (Khoem Naret); para. 153 (Hum Ponak); paras 157, 241, 396 (Meas Saran); para. 155 (Morn Phai Buon); para. 153 (Phuong Phalla); paras 154, 181, 239, 241 (Ly Ream); paras 181, 185, 239, 241 (Sam Pha); para. 153 (Sen Virak); para. 160 (Eam Tres); paras 160, 167 (Both Soth); para. 166 (Sau Sary); para. 166 (Rou Ren); paras 168, 172, 186, 348 (Chhor Dana); para. 181 (Phat Han); paras 181, 183, 185, 241 (Soth Navy); para. 181 (Touch Monin); para. 189 (Kong Vach); para. 190 (San Mom); paras 189-190, 195, 265 (Dy Roeun), para. 242 (Mom Som Oeurn).

<sup>117</sup> *Ibid.*, para. 396 (Khoem Nareth); para. 154 (Sot Sem); para. 154 (Seang Chan); para. 160 (Khen Sok); para. 167 (Chum Sokha); paras 189-190 (Kong Vach).

<sup>118</sup> Nuon Chea Appeal Brief, paras 201, 205.

lawyers;<sup>119</sup> (iii) civil parties are allowed to discuss their experiences with other civil parties;<sup>120</sup> (iv) civil parties attend conferences and attend court, hearing the evidence of other witnesses and civil parties on matters to which they themselves subsequently testify in court.<sup>121</sup> The Lead Co-Lawyers respond to the arguments concerning oath below and the remaining practices (ii), (iii) and (iv) listed above in paras 81-83 below.

## **1. Taking of oath**

### **a) ECCC Law**

71. The Trial Chamber was consistent in ruling that Civil Parties need not take an oath before being examined in court,<sup>122</sup> including following the Rule 92 submissions by the Co-Prosecutors regarding civil party evidence.<sup>123</sup> Acknowledging the distinctive features of Civil Party participation at trial, the Trial Chamber settled the debate holding that Civil Parties are exempt from taking the oath but may testify and have their statements put before the Chamber and assessed as evidence where relevant and probative. In court, this issue was addressed on 24 January 2013,<sup>124</sup> 6 December 2011<sup>125</sup> and 4 April 2011.<sup>126</sup>

<sup>119</sup> *Ibid*, paras 201-202.

<sup>120</sup> *Ibid*, para. 204.

<sup>121</sup> *Ibid*, para. 204.

<sup>122</sup> The Trial Chamber decided on this issue on 8 April 2011 following a Trial Management Meeting noting that “Internal Rules 23(4), 24 and 31 indicate those parties before the ECCC for whom an oath must be administered under the ECCC legal framework and that Civil Parties are not required to take the oath. Nonetheless, if a Civil Party elects to do so, no procedural defect results.” See Trial Chamber response to Motions E67, E57, E56, E58, E23, E59, E20, E33, E71 and E73 following Trial Management Meeting of 5 April 2011, **E74**, 8 April 2011, p. 1 *citing* T. 5 April 2011, p. 100. See also Observation des parties civiles sur la motion présentée par Ieng Sary aux fins de prestation de serment par les parties civiles préalablement à leur témoignage, **E57/1**, 17 March 2010, para. 30; Ieng Sary’s Motion for Civil Parties to Testify Under Oath if They are Permitted to Testify as to Their Knowledge of the Criminal Case, **E57**, 24 February 2011, para. 12.

<sup>123</sup> Decision on Request to Recall Civil Party Testimony TCCP-187, for Review of Procedure concerning Civil Parties’ Statements on Suffering and related motions and responses (E240, E240/1, E250, E250/1, E267, E267/1 and E267/2), **E267/3**, 2 May 2013, para. 21-22; Co-Prosecutors’ Rule 92 Submission Regarding Civil Party Testimony, **E267**, 21 February 2013; Reply to Co-Prosecutors’ Rule 92 Submissions Regarding Civil Party Testimony, **E267/1**, 4 March 2013, para. 17. See further Ieng Sary’s Response to Co-Prosecutors’ Rule 92 Submission Regarding Civil Party Testimony, **E267/2**, 4 March 2013, para. 15-17.

<sup>124</sup> T. 24 January 2013, **E1/164.1**, p.76 *quoting* Judge Cartwright: “As to the discussion about whether or not civil parties should take the oath and the consequences of that, we have had this discussion on many occasions, and the Chamber is fully aware of the responsibilities that it has and we do not wish to have this argument repeated ad nauseam – or frequently, to omit the Latin.”

<sup>125</sup> T. 6 December 2011 **E1/17.1**, pp. 34-35 *quoting* Mr. President, Judge Nil Nonn: “Pursuant to the Criminal Procedure Code of 2007, the applicable law before the ECCC, and the Internal Rules of the ECCC do not require civil party to take an oath.” See also *ibid.*, pp. 35-36 *quoting* Judge Lavergne: “May I make some explanations? Because I believe that these provisions of Cambodian law – which are also applied in French

72. The Lead Co-Lawyers submit that the position taken by the Trial Chamber is in conformity with the Internal Rules,<sup>127</sup> Cambodian law,<sup>128</sup> French law<sup>129</sup> and considerate of the unique status of Civil Parties before the ECCC.<sup>130</sup> The assessment of the evidence provided by them during their examination in court thus has to be treated in the same respect as that of the Accused or the Charged Person and *not* a witness. Therefore, like the accused when called to testify, they retain the privilege to testify without oath.

73. The Nuon Chea Appeal relies on the same provisions to argue instead that civil parties may not be heard as witnesses, claiming that this means that civil parties are barred from presenting evidence before the Trial Chamber. The Lead Co-Lawyers submit that this is a misreading of the provisions. The provision is purported to confirm the status of Civil Parties as parties to the case (as opposed to “witnesses”) thereby precluding them from the requirement of taking an oath and *not* to imply that Civil Parties may not appear before the court to present facts as evidence.

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Civil Law – the rule is clear. Civil parties are parties to the proceedings and, in this capacity, they can testify without taking an oath, they can testify with regard to prejudice that they claim to have suffered, including facts on which they can make submissions, including the charges against the Accused. There will be time for assessing the value of their testimonies, and I think this point is not subject to dispute.”

<sup>126</sup> T. 5 April 2011E1/2.1, p. 100 *quoting* Mr. President, Judge Nil Nonn: “The Trial Chamber also notes the motion of the Ieng Sary Defence regarding oaths where civil parties testifying at trial, that is document E57. If a civil party elects to take the oath, no procedural defect results. Internal Rules 24 and 31 however, already indicate those parties before the ECCC for whom an oath must be administered under the ECCC legal framework.”

<sup>127</sup> Internal Rules 23(4), 24 and 31 indicate those parties before the ECCC for whom an oath must be administered under the ECCC legal framework and that Civil Parties are not required to take the oath. Rule 23 of the Internal Rules of the ECCC also states that: “The Civil Party cannot be questioned as a simple witness in the same case and, subject to Rule 62 relating to Rogatory Letters, may only be interviewed under the same conditions as a Charged Person or Accused.” *See also* Internal Rule 24(2), which provides that close family members of an Accused, Charged Person, or Civil Party do not testify under oath.

<sup>128</sup> Article 312 of the Code of Criminal Procedure of the Kingdom of Cambodia stipulates that: “A civil party may never be heard as a witness.”

<sup>129</sup> Under French law, it is not possible to be both a party to the proceedings and a witness. A civil party, once he or she has joined as such, can thus not be heard as a witness. *See* French Code of Criminal Procedure, Article 422.

<sup>130</sup> This matter had been raised on trial by the Ieng Sary Defence in Case 002/01 in which they pleaded for Civil Parties to testify under oath if they are permitted to testify as to their knowledge of the criminal case (E57). The Trial Chamber did not find any reason to depart from the approach taken by the Trial Chamber in Case 001. The Trial Chamber in Case 001 ruled on 8 April 2011 that “Civil Parties are not required to take the oath [when testifying as to the knowledge of the criminal case and] if a Civil Party elects to do so, no procedural defect results”. *See* Trial Chamber response to Motions E67, E57, E56, E58, E23, E59, E20, E33, E71 and E73 following Trial Management Meeting of 5 April 2011, E74, 8 April 2011, p. 1 *citing* T. 5 April 2011, p. 100. It affirmed the explicit provisions in the Internal Rules outlined above and concluded that the civil parties were at liberty to elect to take oath but could not be required to do so under the existing provisions

74. Further, the Trial Chamber clarified that it gives weight to Civil Party testimony only after assessing it on a case-by-case basis in light of the credibility of that testimony.<sup>131</sup> The Lead Co-Lawyers submit that this assessment by the Trial Chamber is in accordance with the previous practice at the ECCC, follows Cambodian law and conforms with international standards.<sup>132</sup> It is not prejudicial to the rights of the accused inasmuch as the evidence put forward by the Civil Parties in court is duly examined by all parties to the proceedings, including the Defence. The Trial Chamber only assesses its probative value towards proving the allegations *after* this exercise. The propriety of such assessment although challenged by the Appellant can hardly be more emphasised.

75. Neither is the issue of civil parties adducing live evidence something that arose as a matter of surprise. When the Lead Co-Lawyers filed their initial Rule 80 filing, neither of the Defence teams made any substantive objections relating to the exigency of civil parties to take an oath.<sup>133</sup> The Lead Co-Lawyers had pleaded that there is no legal basis for the Trial Chamber to simply determine that Civil Parties testify as witnesses<sup>134</sup> and this was affirmed by the Trial Chamber on multiple occasions as elaborated above.

76. The Trial Chamber is entitled to admit any relevant evidence it deems to have probative value – sworn or unsworn. Therefore, to advocate that Civil Party testimony is unreliable on account of being unsworn is tenuous.

77. The Lead Co-Lawyers concede that Civil Parties, by nature and etymology, are partial and have an interest in a certain outcome of the trial proceedings – a necessary premise for their claims to reparation. However, like the Accused, their status in the proceedings, by itself, should not be a reason to exclude the evidence provided by them, live and tested.

78. The Lead Co-Lawyers submit that not only does the Appellant fail to show how the practice concerning oath-taking by Civil Parties is prejudicial to the Accused, it also has not established any error in the Trial Chamber’s reliance on such evidence.

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<sup>131</sup> Decision on Request to Recall Civil Party TCCP-187, for Review of Procedure Concerning Civil Parties’ Statements on Suffering and Related Motions and Responses (E240, E240/1, E250, E250/1, E267, E267/1 and E267/2), 002/19-09-2007/ECCC/TC, **E267/3**, 2 May 2013 (“Decision on Review of Procedure Concerning Civil Parties”), para. 22.

<sup>132</sup> See Section VI (A) of the present brief.

<sup>133</sup> Civil Party Lead Co-Lawyers’ Rule 80 Summaries and Expert Qualifications With Points of the Indictment, Including Confidential Annexes. **E9/8**, 23 February 2011, paras 7-10.

<sup>134</sup> *Ibid.*, para. 8.

79. Nuon Chea Appeal relied on ICC jurisprudence to elaborate that “while victims may express their views and concerns without giving an oath, any evidence which concerns criminal responsibility must be given as a witness appearing before the Chamber under oath.”<sup>135</sup>

80. Notwithstanding that ICC jurisprudence is inapplicable in the unique context of the ECCC,<sup>136</sup> the decision cited in the Nuon Chea Appeal relates to the circumstances where the victims themselves *requested* to provide evidence on oath.<sup>137</sup> Further, considering the context that the ICC does not operate or apply ECCC Rules, Cambodian law or French law which explicitly prohibits such practice, the Lead Co-Lawyers submit that, even if guidance is sought from ICC jurisprudence, the Lead Co-Lawyers submit that the ECCC practice pertaining to civil parties adducing evidence in court fulfils the standard “safeguards” set out in the decision:

The Trial Chamber has correctly identified the procedure and confined limits within which it will exercise its powers to permit victims to tender and examine evidence: (i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness and (vi) consistency with the rights of the accused and a fair trial. With these safeguards in place, the grant of participatory rights to victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of the evidence is not inconsistent with the onus on the Prosecutor to prove the guilt of the accused nor is it inconsistent with the rights of the accused and a fair trial.<sup>138</sup>

## **2. *Other practices relating to Civil Party participation***

81. The Lead Co-Lawyers submit that this argument in the Nuon Chea Appeal concerning other practices relating to civil party participation is premised on civil parties being at par with witnesses. As the Lead Co-Lawyers elaborated above, this is incorrect.

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<sup>135</sup> Nuon Chea Appeal Brief, para. 205.

<sup>136</sup> Decision on LCL Request re Appeals, para. 16.

<sup>137</sup> Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Lubanga, ICC-01/04-01/06, Requête soumise par le représentant légal des victimes représentées, sur le désir des victimes A/0225/06, A/0229/06 et A/270/07 de participer en personne à la procédure, 2 April 2009 (notified on 3 April 2009), ICC-01/04-01/06-1812-Conf. as cited in Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, ICC-01/04-01/06-2032-Anx,26 June 2009, para. 20 citing with approval the Trial Chamber decision ICC-01/04-01/06-1432, paras 1, 14 and discussed in para. 4.

<sup>138</sup> Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Lubanga, ICC-01/04-01/06, Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, ICC-01/04-01/06-2032-Anx,26 June 2009, para. 20 citing with approval the Trial Chamber decision ICC-01/04-01/06-1432, para. 4.

Civil Parties are not witnesses. Their status as a “party” to the proceedings puts their evidence on the same level as that of the Accused and not witnesses. Like the Accused, Civil Parties *participate* whereas witnesses are sought and summoned.

82. It is for this exact reason that Civil Parties are permitted to meet with their lawyers,<sup>139</sup> have access to the Case-File,<sup>140</sup> may attend court hearings<sup>141</sup> and/or form Victim Associations.<sup>142</sup>

83. The fact that Civil Parties meet with their lawyers and are aware of the evidence given by witnesses and other Civil Parties are factors that the Trial Chamber and all parties are aware of. These possibilities are clearly provided in the Internal Rules. Therefore, the imputation of errors in the Trial Judgement for a practice that is provided within the unique scheme of victim participation at the ECCC since the start of the trial is unfitting. The Lead Co-Lawyers urge the Supreme Court Chamber to dismiss this argument in Ground 34 of their appeal.

### **3. *Civil Party Testimony to prove factual allegations***

84. The Nuon Chea Defence allege that the Trial Chamber erred in law in holding that the weight to be given to Civil Party testimony will be “assessed on a case-by-case basis in light of the credibility of that testimony”.<sup>143</sup>

85. When filing their initial list of Witnesses, Experts and Civil Parties, the Lead Co-Lawyers submitted that “[a]ll the Parties shall be able to question all individuals on all issues and *criminal events to which they are able to testify*”<sup>144</sup> and requested the Trial Chamber to assess Civil Party testimony according to the same credibility criteria as Witness testimony.<sup>145</sup> Therefore, the Lead Co-Lawyers submit that the Nuon Chea Defence was conscious of the fact the Civil Parties would be permitted to provide evidence during their examination in court. Therefore, their allegation that the Trial Chamber should not have

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<sup>139</sup> Internal Rules 23 *ter*

<sup>140</sup> Internal Rule 86.

<sup>141</sup> Internal Rule 12 *bis* (1)(h).

<sup>142</sup> Internal Rule 23 *quarter*.

<sup>143</sup> Nuon Chea Appeal Brief, paras 194-195.

<sup>144</sup> Civil Party Lead Co-Lawyers’ Rule 80 Summaries and Expert Qualifications With Points of the Indictment, Including Confidential Annxes. E9/8, 23 February 2011, para. 5

<sup>145</sup> *Ibid*, para. 8.

considered and/or relied upon Civil Party evidence in court is baseless. They themselves proposed Civil Parties on their list,<sup>146</sup> the safe conclusion of which is that they expected those Civil Parties to be examined in court and bring in evidence that the Trial Chamber could rely on to prove and/or disprove material facts.

86. This was also the case following the Lead Co-Lawyers' Rule 80 submission dated 9 May 2014 whereby the civil parties sought to be called before the Trial Chamber were those that would "substantially assist the Trial Chamber in ascertaining the truth concerning the allegations to be tried in Case 002/02, particularly in establishing the crime-base evidence and assisting the Chamber to assess the gravity of the alleged crimes and the harm endured by civil parties."<sup>147</sup>

87. Further, when the Co-Prosecutors filed their Rule 92 submission regarding civil party evidence in which they outlined their observations regarding the weight to be afforded to civil party testimony, the Khieu Samphân Defence replied to this submission aligning with the position previously taken by the Lead Co-Lawyers, i.e. they supported the probative value of witnesses and civil party testimonies being assessed by the same standard; they implored the Trial Chamber to assess the probative value of the testimonies of the Accused as well as of civil parties on a case-by-case basis, taking into account their status as parties to the proceedings.<sup>148</sup> The Nuon Chea Defence did not take issue with this practice during the written submissions.

88. Regardless of the parties' positions, the Lead Co-Lawyers submit that the Trial Chamber applied the correct standard in determining the procedure and modalities for examination of Civil Parties and their subsequent reliance on them to prove facts to be adjudicated before the Trial Chamber. Internal Rule 87(1) does not qualify from which sources the evidence may be received by the Trial Chamber if allowed under the law as long

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<sup>146</sup> See Updated Lists and Summaries of Proposed Witnesses, Civil Parties and Experts, Annex A, **E305/4.1**, p. 14.

<sup>147</sup> Civil Party Lead Co-Lawyers' Rule 80 Witness, Expert and Civil Party Lists for Case 002/02 with Confidential Annexes, **E305/7**, 9 May 2014, para. 9.

<sup>148</sup> Reply to Co-Prosecutors' Rule 92 Submissions Regarding Civil Party Testimony, **E267/1**, 4 March 2013, para. 17. See also *ibid.*, para. 14: "The position of Khieu Samphân Defence team is therefore consistent with that of the Civil Party Lead Co-Lawyers [...] [i]n other words, being a party to the proceedings, whether as Prosecution, Defence or civil party, necessarily entails partiality, yet this partiality does not automatically discount the credibility and veracity of the statements and positions of each of the parties."



as the Chamber has had the chance to determine its relevance to the material facts, its authenticity and its probative value.

89. Moreover, the standard applied by the Trial Chamber is different than what is alleged by the Appellants. The criteria to have Civil Parties examined in court was that if their proposed testimony brought out facts relating to the acts and conducts of the Accused, they would be called to be examined by the parties, otherwise, the information pertaining to that aspect would be inadmissible.<sup>149</sup>

90. Therefore, the Lead Co-Lawyers submit that the alleged error that Trial Chamber committed in relying on Civil Party testimony by the very fact that it was provided by Civil Parties is not founded. The Trial Chamber considered that the information concerning acts and conduct of the Accused was inadmissible if the Civil Party was not examined by the parties and the Trial Chamber. There was nothing to bar the Trial Chamber from relying on the facts that resulted from their examination in court. When the Trial Chamber did rely on the facts from Civil Party testimony, they were carefully considered by the Trial Chamber alongside other evidence on the record.

91. The Lead Co-Lawyers disagree with the assertion in the Nuon Chea Appeal that their analysis shows that 31 civil parties were cited a total 787 times and therefore, “more frequently than witnesses”.<sup>150</sup> The Lead Co-Lawyers urge the Supreme Court Chamber to view this claim in perspective of the fact that Civil Party testimony was cited not only to establish facts but also to determine the impact and to establish conditions and context of the crime bases.

#### ***4. Reliance on Civil Party Testimony***

92. The individual errors relating to Civil Party testimony going towards the proof of facts and allegations have been addressed by the Co-Prosecutors in their response brief.<sup>151</sup>

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<sup>149</sup> Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents before the Trial Chamber, **E96/7**, 20 June 2012, paras 21-22; *see also* Decision on Objections to the Admissibility of Witnesses, Victim and Civil Party Statements and Case 001 Transcripts Proposed by the Co-Prosecutors and Civil Party Lead Co-Lawyers, **E299**, 15 August 2013, paras 26-27.

<sup>150</sup> Nuon Chea Appeal Brief, para. 196.

<sup>151</sup> *See* OCP Response Brief, paras 147, 183, 189-190, 193, 249-251, 266 (Pin Yathay); paras 149, 151, 154, 181, 184, 239, 244, 249, 251 (Yim Sovann); 150, 244, 246, 389 (Chum Sokha); paras 64, 148, 168, 185, 242,

The Lead Co-Lawyers defer to their response in this respect to the extent that it ties in with the evidence provided by witnesses and documents for a particular factual finding challenged in the Nuon Chea Appeal.

93. The Lead Co-Lawyers hereby provide a response to the individual challenges to Civil Party Testimony so challenged.

a) *Denise Affonco*

94. Concerning Ground 117 of the Nuon Chea Appeal Brief, the Lead Co-Lawyers submit that the Trial Chamber was entitled to consider and rely on her testimony that “people were sick on trucks, but received no assistance” during the Phase II population movement.<sup>152</sup> The Lead Co-Lawyers submit that her examination in court was consistent with the other evidence that she provided before the Trial Chamber.<sup>153</sup> The defence teams examined her at length but she was not examined by either on this fact in her testimony.<sup>154</sup> Further, the Lead Co-Lawyers note that in proving that Khmer Rouge soldiers did not provide assistance to the sick, her account was corroborated in the Trial Judgement.<sup>155</sup>

95. Concerning Ground 48 of the Nuon Chea Appeal Brief, the Lead Co-Lawyers submit that first, this Ground challenges a reference to Denise Affonco’s testimony and not a finding by the Trial Chamber;<sup>156</sup> second, the record clearly shows that the Civil Party testified that her friend was killed by the Khmer Rouge forces because she refused to evacuate her house.<sup>157</sup> She was not examined by either defence teams on this account.<sup>158</sup> Neither is this particular account inconsistent with other evidence provided by her.<sup>159</sup>

96. Therefore, the Lead Co-Lawyers submit that the Trial Chamber was entitled to rely on Denise Affonco for rendering factual findings and did not err in the manner that it did so.

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266 (Lay Bony); paras 33, 181, 185, 187-190, 193, 195, 239, 241, 249 (Pech Srey Phal); paras 186, 189, 249-251, 382 (Toeng Sokha); para. 154 (Sot Sem).

<sup>152</sup> Judgement, para. 591, fn. 1791.

<sup>153</sup> See E9/32.2.29, p. 41. See further E3/3976, p. 6.

<sup>154</sup> T. 13 December 2012, **E1/153.1**, pp. 75-101.

<sup>155</sup> See Judgement, fns 1793, 1795. See also *infra* paras 97-99.

<sup>156</sup> See Judgement, para. 474: “In particular, Civil Party Denise AFFONÇO described how a school friend of hers who stayed to wait for her husband was killed on the spot.”

<sup>157</sup> T. 12 December 2012, **E1/152.1**, pp. 71-72.

<sup>158</sup> T. 13 December 2013, **E1/153.1**, pp. 75-101.

<sup>159</sup> E9/32.2.29, p. 21.

The Lead Co-Lawyers urge the Supreme Court Chamber to dismiss Nuon Chea's Grounds of Appeal 48 and 117.

b) *Yim Sovann*

97. Concerning Ground 177, the Lead Co-Lawyers submit that the Trial Chamber was entitled to consider and rely on her to find that Khmer Rouge soldiers did not provide assistance to the sick during the Phase II population movement.<sup>160</sup> She was not examined by the Nuon Chea Defence on this account or any others.<sup>161</sup> The Trial Chamber considered many pieces of evidence to that effect.<sup>162</sup> The Nuon Chea Appeal claims that the Trial Chamber disregarded her evidence that food was provided to the evacuees, however, this is a mischaracterisation. The Trial Chamber did consider that people on the trains had food and concluded that it was "insufficient" and cited to Yim Sovann's testimony (and those of others) where she clearly indicates the same.<sup>163</sup>

98. Concerning Ground 78 of the Nuon Chea Appeal that the "witnesses" gave so little detail, the Lead Co-Lawyers submit that this Ground challenges the Trial Chamber's discussion of Yim Sovann's evidence in the Judgement.<sup>164</sup> In respect of Ground 97<sup>165</sup> which challenges the related findings of the Judgement, the Lead Co-Lawyers submit that her account was consistent with her other evidence provided by her<sup>166</sup> and was corroborated by other evidence provided in court.<sup>167</sup> Further, she was not examined by the Nuon Chea Defence.<sup>168</sup>

<sup>160</sup> Judgement, para. 591, fn. 1791.

<sup>161</sup> T. 19 October 2012, **E1/135.1**, p. 116.

<sup>162</sup> Judgement, paras 591-592.

<sup>163</sup> Judgement, para. 597, fn. 1833 *citing* inter alia "T. 19 October 2012 (YIM Sovann), p. 100 (They were given one loaf of bread when they boarded the train, which was not enough and thereafter they were given nothing)".

<sup>164</sup> Nuon Chea Appeal Brief, para. 291 challenging Judgement, para. 490.

<sup>165</sup> The Lead Co-Lawyers point out that the Nuon Chea Appeal claims that Yim Sovann's witnessed "a single shooting of the driver of a single vehicle". In fact, Yim Sovann witnessed two different events of killings during the evacuation of Phnom Penh: one shooting of several people at Ou Russei Market, and one involving the shooting of a driver. *See* T. 19 October 2012, **E1/135.1**, pp. 81, 83.

<sup>166</sup> E3/5787, pp. 3-5.

<sup>167</sup> Judgement, para. 474 discusses further evidence on the killing of civilians during the evacuation of Phnom Penh.

<sup>168</sup> T. 19 October 2012, **E1/135.1**, p. 116.

99. Therefore, the Lead Co-Lawyers submit that the Trial Chamber did not err in relying on Yim Sovann for reaching factual findings. The Lead Co-Lawyers urge the Supreme Court Chamber to dismiss the Nuon Chea's Grounds of Appeal 78, 97, and 177.

c) *Toeng Sokha*

100. Concerning Ground 169 of the Nuon Chea Appeal Brief,<sup>169</sup> the Lead Co-Lawyers submit that her testimony was overall credible and she was clear on the extent of her knowledge of the events.<sup>170</sup> She gave a hearsay account of the event however, that does not bar the Trial Chamber from considering her evidence and according it probative value.<sup>171</sup> Further, although Toeng Sokha's testimony is the only one cited in fn. 1845 of the Judgement, there was other live evidence during trial to show that the people were shot during the Phase II population movement.<sup>172</sup>

101. Ground 177 of the Nuon Chea Appeal refers to an extract of her testimony where she explained that they [the evacuees] ate "[their] food" in the train<sup>173</sup> to show that the Trial Chamber "disregarded" "[o]ther evidence that evacuees were given food during the journey".<sup>174</sup> The Lead Co-Lawyers submit that the Nuon Chea Appeal ignores the fact that the Civil Party described in detail how her daughter died during Phase II population movement because of "lack of food".<sup>175</sup>

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<sup>169</sup> Nuon Chea Appeal Brief, para. 196 referring to Judgement, para. 598, fn. 1845.

<sup>170</sup> T. 4 December 2012, E1/147.1, pp. 64, 67-68.

<sup>171</sup> Hearsay evidence which a Trial Chamber considers relevant have been admitted by the ICTY under Rule 89(C). This was established in *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996 followed by *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Decision on Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability, 26 January 1998. Neither decision was a subject of appeal as in the current case but the ICTY Appeals Chamber settled this question stating: "[t]he fact that the evidence is hearsay does not necessarily deprive it of probative value, but it is acknowledged that the weight or probative value to be afforded to that evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined, although even this will depend upon the infinitely variable circumstances which surround hearsay evidence." See *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's appeal on admissibility of evidence, 16 February 1999, para. 15.

<sup>172</sup> See *example* Judgement, para. 595, fn. 1818.

<sup>173</sup> T. 4 December 2012, E1/147.1, pp. 50-51.

<sup>174</sup> Nuon Chea Appeal Brief, para. 432.

<sup>175</sup> T. 4 December 2012, E1/147.1, p. 51.

102. Ground 196 of the Nuon Chea Appeal alleges that the finding that “people were questioned about their past” was “manifestly unfounded”.<sup>176</sup> The Lead Co-Lawyers submit that not only is this finding in the Judgement heavily supported by both live and documentary evidence,<sup>177</sup> but her testimony states clearly that people’s names “were registered” and they were “asked what our occupation was and where we came from”<sup>178</sup> and was unchallenged during defence examination.<sup>179</sup>

103. Concerning Ground 208 of the Nuon Chea Appeal Brief, the Lead Co-Lawyers submit that Toeng Sokha’s testimony that soldiers of former officials, “a few days later, they were nowhere to be found” in Bati District after evacuation<sup>180</sup> supports the conclusion that “disappearances continued in late April and May 1975 [...] after evacuation, including in [...] Takeo”.<sup>181</sup> The Lead Co-Lawyers submit that this was unchallenged during her examination by the defence teams.<sup>182</sup>

104. Therefore, the Lead Co-Lawyers submit that the Trial Chamber did not err in relying on Toeng Sokha for factual findings. The Lead Co-Lawyers urge the Supreme Court Chamber to dismiss Nuon Chea’s Grounds of Appeal 177, 169 and 208.

#### **D. Use of Statements of Suffering and Impact Testimony**

105. In this section, the Lead Co-Lawyers respond to the grounds in the Nuon Chea Appeal and the Khieu Samphân Appeal concerning statements of suffering and impact testimony.<sup>183</sup> Broadly, the Appellant challenges the Trial Chamber’s reliance on Civil Party statements of suffering and impact testimony for findings of facts. The Nuon Chea Appeal

<sup>176</sup> Nuon Chea Appeal Brief, para. 393.

<sup>177</sup> See Judgement, para. 600 fn. 1854.

<sup>178</sup> T. 4 December 2012, E1/147.1, p. 62.

<sup>179</sup> *Ibid*, pp. 84-96.

<sup>180</sup> *Ibid*, p. 78; see also *ibid*, p. 81.

<sup>181</sup> Judgement, para. 832.

<sup>182</sup> T. 4 December 2012, E1/147.1, pp. 84-96.

<sup>183</sup> The Lead Co-Lawyers use the term “statements of suffering” for statements on impact of crimes provided by the Civil Parties during the evidentiary hearings following their testimony on facts. The term “impact testimony” is used for the special hearings on the impact of crimes held between 27 May and 4 June 2013. The Lead Co-Lawyers note that the Khieu Samphân Appeal uses the term “*declarations de parties civiles sur l’impact des crimes*”. The Lead Co-Lawyers have understood their allegations to include both statements of suffering and impact testimony as the Trial Judgement paragraphs referred to in fn. 75 of Khieu Samphân Appeal Brief, by inference, refer to impact testimony as well. The Lead Co-Lawyers uses different terms to distinguish their origin.

Brief also challenges certain individual instances of such reliance as separate grounds of appeal. The Lead Co-Lawyers therefore, first respond to the challenge, in principle (Nuon Chea Appeal Brief, Ground 34 and Khieu Samphân, Ground I.4(23)), and then proceed to respond to the individual challenges.

106. Lead Co-Lawyers submit that thirteen Civil Parties presented a statement of suffering at the end of their testimonies, in the context of the substantive hearings.<sup>184</sup> Fifteen civil parties appeared in the course of the victim impact hearings scheduled between 27 May – 4 June 2013.<sup>185</sup>

107. In respect of statements of suffering that were made in the course of substantive hearings, the Lead Co-Lawyers submit that all parties as a matter of course had the opportunity to examine civil parties on the facts that they presented before the Trial Chamber. On occasions where the civil parties brought up facts during their testimony which were outside the purview of what had been mentioned in their statement, the parties were permitted to ask further questions.<sup>186</sup>

108. In respect of impact testimony, the Lead Co-Lawyers submit that during the oral submissions by the parties on this issue, the Lead Co-Lawyers,<sup>187</sup> the OCP<sup>188</sup> and the

<sup>184</sup> T. 29 August 2012 (EM Oeun), **E1/117.1**; T. 22 October 2012 (YIM Sovann; CHUM Sokha), **E1/136.1**; T. 24 October 2012 (LAY Bony), **E1/138.1**; T. 6 November 2012 (MOM Sam Oeurn), **E1/141.1**; T. 22 November 2012 (MEAS Saran), **E1/145.1**; T. 23 November 2012 (OR Ry; CHAU Ny), **E1/146.1**; T. 4 December 2012 (TOENG Sokha), **E1/147.1**; T. 5 December 2012 (PECH Srey Phal), **E1/148.1**; T. 6 December 2012 (KIM Vandy), **E1/149.1**; T. 13 January 2013 (Denise AFFONCO), **E1/153.1**; T. 17 February 2013 (PIN Yathay), **E1/170.1**.

<sup>185</sup> T. 27 May 2013 (SOU Sotheavy), **E1/197.1**; T. 27 May 2013 (AUN Phally), **E1/197.1**; T. 27 May 2013 (SANG Rath), **E1/197.1**; T. 27 May 2013 (YOS Phal), **E1/197.1**; T. 29 May 2013 (THOUCH Phandarasar), **E1/198.1**; T. 29 May 2013 (CHAN Sopheap), **E1/198.1**; T. 29 May 2013 (HUO Chantha), **E1/198.1**; T. 29 May 2013 (CHHENG Eng Ly), **E1/198.1**; T. 30 May 2013 (NOU Hoan), **E1/199.1**; T. 30 May 2013 (SOPHAN Sovany), **E1/199.1**; T. 30 May 2013 (YIM Roumdoul), **E1/199.1**; T. 30 May 2013 (PO Dina), **E1/199.1**; T. 4 June 2013 (BAY Sophany), **E1/200.1**; T. 4 June 2013 (SOEUN Sovandy), **E1/200.1**; T. 4 June 2013 (SENG Sivutha), **E1/200.1**.

<sup>186</sup> T. 23 November 2012, **E1/146.1**, p. 105.

<sup>187</sup> T. 20 May 2013, **E1/193.1**, p. 104: [Lead Co-Lawyers] “[i]t is very clear for the Civil Party Lead Co-Lawyers that questions – the right of questioning must be given to the Co-Prosecutors and the parties [...] What we suggest is very straightforward: it is that each civil party be heard, that the civil party lawyer ask the civil party questions, and that time for examinations be given to the Co-Prosecutors and the other defence parties, to the scale of 30 minutes respectively.”

<sup>188</sup> *Ibid*, p. 106: [OCP] “if, during the testimony of a civil party, that civil party, whilst being spoken to about suffering, provides probative and relevant evidence going to issues in the case, it is only fair that the Defence should be able to challenge such evidence.

respective defence teams<sup>189</sup> agreed that such a testimony could surface facts under examination before the Trial Chamber and that the OCP and the defence teams would be allowed to question them on the facts.

109. The Lead Co-Lawyers, before the impact testimonies began, indicated clearly the Civil Parties were going to provide such testimony not only for their personal sake but “also for the sake of this trial” including “important elements”;<sup>190</sup> the caveat was added that some of these testimonies “might not be as clear cut and specific as testimonies that are purely factual”.<sup>191</sup> The Trial Chamber was braced of the possibility that there may be some “inaccuracies regarding dates or regarding names or regarding places”<sup>192</sup> and took that into consideration when basing their factual findings on impact testimony.

110. During one specific occasion during the impact hearings when the Nuon Chea Defence observed that Civil Party Yos Phal was reading out a statement in court,<sup>193</sup> the Civil Party Lawyer clarified again that it related to “the facts that Mr. Yos Phal wants to present”<sup>194</sup> to which neither Defence teams objected.

111. Furthermore, in respect of statements of suffering, the parties were allowed to comment on the *suffering* of the civil parties only after they left the courtroom; the Lead Co-Lawyers submit that this was not mutually exclusive of the right of the parties to put questions on *facts* to the civil parties when in court and/or request a recall of the civil parties if they bring *new* facts during their testimony.

112. Prior to rendering the Trial Judgement and holding impact hearings, the Trial Chamber had been unequivocal when distinguishing between Civil Parties providing “testimony on the facts at issue, which is confined to the scope of Case 002/01 and subject to adversarial argument” and “statements of suffering which the Civil Party can freely make at

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<sup>189</sup> *Ibid*, p. 108: [Nuon Chea Defence] “I don't think I would ever be saying this in a court of law, but I think I agree with all 10 submissions from the Prosecution”; *ibid*. p. 109 [Khieu Samphân Defence] “I seem - it seems to me that it is normal, in - if these people come next week, that aspects linked to harm slide to some things that are supposedly factual. Well, we will manage as we can, faced with the situation, in order to try to examine them and to *See* on what the harm they describe really rests on.”

<sup>190</sup> T. 27 May 2013, E1/197.1, p. 8.

<sup>191</sup> *Ibid*, p. 9.

<sup>192</sup> *Id*.

<sup>193</sup> *Ibid*, p. 73.

<sup>194</sup> *Ibid*, p. 74.

the conclusion of their testimony”.<sup>195</sup> It was acknowledged that “harm suffered”, albeit a consequence of “facts” was something distinct<sup>196</sup> and did not bar the Trial Chamber from servicing the emergent statements within the scope of Case 002/01 to adversarial argument.<sup>197</sup>

113. Having granted the parties “an opportunity to object to parts of the statement considered by them to be prejudicial to the Accused”, the Trial Chamber, rightly so, considered itself vested with the discretion to assess the facts brought up by the civil parties during their testimony on a case-by-case basis and assign them probative value.<sup>198</sup> The Lead Co-Lawyers submit that this approach was consistent during Case 002/01 and was as per the practice established in Case 001.

114. In order to present a consolidated response to the Appellants, the Lead Co-Lawyers first draw the attention of the Supreme Court Chamber to their respective positions on this matter during trial and on appeal. Not only does this contrast their change of stance on the issue on appeal, but it also puts into perspective the alleged prejudice that they claim occurred on grounds of alleged lack of notice.

## ***I. Nuon Chea Defence***

### ***a) Position on appeal***

115. On appeal, the Nuon Chea Defence contend that each reference to the victim impact testimony and statements in the Trial Judgement constitutes an error of law, pleading that they should have been excluded entirely from the Chamber’s consideration of the substance of the allegations.<sup>199</sup> The Nuon Chea Defence argues that the Trial Chamber relied “an astonishing 255 times” on this evidence throughout the Judgment,<sup>200</sup> in purported breach of

<sup>195</sup> Decision on Request to Recall Civil Party TCCP-187, for Review of Procedure concerning Civil Parties’ Statements on Suffering and Related Motions and Responses, E267/3, 2 May 2013, para. 14.

<sup>196</sup> See *ibid*, p. 10 where the Trial Chamber also directed the Lead Co-Lawyers to “structure the questioning of Civil Parties in a manner that differentiates between testimony on facts and statements pertaining to suffering”. In the Judgement itself, the Trial Chamber has discussed the facts emerging from the civil party impact testimony and statements of suffering separately from the discussion on their harm suffered. See *example Judgement*, paras 1141-1150 (add paras where harm was discussed).

<sup>197</sup> *Ibid*, paras 16-17, 19.

<sup>198</sup> *Ibid*, para. 22.

<sup>199</sup> Nuon Chea Appeal Brief, para. 187.

<sup>200</sup> *Ibid*, paras 185-193; Khieu Samphân’s Appeal Brief, para. 30.



“[i]nternational standards”, “domestic practice”, “past practice at the ECCC” and “the express assurance of the Trial Chamber”.<sup>201</sup>

116. Drawing the weight of their argument from domestic and international courts, the Nuon Chea Defence states that victim impact is relevant (solely) to the gravity of the crimes, a factor in sentencing but not to the substance of charges and should not constitute evidence of guilt.<sup>202</sup> The Nuon Chea Defence erroneously state that the position of the Trial Chamber and that of the Lead Co-Lawyers was similar to this contention.<sup>203</sup> The Nuon Chea Appeal cites a decision in support of this contention, which deals with the treatment of character witnesses and not victim impact testimony.<sup>204</sup>

117. The Nuon Chea Defence adds that had it been known that such statements and testimony would be used otherwise, it would have objected to the “grossly disproportionate schedule pursuant to which that testimony was heard before the Chamber” and made submissions in its Closing Brief.<sup>205</sup> The Nuon Chea Defence concludes that this amounted to a prejudice to their client.

*b) Position during trial*

118. During Trial, this issue was litigated on at least three occasions – during a series of filings each triggered by E240, E250, ad E267 none of which was taken up by Nuon Chea Defence as an opportunity to substantively challenge the scope of statements of suffering and/or victim impact hearings.

119. In respect of statements of suffering and impact testimony, the Nuon Chea Defence not only had notice of the scope and the purpose of the hearings in the nature of written decisions and oral rulings, but also had more than one occasion in-court to object to the

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<sup>201</sup> Nuon Chea’s Appeal Brief, para. 187.

<sup>202</sup> *Ibid*, paras 188-190.

<sup>203</sup> *Ibid*, para. 191.

<sup>204</sup> *Ibid*, fn. 513 *citing* 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. 46 (“In the present case, the portion of the trial proceedings described in the Scheduling Order of 13 August 2009 as ‘Questioning the witnesses and expert on the issues relating to the character of the accused’ relates solely to issues of character of the Accused. These are considerations for determining aggravating or mitigating circumstances in relation to any eventual sentence, and have no bearing on the guilt of innocence of the Accused”).

<sup>205</sup> Nuon Chea Appeal Brief, para. 193.

practice adopted by the Trial Chamber as did Khieu Samphân Defence. They did not plead any prejudice that could accrue to their client by virtue of these special hearings during trial. Neither did it object to the statements of suffering when they were intrinsically linked to the facts under examination.<sup>206</sup>

## **2. *Khieu Samphân Defence***

### *a) Position on appeal*

120. The Khieu Samphân Defence similarly allege that the Trial Chamber committed an error in use and reliance of civil party statements on impact of crimes contending that these statements were only intended for the Trial Chamber to appreciate the gravity of crimes and for Civil Parties to present evidence in support of reparations sought.<sup>207</sup> The Khieu Samphân Defence concludes that the Trial Chamber's reliance on them for factual findings has prejudiced their client insofar as the defence was not notified of the use of such statements for determination on facts.

121. The Khieu Samphân Appeal refers to a series of written decisions addressing the specific and broad issues relating to the statements of suffering, conduction of impact hearings and the probative value of civil party testimony. However, as discussed later, the Lead Co-Lawyers will demonstrate that these decisions achieve a reading contrary to that pushed by the appellant.

### *b) Position during trial*

122. During trial, the Khieu Samphân Defence objected to the Civil Parties' statement of suffering on two grounds: first, because it claimed statements of suffering should not

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<sup>206</sup> See example, T. 24 October 2012 (LAY Bony), **E1/138.1**, p. 65 “the black clothed soldiers had to evacuate us from one place to another [...]. I had to move along with others whenever we were made to move from one place to another”; T. 13 January 2013 (Denise AFFONCO), **E1/153.1**, p.104 “we were deported, we were forced to leave our homes, we were told lies, saying it was just for a few days. Well, in fact, when you leave your house, you never, ever See it again”; T. 4 December 2012 (TOENG Sokha), **E1/147.1**, p. 98 “During the evacuation from Phnom Penh on 17 April 1975, it could be compared to a bomb was exploded to shatter all the families in Phnom Penh [...]. We were separated from family members, from friends, and we suddenly lost all what we earned”.

<sup>207</sup> Khieu Samphân Appeal Brief, para. 30 citing E236/5/3/2, E267/3, E218, E236/5, E285/1, E299, and E299/2.

encompass harm suffered as a result of facts not included in the scope of Case 002/01;<sup>208</sup> and second, because on one occasion a Civil Party, namely Civil Party CHAU Ny, introduced *new* evidence in his statement of suffering, which had never been discussed in Court and was not mentioned in his written testimony.<sup>209</sup> It argued that, should the Trial Chamber decide not to allow it to cross-examine the Civil Party, the factual evidence introduced by the Civil Party in his statement of suffering should “not be admissible into evidence”.<sup>210</sup> Even before a formal written decision was issued on this matter, Judge Lavergne confirmed in court that the parties were not precluded from examining civil parties if and when they bring up statements of new facts that have not been referred to in their previous statements.<sup>211</sup>

### 3. *Notice on use and reliance of statements of suffering*

123. The Lead Co-Lawyers contend that the Defence teams were not only given an opportunity to examine the civil parties on facts arising from their testimony but also to submit their observations and comments on the suffering after the civil party left the courtroom. In cases where the Civil Parties brought facts that related to the acts and conduct of the Accused, the Trial Chamber granted the request to recall the Civil Party to be questioned in relation to them.<sup>212</sup>

124. Furthermore, the Lead Co-Lawyers submit that the Trial Chamber was categorical on assigning probative value to civil party testimony: “the weight to be given to Civil Party testimony will be assessed on a case-by-case basis in light of the credibility of that testimony”<sup>213</sup> and had notified all parties its intention to consider the facts raised during the examination based on its discretion.<sup>214</sup>

<sup>208</sup> See T. 22 October 2012, **E1/136.1**, pp. 10-13; Khieu Samphân’s Response to ‘Demande des co-avocats principaux pour les parties civiles afin de définir l’étendue de la déclaration sur la souffrance des parties civiles déposantes’, 12 November 2012, **E240/1**. See also Decision on Request to Recall Civil Party TCCP-187, for Review of Procedure concerning Civil Parties’ Statements on Suffering and Related Motions and Responses, 2 May 2013, **E267/3**, paras 14-18.

<sup>209</sup> T. 23 November 2012 (CHAU Ny), **E1/146.1**, pp. 100-102.

<sup>210</sup> Khieu Samphân’s Application for reconsideration of the decision not to recall Civil Party TCCP-187, and for review of the procedure for hearing Civil Parties, 7 December 2012, **E250**, paras 16, 25.

<sup>211</sup> T. 23 November 2012, **E1/146.1**, p. 105.

<sup>212</sup> Decision on Request to Recall Civil Party TCCP-187, for Review of Procedure concerning Civil Parties’ Statements on Suffering and Related Motions and Responses, 2 May 2013, **E267/3**, para. 22.

<sup>213</sup> *Id.*

<sup>214</sup> T. 24 October 2012, **E1/138.1**, p. 70.

#### 4. *Notice on use and reliance of impact testimony*

125. The Lead Co-Lawyers submit that the oral discussion in court prior to the conduct of impact hearings is telling of the nature and purpose of those proceedings.

126. The OCP had submitted that “if, during the testimony of a Civil Party, that Civil Party, whilst being spoken to about suffering, provides probative and relevant evidence going to issues in the case, it is only fair that the Defence should be able to challenge such evidence”.<sup>215</sup> The Nuon Chea Defence had confirmed that they were in full agreement with the Co-Prosecutors’ statements: “I don’t think I would ever be saying this in a court of law, but I think I agree with all ten submissions from the Prosecution. [...] We fully concur with the submissions of the Prosecution”.<sup>216</sup> The Khieu Samphân Defence also acquiesced to the Co-Prosecutors’ statements and confirmed its agreement that, if factual allegations were to be raised during these testimonies, the Defence would be allowed to cross examine the Civil Parties.<sup>217</sup>

127. Accordingly, the Trial Chamber recorded the “mutual consent amongst all the parties” and ruled that the parties would be allowed to question the civil parties “on relevant factual issues”.<sup>218</sup> The Defence was fully aware that Civil Parties could raise factual allegations during their testimonies, and it is precisely for that reason that the Defence was allowed time to examine them.

128. The Nuon Chea Appeal’s misguided reference to the decision on questioning of accused, experts and witnesses testifying on character<sup>219</sup> steers away from the matter of reliance on statements on suffering and impact hearing.

129. Further, Khieu Samphân’s reference to E236/5/3/2, E267/3, E218, E236/5, E299 and E299/2<sup>220</sup> to show that the purpose of impact hearings was limited to purposes other than

<sup>215</sup> T. 20 May 2013, **E1/193.1**, p. 106.

<sup>216</sup> *Ibid*, p. 108.

<sup>217</sup> T. 20 May 2013, **E1/193.1**, pp. 108-109 (“it seems to me that it is normal, if these people come next week, that aspects linked to harm slide to some things that are supposedly factual”).

<sup>218</sup> T. 21 May 2013, **E1/194.1**, pp. 119-120 (emphasis added).

<sup>219</sup> 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. 46.

<sup>220</sup> Khieu Samphân Appeal Brief, para. 30.

reliance on facts is misguided, especially in light of the fact that E267/3 itself clarifies the situation in respect of facts emerging from statements of suffering.

#### **5. Time allocation**

130. The Lead Co-Lawyers submit that the one occasion when the Defence considered that the time allocated to it was not sufficient to properly question the Civil Party during the hearing on victim impact, the Trial Chamber granted it an extension of time.<sup>221</sup>

131. There were no other requests from the Defence for additional time to question a Civil Party or to recall a Civil Party who had testified during victim impact hearings, and on no other occasion did the Defence complain that it was not given sufficient time to challenge the factual evidence presented during these victim impact hearings.

#### **6. Opportunity for confrontation**

132. The Appellants were allowed to put questions to Civil Parties during hearings on impact of crimes. As already discussed at length before, they were also allowed to request a recall of a Civil Party if new facts emerged from their statement of suffering. Over the course of the impact hearings in Case 002/01, 15 Civil Parties testified, and each time, both Defence teams were afforded the opportunity to question the Civil Party. The Defence occasionally availed itself of this right, but more often than not, it abstained from doing so.<sup>222</sup>

133. As discussed in the response to individual challenges, it is evident that each Appellant was conscious of the facts being brought up by the civil parties and was aware of the opportunity to challenge them.

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<sup>221</sup> T. 27 May 2013, **E1/197.1**, p. 98. To support its request for extension, Nuon Chea's Defence explained that additional time was necessary because the Civil Party's testimony was "evidence": "I would like to continue because if this is evidence, then we need to have the possibility to cross-examine obviously" (*ibid*, pp. 97-98).

<sup>222</sup> The Nuon Chea's Defence team chose to not ask questions to the following Civil Parties: T. 27 May 2013 (SOU Sotheavy, SANG Rath), **E1/197.1**, pp. 27, 67; T. 29 May 2013 (CHAN Sopheap, HUO Chantha, CHHENG Eng Ly), **E1/198.1**, pp. 60, 89-90, 108; T. 30 May 2013 (SOPHAN Sovany, YIM Roumdoul), **E1/199.1**, pp. 62, 90; T. 4 June 2013 (SOEUN Sovandy, SENG Sivutha ), **E1/200.1**, pp. 78, 116. The Khieu Samphan's Defence team chose to not ask questions to the following Civil Parties: T. 27 May 2013 (SANG Rath), **E1/197.1**, pp. 67-68; T. 29 May 2013 (THOUCH Phandarasar, HUO Chantha, CHHENG Eng Ly), **E1/198.1**, pp. 38, 90, 108; T. 30 May 2013 (SOPHAN Sovany, YIM Roumdoul, PO Dina), **E1/199.1**, pp. 62, 91, 116; T. 4 June 2013 (BAY Sophany, SENG Sivutha), **E1/200.1**, pp. 49, 116.

## 7. *Reliance*

134. The Lead Co-Lawyers submit that, contrary to what is alleged by the Appellants, the Trial Chamber was unambiguous about the purpose of the statements of suffering and impact hearing. This was derived as a natural consequence to having every party examine the civil parties on facts in an adversarial fashion – regardless of whether they were providing impact testimony or statements of suffering. The Lead Co-Lawyers submit that a fact arising in court from a witness, civil party or an expert after being subjected to adversarial debate forms part of the pool of evidence that the Trial Chamber has the discretion to rely on.

135. In respect of impact testimonies, the Co-Prosecutors have responded in respect of Civil Parties namely Chheng Eng Ly,<sup>223</sup> Seng Sivutha,<sup>224</sup> Bay Sophany,<sup>225</sup> Chan Socheat,<sup>226</sup> Nuo Hoan,<sup>227</sup> Po Dina,<sup>228</sup> and Aun Phally.<sup>229</sup> The Lead Co-Lawyers hereby, respond individually to the reference and reliance by the Trial Chamber on the remaining impact testimonies. In addition, the Lead Co-Lawyers respond to the grounds relating to Chan Socheat and Aun Phally addressing issues that have not been elaborated in the OCP Response Brief.

### a) *Yos Phal*

136. The Trial Chamber made reference to Yos Phal's<sup>230</sup> impact testimony on three occasions.<sup>231</sup> He was relied upon to make factual findings on eight occasions.<sup>232</sup> He was cited by the Judgement five times to make a determination on the harm suffered by Civil Parties.<sup>233</sup>

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<sup>223</sup> OCP Response Brief, paras 151, 181, 186, 239, 244.

<sup>224</sup> *Ibid*, paras 177, 243.

<sup>225</sup> *Ibid*, paras 181, 535.

<sup>226</sup> *Ibid*, paras 181, 184, 189-190, 266.

<sup>227</sup> *Ibid*, paras 241.

<sup>228</sup> *Ibid*, para. 167.

<sup>229</sup> *Ibid*, paras 189-190, 195.

<sup>230</sup> Alternative spellings of his name as “Yuos Phal” have also been used by the Trial Chamber.

<sup>231</sup> Judgement, fn. 1372 noting in para. 464 that the “[p]eople took to the streets to celebrate and congratulate the Khmer Rouge soldiers, believing peace would return to Cambodia”; Judgement, fn. 1397 noting that “[n]umerous witnesses, civil parties and victims recounted how soldiers were aggressive and shouted at members of the population or fired shots in the air to urge the population to leave their homes and move”; Judgement, para. 491 stating that “Civil Party Yos Phal recounted how his health deteriorated, becoming emaciated and developing a fever during the course of his journey to Ph’av District. Having no access to proper medicine, he picked bitter leaves along the road, pounded, cooked and drank them as a form of medicine”.

<sup>232</sup> Judgement, fn. 1374 for stating in para. 465 that the “Khmer Rouge announced to the population that the evacuation was temporary, with most witnesses being told they needed only evacuate for three or more days,

137. Khieu Samphân responded to the questions that had been posed by him.<sup>234</sup> Each Defence team was given an opportunity to put questions to him on the facts that had arisen during his impact testimony which was availed by both.<sup>235</sup> Additional time was granted by the Trial Chamber to the Nuon Chea Defence, when so requested.<sup>236</sup> On four occasions, the Trial Chamber relied on facts that had been confirmed when he was put questions by the Defence.<sup>237</sup>

138. Nevertheless, the Nuon Chea Appeal challenges reliance on Yos Phal in the Judgement on three occasions.<sup>238</sup> Notwithstanding this challenge, it *seeks* reliance on his OCIJ interview to show that there existed evidence that ordinary soldiers were not targeted by the Khmer Rouge.<sup>239</sup>

139. In respect of Nuon Chea's challenge to reliance on Yos Phal in Judgment, para. 490, the Lead Co-Lawyers submit that this paragraph contains a discussion of evidence pertaining to the violence suffered by the evacuees during Phase One of the Population Movement. The evidence discussed therein has been relied upon by the Trial Chamber to conclude that "the

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after which they could return home"; Judgement, fn. 1379 for stating in para. 468 that the "Khmer Rouge told the local population that they were being evacuated in order to protect them against anticipated further aerial bombardments by the U.S.A"; Judgement, fn. 1381 to state in para. 469 that "[y]et other residents were told the evacuation was for their public safety as Angkar needed to 'sweep' or 'clean' the remaining enemies from the city, organise the city, or disperse the enemy's spy network, which allegedly included American imperialist spies in Phnom Penh"; Judgement, fn. 1461 stating in para. 490 that "[t]here were also numerous instances of Khmer Rouge soldiers shooting and killing civilians during the course of the evacuation, with victims including a famous film actor, several people driving vehicles and even those who simply became too weak to continue"; Judgement, fn. 1471 stating in para. 491 that "[m]any evacuees were soon rendered weak or fell sick due to the conditions; some even died"; Judgement, fn. 1498-1499 stating in para. 500 that on 17 April 1974 some victims were "identified as [...] Khmer Republic soldiers" and that victims of the evacuation from Phnom Penh included "civilians, young and old alike"; Judgement, fn. 1515 noting that "[c]ivilian officials of the Khmer Republic [...] were in fact evacuated alongside the civilian population"; Judgement, fn. 1531 to state in para. 512 concerning checkpoints.

<sup>233</sup> Judgement, para. 1145 stating that Yos Phal "described how they or their family members fell ill and, in some cases, died"; Judgement, fn. 3265 noting that "Civil Parties who gave evidence before the Chamber reported experiencing severe hunger, thirst and exhaustion"; Judgement, para. 1146 noting that Civil Parties "walked past the bodies of the dead and dying"; Judgement, fn. 3273 to remark that "Civil Parties also saw adults and children suffering from illness and malnutrition, and people who had sustained terrible injuries, reportedly as a result of assault or rape"; Judgement, fn. 3274 to note that in some cases, "Civil Parties watched as Khmer Rouge soldiers brutally killed other evacuees, including infants".

<sup>234</sup> T. 27 May 2013, E1/197.1, pp. 82-85.

<sup>235</sup> T. 27 May 2013, E1/197.1, pp. 92-100 (Nuon Chea Defence); *ibid.*, pp. 101-105 (Khieu Samphân Defence).

<sup>236</sup> *Ibid.*, p. 98.

<sup>237</sup> Judgement, fn. 1379, 1381, 1515; 1531.

<sup>238</sup> Nuon Chea Appeal Brief, fns 795 (against Judgement, para. 490), 833 (against Judgement, para. 490); 585 (against Judgement, fn. 2638 where reference has been made to his OCIJ interview E3/4611).

<sup>239</sup> Nuon Chea Appeal Brief, para. 609 relying on E3/4611.

*effects* of [evacuation of Phnom Penh] were compounded by the coercive and threatening circumstances in which the evacuation was effected<sup>240</sup> and to make a determination of the harm suffered by the Civil Parties.<sup>241</sup> Therefore, the alleged error claimed in Nuon Chea Appeal in respect of reliance on Yos Phal in para. 490 is unfounded.

140. Regardless, the Lead Co-Lawyers submit that the Civil Party was confronted with this OCIJ interview by both Defence teams<sup>242</sup> and where he has been relied upon by the Trial Chamber for facts, those facts had been subject of confrontation and debate when the parties put questions to him.<sup>243</sup> Moreover, the facts emerging from his impact testimony were carefully considered and compared with other evidence on the record<sup>244</sup> and are corroborated with other evidence on record.<sup>245</sup>

141. In respect of Nuon Chea seeking reliance on Yos Phal's OCIJ interview, the Nuon Chea Defence questioned him live on this aspect including about how the biographies were made and who was targeted by the Khmer Rouge during the evacuation,<sup>246</sup> including soldiers like himself.<sup>247</sup> The Nuon Chea Appeal makes reference to none of that and instead alleges that "none of these specific facts are referred to in the Judgement"<sup>248</sup> when in fact this discussion was considered by the Trial Chamber in full.<sup>249</sup>

*b) Sou Sotheavy*

142. The Trial Judgement made reference to Sou Sotheavy's impact testimony on three occasions.<sup>250</sup> She was relied upon to make factual findings on five occasions.<sup>251</sup> She was

<sup>240</sup> See Judgement, para. 552 fn. 1650 (emphasis added).

<sup>241</sup> *Ibid*, para. 1146.

<sup>242</sup> See T. 27 May 2013, **E1/197.1**, pp. 93, 96 (Nuon Chea Defence); pp. 101-105 (Khieu Samphan Defence).

<sup>243</sup> See Judgement, fn. 1890 *cf.* T. 27 May 2013, **E1/197.1**, pp. 88-89 (OCP); Judgement, fn. 1969 *cf.* T. 27 May 2013, **E1/197.1**, p. 89 (OCP); Judgement, fn. 2638 *cf.* T. 27 May 2013, **E1/197.1**, p. 92-93 (Nuon Chea Defence).

<sup>244</sup> *Ibid*, paras 468-469; 504-510

<sup>245</sup> See *ibid*, fns 1374, 1379, 1381, 1461, 1471, 1498-1499, 1515, 1531.

<sup>246</sup> T. 27 May 2013, **E1/197.1**, pp. 92-100.

<sup>247</sup> T. 27 May 2013, **E1/197.1**, p. 93, 97 *cf.* T. 27 May 2013, **E1/197.1**, p. 74, 105.

<sup>248</sup> Nuon Chea Appeal Brief, paras 585-609.

<sup>249</sup> See Judgement, para. 512 fn. 1531 *citing* T. 27 May 2013, **E1/197.1**, pp. 71-75, 94, 102-104.

<sup>250</sup> Judgement, fn. 1394 noting that "[n]umerous witnesses testified that, following these instructions, over the course of 17 April and the ensuing days armed Khmer Rouge soldiers entered people's homes and even pagodas, and forced people out at gunpoint"; Judgement, fn. 1397 to note that "[n]umerous witnesses, civil parties and victims recounted how soldiers were aggressive and shouted at members of the population or fired shots in the air to urge the population to leave their homes and move"; Judgement, para. 489 mentioning that



cited four times in the Judgement to make a determination on the harm suffered by civil parties.<sup>252</sup>

143. Each Defence team was given an opportunity to put questions to her on the facts that had arisen during her impact testimony. The Nuon Chea Defence did not avail themselves of the opportunity to do so.<sup>253</sup> The Khieu Samphân Defence confronted her with her written record of interview to clarify the sole fact of her having heard gunshots and people being murdered during evacuation.<sup>254</sup>

144. After having subjected her impact testimony to adversarial debate, the Trial Chamber relied on several facts brought out during her testimony save the one where her testimony did stand did not stand the test i.e. it did not rely on her to enter factual findings of murder as she admitted to not personally having seen the outcomes of the shooting that day.

145. Where the Trial Chamber did rely on them for making findings, the facts in her testimony were each respectively corroborated by a variety of testimonial and documentary evidence.<sup>255</sup> Further, even when making a reference to her experience of having encountered a friend who had been raped, the Trial Chamber compared it with other contrary evidence on the record.<sup>256</sup> Therefore, the Lead Co-Lawyers submit that the Trial Chamber committed no error in referring and/or relying on Sou Sotheavy's impact testimony for facts.

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“Civil Party SOU Sotheavy attested to the rape of a friend”; Judgement, para. 491 mentioning that “Sou Sotheavy described how they had to walk day and night and were only allowed to stop when they reached their destination; she went for several days without food and was not given enough time to rest”.

<sup>251</sup> Judgement, fn. 1401 stating that the “Khmer Rouge soldiers also threatened to kill those who refused to follow their instructions and leave”; Judgement, fn. 1412 to stating that those that were evacuated included “pregnant women”; Judgement, fn. 1446 to stating that evacuees from Phnom Penh settled in Svay Rieng; Judgement, fn. 1449 to state that evacuees were told to move on; Judgement, fn. 1499 to state that victims of the evacuation from Phnom Penh included “civilians, young and old alike” in para. 500.

<sup>252</sup> Judgement, para. 1144 fn. 3258, para. 1145 fn. 3265, para. 1146 fn 3273. Judgement, fn. 3258 in consideration of the fact that in the days following 17 April 1975, “many Civil Parties feared for their lives when the Khmer Rouge soldiers forced them to evacuate the city” and “had to abandon their homes and most of their material possessions” in para. 1144; Judgement, fn. 3265 noting that “Civil Parties who gave evidence before the Chamber reported experiencing severe hunger, thirst and exhaustion” in para. 1145 and “walked past the bodies of the dead and dying” in para. 1146; Judgement, fn. 3273 to remark that “Civil Parties also saw adults and children suffering from illness and malnutrition, and people who had sustained terrible injuries, reportedly as a result of assault or rape.”

<sup>253</sup> T. 27 May 2013, E1/197.1, p. 27.

<sup>254</sup> T. 27 May 2013, E1/197.1, pp. 27-31.

<sup>255</sup> See Judgement, fns 1401, 1412, 1446, 1449.

<sup>256</sup> See Judgement, fn. 1461.

c) *Chan Sopheap*

146. The Judgement makes reference to Chan Sopheap's<sup>257</sup> impact testimony on five occasions.<sup>258</sup> She was relied upon to make factual findings on sixteen occasions.<sup>259</sup> She was cited on two occasions to make a determination on the harm suffered by civil parties.<sup>260</sup>

147. Each Defence team was given an opportunity to put questions to her on the facts that had arisen during her impact testimony. The Nuon Chea Defence did not avail themselves of the opportunity to do so.<sup>261</sup> The Khieu Samphân Defence confronted her about the incident involving a man who was shot dead on the boat when it arrived in Phnom Penh.<sup>262</sup>

148. After having subjected her impact testimony to adversarial debate, the Trial Chamber relied on several facts brought out during her testimony, which were corroborated by other

<sup>257</sup> Alternative spellings of his name as “Chan Socheat” have also been used by the Trial Chamber.

<sup>258</sup> Judgement, fn. 1394 noting that “[n]umerous witnesses testified that [...] Khmer Rouge soldiers entered people’s homes and even pagodas, and forced people out at gunpoint”; Judgement, para. 482 fn. 1432 noting that the “exodus of thousands of people from Phnom Penh was described as crowded, chaotic, confusing and difficult, as evacuees struggled with little children and elderly family members”; Judgement, para. 497 fn. 1488 noting that “[n]umerous witnesses recounted seeing people dying in the streets and along the roadside”; Judgement, para. 580 fn. 1732 discussing that “[b]etween September 1975 and early 1977, victim accounts indicate that, at different stages of movement, [...] thousands were then transported in individual [...] boats”; Judgement, para. 595 mentioning that when “Civil Party Chan Socheat, her family and hundreds of other families passed the Royal Palace, one man shouted, “Bravo! Now we have arrived in Phnom Penh!”.

<sup>259</sup> Judgement, fn. 1374 for stating in para. 465 that the “Khmer Rouge announced to the population that the evacuation was temporary, with most witnesses being told they needed only evacuate for three or more days, after which they could return home”; Judgement, fn. 1379 for stating in para. 468 that the “Khmer Rouge told the local population that they were being evacuated in order to protect them against anticipated further aerial bombardments by the U.S.A”; Judgement, fn. 1381 to state in para. 469 that “[y]et other residents were told the evacuation was for their public safety as Angkar needed to ‘sweep’ or ‘clean’ the remaining enemies from the city, organise the city, or disperse the enemy’s spy network, which allegedly included American imperialist spies in Phnom Penh”; Judgement, para. 476 fn. 1411 to state that “[e]veryone was evacuated, including [...] the sick and injured from the city’s hospitals”; Judgement, fn. 1446 to stating that evacuees from Phnom Penh settled in Kandal;”; Judgement, para. 588 fn. 1765 stating that some people from Kandal were then displaced in the second wave; Judgement, para. 589 fn. 1783-1784 stating that some people were told that “they were being returned to their homes” and that they happy and willing to leave”; Judgement fn. 1807 to state in para. 594 concerning the transfer to the Mekong riverside that people were transported by boat [...] in the direction of Phnom Penh [...]”; Judgement, para. 595 fn. 1816 that some boats continued past Phnom Penh and fn. 1820 that upon arrival, “some were given food and waited with other people for onward transport”; Judgement, para. 596 fn. 1822 to state that “Khmer Rouge soldiers and officials ordered thousands of people [...] to board trains”; Judgement, para. 597 , fn. 1832-1833 to state that “[o]ther[ trains] were overcrowded with men, women, children and the elderly” and to state that “[p]eople on the trains had insufficient food and were not allowed to carry belongings”; Judgement, para. 601 fn. 1862 to state that the Khmer Rouge “transported [some people] under armed guard on foot, by truck or by ox cart to cooperatives and work-sites in Pursat Province” and fn. 1867 to state that “[u]pon arrival, belongings were confiscated and some people had to build their own shelter”.

<sup>260</sup> Judgement, para. 1144 fn. 3258, para. 1148 fn. 3282.

<sup>261</sup> T. 29 May 2013, E1/198.1, p. 60.

<sup>262</sup> *Ibid.*, pp. 61-63.

similar accounts on the record.<sup>263</sup> The Trial Chamber also compared her account with other evidence on record.<sup>264</sup> On one occasion where she is solely relied upon,<sup>265</sup> the facts pertaining to that incident had been confirmed and were consistent in court when she was questioned about it by both Co-Prosecutors<sup>266</sup> and the Khieu Samphân Defence.<sup>267</sup>

149. The Lead Co-Lawyers submit that the Trial Chamber had the discretion to rely on her for facts and exercised it within the confines of law.

d) *Aun Phally*

150. The Trial Judgement made reference to Aun Phally's impact testimony on seven occasions.<sup>268</sup> He was relied upon to make factual findings on fifteen occasions.<sup>269</sup> He was

<sup>263</sup> See Judgement, fns 1374, 1379, 1381, 1411, 1446, 1765, 1783, 1784, 1807, 1816, 1820, 1822, 1832, 1833, 1862, 1867.

<sup>264</sup> See Judgement, para. 589.

<sup>265</sup> *Ibid*, fns 1817-1818.

<sup>266</sup> T. 29 May 2013, E1/198.1, p. 58.

<sup>267</sup> *Ibid*, pp. 61-63.

<sup>268</sup> Judgement, fn. 1394 noting that “[n]umerous witnesses testified that [...] Khmer Rouge soldiers entered people’s homes and even pagodas, and forced people out at gunpoint”; Judgement, fn. 1397 to support the fact that “[n]umerous witnesses, civil parties and victims recounted how soldiers were aggressive and shouted at members of the population or fired shots in the air to urge the population to leave their homes and move”; Judgement, fn. 1459 that there exists evidence of “some evacuees walking a certain distance at gunpoint”; Judgement, fn. 1483 evaluating in contrast to other evidence that “numerous witnesses and civil parties recounted how the Khmer Rouge soldiers along the way did not provide them with any food, water, medicine or even transport, not even to assist the evacuees who were weak, elderly or injured”; Judgement fn. 1496 noting that there was significant evidence “of wounded people or dead bodies lying along the roads leading out of Phnom Penh”; Judgement, fn. 1903 stating that “Civil Party Aun Phally [...] heard the[...] screams [of people who attempted to escape] after they were caught, although he did not specify their fate”.

<sup>269</sup> Judgement, fn. 1359 to state that “Khmer Rouge troops [...] were commonly identified as wearing black pants and shirts, *kramas* [...]” in para. 460; Judgement, fn. 1374 stating in para. 465 that “[t]he Khmer Rouge announced to the population that the evacuation was temporary, with most witnesses being told they needed only evacuate for three or more days, after which they could return home”; Judgement, fn. 1401 to state that the “Khmer Rouge soldiers also threatened to kill those who refused to follow their instructions and leave”; Judgement, fn. 1446 to state that evacuees from Phnom Penh settled in Prey Veng; Judgement, fn. 1451 to state in para. 487 that “evacuees continued and travelled onwards for anywhere between several days and several weeks”; Judgement, fn. 1469 stating that “forced to walk for days if not weeks on end, evacuees, and young children in particular, soon suffered from exhaustion and could barely walk” in para. 491; Judgement, fn. 1500 stating that “exact circumstances of the death of [...] corpses [...] visible along the roads, are unclear”; Judgement, fn. 1767 stating in para. 588 that “hundreds of thousands of people [...] including Prey Veng [...] were displaced in a ‘second wave’ of evacuations”; Judgement, fn. 1771 stating that “[i]n some locations, exclusively ‘New People’ were displaced” in para. 588; Judgement, fn. 1776 stating in para. 588 that “Khmer Rouge officials [...] ordered people to depart or face consequences [...]”; Judgement fn. 1807 to state in para. 594 concerning the transfer to the Mekong riverside that people were transported by boat [...] in the direction of Phnom Penh [...]”; Judgement, fn. 1814 stating in para. 595 that “[s]ome people were unloaded from boats in Kandal Province (Southwest Zone)”; Judgement, fn. 1836 stating in para. 597 that “[p]eople died of exhaustion or starvation during the journey”; Judgement, fn. 1839 that “[c]orpses were later seen along the

cited three times in the Judgement to make a determination on the harm suffered by civil parties.<sup>270</sup>

151. Each Defence team invoked their right to question Aun Phally on the facts.<sup>271</sup> In fact, on thirteen of the occasions detailed above, the Trial Judgment referred and/or relied upon the facts that were brought up when the Co-Prosecutor<sup>272</sup> and the Defence<sup>273</sup> put questions to him.

152. The Trial Chamber noted specifically when such facts were “unclear”<sup>274</sup> and took a cautious approach in that regard, ultimately basing its findings on the precise evidence discussed in other sections of the Judgement and not on Aun Phally’s impact testimony.

153. Where the Trial Chamber did rely on them for making findings, the facts in his testimony were each respectively corroborated by a variety of testimonial and documentary evidence.<sup>275</sup> On one occasion where the reliance on Aun Phally is uncorroborated, it has not been made to enter findings on crime but rather to show that “[s]ome of those moved later attempted to return to the cooperatives from which they came.”<sup>276</sup> Even in that instance, in order to accurately represent the facts, the Trial Chamber also clarified that Aun Phally “did not specify the fate” of those people.<sup>277</sup> Therefore, the Lead Co-Lawyers submit that the Trial Chamber committed no error in referring and/or relying on Aun Phally’s impact testimony for facts.

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tracks”; Judgement, fn. 1898 stating in para. 608 that people in the seasonal workforce were “were moved, often on foot, under guard and with insufficient food or accommodation”; Judgement, fn. 1902 stating in para. 609 that “[s]ome of those moved later attempted to return to the cooperatives from which they came”.

<sup>270</sup> Judgement, paras 1145 fn 3265, para. 1147 fn 3275, para. 1148 fn 3283. Judgement, fn. 3265 noting that “Civil Parties who gave evidence before the Chamber reported experiencing severe hunger, thirst and exhaustion” in para. 1145; Judgment, fn. 3275 noting that “[o]ther Civil Parties were themselves threatened, held at gunpoint or beaten by soldiers as they left their homes and travelled out of Phnom Penh”; Judgement, para. 1147 noting that “[o]ther Civil Parties were separated from their relatives shortly after their arrival at the new locations; Judgement, para. 1148 stating that “Civil Party Aun Phally recalled seeing dead bodies left on the road”.

<sup>271</sup> See T. 27 May 2013, **E1/197.1**, pp. 47-53 (Nuon Chea Defence); pp. 53-54 (Khieu Samphân Defence).

<sup>272</sup> See Judgement, fns 1374, 1401, 1469, 1898 where Aun Phally has been cited as support for a finding; see Judgement, fns 1776, 1898 for references to Aun Phally.

<sup>273</sup> See *ibid*, fns 1359, 1394, 1771, 1500, 1771, 1776; see Judgement fn. 1496 for references to Aun Phally.

<sup>274</sup> Judgement, para. 500 fn. 1500 *citing as example, inter alia*, to Aun Phally.

<sup>275</sup> See Judgement, fns 1359, 1374, 1401, 1446, 1451, 1469, 1500, 1767, 1776, 1807, 1814, 1836, 1839; 1898.

<sup>276</sup> *Ibid*, para. 609, fn. 1902.

<sup>277</sup> *Ibid*, para. 609, fn. 1903.

e) *Sang Rath*

154. The Trial Judgment relied upon Sang Rath to make factual findings on ten occasions.<sup>278</sup> On five of those occasion, the facts relied upon either were confirmed<sup>279</sup> or emerged when the Co-Prosecutors put questions to her.<sup>280</sup>

155. Each Defence team was given an opportunity to put questions to her on the facts that had arisen during her impact testimony, including the ones resulting from the questions by the Co-Prosecutors. Neither Defence team availed themselves of the opportunity to do so.<sup>281</sup>

156. The facts in her testimony were each respectively corroborated by a variety of testimonial and documentary evidence when they were relied upon by the Trial Chamber.<sup>282</sup> On one occasion in respect of the conditions in the trains to the Northwest Zone, where her evidence, albeit corroborated, was not consistent with the totality of evidence before the Chamber, the Trial Chamber gave equal consideration to evidence to the contrary.<sup>283</sup> Therefore, the Lead Co-Lawyers submit that the Trial Chamber committed no error in relying on Sang Rath's impact testimony for facts.

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<sup>278</sup> Judgement, fns 1772, 1774 in to state in para. 588 that “‘Old People’ [...] were transferred [during the second wave of evacuations]” on orders by the village chief; Judgement, fn 1779 to state in para.589 that people were given a variety of reasons for their re-location including that “‘there was plenty of food in Battambang””; Judgement, fn. 1789-1790, 1792 to state in para. 591 that “[t]rucks to assembly points [...] were crowded”, “[p]eople were constantly monitored, had no water and insufficient food, and were not allowed to carry any belongings” and “[u]pon arrival at various assembly points, the trucks stopped and people waited outdoors without sufficient food or water for up to a few days””; Judgement, fn. 1832 to state in para. 597 that “[o]ther[ trains] were overcrowded with men, women, children and the elderly””; Judgement, fn. 1856 to state in para. 600 that after disembarking from the trains, people “‘were provided with no water, food, hygiene facilities, hammocks or mosquito nets””; Judgement, fn. 1859, 1862 to state in para. 601 that “‘Khmer Rouge soldiers and officials divided the people according to the locations where they would be sent, sometimes separating families”” and “‘transported [some people] under armed guard on foot, by truck or by ox cart to cooperatives and work-sites in Pursat Province””.

<sup>279</sup> *Ibid*, fns 1772, 1774, 1779, 1856.

<sup>280</sup> *Ibid*, fn. 1790.

<sup>281</sup> T. 27 May 2013, **E1/197.1**, pp. 67-68.

<sup>282</sup> Judgement, fns 1772, 1774, 1779, 1789, 1790, 1792, 1832, 1856, 1859, 1862.

<sup>283</sup> *See* Judgement, para. 597: Each wagon had the capacity to hold as many as 40-50 people, but usually there were 20-25 people in each wagon. Some were not crowded: people could sit on the floor or remain standing. Others were overcrowded with men, women, children and the elderly. (internal citations omitted).

f) *Thouch Phandarasor*

157. The Trial Judgement made reference to Thouch Phandarasor's impact testimony on four occasions.<sup>284</sup> She was cited four times in the Judgement to make a determination on the harm suffered by civil parties.<sup>285</sup> She was relied upon to make factual findings on nineteen occasions,<sup>286</sup> Two of those times, those facts had been confirmed when other parties put questions to her.<sup>287</sup> Although this number appears large, the Lead Co-Lawyers submit that this is due to the fact that her impact testimony touched upon a wider range of issues. The

<sup>284</sup> Judgement, para. 464 fn. 1371 noting that "the population was happy that hostilities had ended"; Judgement, fn. 1397 to note that "[n]umerous witnesses, civil parties and victims recounted how soldiers were aggressive and shouted at members of the population or fired shots in the air to urge the population to leave their homes and move"; Judgement, para. 476 fn. 1413 noting that "[w]itnesses and civil parties recounted seeing the sick and injured evacuated while limping on crutches, pushed in their hospital beds, wheelbarrows or wheelchairs, with intravenous drips still attached or trailing oxygen tanks"; Judgement, para. 490 fn. 1462 noting that "[t]here were also numerous instances of Khmer Rouge soldiers shooting and killing civilians during the course of the evacuation, with victims including a famous film actor, several people driving vehicles and even those who simply became too weak to continue";

<sup>285</sup> Judgement, fns 3258, 3262, 3273, 3279.

<sup>286</sup> Judgement, para. 464 fn. 1371 stating that "the Khmer Rouge began to instruct the population to leave Phnom Penh immediately"; Judgement, fn. 1374 for stating in para. 465 that the "Khmer Rouge announced to the population that the evacuation was temporary, with most witnesses being told they needed only evacuate for three or more days, after which they could return home"; Judgement, fn. 1376 stating in para. 466 that "[m]ost people gathered family members and took what little they could, such as money"; Judgement, fn. 1379 for stating in para. 468 that the "Khmer Rouge told the local population that they were being evacuated in order to protect them against anticipated further aerial bombardments by the U.S.A"; Judgement, fn. 1381 to state in para. 469 that "[y]et other residents were told the evacuation was for their public safety as Angkar needed to 'sweep' or 'clean' the remaining enemies from the city, organise the city, or disperse the enemy's spy network, which allegedly included American imperialist spies in Phnom Penh"; Judgement, para. 481 fn.1430 stating that "[a]rmed Khmer Rouge soldiers lined the main roads and supervised the evacuation as they directed the population to keep moving out of the city and onwards"; Judgement, para. 484 fns 1440-1441 stating that "[t]he city's population set out by whatever means were available to them, mostly on foot, but also by bikes, push carts, or with cars" and that "[p]eople who left by car soon ran out of fuel, or had their cars confiscated by Khmer Rouge soldiers shortly thereafter"; Judgement, para. 492 fn. 1475 stating that "[p]regnant women gave birth along the road without medical assistance, and some miscarried"; Judgement, para. 503 fn. 1510 stating that "[a]ll of those senior officials disappeared and media and diplomatic dispatches subsequently reported that certain officials [...] were executed"; Judgement, para. 588 fn. 1764 stating that people from Kampong Speu were displaced in the second wave; Judgement, fn. 1789 to state in para. 591 that "[t]rucks to assembly points [...] were crowded"; Judgement, para. 596 fn. 1822 to state that "Khmer Rouge soldiers and officials ordered thousands of people [...] to board trains"; Judgement, fn. 1832 to state in para. 597 that "[o]ther[ trains] were overcrowded with men, women, children and the elderly"; Judgement, para. 601 fn. 1862 to state that the Khmer Rouge "transported [some people] under armed guard on foot, by truck or by ox cart to cooperatives and work-sites in Pursat Province" and fn. 1867 that "[u]pon arrival [...] some people had to build their own shelter"; Judgement, para. 617 to state that by mid-1971 Khmer Rouge soldiers had gathered hundreds of former soldiers of the Khmer Republic and their families, and transported them by cart and on foot to various locations including [...] Boeung Kantout" (fn. 1941) where they were "not provided food along the way, were threatened with loaded weapons and questioned about their history" (fn. 1945) and were then "transferred to new locations and some were separated from their families" (fn. 1947).

<sup>287</sup> Judgement, fn. 1371 *cf.* T. 29 May 2013, E1/198.1, pp. 35-36; Judgement, fn. 1510 *cf.* E1/198.1, pp.30-31, 37.

Lead Co-Lawyers submit that the Trial Chamber had the discretion to do so and exercised it within the confines of law as is clear from the response below.

158. The Nuon Chea Defence challenges the reliance on Thouch Phandarasor on two occasions, both related to paragraph 490.<sup>288</sup> The Lead Co-Lawyers refer to para. 139 of the present brief for a response on this challenge.

159. The Lead Co-Lawyers further argue that each Defence team was given an opportunity to put questions to her on the facts that had arisen during her impact testimony, including the ones resulting from the questions by the Co-Prosecutors. The Nuon Chea Defence put questions to her<sup>289</sup> whereas the Khieu Samphân Defence did not avail themselves of the opportunity.<sup>290</sup>

160. The Lead Co-Lawyers conceded that she has been solely relied upon by the Trial Chamber on two occasions along with her supplementary information.<sup>291</sup> However, in that respect, it is submitted that her impact testimony stood the test on the factual elements and was credible. Further, neither Defence teams challenged her on that account in court. Lastly, her supplementary information was presented before the court and she attested to the truth contained therein.<sup>292</sup> Therefore, the Lead Co-Lawyers submit that there was no error committed in relying on her to establish facts in the Judgement.

*g) Sophan Sovany*

161. The Trial Chamber referred to Sophan Sovany's impact testimony on one occasion.<sup>293</sup> She was relied upon to make factual findings on eleven occasions.<sup>294</sup> She was cited by the Judgment three times to make a determination on the harm suffered by Civil Parties.<sup>295</sup>

<sup>288</sup> See Nuon Chea Appeal Brief, fns 795, 833.

<sup>289</sup> T. 29 May 2013, **E1/198.1**, pp. 34-38.

<sup>290</sup> *Ibid*, p. 38.

<sup>291</sup> Judgement, para. 588 fn. 1764 stating that people from Kampong Speu were displaced in the second wave (this information was confirmed by her during the questions put by the OCP, see T. 29 May 2013, **E1/198.1**, pp. 32-33); Judgement, para. 617 fn. 1941 to state that by mid-1971 Khmer Rouge soldiers had gathered hundreds of former soldiers of the Khmer Republic and their families, and transported them by cart and on foot to various locations including [...] Boeung Kantout";

<sup>292</sup> T. 29 May 2013, **E1/198.1**, p. 11.

<sup>293</sup> Judgement, fn. 1833 noting at para. 597 that "[p]eople on the trains had insufficient food and were not allowed to carry belongings".

<sup>294</sup> Judgement, fn. 1765 stating in para. 588 that "[b]eginning in September 1975 and continuing into early 1977, hundreds of thousands of people in the Southwest, West and East Zones (including Kampong Speu, Kandal [...] Provinces) were displaced in a "second wave" of evacuations"; Judgement, fn. 1771 stating in para. 588 stating

162. Each Defence team was given the opportunity to put questions to her on the facts that had arisen during her impact testimony. Both the Nuon Chea Defence and Khieu Samphan Defence chose not to exercise this right.<sup>296</sup>

163. The Nuon Chea Appeal challenges reliance on Sophan Sovany in the Judgment on one occasion based on admissibility.<sup>297</sup> In respect of this challenge, the Lead Co-Lawyers submit that the Trial Chamber may exercise its discretion to rely upon any evidence before it, after all parties have been afforded the right to confront such evidence.<sup>298</sup> The strategic decision by both Defence teams to not exercise this right does not make the evidence inadmissible.<sup>299</sup>

164. Regardless, Nuon Chea's challenge of Sophan Sovany testimony regarding new people being exclusively displaced in certain locations was corroborated by numerous testimonies.<sup>300</sup>

*h) Soeun Sovandy*

165. The Trial Judgment made reference to Soeun Sovandy's impact testimony on two occasions to make a determination on the harm suffered by civil parties.<sup>301</sup> The Lead Co-

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that "In some locations, exclusively 'New People' were displaced"; Judgment, fn. 1775 stating in para. 588 that "Khmer Rouge officials including... Angkar, ordered people to depart or face the consequences"; Judgment, fn. 1779 stating at para. 589 that "People were given a variety of reasons for their re-location. The majority were told or believed there was plenty of food in Battambang"; Judgment, fn. 1806 stating at para. 594 that people were "transported by boat, under armed guard" to various locations; Judgment, fn. 1811 stating at para. 594 that "[s]ome children on the boat cried because they were hungry and Khmer Rouge soldiers threatened to throw them overboard"; Judgment, fn. 1822 stating at para. 596 that "Khmer Rouge soldiers and officials ordered" and pushed people onto the train; Judgment, fn. 1835 stating at para. 597 that "[p]eople had to ask the soldiers to stop the train to relieve themselves" and became frightened as they were only allowed to defecate under armed guard; Judgment, fn. 1826 stating at para. 596 that "[t]he doors of each train wagon were barred with wooden poles"; Judgment, fn. 1866 stating at para. 601 that "[t]he cooperatives were not equipped to handle the volume of people arriving, particularly new cooperatives in the jungle"; Judgment, fn. 1867 stating at para. 601 that "[u]pon arrival, belongings were confiscated and some people had to build their own shelter".

<sup>295</sup> Judgment, fn. 3259 stating at para. 1144 that "[t]hey had to abandon their homes and most of their material possessions"; Judgment, fn. 3266 stating at para. 1145 that "[m]any were reduced to eating whatever they could find *en route* and drinking dirty water"; Judgment, fn. 3270 stating at para. 1146 that "[d]uring the long march out of Phnom Penh, many Civil Parties witnessed harrowing events. They walked past the bodies of the dead and dying".

<sup>296</sup> T. 30 May 2013, E1/199.1, p.63 (Nuon Chea Defence); *ibid.*, (Khieu Sampan Defence).

<sup>297</sup> Nuon Chea Appeal Brief, fns 1018 (against Judgment, para. 588).

<sup>298</sup> *See further*, Section VI of the present response.

<sup>299</sup> T. 30 May 2013, E1/199.1, p.63 (Nuon Chea Defence); *ibid.*, (Khieu Sampan Defence).

<sup>300</sup> Judgment, fn. 1771.

<sup>301</sup> *See* Judgment, fns 2269, 2278.



Lawyers submit that the meagre reliance in the Judgement to his impact testimony is telling of the fact that the Trial Chamber was conscious of the fact the Soeun Sovandy's testimony was largely outside the scope of Case 002/01<sup>302</sup> and his testimony concerning forced transfer was heavily challenged by Khieu Samphân Defence, pointing out the discrepancies in the information contained in his civil party application relating to the circumstances of his family's movement from Phnom Penh.<sup>303</sup>

## **E. Conclusion**

166. The Lead Co-Lawyers conclude that on careful examination of the civil party evidence, it is clear that the allegations of the Appellants concerning the prejudice occasioned on their reliance are unsubstantiated.

167. The Trial Chamber was very well within its discretion to consider civil party evidence, whether through civil party applications or live testimony, to arrive at the factual conclusions based on the totality of evidence.

168. The Lead Co-Lawyers submit that for the reasons elaborated above, the Defence Appeal Briefs do not establish any error of fact or error of law concerning civil party evidence invalidating the Judgement. Therefore, the Lead Co-Lawyers request the Supreme Court Chamber to dismiss the respective grounds of appeal in their entirety.

## **VII. REQUEST**

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

- (1) **SUMMARILY DISMISS** the Nuon Chea Appeal and Khieu Samphân Appeal for grounds not fulfilling the standard of review on appeal; or otherwise
- (2) **DISMISS** the Nuon Chea Appeal and Khieu Samphân Appeal on merits.

Respectfully submitted,

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<sup>302</sup> T. 4 June 2013, **E1/200.1**, pp. 51-55.

<sup>303</sup> T. 4 June 2013, **E1/200.1**, pp. 80-89.

Date	Name	Place	Signature
25 May 2015	Marie GUIRAUD Lead Co-Lawyer	Phnom Penh	