

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

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**NUON CHEA'S REPLY TO THE CIVIL PARTY LEAD CO-LAWYERS' RESPONSE  
TO NUON CHEA'S SIXTH REQUEST FOR ADDITIONAL EVIDENCE ON APPEAL**

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**Filed By**

**Nuon Chea Defence Team:**  
SON Arun  
Victor KOPPE  
LIV Sovanna  
PRUM Phalla  
Doreen CHEN  
Xiaoyang NIE  
Marina HAKKOU  
Henri DECŒUR

**Distribution**

**Co-Lawyers for Khieu Samphân:**  
KONG Sam Onn  
Anta GUISSÉ  
Arthur VERCKEN

**Co-Prosecutors:**  
CHEA Leang  
Nicholas KOUMJIAN

**Co-Lawyers for the Civil Parties:**  
PICH Ang  
Marie GUIRAUD

Pursuant to Article 8.4 of the Practice Direction on the Filing of Documents before the ECCC, the Co-Lawyers for Mr Nuon Chea (the ‘Defence’) submit this reply to the Civil Party Lead Co-Lawyers’ Response to Nuon Chea’s Sixth Request Concerning Additional Evidence on Appeal (respectively, the ‘Civil Parties’ Response’ or the ‘Response’, and the ‘Request’).

## I. PROCEDURAL BACKGROUND

1. On 7 August 2014, the Trial Chamber rendered its Judgment in Case 002/01 (the ‘Judgment’).<sup>1</sup> On 29 September 2014, the Defence filed its notice of Appeal before the Supreme Court Chamber, outlining 223 grounds of appeal.<sup>2</sup> On 29 December 2014, the Defence submitted its Appeal brief (the ‘Appeal’).<sup>3</sup>
2. On 11 September 2015, the Defence filed its sixth Request to consider and obtain additional evidence in connection with the Appeal.<sup>4</sup> On 29 September 2015, the Lead Co-Lawyers for the Civil Parties filed their Response to the Defence’s Request.<sup>5</sup> The Defence deems it necessary to reply to the Civil Parties’ Response.

## II. ARGUMENT

3. The Civil Parties’ Response makes three substantive points. It argues, first, that the Request pertains to an issue not challenged in the Appeal, namely the composition of the joint criminal enterprise (‘JCE’).<sup>6</sup> It further argues that the Request intends to challenge Nuon Chea’s assumed conviction as a superior.<sup>7</sup> Finally, the Civil Parties’ Response argues that some of the evidence tendered in the Request should not be admitted because it falls outside the temporal scope of Case 002/01.<sup>8</sup>
4. The Civil Parties have no standing to respond to the Request. In any event, the above arguments are without merit and should be disregarded by the Supreme Court Chamber.

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<sup>1</sup> E313, ‘Case 002/01 Judgement’, 7 Aug 2014 (‘Judgment’).

<sup>2</sup> E313/1/1, ‘Notice of Appeal against the Judgment in Case 002/01’, 29 Sep 2014.

<sup>3</sup> F16, ‘Nuon Chea’s Appeal against the Case 002/01 Judgement’, 29 Dec 2014 (‘Appeal’).

<sup>4</sup> F2/8, ‘Nuon Chea’s Sixth Request to Consider and Obtain Additional Evidence in Connection with the Appeal against the Trial Judgement in Case 002/01’, 11 Sep 2015 (‘Sixth Request for Additional Evidence’).

<sup>5</sup> F2/8/1, ‘Civil Party Lead Co-Lawyers’ Response to Nuon Chea’s Sixth Request Concerning Additional Evidence on Appeal’, 29 Sep 2015 (‘Civil Parties’ Response’).

<sup>6</sup> F2/8/1, Civil Parties’ Response, paras 14–23.

<sup>7</sup> F2/8/1, Civil Parties’ Response, paras 24–28.

<sup>8</sup> F2/8/1, Civil Parties’ Response, paras 29–30.

### A. The Civil Parties Fail to Demonstrate Standing

5. The Supreme Court Chamber has made it clear that ‘the exercise of the [Civil Parties]’ right to respond [...] must be subject to limitations’, adding that ‘the arguments set out in the proposed response must relate to grounds directly affecting Civil Parties’ rights and interests’.<sup>9</sup> The Trial Chamber, noting ‘the emerging jurisprudence of the ICC Appeals Chamber [imposing] significant restrictions upon the right of victims to express their views during the trial’, similarly held that ‘a restrictive interpretation of rights of Civil Parties in proceedings before the ECCC is required’.<sup>10</sup>
6. The Defence notes that the Civil Parties did not endeavour to demonstrate the extent to which the Request affects their rights and interests. Instead, the Civil Parties simply referred to arguments previously made in their response to the Defence’s request for investigative action concerning the testimony of Sam Sithy.<sup>11</sup> The Civil Parties also failed to explain how the arguments put forward in their previous filing remain applicable to the issue at hand.
7. The Civil Parties’ failure to provide any explanation of how their rights and interests may have been affected by the Request specifically is in fact consistent with their flawed understanding of the role of civil parties in proceedings before the ECCC. The Civil Parties argue that ‘the Request does not respect the balance of rights of all parties’, considered in light of the ‘need for an expeditious trial’ and of ‘the right of the civil parties to obtain a timely verdict and expediency of proceedings’.<sup>12</sup> They are ‘mindful of the advanced age of the Co-Accused’ and therefore concerned that the Request may ‘siphon the time and resources of the Chamber towards fact-fishing as the Civil Parties await a verdict’.<sup>13</sup>

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<sup>9</sup> **F10/2**, ‘Decision on Civil Party Lead Co-Lawyers’ Requests Relating to the Appeals in Case 002/01’, 26 Dec 2014, para. 17.

<sup>10</sup> Case 001, **E72/3**, ‘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 Oct 2009 (‘Decision on Civil Party Standing’), paras 13 and 39.

<sup>11</sup> **F2/8/1**, Civil Parties’ Response, para. 32. See **F28/1**, ‘Civil Party Lead Co-Lawyers’ Response to Nuon Chea’s Investigatory Requests Relating to Sam Sithy’, 18 Sep 2015 (‘Civil Parties’ Response to Request for Investigative Action’), paras 37–41; **F28**, ‘Request for Investigative Action into Events Described during the Testimony of Sam Sithy’, 7 Sep 2015.

<sup>12</sup> **F28/1**, Civil Parties’ Response to Request for Investigative Action, paras 40–41.

<sup>13</sup> **F28/1**, Civil Parties’ Response to Request for Investigative Action, paras 38 and 41.



8. While the Civil Parties' impatience may seem understandable, it does not provide any basis for standing. The direct consequence of their argument is that any request submitted by any party at this stage of the proceedings would *ipso facto* affect the rights and interests of the Civil Parties since it would impact the schedule of the proceedings. This interpretation cannot be reconciled with the Chamber's clear instructions that standing must be established on a case-by-case basis in light of the impact that a particular argument raised by the Defence may have on the Civil Parties' rights and interests. The Civil Parties ought to have demonstrated how the evidence sought for admission in the Request would, in their opinion, have affected their rights and interests.
9. The Defence recalls that the Civil Parties' rights and interests are to be determined in light of the Civil Parties' role in ECCC proceedings, which is to 'seek reparation'<sup>14</sup> – not to manage the schedule of proceedings. Since the Request does not concern the issue of reparations or other matters of interest for the Civil Parties, the latter lack standing to make submissions in response to it.

#### **B. The Defence Did Challenge the Existence and Definition of the JCE**

10. The Civil Parties' Response claims that the Request seeks to challenge the composition of or Nuon Chea's membership in the JCE, and that the Defence failed to do so in the Appeal.<sup>15</sup> From a formalistic viewpoint, this is quite an absurd assertion. Considering that the Trial Chamber defined the JCE in the broadest terms as pursuing the purpose of 'implement[ing] rapid socialist revolution' – a purpose which was not inherently criminal –,<sup>16</sup> the idea that the Defence ought to have challenged Nuon Chea's membership in the revolution defies common sense.
11. The Civil Parties' assertion also misrepresents both the Request and the Appeal submissions. The formulation of ground 200 of the Appeal is self-explanatory: 'The Trial Chamber erred in fact in defining the CPK's Joint Criminal Enterprise'. The Appeal challenges the existence and definition of the JCE, in all its constitutive elements, notably the existence of a common purpose involving the commission of crimes.<sup>17</sup> Contrary to the

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<sup>14</sup> Case 001, **E72/3**, Decision on Civil Party Standing, paras 25, 33 and 42. *See, also*, **E365/1**, 'Nuon Chea's Response to Civil Party Lead Co-Lawyers' Request for Clarifications on the Scope of Examination of Civil Parties', 25 Sep 2015, paras 12–15.

<sup>15</sup> **F2/8/1**, Civil Parties' Response, paras 14–16, and 21.

<sup>16</sup> **E313**, Judgment, paras 722, and 777–778.

<sup>17</sup> **F16**, Appeal, paras 494–498.

Civil Parties' submission, the Appeal does make the point repeatedly that evidence pertaining to internal rebellion within the CPK was relevant and ought to have been considered.<sup>18</sup> By rebutting the very idea of a 'common' criminal purpose 'shared' between individuals who belonged to rival factions which at one time even engaged in open armed conflict, the evidence tendered in the Request does not raise new grounds of appeal but simply provides further proof of errors already challenged in the Appeal.

12. Furthermore, contrary to the Civil Parties' submission,<sup>19</sup> the Request is perfectly in compliance with the Rules. As a matter of procedural law, Rule 108(7) requires the Defence to link a request for additional evidence to specific disputed findings in the Judgment, not to any particular ground of appeal. In any event, the Supreme Court Chamber retains complete discretion to examine additional evidence under Rule 104(1) 'where the interests of justice so require, taking into account the specific circumstances of the case' and 'consider[ing] whether the evidence is conducive to ascertaining the truth'.<sup>20</sup>

### **C. The Trial Chamber Did Rely on Nuon Chea's Supposed Authority and Control over Subordinates to Enter a Conviction**

13. The Civil Parties seem to believe that the Request seeks to tender evidence for the purpose of challenging Nuon Chea's assumed conviction as a superior.<sup>21</sup> Again, the Civil Parties' Response misrepresents the argument made in the Request. What the evidence tendered in the Request does challenge, is any factual and legal finding that Nuon Chea exercised

<sup>18</sup> See **F16**, Appeal, e.g. para. 35 ('conflict within the CPK which caused loyalties throughout the Party to splinter'; 'the Closing Order says nothing about the large body of available evidence that the Party was divided in competing, equally strong factions; the uncontroverted fact that Vietnam sponsored one of these factions in a war against Pol Pot, Nuon Chea and others'; 'these 'purges were the result of an armed conflict within the Party pitting Pol Pot and Nuon Chea against the very cadres who supposedly implemented their policies'), para. 57 ('numerous witnesses have described to [Thet Sambath] how Pol Pot and Nuon Chea were 'opposed' and 'betrayed' by their supposed subordinates in the CPK, many of whom acted independently to commit crimes'), para. 82 ('The Defence also sought [...] evidence in connection with, *inter alia*, the rebellion of cadres throughout the CPK against Pol Pot and Nuon Chea'), para. 242 ('cadres throughout the country – 'actually most of them' – secretly betrayed and opposed Pol Pot'), para. 462 ('Nuon Chea's longstanding defence that 'bad cadres' throughout the CPK hierarchy committed crimes as part of their opposition to and betrayal of the Party'; 'the question of whether Ruos Nhim could or would have acted independently of Pol Pot and Nuon Chea's wishes').

<sup>19</sup> **F2/8/1**, Civil Parties' Response, para. 23.

<sup>20</sup> **F2/5**, 'Decision on Part of Nuon Chea's Requests to Call Witnesses on Appeal', 29 May 2015 ('Decision to Call Witnesses on Appeal'), para. 17.

<sup>21</sup> **F2/8/1**, Civil Parties' Response, para. 24.



authority and control over other CPK cadres, notably Zone Secretaries and fellow Standing Committee members Ruos Nhim and Sao Phim.<sup>22</sup>

14. Contrary to the Civil Parties' submission, the Trial Chamber did rely on findings concerning Nuon Chea's *de jure* or *de facto* authority to enter a conviction. Factual and legal findings concerning the existence of Nuon Chea's *de jure* or *de facto* authority over other CPK cadres were determinant in the Chamber's analysis of Nuon Chea's responsibility for ordering<sup>23</sup> and instigating.<sup>24</sup>
15. Those latter findings were in turn explicitly taken into consideration by the Trial Chamber in its analysis on Nuon Chea's contribution to the JCE.<sup>25</sup> The Civil Parties' argument that Nuon Chea's 'effective control over the subordinate is immaterial for the challenges relating findings of conviction on JCE'<sup>26</sup> therefore misrepresents the Judgment and is devoid of merit.
16. What is more, given that the Trial Chamber found Nuon Chea responsible as a superior, for the purposes of the Appeal it is irrelevant that a conviction was not entered on that basis. The Defence does challenge Nuon Chea's responsibility as a superior in the event that the Supreme Court Chamber would invalidate all convictions entered on the basis of all other modes of responsibility.

#### **D. The Evidence Tendered in the Sixth Request Is Admissible Regardless of the Temporal Scope**

17. The Civil Parties finally argue that additional evidence post-dating December 1977 ought not to be considered by the Supreme Court Chamber.<sup>27</sup> This argument is flawed on its face, as the Trial Chamber did make numerous findings based on evidence dating as late as 1979.<sup>28</sup> If the Trial Chamber can rely on evidence falling outside the temporal scope of Case 002/01, then the Defence is certainly entitled as well to adduce similar evidence to rebut the Chamber's findings. In any event, the Defence recalls that the Supreme Court

<sup>22</sup> F2/8, Sixth Request for Additional Evidence, paras 5–6.

<sup>23</sup> E313, Judgment, paras 884, 905, 907 and 923–924.

<sup>24</sup> E313, Judgment, paras 887, 908 and 926.

<sup>25</sup> E313, Judgment, para. 862 ('The Chamber's finding below that NUON Chea planned, ordered, instigated, aided and abetted the crimes at issue [...] also demonstrate a sufficient link between the direct perpetrators and NUON Chea').

<sup>26</sup> F2/8/1, Civil Parties' Response, para. 26.

<sup>27</sup> F2/8/1, Civil Parties' Response, paras 28–29.

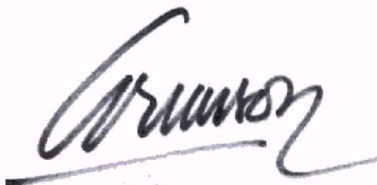
<sup>28</sup> See E313, Judgment, e.g. para. 293, note 910, para. 319, note 982, para. 332, note 1011, and para. 345, note 1040.

Chambers retains discretion to examine any evidence it deems conducive to ascertaining the truth, and that it has recently heard new witnesses who testified about events post-dating December 1977.<sup>29</sup>

### III. CONCLUSION

18. For the reasons stated above, the Defence requests the Supreme Court Chamber to disregard the Civil Parties' Response in its entirety.

CO-LAWYERS FOR NUON CHEA



SON Arun



Victor KOPPE

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<sup>29</sup> F2/5, Decision to Call Witnesses on Appeal.