

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

**FILING DETAILS**

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**CIVIL PARTY LEAD CO-LAWYER'S RESPONSE TO NUON CHEA'S URGENT  
REQUEST CONCERNING THE IMPACT ON APPEAL PROCEEDINGS OF NUON  
CHEA'S DEATH PRIOR TO THE APPEAL JUDGEMENT**

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**Before:**

**Supreme Court Chamber**

Judge KONG Srim, President

Judge SOM Sereyvuth

Judge Chandra Nihal JAYASINGHE

Judge Maureen HARDING CLARK

Judge Florence Ndepele MUMBA

Judge MONG Monichariya

Judge YA Narin

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## I. INTRODUCTION

1. On 16 November 2018, the Trial Chamber issued the summary of its verdict in Case 002/02 during a public hearing.<sup>1</sup> On 28 March 2019, the full reasoned judgement was notified to the Parties in Khmer, English, and French.<sup>2</sup> Following requests from KHIEU Samphân and NUON Chea, the Supreme Court Chamber ordered that all notices of appeal be filed before 1 July 2019.<sup>3</sup> The Office of the Prosecutors and both Defence teams filed notices of appeal against the Trial Judgement.<sup>4</sup>
2. On 4 August 2019, NUON Chea died. His death certificate was filed by the Office of the Co-Prosecutors on 5 August 2019.<sup>5</sup> On 6 August 2019, the Defence team for NUON Chea filed their Urgent Request Concerning the Impact on Appeal Proceedings of NUON Chea's Death prior to the Appeal Judgement ("Request") in English only.<sup>6</sup> On 13 August 2019 the Supreme Court Chamber terminated proceedings against NUON Chea, but held that it would remain seized of the Request concerning the impact of NUON Chea's death on the trial judgment and underlying convictions.<sup>7</sup> The Lead Co-Lawyer hereby responds to the NUON Chea Request with concerns affecting specific rights and interests of Civil Parties arising from the NUON Chea Request, and defer to the wisdom of the Supreme Court Chamber in deciding the Request.

## II. STANDING

3. In its Decision on Civil Party Standing in Case 002/01 and the Appeal Judgement in Case 002/01, the Supreme Court Chamber held that Civil Parties enjoy the right to respond to

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<sup>1</sup> See **E1/529.1** Transcript of Hearing on the Substance in Case 002/02, 16 November 2018.

<sup>2</sup> **E465** Case 002/02 Judgement, 16 November 2018 (full reasoned decision notified 28 March 2019).

<sup>3</sup> **F43** Decision on NUON Chea and KHIEU Samphân's Requests for Extensions of Time and Page Limits on Notices of Appeal, 26 April 2019, para. 13.

<sup>4</sup> **E465/2/1** Co-Prosecutors' Notice of Appeal of the Trial Judgement in Case 002/02, 21 June 2019 (advancing one ground of appeal); **E465/4/1** KHIEU Samphân's Notice of Appeal (002/02), 1 July 2019 (identifying 1,824 errors and 355 Trial Chamber decisions); **E465/3/1** NUON Chea's Notice of Appeal against the Trial Judgement in Case 002/02, 1 July 2019 (advancing 351 grounds of appeal).

<sup>5</sup> **F46.1** NUON Chea's Death Certificate.

<sup>6</sup> **F46/2** Urgent Request Concerning the Impact on Appeal Proceedings of Nuon Chea's Death Prior to the Appeal Judgement, 6 August 2019 ("Request").

<sup>7</sup> **F46/3** Decision to Terminate Proceedings against NUON Chea, 13 August 2019.

submissions during the appellate phase of proceedings,<sup>8</sup> provided that the submissions affect Civil Parties' rights and interests.<sup>9</sup>

4. Internal Rule 21(1) expressly provides that victims have an interest in 'legal certainty and transparency of proceedings'. Internal Rule 21(1)(c) further provides that '[t]he ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings'. As victims of international crimes, civil parties have further rights under international law to truth, to having facts established by a judicial decision, and to a remedy.<sup>10</sup>

### III. RESPONSE

5. This limited response is submitted to raise concerns relating to the specific interests of the Civil Parties which arise from the Request. The Civil Parties have been parties to these proceedings since 2007 and have rights, including to legal certainty and to be informed. Internal Rule 21(1) requires an interpretation of the Internal Rules that safeguards not only the interests of the accused, but also those of victims.

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<sup>8</sup> **F10/2** Decision on Civil Party Lead Co-Lawyers' Requests Relating to the Appeals in Case 002/01, 26 December 2014, paras 14 and 17 ("Decision on Civil Party Standing"). The Decision on Civil Party Standing addressed the right to respond to Defence Appeal Briefs specifically. The principles contained in paragraphs 14 and 17 of that decision apply to other responses. See **F36** Appeal Judgement, 23 November 2016, para. 81 ("In this respect, it agreed with NUON Chea in that the Civil Party Lead Co-Lawyers had failed to substantiate how their submission complied with the principles set out in its previous jurisprudence, namely, how NUON Chea's requests affected the Civil Parties' rights and interests. Mere reference to the need to guarantee the 'balance of parties' is too generic to meet that requirement, even if understood as a Civil Parties' right to obtain a timely verdict.").

<sup>9</sup> **F10/2** Decision on Civil Party Standing, 26 December 2014, para. 17.

<sup>10</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly, A/RES/60/147, 21 March 2006, para. 11(a)(victims' right to '[e]qual and effective access to justice'); para. 12 ('A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws.');

para. 22 (b), (c) and (f) (the right to satisfaction includes '[v]erification of the facts and full and public disclosure of the truth ...'; '[a]n official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim' and '[j]udicial and administrative sanctions against persons liable for the violations'). [Attachment 1]

6. The Lead Co-Lawyer submits that while proceedings are terminated and the trial judgement is not final as to NUON Chea,<sup>11</sup> the judgement is still valid and is not vacated as argued in the Request.<sup>12</sup> Rather, the judgment – and the trial record – remain intact and valid, but have no legal effect as to NUON Chea.<sup>13</sup> This is consistent with both the presumption of innocence<sup>14</sup> and the Civil Parties right to truth and to a remedy – including the right to have the facts established in a judicial decision.<sup>15</sup>
7. In this regard, the Lead Co-Lawyer recalls the Chamber’s jurisprudence from Case 001. The Chamber acknowledged the importance of satisfaction to victims in proceedings before the ECCC:

this Chamber is of the view that although collective and moral reparations may not reinstate the victims of human rights abuses either physically or economically, other general purposes of reparations are fulfilled before the ECCC to the extent that the reparation responds to “the psychological, moral, and symbolic elements of the violation.” This is achieved through the ‘verification of the facts and full and *public disclosure of the truth*’ as fostered by the findings of the *Co-Investigating Judges and three Chambers*, through the access and participation of victims to proceedings, and through victims’ identification and individual recognition in the final judgement that represent a public acknowledgement of their suffering...<sup>16</sup>

<sup>11</sup> E163/5/1/13 Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision Concerning the Scope of Case 002/01, 8 February 2013, para. 24 (“...and the fact that, in the context of the ECCC, judgments on the merits are not final until having passed through the appellate stage.”).

<sup>12</sup> F46/2 Urgent Request Concerning the Impact on Appeal Proceedings of Nuon Chea’s Death Prior to the Appeal Judgement, 6 August 2019, paras 22-23, 32.

<sup>13</sup> See Criminal Procedure Code of the Kingdom of Cambodia, Article 397 (“During an appeal, enforcement of a judgement shall be suspended.”). See also Criminal Procedure Code of the Kingdom of Cambodia, Article 435; Constitution of the Kingdom of Cambodia, Article 38 (“The accused shall be considered innocent until the court has judged finally on the case.”). The Lead Co-Lawyer notes that the only mechanism for invalidating a judgment through the appeal procedure is outlined in the Internal Rules, see e.g. Internal Rule 104(1)(a).

<sup>14</sup> Law on the Establishment of the Extraordinary Chambers, amended 27 October 2004, Articles 35 *new* and Article 37 *new*; The Constitution of the Kingdom of Cambodia, Article 38. The Lead Co-Lawyer notes that Internal Rule 21(1)(d) states only that the presumption of innocent applies ‘as long as his/her guilt has not been established’.

<sup>15</sup> *Supra* note 10; F28 Case 001 Appeal Judgement, 3 February 2012, para. 661 (“Case 001 Appeal Judgement”). See also, for example, IACtHR, *Plan de Sánchez Massacre v. Guatemala (Reparations)*, Judgment of November 19, 2004, para. 81 [Attachment 2]; IACtHR, *Case of Tibi v. Ecuador (Preliminary Objections, Merits, Reparations and Costs)*, Judgment of September 07, 2004, para. 243 [Attachment 3]; IACtHR, *Case of the “Juvenile Reeducation Institute” v. Paraguay (Preliminary Objections, Merits, Reparations and Costs)*, Judgment of September 2, 2004, para. 299 [Attachment 4]; IACtHR, *Case of Ricardo Canese v. Paraguay (Merits, Reparations and Costs)*, Judgment of August 31, 2004, para. 205 [Attachment 5].

<sup>16</sup> Case 001 Appeal Judgement, para. 661 (emphasis added).

8. In reaching its decision on the Request, the Lead Co-Lawyer submits that it is necessary that the Chamber consider the meaning of the words “vacate”, “terminates”, and “extinguishes”, and not effect a decision that diminishes the symbolic value of the Trial Chamber’s judgement to civil parties, particularly those who testified. The record and judgment created by the trial in Case 002/02 remain – as will the testimonies of individual civil parties – it is only the legal effect of the Trial Chamber’s judgment as to the criminal responsibility of NUON Chea that does not exist.
9. The Lead Co-Lawyer does not agree with the Defence’s assertion that the Civil Parties’ ‘right for reparation could be denied if proceedings [against NUON Chea] were to stop at this stage.’<sup>17</sup> The Lead Co-Lawyer considers this view to be misguided. The reparation measures endorsed by the Trial Chamber in Case 002/02 were sought through Internal Rule 23*quinqüies* 3(b). This legal basis is not dependent on the existence of a final judgment, much less one which relates to any particular accused.
10. The Trial Chamber in Case 002/01 acknowledged ‘circumstances beyond the control of the Chamber, namely the limited availability of financial resources to fund reparations pursuant to Internal Rule 23*quinqüies*(3)(b), and the likelihood that future trials may be prevented by the death or unfitness of the remaining Case 002 Accused, may regrettably deprive many civil parties of their right to an effective remedy for the harm they have suffered. It is against this backdrop that the Chamber has sought to take all reasonable measures to minimise the risk that it may be prevented also from rendering any timely verdict in Case 002/01.’<sup>18</sup> The Trial Chamber explained that ‘the new and separate reparations avenue created by Internal Rule 23*quinqüies*(3)(b), pursuant to which the initiatives proposed as possible measures do not result in enforceable claims against an Accused, and may be developed in parallel with the trial’<sup>19</sup> – elaborating that – ‘[i]n relation for requests for awards borne by the Convicted Person pursuant to Internal Rule 23*quinqüies*(3)(a), the Chamber notes that the inherent unlikelihood, within the specific

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<sup>17</sup> Request, para. 70.

<sup>18</sup> E284 Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, para. 161.

<sup>19</sup> E284 Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, para. 158.

Cambodian context, of reparations awards against ECCC Convicted Persons resulting in meaningful outcomes for civil parties (as borne out by the experience in Case 001) was a significant part of the rationale for the adoption of the alternative reparations limb in Internal Rule 23*quinq*ues(3)(b).<sup>20</sup>

11. The motivation behind the creation of Internal Rule 23*quinq*ues(3)(b) reveals that it was designed to avoid any link to a particular accused – the Rule does not merely allow for external funding of an award which is otherwise directed at an accused. An external proposal for a different rule amendment creating this link<sup>21</sup> was not accepted, and the Trial Chamber made clear in its judgments in Case 002/01 and Case 002/02 that awards sought through Internal Rule 23*quinq*ues(3)(b) could not be directed against an accused.<sup>22</sup>
12. Not only are reparations under Rule 23*quinq*ues 3(b) not linked to a specific accused, they are also not dependent on a judgment. This is demonstrated by the fact that reparations programs in the present case have been developed and implemented in parallel with the trial.<sup>23</sup> In its reasoning for allowing this the Trial Chamber stated that this

<sup>20</sup> **E284** Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, para. 158 note 264 (citing ECCC Press release of 17 September 2010, <http://www.eccc.gov.kh/en/articles/eight-eccc-plenary-session-concludes>, ‘the February 2010 Plenary Session had empowered a Sub-Committee to explore possibilities for expanding the current reparations scheme before the ECCC. Previous Internal Rules specified that awards under the Civil Party system may be awarded exclusively against convicted persons. Experience has also shown that where convicted persons are indigent, reparations awards under the classic Civil Party model are unlikely to yield significant tangible results for Civil Parties. A traditional Civil Party claim must also satisfy stringent admissibility and pleading requirements. Within the specific Cambodian context, these are frequently difficult for Civil Parties to satisfy. Further, in cases where the convicted person does not voluntarily comply with a reparations award against him or her, enforcement must be sought before Cambodian national courts. The Rules and Procedure Committee sought to address these limitations by proposing additional reparations avenues that may instead utilize external resources or third party funding in support of reparations, or otherwise provide more effective forms of redress’).

<sup>21</sup> The Center for Justice & Accountability, Victims’ Right to Remedy, <https://cja.org/what-we-do/litigation/khmer-rouge-trials/related-resources/victims-right-to-remedy/> (‘In Case 002, the Court’s rules were amended to permit third parties to cover the cost of the reparations. The current system allows the cost of reparations to either be borne by the convicted person, or by external funding which has already been secured to implement a project designed by the legal representatives of the Civil Parties in cooperation with the Victims Support Section. In order to ensure that an order of reparations is issued first and foremost against the convicted party, CJA submitted a proposed amendment to the internal rules in a plenary session before the ECCC. ‘) (last accessed 22/08/2019) [Attachment 6]; The Center for Justice & Accountability, Proposed Amendment of Internal Rule 23*quinq*ues(3), <http://cja.org/downloads/Plenary%20Paper%20Rule%2023.pdf>, p. 3 (last accessed 22/08/2019) [Attachment 7].

<sup>22</sup> **E313** Case 002/01 Trial Judgment, 7 August 2014, paras 1123-1124; **E465** Case 002/02 Trial Judgment, 16 November 2018, para. 4416 and note 14224.

<sup>23</sup> **E313** Case 002/01 Trial Judgment, 7 August 2014, para. 1120; **E465** Case 002/02 Trial Judgment, 16 November 2018, para. 4418 (‘...The Chamber is aware that the majority of these projects have already been partially or fully

approach is in keeping with the purpose of the rule, which was adopted ‘to enable, with donor assistance and that of external collaborators, the realisation of meaningful reparations within a reasonable time.’<sup>24</sup>

13. The reparations framework of the ECCC is *sui generis*. It provides for collective and moral reparations that ‘show solidarity with the victims of the DK era crimes’ and that are recognised or endorsed by the Chamber, rather than dependent on a judgment or directed through an order against the Accused.<sup>25</sup> The Lead Co-Lawyer therefore submits that NUON Chea’s death does not impact the portion of the Trial Judgment addressing civil party reparations. Rather, the reparations portion of the judgment gives appropriate effect to the Civil Parties’ right to meaningful reparation within a reasonable time, particularly considering their advanced ages, the advanced ages of the Accused before the ECCC, and the length of proceedings. In addition, even though the Trial Chamber judgment has no legal effect on NUON Chea, the Trial Chamber nevertheless convicted NUON Chea and granted the Civil Party Lead Co-Lawyers’ awards requests while acknowledging them as “moral and collective reparations.”<sup>26</sup>

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implemented. In this context, the Chamber recalls the Lead Co-Lawyers’ concerns regarding the practical difficulties in securing external funding for the realization of reparation projects under the mode of implementation established in Internal Rule 23 *quinquies*(3)(b). The Chamber addressed these concerns during the course of proceedings in Case 002/01 by permitting the implementation of projects to begin prior to the verdict in order to ensure the realization of meaningful reparations within a reasonable time. The Chamber reiterates that while a conviction is a precondition for awarding collective and moral reparations pursuant to Internal Rule 23*quinquies*(1), recognising projects whose implementation has already begun or even concluded is in keeping with the purposes of Internal Rule 23*quinquies*(3)(b).’),

<sup>24</sup> E218/7 Trial Chamber Memorandum entitled Indication of priority projects for implementation as reparation (Internal Rule 80bis(4)), 3 December 2012.

<sup>25</sup> E465 Case 002/02 Trial Judgment, 16 November 2018, para. 4410 (‘The redress available before the ECCC differs from that available under a number of international treaties and other instruments, or before certain regional human rights courts, which are instead empowered to adjudicate questions of State responsibility and to order States to make reparation to their citizens, where States are found responsible for gross violations of international human rights law. The Chamber has no jurisdiction to order the implementation or the payment of reparation measures against Cambodian or other national authorities or international bodies. Nor can it properly impose obligations on persons or entities that were not parties to the proceedings before it. However, the adoption of Internal Rule 23*quinquies*(3)(b) has enabled the Chamber to recognize that specific projects give appropriate effect to an award sought on behalf of the consolidated group of Civil Parties to contribute to their rehabilitation, reintegration and restoration of dignity where national or international authorities, non-governmental organisations or other potential donors, provide financial support and other forms of assistance to show solidarity with the victims of the DK era crimes.’). See also Case 001 Appeal Judgment, paras 641, 644.

<sup>26</sup> E465 Case 002/02 Trial Judgment, 16 November 2018, p. 2232.



14. The Lead Co-Lawyer urges that a decision on the Request be made expeditiously so that civil parties can be properly informed and have their rights to legal certainty and finality with respect to the termination of proceedings against NUON Chea be satisfied.

#### IV. REQUEST

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

- (1) **TAKE INTO ACCOUNT** Civil Party rights and interests when deciding the merits of the NUON Chea Request.

Respectfully submitted,

Date	Name	Place	Signature
26 August 2019	PICH ANG Lead Co-Lawyer	Phnom Penh	