

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

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**CIVIL PARTY LEAD CO-LAWYERS' SUBMISSIONS RELATING TO KHIEU
SAMPHÂN'S RESPONSE TO THE CO-PROSECUTORS' APPEAL**

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Before:

Supreme Court Chamber

Judge KONG Srim, President
Judge Chandra Nihal JAYASINGHE
Judge SOM Sereyvuth
Judge Florence Ndepele MWACHANDE-
MUMBA
Judge MONG Monichariya
Judge Maureen Harding CLARK
Judge YA Narin

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The Accused:

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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.¹ On 28 March 2019, the full reasoned judgement was notified to the Parties in Khmer, English, and French.² Following requests from the KHIEU Samphân and NUON Chea, the Supreme Court Chamber ordered that all notices of appeal be filed before 1 July 2019.³ The Office of the Prosecutors and both Defence teams filed notices appeal against the Trial Judgement.⁴ NUON Chea died on 4 August 2019 and proceedings were terminated against him.⁵
2. The Co-Prosecutors filed their Appeal Brief on 20 August 2019 advancing a single ground of appeal relating male victims of forced sexual intercourse.⁶ In its appeal, the Co-Prosecutors rely in part on the evidence of Civil Parties EM Oeun,⁷ MOM Vun,⁸ SOU Sotheavy,⁹ and YOS Phal.¹⁰ After having been granted an extension of time,¹¹ KHIEU Samphân filed his Response Brief to the Co-Prosecutors' appeal on 23 September 2019.¹² It was notified on 25 September 2019. KHIEU Samphan's Response Brief relies in part on the evidence of Civil Parties SENG Soeun,¹³ KUL Nem,¹⁴ MEAN Loey,¹⁵ MEY Savoeun,¹⁶ PRAK Doeun,¹⁷ SAY Narouen,¹⁸ OM

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

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

³ **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.

⁴ **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).

⁵ **F46/3** Decision to Terminate Proceedings against NUON Chea, 13 August 2019.

⁶ **F50** Co-Prosecutors' Appeal Against the Case 002/02 Trial Judgment, 20 August 2019. ("Co-Prosecutors' Appeal Brief").

⁷ Co-Prosecutors' Appeal Brief, para. 29.

⁸ Co-Prosecutors' Appeal Brief, paras 36-37.

⁹ Co-Prosecutors' Appeal Brief, para. 27

¹⁰ Co-Prosecutors' Appeal Brief, para. 27.

¹¹ **F49** Decision on KHIEU Samphân's Request for Extensions of Time and Page Limits for Filing his Appeal Brief, 23 August 2019, para. 36.

¹² **F50/1** Réponse de la Défense de KHIEU Samphân à l'appel de la'Accusation (002/02), 23 September 2019. ("KHIEU Samphân's Response Brief").

¹³ KHIEU Samphân's Response Brief, para. 47.

¹⁴ KHIEU Samphân's Response Brief, para. 48.

¹⁵ KHIEU Samphân's Response Brief, para. 51.

Yoeurn,¹⁹ PEN Sochan,²⁰ CHUM Samoeurn,²¹ CHEA Dieb,²² PREAP Sokhoeurn,²³ and SUN Vuth,²⁴ as well as rebutting arguments surrounding the four civil parties discussed by the Co-Prosecutors.²⁵

3. The Lead Co-Lawyers, cognisant of the limitations on the participatory rights of Civil Parties as previously explained by the Supreme Court Chamber,²⁶ had not intended to respond to the Co-Prosecutor's appeal. The Lead Co-Lawyers are, however, compelled to file these limited submissions insofar as Civil Party rights and interests are affected by the KHIEU Samphân Response Brief.

II. APPLICABLE LAW

4. Internal Rule 21(1)(c) provides that “[t]he ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings”. Internal Rule 23(1)(a) provides that Civil Parties “[p]articipate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution”. Internal Rule 12^{ter} (1) provides that the Lead Co-Lawyers “shall ensure the effective organization of Civil Party representation during the trial stage and beyond, whilst balancing the rights of all parties and the need for an expeditious trial within the unique ECCC context.”
5. 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 defence submissions, including during the appellate phase of

¹⁶ KHIEU Samphân's Response Brief, para. 52.

¹⁷ KHIEU Samphân's Response Brief, para. 69.

¹⁸ KHIEU Samphân's Response Brief, para. 70.

¹⁹ KHIEU Samphân's Response Brief, para. 71.

²⁰ KHIEU Samphân's Response Brief, para. 73.

²¹ KHIEU Samphân's Response Brief, para. 74.

²² KHIEU Samphân's Response Brief, para. 75.

²³ KHIEU Samphân's Response Brief, paras 76-77.

²⁴ KHIEU Samphân's Response Brief, para. 79.

²⁵ KHIEU Samphân's Response Brief, paras 45 (YOS Phal), 46 (SOU Sotheavy), 56-59 (EM Oeun), 80 (MOM Vun).

²⁶ **F10/2** Decision on Civil Party Lead Co-Lawyers' Requests Relating to the Appeals in Case 002/01, 26 December 2014, para. 23 (“Decision on Civil Party Standing”).

proceedings,²⁷ provided that the submissions affect Civil Parties' rights and interests and are not repetitive of matters addressed by the Co-Prosecutors.²⁸ The Supreme Court Chamber, however, limited the Civil Parties' right to respond to an appeal by the Co-Prosecutors in Case 002/01. Specifically, the Lead Co-Lawyers' request to clarify their position on the Co-Prosecutors' appeal brief was denied on the basis that such observations could not "be considered to derive from or be warranted by Internal Rule 23(1)(a)."²⁹

6. The Supreme Court Chamber reasoned that the right to respond to Defence appeal briefs,

inasmuch as the arguments contained therein affect Civil Parties' interests, flows logically from the prerogatives afforded to Civil Parties at the investigative, trial and appeal stages. Specifically, it notes that "[t]he parties" are entitled to make written submissions before the competent Chamber up until the closing submissions, as detailed in the Practice Direction on Filing. The authorisation to submit written applications and pleadings reasonably incorporates the right to respond and reply to other parties' submissions, consistent with the adversarial structure of proceedings.³⁰

III. SUBMISSIONS

7. While recognising that these submissions do not fall strictly within the pleading framework envisioned by the Internal Rules and Practice Direction, the Lead Co-Lawyers submit that the present submissions are necessary considering the centrality of Civil Party evidence to the KHIEU Samphân Response Brief and respectfully request that they be considered by the Chamber in order to preserve the balance of rights amongst the parties.³¹

²⁷ F10/2 Decision on Civil Party Standing, paras 14 and 17. Although the Decision on Civil Party Standing was addressed to the right to respond to Defence Appeal Briefs, the core principles contained in it apply equally to other responses and have been applied in respect of other responses by the Supreme Court Chamber: See F36 Appeal Judgement, 23 November 2016, para. 81.

²⁸ F10/2 Decision on Civil Party Standing, para. 17.

²⁹ F10/2 Decision on Civil Party Standing, para. 23.

³⁰ F10/2 Decision on Civil Party Standing, para. 14.

³¹ F10/2 Decision on Civil Party Standing, paras 14, 17.

8. The Lead Co-Lawyers consider it necessary to address some submissions made by KHIEU Samphân. These submissions on behalf of Civil Parties are permissible in accordance with the established principles because:
- (a) The submissions address (and are limited to) matters which directly affect Civil Parties' rights and interests. Specifically, claims are made in the KHIEU Samphân Response Brief regarding the credibility and reliability of Civil Party evidence and its relevance to certain matters. The Civil Parties affected have an interest in being heard to defend themselves regarding the quality of their evidence, and to make submissions on the question of its relevance.
 - (b) These submissions do not cover matters which are addressed in the Co-Prosecutors' Appeal Brief and are derived from Internal Rule 23(1)(a) as the submissions support the prosecution.
9. Considering submissions on these limited issues is in keeping with the Supreme Court Chamber's recognition that each party in the proceedings has "specific functions and responsibilities in the proceedings."³² The Lead Co-Lawyers are the persons vested with the responsibility to address the Chamber on the interests of the Civil Parties.³³ Where another party directly attacks the credibility of Civil Parties, it is the Lead Co-Lawyers who are best placed to address the Chamber on these matters.
10. The Lead Co-Lawyers recognise that the timing of the present submissions is unusual in that they address a response made to another party's submissions. However, it is noted that a similar step was recently taken by KHIEU Samphân when he intervened to make submissions addressing the Co-Prosecutors' response to the NUON Chea defence team's urgent request following his death.³⁴ These submissions were filed following the Co-Prosecutors' response notwithstanding that KHIEU Samphân had not responded to the original NUON Chea filing. The Lead Co-Lawyers now seek to take an equivalent step.

³² F10/2 Decision on Civil Party Standing, para.11.

³³ Internal Rule 12ter (1), (5).

³⁴ See F46/2/4/1 Réplique de la Défense de KHIEU Samphân à l'Accusation sur la présomption d'innocence en appel (F46/2/4), 9 September 2019, para. 5.

11. Two distinct points are made in KHIEU Samphân's Response Brief regarding the use of Civil Party EM Oeun's evidence.
12. The Lead Co-Lawyers refute KHIEU Samphân's characterisation of EM Oeun's evidence as lacking credibility and reliability.³⁵ The Trial Chamber in Case 002/01, which had the benefit of hearing EM Oeun's testimony in person and was therefore best placed to assess its credibility relied on EM Oeun's evidence in several places in its judgment.³⁶ On appeal in Case 002/01, KHIEU Samphân sought to challenge the reliability of EM Oeun's evidence. The Supreme Court Chamber rejected this argument. It acknowledged that EM Oeun had demonstrated difficulties in recalling *when* events had occurred, but did not consider that this undermined the usefulness of his evidence as it had been used by the Trial Chamber.³⁷ For the same reason, KHIEU Samphân's present claim that EM Oeun's evidence is not credible or reliable must be rejected. The substance of his testimony is credible in respect of the matters for which it is used by the Co-Prosecutor's.
13. Secondly, the Lead Co-Lawyers note KHIEU Samphân's argument relating to the limited scope of EM Oeun's questioning in Case 002/01.³⁸ A broader version of this argument (not specific to EM Oeun) also appears as a ground of appeal in KHIEU Samphân's notice of appeal. For efficiency and to avoid duplication, the Lead Co-Lawyers make no response to that argument now specific to EM Oeun, but may respond in the context of KHIEU Samphân's appeal, subject to any submissions from the Co-Prosecutors and the need to avoid repetition.³⁹

³⁵ F50/1 KHIEU Samphân's Response Brief, para. 58.

³⁶ E313 Case 002/01 Judgement, 7 August 2014, p167 fn. 981; p170 fn. 997; p195 fn. 1143; p258 fn. 1446; p290 fn. 1548; p447 fn. 2436; p476 fn. 2580.

³⁷ "EM Oeun admitted to having trouble recalling the events in chronological order because of their traumatic nature and the 40-year passage of time, which he said affected and left gaps in his memory. However, KHIEU Samphân fails to provide any reference to the Trial Judgment as to the impact that such alleged ignorance on the part of the Trial Chamber could have had on the verdict": F36 Appeal Judgement, 23 November 2016, para. 347.

³⁸ F50/1 KHIEU Samphân's Response Brief, para. 57.


³⁹ As per the requirements set out in F10/2 Decision on Civil Party Standing, para.17.

IV. REQUEST

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

- (1) **TAKE INTO ACCOUNT** the present submissions in their determination of the Co-Prosecutors' appeal.

Respectfully submitted,

Date	Name	Place	Signature
7 October 2019	PICH ANG Lead Co-Lawyer	Phnom Penh	
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