

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

FILING DETAILS

Case No: 002/19-09-2007-ECCC/SC

Party Filing: Civil Party Lead Co-Lawyers

Filed to: Supreme Court Chamber

Original Language: English

Date of Document: 28 October 2019

CLASSIFICATION

**Classification of the document
suggested by the filing party:**

PUBLIC

Classification by Chamber:

សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

ឯកសារដើម	
ORIGINAL/ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ (Date):	28-Oct-2019, 15:07
CMS/CFO:	Sann Rada

**REQUESTS CONCERNING THE CIVIL PARTY LEAD CO-LAWYERS'
RESPONSE TO KHIEU SAMPHÂN'S 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:

KHIEU Samphân

Co-Lawyers for the Defence:

KONG Sam Onn
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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 judgment was notified to the Parties in Khmer, English, and French.² Following requests from KHIEU Samphân and NUON Chea, the Supreme Court Chamber ordered that all notices of appeal be filed by 1 July 2019.³ The Office of the Co-Prosecutors and both Defence teams filed notices appeal against the Trial Chamber’s judgment.⁴ NUON Chea died on 4 August 2019 and proceedings were terminated against him.⁵ Following requested extensions of page and time limits,⁶ the Supreme Court Chamber directed KHIEU Samphân to file his appeal brief on or by 27 February 2020 in English or French (with a Khmer translation to follow at the soonest possibility) and that the brief must not exceed 750 pages.⁷ The Supreme Court Chamber further directed the Co-Prosecutors to file their response, not exceeding 350 pages, in one language 120 days following the notification of the appeal brief.⁸
2. The Civil Party Lead Co-Lawyers (“Lead Co-Lawyers”) hereby declare their intention to respond to KHIEU Samphân’s appeal brief insofar as it directly affects the specific rights and interests of Civil Parties.⁹ In line with the procedure followed in Case 002/01, the Lead Co-Lawyers request to file their response following the Co-Prosecutors’ response in order to eliminate overlap and repetition. They request leave to file in one language 60 days from notification of the Co-Prosecutors’ response with the translation to follow as

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 **F45** KHIEU Samphân’s Request for an Extension of Time and Page Limits for Filing his Appeal Brief, 10 July 2019.

⁷ **F49** Decision on KHIEU Samphân’s Request for Extensions of Time and Page Limits for Filing his Appeal Brief, 23 August 2019, para. 36.

⁸ *Ibid.*

⁹ **F10/2** Decision on Civil Party Lead Co-Lawyers’ Requests Relating to the Appeals in Case 002/01, 26 December 2014, para. 17 (“Decision on Civil Party Standing”).

soon as possible thereafter. The Lead Co-Lawyers further request an extension of the usual page limit, to 320 pages.

II. APPLICABLE LAW

A. Standing to Respond to KHIEU Samphan's Appeal Brief

3. In Case 002/01 the Supreme Court Chamber affirmed that Civil Parties had standing to respond to the Defence Appeal Briefs in that case:

[T]here is no doubt that “victims before the ECCC have the status of a party”. As affirmed in the Appeal Judgement in Case 001, Civil Parties enjoy “the full range of participation rights available to civil parties under the 2007 [Cambodian] Code of Criminal Procedure and the Internal Rules in the pre-trial, trial, and appeal phases of a case”. It should be noted, however, that each party – i.e. “the Co-Prosecutors, the Charged Person/Accused and Civil Parties” – is vested with a distinct array of procedural rights tailored to its specific functions and responsibilities in the proceedings.¹⁰

4. The Supreme Court Chamber reasoned that the right to respond,

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. As such, it would be discordant with Civil Parties' powers relating to their overall role in all phases of proceedings to disavow their right to respond to the Defence Appeal Briefs this juncture.¹¹

5. While holding that Civil Parties enjoy the right to respond to Defence appeal briefs, the Supreme Court Chamber imposed two limitations designed to safeguard the equality of arms and the effective conduct of proceedings: (i) that “the arguments set out in the proposed response must relate to grounds directly affecting Civil Parties' rights and

¹⁰ F10/2 Decision on Civil Party Standing, para. 11.

¹¹ F10/2 Decision on Civil Party Standing, para. 14.

interests”; and (ii) that “the Lead Co-Lawyers must endeavour to avoid repetitiveness and overlap with issues already covered by the Co-Prosecutors’ projected response”.¹²

B. Extensions of Time and Page Limits

6. The Practice Direction on the Filing of Documents (“Practice Direction”) provides for a 10-day time limit for the filing of responses.¹³ The Supreme Court Chamber explained that “Internal Rule 39(2) foresees that, unless otherwise provided by the Internal Rules and taking into consideration the circumstances of the case, judges may set time limits for the filing of pleadings, written submissions and documents relating to a request or appeal. Internal Rule 39(4) also empowers judges to extend any time limits set by them.”¹⁴
7. With respect to the length of documents filed before the Supreme Court Chamber, the Practice Direction provides that they shall be no more than 30 pages in English or French,¹⁵ but that a Chamber “may, at the request of a participant, extend the page limit in exceptional circumstances.”¹⁶

C. Filing in One Language

8. Article 7.1 of the Practice Direction requires all documents to be filed in Khmer as well as in English or French. However Article 7.2 provides that “[i]n exceptional circumstances, the Co-Investigating Judges or a Chamber of the ECCC may authorize a party to file a document in French or in English in the first instance, provided however that a Khmer translation must be filed before the Chamber at the first opportunity.”
9. The Supreme Court Chamber has further elaborated that “permission to file in English or French only, in addition to being justified by extraordinary circumstances, is necessarily predicated upon an assumption that the national component of the filing party is sufficiently informed of the content of the filing and has suffered no prejudice in expressing its position.”¹⁷

¹² F10/2 Decision on Civil Party Standing, para. 17.

¹³ Article 8.3, Practice Direction on Filing Documents before the ECCC/Rev.8 (“Practice Direction”).

¹⁴ 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. 7.

¹⁵ Article 5.2, Practice Direction.

¹⁶ Article 5.4, Practice Direction.

¹⁷ E463/1/1/1 Decision on Co-Prosecutors’ Request to File Response in One Language, 30 November 2018, para. 8.

III. SUBMISSIONS

10. Civil Party evidence features heavily in the Trial Chamber's judgment in Case 002/02. The Trial Chamber's findings relied, at least in part, on all sixty-three testifying Civil Parties. As a natural consequence, Civil Party evidence underlies many of the factual and legal findings which are identified in KHIEU Samphân's notice of appeal.
11. The Lead Co-Lawyers have sought to estimate the possible scope of their response to KHIEU Samphân's appeal brief by attempting to identify approximately how many grounds of appeal are likely to affect Civil Party rights and interests. This process has been made difficult by the format and content of KHIEU Samphân's notice of appeal. It is explicitly stated to be "non-exhaustive".¹⁸ Moreover, despite explaining that it has "identified the errors in a succinct manner", paragraphs 17 to 34 in fact do not identify *errors* so much as the Trial Chamber findings which are challenged. It has therefore been necessary to a large extent for the Lead Co-Lawyers to infer what errors might be alleged in respect of these findings.
12. Having undertaken this process, the Lead Co-Lawyers have managed to identify over 40 substantive issues, involving over 100 of the paragraphs or decisions listed in the KHIEU Samphân notice of appeal and annexes, which appear highly likely to directly affect Civil Party rights and interests. The Lead Co-Lawyers have identified 16 Civil Parties in respect of whose evidence challenges will be made, and which will require specific and individualized responses. Depending on how the grounds develop in KHIEU Samphân's appeal brief, the Lead Co-Lawyers anticipate that challenges to the remaining civil parties may overlap, enabling them to be addressed more broadly in the framework addressing substantive issues. The Lead Co-Lawyers emphasize that these numbers represent preliminary minimum estimates based on the extent of the information available in the KHIEU Samphân notice of appeal and annexes.
13. The Lead Co-Lawyers are cognizant of the need to preserve the balance of rights amongst the parties during appellate proceedings¹⁹ and will therefore endeavour to avoid repetition with the Prosecution in its response. Consistent with the practice in Case 002/01,²⁰ the Lead

¹⁸ E465/4/1, KHIEU Samphân's Notice of Appeal (002/02), 1 July 2019, paras 10 and 15.

¹⁹ F10/2 Decision on Civil Party Standing, paras 14, 17.

²⁰ F10/2 Decision on Civil Party Standing, para. 20.

Co-Lawyers submit that reviewing the response of the Co-Prosecutors in advance of filing their own response would be the most efficient way of preventing overlap and repetition. The Lead Co-Lawyers request to file their response 60 days following the notification of the Co-Prosecutors' response in order to have sufficient time to eliminate areas of repetition in their own response. The Lead Co-Lawyers consider that in the overall context of the appeal proceedings, a period of 60 days will not unduly delay the conclusion of the trial. They underscore that they have no wish to extend proceedings any longer than is absolutely necessary, given that the Civil Parties have a strong interest in seeing these proceedings concluded as promptly as possible.

14. The Supreme Court Chamber has authorized KHIEU Samphân to file a 750 page brief, and the Co-Prosecutors to respond with up to 350 pages. Owing to the substantial number of issues on which the Civil Parties have an interest in responding, the Lead Co-Lawyers request a total of 320 pages. This number is based on an approximate calculation derived from the number of issues and Civil Parties preliminarily identified as likely to require a response.²¹ The Lead Co-Lawyers note that this total may be reduced in the light of overlap amongst the ground and/or responses to them, however they are also conscious that the numbers of issues and Civil Parties calculated at this stage are likely to represent conservative estimates.
15. In order to promote the expeditiousness of proceedings, the Lead Co-Lawyers request to respond in one language with the Khmer translation to follow as soon as possible. The Lead Co-Lawyers submit that this would be the most efficient use of resources, considering that their response will necessarily change depending on what is contained in the Co-Prosecutors' response – some arguments will be removed for redundancy, and others may need to be added. It would therefore be a more efficient use of resources to update one version of the response and submit it for translation, rather than updating the response in two languages. The Lead Co-Lawyers do not consider that such a process would be

²¹ The Lead Co-Lawyers estimate that their response will require an average of 6 pages per substantive issue, noting that some issues may require more pages and some issues fewer, amounting to 240 pages for these issues (6 pages x 40 issues). The Lead Co-Lawyers further estimate 4 pages per individually challenged Civil Party, (also noting that some Civil Parties will require more pages and some fewer), which would amount to 64 pages (4 pages x 16 Civil Parties). The Lead Co-Lawyers anticipate that the introductory, procedural, and concluding sections can reasonably be addressed in 16 pages.


prejudicial to the national side owing to the consultation process of the Section in formulating the response and the availability of KHIEU Samphân's appeal brief in Khmer within the relevant timeframe.

IV. REQUEST

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

- (1) **ALLOW** the Lead Co-Lawyers' request to file their response to KHIEU Samphân's appeal brief 60 days following the notification of the Co-Prosecutors' response; and
- (2) **GRANT** the Lead Co-Lawyers' request to extend the page limit for their response to 320 pages; and
- (3) **GRANT** the Lead Co-Lawyers' request to file their response in English with the Khmer translation to follow at the earliest opportunity.

Respectfully submitted,

Date	Name	Place	Signature
28 October 2019	PICH Ang Lead Co-Lawyer	Phnom Penh	
	Megan HIRST Lead Co-Lawyer	London	