

**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: EN

Date of Document: 18 March 2021

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:



**CIVIL PARTY LEAD CO-LAWYERS' RESPONSE TO KHIEU SAMPHÂN'S
OBSERVATIONS ON THE PROPOSED APPEAL HEARING TIMETABLE**

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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

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1 INTRODUCTION

1. The Civil Party Lead Co-Lawyers (“Lead Co-Lawyers”) file these submissions, pursuant to the Practice Direction on the Filing of Documents before the ECCC (“Practice Direction”),¹ in response to KHIEU Samphân’s Observations on the timetable for the appeal hearing (002/02) (“Defence Observations”).²
2. These submissions have been filed as quickly as possible so as not to slow the Supreme Court Chamber’s (“Chamber”) decision on the hearing timetable. The Lead Co-Lawyers note that during this timeframe it was not possible for the Court’s language services to produce an English translation of the Defence Observations.

2 ADMISSIBILITY

3. The Chamber has previously made clear that replies in these appeal proceedings shall be made only orally.³ The Chamber’s invitation to submit observations was limited to its proposed timetable.⁴ The Defence submissions exceed that invitation by making substantive arguments relating to the civil parties’ right to respond. A significant portion of the Defence Observations amounts to a reply to issues addressed in the Lead Co Lawyer’s Response Brief regarding Civil Party standing.⁵ These portions of the Defence Observations should be ruled inadmissible and disregarded by the Chamber. If the Defence seeks to reply to those submissions, the appropriate time is during the appeal hearing.

3 CIVIL PARTY STANDING

4. In any event, the Defence Observations are incorrect regarding Civil Party standing. The Defence appears to argue that Civil Party standing to make submissions is limited to commenting on Civil Party evidence.⁶ This extremely narrow position is an unprecedented submission and finds no support in the legal texts of the ECCC, in its caselaw, or in practice. The Defence refers to no authority which supports its proposition that that Civil Parties may

¹ Practice Direction on the Filing of Documents before the ECCC, art. 8.3.

² F60/1 *Observations de la Défense sur le calendrier des débats à l’audience d’appel (002/02)*, 12 March 2021 (“Defence Observations”).

³ F49 Decision on KHIEU Samphân’s Request for Extensions of Time and Page Limits for Filing his Appeal Brief, 23 August 2019, para. 22.

⁴ F60 Invitation for Parties to File Observations on Timetable for Appeal Hearing in Case 002/02, 26 February 2021, p. 3.

⁵ F60/1 Defence Observations, paras 13-31.

⁶ See for example F60/1 Defence Observations, paras 25, 37, and 44.

only make submissions concerning their evidence.⁷ Its also ignores that during the course of the Case 002/02 trial proceedings⁸ the Civil Parties made numerous submissions on a range of topics now claimed by the Defence to fall outside their standing, including questions concerning the fairness of trial proceedings on matters other than Civil Party evidence,⁹ on the scope of the case and remaining charges,¹⁰ and the applicable elements of crimes.¹¹ All are matters which the Civil Parties have a direct interest in. As the Chamber has recognised, Civil Party standing to respond during appeal proceedings reflects their standing during investigative and trial proceedings:

the Lead Co-Lawyers in [...] their right to rebut the 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

⁷ The Defence relies primarily on the 2009 Trial Chamber majority decision from Case 001, which ruled that civil parties may not make submissions relating to sentencing or present questions relating to character. However even that decision did not go so far as to limit civil parties' standing to civil party evidence only. Concerning the underlying principles, the Lead Co-Lawyers have already made submissions as to why the majority in the 2009 Trial Chamber decision was wrong: see **F54/2** Civil Party Lead Co-Lawyers' Response to KHIEU Samphân's Appeal of the Case 002/02 Trial Judgment, 4 January 2021, paras 848-863 (“Lead Co-Lawyers' Response Brief”), and **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 October 2009.

⁸ The examples provided in the following footnotes are taken from written submissions and closing statements relating to the Case 002/02 trial stage. However numerous other examples could be found from Case 002/01 and Case 001, as well as from oral submissions and pre-trial filings.

⁹ See for example: **E321/1** Civil Party Lead Co-Lawyers' Support to the Co-Prosecutors' Request to Assign Amici Curiae Counsel and Advance the Trial Proceedings, 27 October 2014; **E350/3** Civil Party Lead Co-Lawyers' submissions relating to the admissibility and permissible uses of evidence obtained through torture, 21 May 2015; **E355/2** Civil Party Lead Co-Lawyers' Response to the Joint Request by the Defence Teams on Certain Practices Concerning Witnesses and Experts, 10 August 2015; **E392/1** Lead Co-Lawyers' Consolidated Response to NUON Chea's Second and Third Request Re Security Centres and Internal Purges, 21 April 2016, paras 20-21; **E395/5** Lead Co-Lawyers' Response to NUON Chea's Submissions on the Relevance of Evidence of Treasonous Rebellion to his Individual Criminal Responsibility in Case 002/02, 20 June 2016; **F53/5** Civil Party Lead Co-Lawyers' Response to KHIEU Samphân's Application for Disqualification of Six Appeal Judges, 25 November 2019.

¹⁰ See for example: **E301/5/3** Civil Parties' Submission on the Scope of Case 002/02, 31 January 2014; **E306/7** Lead Co-Lawyers' Rule 92 Submission on the Confirmation of the Scope of Case 002/2 concerning the Charges of Rape outside the Context of Forced Marriage, 18 March 2016; **E306/7/2** Lead Co-Lawyers' Reply to KHIEU Samphan Defence's Response to Request for Clarification on Rape Outside Forced Marriage, 4 April 2016; **E392/1** Lead Co-Lawyers' Consolidated Response to NUON Chea's Second and Third Request Re Security Centres and Internal Purges, 21 April 2016, paras 14-17; **E439** Civil Party Lead Co-Lawyers' Request for Clarification Relating to Remaining Charges in Case 002, 9 September 2016; **E306/7/3/1/1** Civil Party Lead Co-Lawyers' Immediate Appeal Against Trial Chamber Decision on Request for Confirmation of Scope of the Charges of Rape Outside the Context of Forced Marriage, 28 September 2016. The Lead Co-Lawyers note that they made submissions during the closing statements in Case 002/02 in response to the Defence's scope submissions. See **E1/526.1** T., 21 June 2017 (Closing Statements), p. 54 *et seq* after [13.32.30]. This list is non-exhaustive and does not refer to the numerous instance during which these subjects were raised at trial and upon which the Lead Co-Lawyers made oral submissions.

¹¹ **E457/6/2** Civil Party Lead Co-Lawyers' Closing Brief in Case 002/02, 2 May 2017, paras 49-104. See also **E1/520.1** T., (Closing Statements), p. 86 *et seq* after [13.58.19].

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 at this juncture.¹²

5. The Chamber has not limited the scope of Civil Party submissions during appeal proceedings to only the subject of Civil Party evidence. That the Lead Co-Lawyers focused on certain issues in the Case 002/01 appeal does not indicate that their standing was limited to those matters.¹³ The Defence appears to believe that litigants can be assumed to have argued *every* matter within their standing. However, most parties decide on a more limited range of issues to litigate, based on various factors, among them case strategy and the allocation of limited resources. The outcome of such decisions in any given instance cannot be taken to imply a position regarding standing.
6. The Defence gives no explanation for its assertions that certain topics (fairness of the proceedings, *saisine*, legality, the elements of the crimes) do not directly affect Civil Party interests, or of what it understands "civil party interests" to mean. Detailed submissions are contained in the Lead Co-Lawyers' Response Brief explaining the rights and interests of Civil Parties and how these are affected by the topics addressed by the Lead Co-Lawyers in this appeal.¹⁴ Those arguments need not be repeated.
7. The Defence Observations also misstate the Chamber's requirements concerning the relationship between submissions from the Lead Co-Lawyers and the Office of the Co-Prosecutors ("OCP"). The Defence position appears to be that the Lead Co-Lawyers may not address any topic which the OCP has dealt with.¹⁵ This cannot have been the Chamber's intention. Since the OCP addressed *every* "ground" raised by the Defence in its Appeal Brief, the consequence of the position now taken by the Defence would be that the Lead Co-Lawyers would not be permitted to make *any* submissions at all.

¹² **F10/2** Decision on Civil Party Lead Co-Lawyers' Requests Relating To The Appeals in Case 002/01, para. 14 [*emphasis added*].

¹³ See **F60/1** Defence Observations, para. 24.

¹⁴ Especially at **F54/2** Lead Co-Lawyers' Response Brief, paras 43-57.

¹⁵ See for example **F60/1** Defence Observations, para. 39.

8. In fact, the Chamber ordered that the Lead Co-Lawyers must “endeavour to avoid repetitiveness and overlap with issues already covered” by the OCP.¹⁶ Following this requirement, the Lead Co-Lawyers have only addressed topics already covered by the OCP in order to argue something different or additional. In other words, the submissions made do not merely repeat OCP submissions. When drafting their Response Brief the Lead Co-Lawyers declined to address numerous topics, or significantly narrowed their submissions on them, because their positions on those subjects overlapped with arguments already made by the OCP.¹⁷ On nearly half of the “grounds” raised in the Defence appeal, the Lead Co-Lawyers made no submissions.¹⁸
9. The Lead Co-Lawyers consider it clear that the particular role of the Civil Parties has already been taken into account by the Chamber in its proposed hearing timetable. This is evident from the relatively smaller amount of time allocated to the Lead Co-Lawyers on some topics, and the fact that no time was allocated for the individual criminal responsibility of KHIEU Samphân. Therefore, no adjustments on this basis are justified.

4 RESPONSES ON THE PROPOSED TIMETABLE

10. Finally, the Lead Co-Lawyers respond the Defence request for a separate allocation of half an hour for arguments concerning the delayed publication of the Trial Chamber’s written reasons for judgment.¹⁹ The Defence has given no reason why that topic cannot be dealt with in the time allotted for the topic “Fairness in the proceedings”, within which it clearly falls.
11. The Lead Co-Lawyers do not object to the Chamber allocating time to the Defence Co-Lawyers in the final session. Regarding the other time adjustments sought by the Defence, the Lead Co-Lawyers do not take a position, however they respectfully request that if time allocated to the Defence is increased, the times proposed by the Chamber for the Civil Parties be proportionately increased also.

¹⁶ F52/1 Decision on Requests Concerning the Civil Party Lead Co-Lawyers Response to KHIEU Samphân Appeal, 6 December 2019, para. 12.

¹⁷ This points is made in general at F54/2 Lead Co-Lawyers’ Response Brief, para 54 and 56-57; on specific issues see also paras 77, 82, 89, 112, 120, 129, 167, 182, 240-241, 277, 278, 279, 317, 337 (footnote 800), 376, 380, 449, 501, 753, and 834.

¹⁸ See F54/2.1 Lead Co-Lawyers’ Response Brief, Annex A: Index of Defence grounds and responses. It shows that the Lead Co-Lawyers made no submissions on 122 of the 256 “grounds” raised by the Defence.

¹⁹ F60/1 Defence Observations, paras 32-33.

5 REQUESTS


12. The Lead Co-Lawyers therefore respectfully request the Chamber to:

REJECT, either as inadmissible or on their merits, the Defence arguments concerning Civil Party standing; and

REJECT the Defence request for a separate session concerning the delayed publication of the Trial Chamber's written reasons for judgment; and

GRANT the Lead Co-Lawyers additional time proportionate to any additional time granted to the Defence.

Respectfully submitted,

Date	Name	Place	Signature
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