

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

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**KHIEU Samphan Defence Reply to the Prosecution's Request concerning Its Response to  
the Appeal Briefs [F47/1, paras. 25-26(ii)]**

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**MAY IT PLEASE THE SUPREME COURT CHAMBER**

1. On 10 July 2019, the KHIEU Samphan Defence (the “Defence”) requested the Supreme Court Chamber to permit it to file a 950-page appeal brief in French within 10.5 months of the filing of its notice of appeal, with the translation into Khmer to follow as soon as possible.<sup>1</sup>
2. On 23 July 2019, the parties received notification of the Prosecution’s Response to the Defence’s Request.<sup>2</sup> The Prosecution opposes it, contending that a period of five months and 300 pages for each defence team to file briefs, in one language, is sufficient.<sup>3</sup> It requests that any extensions granted to the Defence be “extended [to it] in a proportionate manner” for filing its response brief.<sup>4</sup>
3. The same day, the NUON Chea Defence filed a “first” request for extensions for filing its appeal brief. It requested permission to file a 1000-page brief in one language initially within 10.5 months of filing its notice of appeal.<sup>5</sup>
4. On 29 July 2019, the Defence replied to the Prosecution.<sup>6</sup> It did not oppose the Prosecution’s request concerning its Response, as it seemed reasonable at the time.
5. On 2 August 2019, the parties received notification of the Prosecution’s Response to the NUON Chea Defence Request for extensions, which request the Prosecution opposes.<sup>7</sup> In its Response, it requests to be afforded “70% of the combined total of pages and 50% of the combined time granted to both Defence teams” for filing its response brief.<sup>8</sup>
6. On 4 August 2019, NUON Chea died.

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<sup>1</sup> Khieu Samphan’s Request for an Extension of Time and Page Limits for Filing His Appeal Brief, 10 July 2019, **F45**.

<sup>2</sup> Co-Prosecutors’ Response to Khieu Samphan’s Request for Additional Time and Page Limits for Appellate Briefs, 22 July 2019, **F45/2** (“Response **F45/2**”), notified in French on 26 July 2019.

<sup>3</sup> Response **F45/2**, paras. 17 and 22.

<sup>4</sup> Response **F45/2**, paras. 18 and 22.

<sup>5</sup> NUON Chea’s First Request for an Extension of Time and Page Limits for Filing His Appeal Brief Against the Trial Judgement in Case 002/02, 23 July 2019, **F47**.

<sup>6</sup> Khieu Samphan’s Defence Reply to the Responses to its Request for Extension of Time and Page Limits for Filing His Appeal Briefs, 29 July 2019, **F45/3**, notified on 30 July 2019.

<sup>7</sup> Co-Prosecutors’ Response to NUON Chea’s Request for Additional Time and Page Limits for His Appeal Brief, 1 August 2019, **F47/1** (“Response/Request **F47/1**”). The Defence worked on the basis of a first unfinished draft translation into French received from ITU, as it [ITU] was unable to translate the document in a timely fashion

<sup>8</sup> “Response/Request **F47/1**, paras. 25-26(ii).

7. The Defence hereby opposes the Prosecution's new supplemental request, as it deems it evolving in nature and lacking in substantiation (I), unreasonable (II) and untimely (III).

**I. THE REQUEST IS EVOLVING IN NATURE AND LACKING IN SUBSTANTIATION**

8. On appeal in Case 02/01, the Prosecution systematically requested extensions of time and/or page limits proportionate to any granted to the defence teams for purposes of filing its response to appeal briefs or even for examining witnesses.<sup>9</sup> The Supreme Court Chamber systematically denied such requests, deeming them lacking in substantiation.<sup>10</sup> Owing to the "obduracy" of the Prosecution,<sup>11</sup> the Supreme Court Chamber even had to recall that there is a fundamental difference between the position of an accused in a criminal trial and that of the prosecution.<sup>12</sup>
9. As regards, specifically, the Prosecution's Response to the appeal briefs of both defence teams, the Supreme Court Chamber granted the Prosecution the same number of pages plus a third of that amount (and not the combined total it requested)<sup>13</sup> and less than a third of the time period granted to the defence teams (and not the same amount it requested).<sup>14</sup> So where the defence

<sup>9</sup> In regard to the appeal briefs, the Prosecution requested, for its response, the same time limits as those afforded to the defence teams and page limits amounting to the combined total of the two appeal briefs (references in the next footnote).

<sup>10</sup> Decision on Defence Motion for Extension of Time and Page Limits on Notices of Appeal and Appeal Briefs, 29 August 2014, **F3/3**, paras. 5 and 10; Decision on Motions for Extensions of Time and Page Limits for Appeal Briefs and Responses, 31 October 2014, **F9** ("Decision **F9**"), paras. 8-9, 15, 17, 20-21, 23; Decision on Co-Prosecutors' Request for Page and Time Extensions to Respond to the Defence Appeals of the Case 002/01 Judgment, 21 April 2015, **F23/1** ("Decision **F23/1**"), paras. and 11; Decision on Co-Prosecutors' and Civil Party Lead Co-Lawyers' Request for Additional Time for Examination of SCW-5, 30 June 2015, **F26/2/2** ("Decision **F26/2/2**"), paras. 6-8.

<sup>11</sup> Decision on the Co-Prosecutors' Request for Page Extension for Their Prospective Response to NUON Chea's Sixth Request for Additional Evidence, 5 October 2015, **F2/8/2/1**, p. 3: "the Co-Prosecutors, notwithstanding the Supreme Court Chamber's consolidated view on this issue, obdurately justified the relief sought by making reference to the other party's request".

<sup>12</sup> Decision **F26/2/2**, para. 6: "the Supreme Court Chamber recalls that there is a fundamental difference between the position of the accused in a criminal trial, whose liberty is at stake and who enjoys the fair trial rights set out, in particular, in Article 14(2) and (3) of the International Covenant on Civil and Political Rights ("ICCPR"), and that of the prosecution, which is representing the public interest that justice be done in accordance with the law".

<sup>13</sup> Decision **F9**, paras. 15 and 17. The Supreme Court Chamber relied on the regulations of the international or internalised criminal tribunals in cases involving multiple accused. Pursuant to those regulations, in a one-appellant situation, the respondent is granted the same number of pages for the response to the appellant (para. 15 and footnotes 30-31).

<sup>14</sup> Decision **F9**, paras. 20-21 ("The Supreme Court Chamber bears in mind that the *ad hoc* tribunals normally granted approximately half the time for response briefs as they do for appeal briefs, and considers that the Co-Prosecutors would be able to hold discussions and conduct a significant amount of preliminary work on their response upon receiving the appeal briefs in either English or French", para. 20).

teams were granted 90 days and 210 pages for filing their briefs in one language, the Prosecution was granted 30 days and 280 pages for filing its response in both languages.<sup>15</sup>

10. In Case 002/02, in response to the Defence, the Prosecution only requested extensions that are “proportionate” to any granted to the Defence teams for filing of its responses to the appeal briefs.<sup>16</sup> The Defence understood this to mean that the Prosecution had ceased making the kind of groundless requests as those it did in Case 002/01, and was finally deferring to the Supreme Court Chamber and its jurisprudence in Case 002/01.
11. However, 10 days thereafter, in response to the NUON Chea Defence, it adopted a new position. This time, it requested “at least 70% of the combined total of pages and at least 50% of the combined time afforded to the Defence”. It requested further that the deadline for filing its response, “in one language”, should be “at least 45 days after the Defence briefs have been filed in Khmer”.<sup>17</sup>
12. Therein, not only does the Prosecution fail to explain this abrupt change in position, but it also provides no grounds for its requests. It merely refers to the reasons why, according to it, the defence teams should be afforded only five months and 300 pages in one language, and, in rather contradictory fashion, to the “volume of issues” that NUON Chea and KHIEU Samphan intend to appeal.<sup>18</sup> While – unlike in Case 002/01 – it is not requesting page limits amounting to the combined total of the two appeal briefs, it fails to explain why it should be granted at least 70% of the combined total, i.e. more than the same page limits plus one third, as was granted in Case 002/01. Similarly, it fails to explain why it is requesting – as it did in Case 002/01 – the same time limits as those granted to the defence teams,<sup>19</sup> i.e. significantly more than less one third, as granted in Case 002/01. It also fails to explain why it should be permitted to file in one language only. In other words, it provides no good grounds as to why the Supreme Court Chamber should depart from its Case 002/01 jurisprudence.

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<sup>15</sup> Decision F9, para. 23.

<sup>16</sup> Response F45/2, paras. 18 and 22.

<sup>17</sup> Response/Request F47/1, paras. 25 and 26(ii).

<sup>18</sup> Response/Request F47/1, para. 25.

<sup>19</sup> “50% of the combined time” granted to the two defence teams amounts to the same time period granted to them.

13. The truth of the matter is that it simply cannot. Its unreasonable request is only aimed at misleadingly scaring the Supreme Court Chamber regarding the time allowances requested by the defence teams.

## **II. THE REQUEST IS UNREASONABLE AND IS AIMED AT SCARING THE SUPREME COURT CHAMBER**

14. There are no good ground in Case 002/02 to grant the Prosecution a proportionate increase in the time and page limits for its response as was granted in Case 002/01. Such was already the case in regard to the Prosecution’s response to two appeal briefs, and is indeed still the case today after NUON Chea has died.

15. When the Prosecution filed its Response, it was aware that like Case 002/01, Case 002/02 was the trial of two accused persons, and, moreover, Accused who were found guilty of participating in a joint criminal enterprise (“JCE”). The Prosecution was also aware that, as was the case in Case 002/01, it could start preparing its response upon receipt of the appeal briefs in one language and file it in both languages shortly after receiving notification of the Khmer versions.

16. In responding to the two Appellants, the Prosecution was aware that in their respective briefs, the Appellants were bound to raise largely overlapping issues. Evidence of this is the mere fact that in the reasons for the judgement, very few pages, out of the grand total, deal with each of the accused in particular:

	Total number of pages, including annexes	Number of pages relating to NUON Chea’s roles and responsibilities	Number of pages relating to KHIEU Samphan’s roles and responsibilities
In French	2828	91 (3.21%)	137 (4.84%)
In English’s	2387	78 (3.26%)	92 (3.85%)

17. Most of the issues raised on appeal are common to both Co-Accused (conduct of the proceedings; the law applicable to the crimes, modes of liability, standard of review). Moreover, the Co-Accused were found guilty primarily of participating in a common JCE, the common purpose of which was allegedly implemented through five “policies” (each allegedly involving the commission of multiple crimes); both accused allegedly subscribed to and participated in the purported policies.

18. Accordingly, in order to respond to appeal briefs which bound to overlap to a large extent, the Prosecution did not require more than the proportions it was granted in Case 002/01. This is especially true given that here again it could have taken full advantage of the time allotted to translating the defence teams' briefs into Khmer. It deliberately omits to mention this while claiming, exaggeratedly, that granting the defence teams' request would mean that the time for the Defence appeal briefs alone in Khmer would be almost two years.<sup>20</sup>
19. In filing its Request, the Prosecution was aware that whereas the amount of time spent on the appeal briefs should understandably be significantly higher than in Case 002/01, the time spent on translating them into Khmer is not time lost, quite the contrary. As was the situation in Case 002/01, such time can be devoted, for example, 1) in part, to preparing the defence teams' responses to the Prosecution's appeal brief,<sup>21</sup> and 2) in whole, to preparing the Prosecution's responses to the defence teams' appeal briefs.
20. In Case 002/01, the Supreme Court Chamber underscored the fact that the Prosecution was in a position to work on its response upon receipt of the appeal briefs in one language.<sup>22</sup> The Defence adds that the Prosecution can devote almost all of its resources to Case 002/02,<sup>23</sup> and also that it has in-house translators (unlike the Defence).<sup>24</sup>
21. The Supreme Court Chamber should therefore order it to file its response in both languages no later than 15 days after receiving notification of the Defence's appeal brief in Khmer.
22. Under these circumstances, the Prosecution ought to be able to file a comprehensive response to the Defence appeal brief without occasioning any delay the appellate process.

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<sup>20</sup> Response/Request **F47/1**, para. 23: "This would mean that the time for the Defence appeal briefs *alone* in Case 002/02 would be almost two years." (emphasis supplied)

<sup>21</sup> Decision on Defence Motions for Extension of Pages to Appeal and Time to Respond, 11 December 2014, **F13/2**, paras. 12-13 and 17 (the Supreme Court Chamber postponed the starting point of the time limit for filing the Defence teams' responses to the notification of their appeal briefs in one language).

<sup>22</sup> Decision **F9**, para. 20 (see footnote 14. *supra*); Decision **F23/1**, para. 11 ("As to the contention that 30 days is insufficient for national and international elements of the Office of the Co-Prosecutors to work together, the Supreme Court Chamber considers it evident that such cooperation should have been taking place from the time of the filing of the appeal briefs in one language only. The fact that the Co-Prosecutors have themselves regularly requested filing documents in one language with Khmer translations to follow is a testament to early cooperation.").

<sup>23</sup> Case 004/1 had ended. Case 004/2 is at the deliberations stage before the Pre-Trial Chamber. Case 003 is at the appellate replies stage. Finally, in Case 004, the filing of appeals against the Closing Orders started last month.

<sup>24</sup> See for example the Co-Prosecutors' email of 1 June 2016 at 1306 hours, entitled: "OCP Response to Nuon Chea's Request to Recall Prak Khan – Request to File in One Language", **E409/2.1.2**, p. 2, second paragraph.

### **III. THE REQUEST IS UNTIMELY**

23. While it may delay the point at which a decision can be issued, the practice of making supplemental requests within responses to motions may be justifiable in some instances. Nonetheless, the Defence fails to understand why the Prosecution did not make the request at issue 10 days earlier in its Response to the Defence's Request. That would have saved it from having to put resources into raising the matter de novo, and moreover, having to do so in urgent fashion so to make sure that it responded as soon as possible to avoid delaying the Supreme Court Chamber's decision. Indeed, that decision should be rendered as soon as possible, because it will henceforth determine the course of the on-going proceedings, and will enable the parties to organize themselves more adequately.

24. **FOR THESE REASONS**, the Defence requests the Supreme Court Chamber:

- to DENY the Prosecution's request for proportionate extensions, pursuant to its Case 002/01 jurisprudence;
- to DECIDE upon all the pending requests on an urgent basis, even if this requires issuing the dispositions initially, and then the reasons in due course.

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