

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

FILING DETAIL

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**SECOND REQUEST FOR EXTENSION OF TIME AND PAGE LIMITS FOR
FILING APPEALS AGAINST THE TRIAL JUDGMENT IN CASE 002/01**

Nuon Chea Defence Team:

SON Arun
Victor KOPPE
PRUM Phalla
SUON Visal
LIV Sovanna
Joshua ROSENSWEIG
Doreen CHEN
Xiaoyang NIE

Co-Lawyers for Khieu Samphan:

KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN

Co-Prosecutors:

CHEA Leang
Nicholas KOUMJIAN

Co-Lawyers for Civil Parties:

PICH Ang
Marie GUIRAUD

Pursuant to ECCC Internal Rule 39(4), the Co-Lawyers for Nuon Chea (the ‘Defence’) hereby submit this request for an extension of time and page limits for appeal briefs in connection with the Trial Judgment in Case 002/01:

1. On 7 August 2014, the Trial Chamber issued its judgment in Case 002/01 (‘Judgment’).¹ On 13 August 2014, the Khieu Samphan and Nuon Chea defence teams jointly filed a request for an extension of time and page limits for both notices of appeal and appeal briefs.² The Co-Prosecutors responded³ and the defence teams filed a joint reply.⁴ On 29 August 2014, the Supreme Court Chamber partially granted the request for an extension of time for filing notices of appeal and rejected the request for an extension of page limits.⁵ With regard to appeal briefs, the Chamber indicated that ‘extensions will certainly need to be granted in light of the size and complexity of the case and Trial Judgment’, but held that it was ‘premature to determine the amount of extra time and pages’ prior to the filing of notices of appeal.⁶ On 29 September 2014, the Defence filed its notice of appeal against the Judgment (‘Notice’).⁷
2. This Request consists of three parts: (i) that the Chamber decline to enforce any page limits in connection with appeal briefs; (ii) in the alternative, that the Chamber grant a 500-page limit for appeal briefs; and (iii) that the deadline for appeal briefs be fixed 90 days from the date of the filing of the Notice, or 29 December 2014, exclusive of translation.

A. Page Limits

i – No limits should apply

¹ Document No. E313, ‘Judgement’, 7 August 2014

² Document No. F3, ‘Demande urgente de la Défense de M. KHIEU Samphân et de la Defense de M. NUON Chea aux fins de prorogation des délais et d’extension du nombre de pages des conclusions en appel’, 13 August 2014.

³ Document No. F3/1, ‘Co-Prosecutors’ Response to the Khieu Samphân and Nuon Chea Defence Request for Extended Deadlines and Page Limits in Regards to Case 002/01 Judgment Appeals’, 21 August 2014.

⁴ Document No. F3/2, ‘Reply to Co-Prosecutors’ Response to the Khieu Samphân and Nuon Chea Defence Request for Extended Deadlines and Page Limits in Regards to Case 002/01 Judgment Appeals’, 25 August 2014.

⁵ Document No. F3/3, ‘Decision on Defence Motion for Extension of Time and Page Limits on Notices of Appeal and Appeal Briefs’, 29 August 2014 (‘First Extension Decision’).

⁶ First Extension Decision, para. 10.

⁷ Document No. E313/1/1, ‘Notice of Appeal Against the Case 002/01 Judgment’, 29 September 2014 (‘Notice’).

3. Cambodian criminal law, the primary source of procedural rules before the ECCC,⁸ contemplates no page limits on filings. The same is true under French law, from which the Cambodian code derives, and in all other civil law jurisdictions. While page limits exist at other international tribunals, the procedural context at those courts is based on a common law, adversarial model pursuant to which each party is afforded a fixed, equal opportunity to advance their respective positions.⁹ In civil law systems, page limits are simply unheard of.
4. The Defence notes that a sequence of procedural decisions by the Co-Investigating Judges and subsequently the Trial Chamber placed improper limitations on Nuon Chea's ability to present his defence while the investigation and trial were ongoing. Most importantly, the Defence was prohibited at all times from conducting any of its own investigations.¹⁰ This restriction was contrary to the prevalent practice in common and several civil law systems, most notably including the Cambodian legal system, and other international courts. Furthermore, contrary to the practice in many civil law systems, defence counsel was excluded entirely from the interviews of the Co-Investigating Judges.¹¹ Needless to say, this latter problem does not even arise in common law systems or the *ad hoc* tribunals, where no judicial investigation exists and defence counsel is permitted to conduct its own interviews with its own witnesses. Seen as a whole, the ability of the Defence to fact find, articulate its theory of the case and substantiate that theory has failed to accord with any known system of criminal prosecution, domestic or international. Nuon Chea's first opportunity to articulate his theory of the case (after nearly six years of pre-verdict detention) during closing submissions before the Trial Chamber was again highly circumscribed.¹²
5. After many years of being subjected to these legally baseless restrictions on his ability to press his case, appellate submissions constitute Nuon Chea's one last opportunity to

⁸ Case File No. 001/18-07-2007-ECCC/SC, Document No. **F28**, 'Appeal Judgement', 3 February 2012 ('Duch Appeals Judgment'), 'Partially dissenting joint opinion of Judges Agnieszka Klonowiecka-Milart and Chandra Nihal Jayasinghe', paras 9-10.

⁹ While the Defence recognizes that it relied on jurisprudence from the *ad hoc* tribunals in connection with its original requests for time and page extensions, after reassessing the scope of its appeal in light of the Notice in accordance with the instructions of the Supreme Court Chamber, it has determined that it requires the flexibility accorded by Cambodian law and civil systems generally.

¹⁰ Notice, Ground 9; Document No. **E295/6/3**, 'Nuon Chea's Closing Submissions in Case 002/01', 26 September 2013 ('Closing Submissions'), para. 29; Document No. **A110/I**, Letter from Co-Investigating Judges to Co-Lawyers for Nuon Chea, 10 January 2008 ('CIJ Letter'), para. 3.

¹¹ Closing Submissions, para. 29; CIJ, para. 2.

¹² Notice, Ground 19.

clarify the record and correct the numerous significant errors in the Judgment. Nuon Chea's right to present a defence and confront the evidence against him mandate that he be allowed this opportunity.¹³

6. The Defence notes that Article 12(1) of the ECCC Agreement (which constitutes the Tribunal and necessarily supersedes the Internal Rules) permits Chambers to seek guidance in procedural rules established at the international level only under limited conditions. None of those conditions apply in this case. Indeed, whereas the Trial Chamber has previously upheld the many deviations from Cambodian law reflected in the Internal Rules on the basis that trials before the ECCC 'differ substantially' from ordinary trials in Cambodian courts, in this case the limitations on Defence participation in Case 002 require greater fidelity to Cambodian law, not less.¹⁴
7. The Defence assures the Supreme Court Chamber that it will strive to be as succinct as possible. No party has an interest in weakening the force of its arguments by making unnecessarily long submissions; any party which does so will only harm its own case. Professional and experienced counsel should be trusted to say no more than is necessary to represent their client; by the same token, a defendant accused of thousands of murders and millions of counts of crimes against humanity should not be forced to say less.

ii – Parties should be allowed at least 500 pages

8. Should the Chamber choose to fix page limits for the appeal briefing, a substantial extension of that limit is required. Having reassessed the forthcoming appeal brief in light of its notice of appeal, the Defence concludes that it requires 500 pages to adequately articulate the reasoning underlying the 223 errors of law and fact it has alleged. These grounds of appeal encompass 16 distinct decisions of the Trial Chamber in addition to the Judgment, many of which involve numerous component oral decisions given over the course of the trial.¹⁵
9. The Defence notes that the circumstances surrounding the appeal against the Case 002/01 judgment diverge from appeals at the *ad hoc* tribunals in several ways. First, the

¹³ ECCC Law, Art. 35^{new} 2(b),(e).

¹⁴ Document No. **E51/14**, 'Decision on Nuon Chea's Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules', 8 August 2011.

¹⁵ Notice, Grounds 2, 6-19, 22, 32, 34.

interlocutory appellate jurisdiction of the Supreme Court Chamber is highly circumscribed. Appeals Chambers at the *ad hoc* tribunals may hear interlocutory appeals concerning any ‘issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which [...] an immediate resolution by the Appeals Chamber may materially advance the proceedings.’¹⁶ By contrast, the Supreme Court Chamber has immediate appeal jurisdiction over a narrowly defined set of issues, which it has repeatedly declined to interpret expansively.¹⁷ All other decisions ‘may be appealed only at the same time as an appeal against the judgment on the merits.’¹⁸ The Trial Chamber has repeatedly refused to reconsider decisions concerning the fairness of the Case 002/01 trial and the various procedural schemes adopted during the Case 002/01 trial on the grounds that appeals would be subsequently available.¹⁹ The effective exercise of that right to appeal requires adequate time and facilities to present a defence, including sufficient space in appellate briefing.²⁰

10. Second, a large number of novel procedural and substantive issues arose during the Case 002/01 judgment. No court, domestic or international, has issued conclusive appellate rulings on the status of customary international law as of 1975 in relation to the crimes or the modes of liability charged in Case 002/01. The Defence’s Notice includes appeals concerning the existence and/or definition of murder,²¹ extermination,²² persecution on political grounds,²³ other inhumane acts through forced transfer,²⁴ other inhumane acts through enforced disappearances,²⁵ joint criminal

¹⁶ ICTY and ICTR Rules of Procedure and Evidence, Rule 73(B).

¹⁷ See e.g., Document No. **E95/8/1/4**, ‘Decision on IENG Sary’s Appeal Against Trial Chamber’s Decision on Co-Prosecutors’ Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity’, 19 March 2012.

¹⁸ Rule 104(4).

¹⁹ See e.g., Document No. **E1/40.1**, ‘Transcript of Trial Proceedings – Trial Day 28’, 8 February 2012, p. 4, ln. 21; Document No. **E1/78.1**, ‘Transcript of Trial Proceedings – Trial Day 66’, 30 May 2012, p. 43, ln. 19; Document No. **E1/79.1**, ‘Transcript of Trial Proceedings – Trial Day 67’, 31 May 2012, p. 30, ln. 3; Document No. **E1/105.1**, ‘Transcript of Trial Proceedings – Trial Day 93’, 9 August 2012, p. 73, ln. 3.

²⁰ ECCC Law, Art. 35^{new}2(b).

²¹ Notice, Ground 172.

²² Notice, Ground 173.

²³ Notice, Ground 190. While the Defence notes that the Supreme Court Chamber addressed the definition of persecution in Case 001, the Defence will submit, *inter alia*, that the Trial Chamber’s definition of the crimes was inconsistent with this Chamber’s ruling.

²⁴ Notice, Ground 179.

²⁵ Notice, Ground 183.

enterprise,²⁶ superior responsibility,²⁷ planning,²⁸ ordering,²⁹ instigating³⁰ and aiding and abetting.³¹ Moreover, the Trial Chamber adopted numerous procedural schemes on an improvisational basis within the *sui generis* procedural context of the ECCC, borrowing from a mix of Cambodian law, international law and the Internal Rules. The legal basis for many of these schemes was doubtful and continually challenged by defence teams in the course of the trial. Appeals against numerous such decisions were also included in the Defence's Notice.³² The Defence estimates that, had these decisions been subject to immediate appeal – as they likely would have been at the *ad hoc* tribunals – it may well have filed over a dozen immediate appeals over the course of the trial, each one permitted thirty pages of briefing.³³

11. Third, the unique circumstances of the severance of Case 002 and the imminent start of trial proceedings in Case 002/02 adds considerable importance to a range of legal and factual errors in the Case 002/01 Judgment. Errors of fact which do not cause a miscarriage of justice and errors of law which do not invalidate the judgment may nevertheless be of great significance to the fair and speedy progress of Case 002/02.³⁴ Because the limits on the Supreme Court Chamber's immediate appeal jurisdiction preclude resolution of these issues in the course of the Case 002/02 trial, their resolution in connection with the appeal against the judgment in Case 002/01 is especially important. A longer appeal will accordingly be required.
12. Fourth, in the Duch Appeals Judgment the Supreme Court Chamber recognized that under Cambodian law there are two levels of appeal: one which resolves factual disputes *de novo*, and a second which may only consider requests for cassation.³⁵ The Chamber added:

Pursuant to the ECCC Law, which provides that the Supreme Court Chamber “shall serve as both appellate chamber and final instance,” remedies available

²⁶ Notice, Ground 198.

²⁷ Notice, Ground 219.

²⁸ Notice, Ground 218.

²⁹ Notice, Ground 218.

³⁰ Notice, Ground 218.

³¹ Notice, Ground 218.

³² See fn 15, *supra*.

³³ See fn 15, *supra*.

³⁴ See fn 15, *supra*.

³⁵ Case File No. 001/18-07-2007-ECCC/SC, Document No. **F28**, ‘Appeal Judgement’, 3 February 2012 (‘Duch Appeal Judgment’), para. 12.

under Cambodian criminal procedure were conflated into one *sui generis* appellate system.³⁶

For this reason, among others, the Defence submits that the Supreme Court Chamber's jurisdiction over errors of fact is considerably broader than the test ultimately adopted in the Duch Appeals Judgment, which was derived from the common law models in place at the ICTY and ICTR. The Defence intends to develop this argument in its appellate briefing. Argument concerning errors of fact beyond the limited scope of a cassation appeal will accordingly require considerably longer appellate submissions.

B. Time Limits

13. The Defence notes that it previously requested a 60-day period for its notice of appeal and a further 75 days for the appeal brief, plus an additional 47-day period for translation. The Chamber granted 53 days for the notice. In light of the magnitude and complexity of the appeal grounds the Defence has identified, it continues to require at least the same total time period from the date of the Judgment. The Defence notes further that the Trial Chamber has, in the interim, issued a scheduling order for the commencement of the trial in Case 002/02 on 17 October 2014.³⁷ The Defence is therefore presently expected to be occupied with the Case 002/01 appeal and the Case 002/02 trial simultaneously. Accordingly, the Defence seeks an extension of 30 days for the appeal briefing, to a total of 90 days from the date of the filing of the Notice, exclusive of translation.
14. The Defence notes that a 500-page appeal brief would require almost five months for translation. The 150-page brief sought in the Defence's first extension request would have required 47 days for translation. It is apparent that, whatever the limits set by this Chamber, if any, the total period for translation will be a substantial proportion of, or possibly more than, the total period designated for appeal briefing. Accordingly, some allowance for translation is required.
15. The Defence submits that the only fair solution is to add the period of translation to the parties' respective time allowance and fix a filing deadline of 90 days plus the

³⁶ Duch Appeal Judgment, para. 13.

³⁷ Document No. E316, 'Scheduling order for hearing on the substance in Case 002/02', 19 September 2014, p. 4.

appropriate period of translation.³⁸ The only alternative would be to grant leave to file in one language. In this case, however, ECCC practice would normally dictate that the response time permitted to the Co-Prosecutors and the civil parties begins to run only after the Khmer language translation is complete.³⁹ Not only would this approach grant to the Co-Prosecutors and civil parties a disproportionate total response time, it would not shorten the length of the overall briefing period. It would accordingly serve no purpose.

16. For these reasons, the Defence submits that, should the Chamber deem the Defence's primary request (a 30 day extension plus the appropriate time for translation) too long, the only alternative is to grant leave to file in one language *and* hold that response times run from the moment appeal briefs are filed in that language. In that regard, the Defence notes that the Co-Prosecutors have sought leave to file submissions in English on numerous occasions,⁴⁰ and that both the Co-Prosecutors and the civil parties filed closing submissions in English only.⁴¹ Should any further submissions be required following the completion of the Khmer language translation, all parties will have ample opportunity to do so during oral argument.

C. Conclusion and Relief Requested

17. For these reasons, the Defence hereby requests that the Supreme Court Chamber:
- a. in regards to page limits:
 - i. hold that no page limits apply to appeal briefs; or, in the alternative
 - ii. fix a limit of 500 pages for each party's appeal brief; and
 - b. in regards to time limits:

³⁸ This period should be calculated on the basis of ITU's standard 4 page per business day capacity, or 20 pages in a fully operation business week.

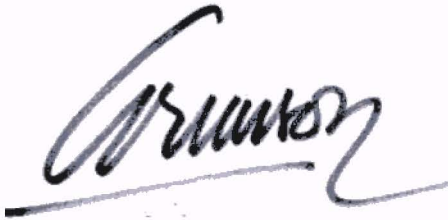
³⁹ *Practice Direction ECCC/01/2007/Rev.8*, 'Filing of Documents Before the ECCC', Art. 8.5.

⁴⁰ See Document No. **E89/2**, 'Co-Prosecutors' Joint Response to Ieng Sary's "Motion to add new trial topics to trial schedule" and Nuon Chea's "Motion in Support of Ieng Sary's Motion to add new trial topics to the trial schedule" and request to add additional topics', 6 June 2011, fn 5; Email from William Smith to Sheila Paylan, 3 December 2012; Email from Tarik Abdulhak to Anne-Marie Burns and Sheila Paylan, 26 November 2012.

⁴¹ See Document No. **E295/6/1**, 'Co-Prosecutors' Final Trial Brief in Case 002/01', 26 September 2013; Document No. **E295/6/2**, 'Civil Parties Closing Brief to Case 002/01 with Confidential Annexes 1-4', 26 September 2013.

- i. fix a deadline of 90 days from 29 September 2014, plus an appropriate period for translation; or, in the alternative
- ii. fix a deadline of 90 days from 29 September 2014 with leave to file in language, and hold that all response times run from the moment that briefs are filed in one language.

CO-LAWYERS FOR NUON CHEA



SON Arun



Victor KOPPE