

**BEFORE THE TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN'S REQUEST TO  
RECONSIDER THE CASE 002/02 HEARING SCHEDULE ORDER**

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## I. INTRODUCTION

1. On 3 October 2014, Khieu Samphan filed an urgent motion requesting the Trial Chamber to reconsider its Scheduling Order for Hearing on the Substance in Case 002/02 dated 19 September 2014<sup>1</sup> and to postpone the commencement of the trial until they file their substantive appeal brief against the Judgment issued in Case 002/02 (“the Motion”).<sup>2</sup>
2. This is Khieu Samphan’s third request to the Trial Chamber seeking the postponement of the Trial 002/02.<sup>3</sup> The prior requests were rejected.<sup>4</sup> Although this request is relatively less extensive it lacks adequate substantiation and therefore should be dismissed. Where Khieu Samphan previously requested to stay the proceedings until the Supreme Court Chamber final judgment on the appeals in Case 002/01 (a delay estimated to 18-24 months)<sup>5</sup>, they now seek a postponement of the trial until they file their own substantive appeal brief. Interestingly, the Defence has recently filed an application before the Supreme Court Chamber requesting a further extension of the deadline to file their appeal brief in two languages.<sup>6</sup> They now request to file their appeal brief by 22 March 2015, corresponding to 174 days following the date of filing of their notice of appeal.<sup>7</sup> Therefore, Khieu Samphan requests to delay the trial proceedings by more than five months (17 October 2104 – 22 March 2015).

<sup>1</sup> **E316** Trial Chamber Scheduling Order for Hearing on the Substance in Case 002/02, 19 September 2014.

<sup>2</sup> **E314/5/1** Khieu Samphan, *Demande urgente de réexamen de l’Ordonnance concernant le calendrier des audiences au fond du procès 002/02*, 3 October 2014. As there is no official translation of the Request in English to date, all quotes used in this OCP Response must be considered as unofficial translation.

<sup>3</sup> Khieu Samphan filed on 10 October 2014 even a further motion discussing the very same topics (**E314/8** Khieu Samphan, *Requête réitérée en récusation des juges composant actuellement la Chambre de première instance devant statuer sur le procès 002/02*, 10 October 2014). The Co-Prosecutors consider this fourth motion as redundant and will not respond to it. It however shows the determination of Khieu Samphan’s Defence to not accept any decision made by the Trial Chamber to commence the trial 002/02 anytime soon.

<sup>4</sup> **E314/5** Trial Chamber Decision on Khieu Samphan’s request to Postpone the Commencement of Case 002/2, dated 19 September 2014; **E301/5/5/1** Trial Chamber Decision on Khieu Samphan Request to Postpone Commencement of Case 002/02 until a Final Judgment is Handed Down in Case 002/01, 21 March 2014.

<sup>5</sup> **E301/5/5/1** Trial Chamber Decision on Khieu Samphan Request to Postpone Commencement of Case 002/02 until a Final Judgment is Handed Down in Case 002/01, 21 March 2014, at para. 11; **E1/239.1** TC Transcript, Adversarial Hearing, 11 February 2014 (William Smith), right above 09:23:00 & at 09:32:50.

<sup>6</sup> **F7** *Demande urgente de la Défense de M. Khieu Samphân aux fins de prorogation du délai et d’extension du nombre de pages du mémoire d’appel*, 6 October 2014, paras. 19 to 24; Initially, Khieu Samphan and Nuon Chea Defence teams had jointly requested the Supreme Court Chamber to allow the Defence to file a 150-page appeal brief in French or in English and the required equivalent in Khmer within **117 days** of the date of filing of the notice of appeal: **F3**, Urgent Application for Extension of Time and Page Limits for Submissions on Appeal by the Defence for Mr Khieu Samphan and the Defence for Mr Nuon Chea, 13 August 2014.

<sup>7</sup> **E313/2/1** Khieu Samphan Notice of Appeal of Judgment 002/01, 29 September 2014.

3. Khieu Samphan requests reconsideration due to (1) the impossibility for the Defence to be simultaneously involved in two trials, a heavy workload that would prevent the Accused to fully participate in his defence and would lead to a breach of equality of arms between the parties; and (2) outstanding issues to be resolved for a fair trial in Case 002/02.
4. The postponement of the commencement of the Case 002/02 substantive hearings is not warranted and should be denied. Such a postponement would be contrary to prior Supreme Court Chamber decisions and would significantly reduce the chances of completing this key trial. The Motion therefore constitutes another attempt to delay the judicial process against both Accused, it is prejudicial to the interests of all other parties and is not in the interests of justice. The Co-Prosecutors refer to their previous arguments filed on 4 September 2014<sup>8</sup> and presented orally during Trial Management meetings and Initial Hearing in response to the Defence's previous requests.<sup>9</sup>

## II. ARGUMENT

5. The Trial Chamber has held that it would only consider an issue anew when it is justified by new circumstances.<sup>10</sup> Khieu Samphan has not demonstrated any new circumstance that would constitute an objective or legitimate basis for reconsideration of the Scheduling Order to postpone the trial. The fact that the Khieu Samphan is not pleased with the Trial Chamber decision to start the evidentiary hearings in Case 002/02 on 17 October 2014 and to establish a reduced hearing schedule while the parties prepare appeal briefs does not warrant a *de novo* consideration. Whether the parties like this Order or not, it is their obligation and responsibility to accept it.
6. The issue of the commencement of Case 002/02 has been clearly settled by the Supreme Court Chamber as well as this Chamber and cannot be re-litigated indefinitely. The Supreme Court Chamber has ordered ten months ago that evidentiary hearings in Case 002/02 should commence "as soon as possible" and "promptly" following the Trial

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<sup>8</sup> E314/3 Co-Prosecutors' Response to Khieu Samphan's Request for Stay of Proceedings or Disqualification of Judges, 4 September 2014;

<sup>9</sup> This includes E1/238.2 TC Transcript, Trial Management Meeting, 12 December 2013 (D. Lysak) at 11:52:08; (Nicholas Koumjian) at 13:33:42, 14:06:30; E1/239.1 TC Transcript, Adversarial Hearing, 11 February 2014 (Seng Bunkheang) at 09:19:27, (W. Smith) at 09:20:56 – 09:37:44, (N. Koumjian) at 13:39:48; E1/240.1 TC Transcript (Initial Hearing), 30 July 2014 (Chea Leang) at 10:22:26.

<sup>10</sup> E314/5 Decision on Khieu Samphan's Request to Postpone the Commencement of Case 002/2, 19 September 2014, para. 5, referring to E328/11/1 Decision on Ieng Sary's Request for Reconsideration of the Trial Chamber Decision on the Accused's Fitness to Stand Trial and Supplemental Request, 19 December 2012 at para 7.

Management Meeting scheduled for 11-13 December 2013 and that waiting eight months before beginning Case 002/02 was not acceptable.<sup>11</sup> They therefore found that the trial 002/02 had to start prior to any final judgment on appeal in Case 002/01. The same Chamber recently reaffirmed this decision on 29 July 2014 in paragraph 51 and stated the following in paragraph 87:

*The Supreme Court Chamber has found that delays and inefficiencies occasioned to future trials by further severance may be mitigated by the more pressing interests of ensuring meaningful justice through obtaining a verdict on at least those remaining charges which will render the combination of Cases 002/01 and 002/02 reasonably representative of the Indictment... Therefore, advantages of relative expediency and manageability bear heavy weight in the circumstances of the present case.<sup>12</sup>*

7. The Supreme Court Chamber decisions are binding. Khieu Samphan is unable to explain why the Trial Chamber should depart from them. The Co-Prosecutors also reaffirm the previous findings of the Trial Chamber in its 19 September 2014 decision. The Trial Chamber recognized the “Court’s obligation under Article 33 (new) of the ECCC Law to ensure a fair and expeditious trial and in this regard the interests of all parties must be taken into account”,<sup>13</sup> recalling that both Nuon Chea and the Co-Prosecutors wanted the trial to commence as soon as possible. As such, the Co-Prosecutors submit that there is a clear, unambiguous direction from the Chambers that Case 002/02 commence as soon as possible, irrespective of the appeal process in Case 002/01.
8. The Scheduling Order E316 is a reasoned decision that has been issued by the Trial Chamber after due consultation of all parties, including Khieu Samphan who was given the opportunity to raise his concerns and discuss publicly the hearing schedule on several occasions.<sup>14</sup> The prospect for the parties to face the inconveniences of

<sup>11</sup> **E284/4/8** Decision on Immediate Appeals Against Trial Chamber’s Second Decision on Severance of Case 002, 25 November 2013, paras. 72 & 76; **E1/238.1** TC Transcript, Trial Management Meeting, 11 December 2013 (N. Koumjian) above 11:23:01.

<sup>12</sup> **E301/9/1/1/3** Supreme Court Chamber Decision on Khieu Samphan’s Immediate Appeal Against the Trial Chamber’s Decision on Additional Severance of Case 002 and Scope of Case 002/02, paras. 51, 55, 62 and 87.

<sup>13</sup> **E314/5** Trial Chamber Decision on Khieu Samphan’s request to Postpone the Commencement of Case 002/2, 19 September 2014, para. 7; **E301/5/5/1** Decision on Khieu Samphan Request to Post pone Commencement of Case 002/02 Until a Final Judgement is Handed Down in Case 002/01, 21 March 2014, referring to *Prosecutor v Kvočka et al.*

<sup>14</sup> At the Trial Management Meeting of 12 December 2013, Item 4 was “the Tentative Trial Schedule for Case 002/02”: see **E1/238.2** TC Transcript, Trial Management Meeting, 12 December 2013 (Anta Guissé) at 13:52:52 [“We do not re-iterate the request {to extent the lunch hour} ...but the four-day consecutive sitting schedule was rather difficult to sustain, given Mr. Khieu Samphan’s age”] & at 14:25:14. **E301/6** *Informations de la Défense de M. Khieu Samphan concernant l’aptitude et les modalités d’organisation des audiences*, 15 January 2014, at para. 2 [where the Defence propose to reduce the schedule to 4 mornings or 3 days per week but do not address the situation of simultaneous appeal.]

simultaneously drafting appeal briefs or appeal response briefs in Case 002/01 and participating in evidentiary hearings in Case 002/02 has been underlined by the Co-Prosecutors about a year ago.<sup>15</sup> The Co-Prosecutors have always supported the Accused's requests for a reduced hearing schedule, submitting that during the appeal phase the Trial Chamber should not sit more than 2 to 3 days per week.<sup>16</sup> However, the Co-Prosecutors have always insisted on the necessity to start the evidentiary hearings, independently of any schedule adopted by the Chamber.

9. The Trial Chamber decision has taken all factors advanced by the Defence and the other parties into consideration before issuing its reasoned decision, including: (a) the proposal by the Co-Prosecutors and Civil Party Lead Co-Lawyers to reduce the number of hearing days per week to permit the parties to prepare the Case 002/01 appeals and their responses; (b) the proposal by Nuon Chea to adjust the court sitting times; (c) the significant resources required by the parties to prepare their notices of appeal and appeal briefs; and (d) the benefit for the Accused from a slightly reduced hearing schedule despite the Medical Experts reports dated 27 March 2014 concluding that both Accused are able "to participate in the full duration of the trials with the usual breaks in between".<sup>17</sup> Ultimately, after hearing the arguments of each party, it belongs to the Trial Chamber to use its the discretionary power to decide the hearing schedule, after balancing the respective rights of the parties, including the right to a fair and expeditious trial.
10. In regards to Khieu Samphan's claim that there is an inequality of arms with the Co-Prosecutors regarding the human resources and workload,<sup>18</sup> it should be kept in mind that the Co-Prosecutors do not face two but six different defence teams in Cases 002,

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<sup>15</sup> **E1/238.1** TC Transcript, Trial Management Meeting, 11 December 2013 (N. Koumjian) at 11:23:01 (p.56): "The alternative to waiting until after the judgment raises another issue about time, and that is the extreme demands on the parties that will exist at that time for the appeal. Once the judgment is issued, the parties are going to be under time deadlines to prepare the appeal. We certainly don't propose (...) waiting to start 02/02 after the appeal"; see also **E1/239.1** TC Transcript, Adversarial Hearing, 11 February 2014 (N. Koumjian) at 13:57:26.

<sup>16</sup> **E1/240.1** TC Transcript (Initial Hearing), 30 July 2014 (Chea Leang) at 10:22:26. ["We do not have any objections to the Defense for the request for the reduction of the number of days {per} week for the proceedings in Case 002/02...either two or three days per week if necessary..."]; **E301/8** Co-Prosecutors' Joint Response to Nuon Chea and Khieu Samphan's Submissions Concerning Court Hearing Schedule and Fitness Review, 21 January 2014, paras. 3-4.

<sup>17</sup> **E316** Trial Chamber Scheduling Order for Hearing on the Substance in Case 002/02, 19 September 2014, at pp. 2-4; see also regarding prior requests in relation to the modification of the Chamber's ordinary sitting schedule: **E301/11** Trial Chamber Decision on Fitness of the Accused Nuon Chea to Stand Trial, 25 April 2014; para. 13; **E301/12** Trial Chamber Decision on Fitness of the Accused Khieu Samphan to Stand Trial, 25 April 2014; para. 13.

<sup>18</sup> **E314/5/1** Khieu Samphan Motion, paras. 19-21.

003 and 004. Consequently, the number of individuals supporting these teams combined is comparatively larger than the resources available to the Co-Prosecutors. Like any other party to trial 002/02 the Co-Prosecutors have a significant workload to discharge in the upcoming months which includes (a) research and drafting their appeal regarding the applicability of the third form of joint criminal enterprise at the ECCC; (b) responding to the Accused appeals in Case 002/01; (c) drafting investigative requests, analyzing evidence and drafting final submissions in Cases 003 and 004; (4) and actively participating in the Case 002/02 testimonial and document hearings. .

11. The Co-Prosecutors do not contest the right of the accused to effectively prepare and actively participate in his own defence but note that Khieu Samphan has a highly qualified team of lawyers and legal consultants who have institutional knowledge of both Cases 002/01 and 002/02. As stated above in paragraph 8, the overlap between the appeal and the new trial has already been anticipated throughout the proceedings to date. The Trial Chamber has previously acknowledged that all parties have had access to the Case 002 case-file since the investigation stage (2007) and so cannot claim to have had insufficient time for preparation of proceedings.<sup>19</sup> Furthermore, the Defence has had a further nine-month period to prepare for Case 002/02 evidentiary hearings, between the final Case 002/01 hearings on 31 October 2013 and the issuance on 7 August 2014 of the Judgment in Case 002/01.
12. The workload and party participation is also more easily facilitated by the reduced court schedule, with only 25 court days scheduled for the rest of the year 2014 (out of 76 days between 17 October and 31 December 2014) representing an average of only 2.27 court days per week.<sup>20</sup> Therefore, it is not reasonable to argue that Khieu Samphan only has one of two options: to either prepare for the hearings of Case 002/02; or focus on the Appeal of Case 002/01. This is even less true when considering that the Defence requested in parallel to extend their deadline to file the appeal brief to the 22<sup>nd</sup> of March 2015.
13. The old age and health concerns of the Accused are undoubtedly reasons to start as expeditiously as reasonably possible the evidentiary hearings of Case 002/02 so that a verdict can be achieved within the lifetime of the Accused and of the many victims who

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<sup>19</sup> **E301/5/5/1** Decision on Khieu Samphan Request to Post pone Commencement of Case 002/02 Until a Final Judgement is Handed Down in Case 002/01, 21 March 2014 at para 13.

<sup>20</sup> The Defence allege that the reduced hearing schedule would correspond more or less to the 3 or 4 hearing days per week held during the Trial 002/01: **E314/5/1** Khieu Samphan Motion, para. 15.

have waited for justice for 35 to 40 years. There are no objective medical elements that support the Defence conclusion that the March 2014 medical expertise report would be “inconclusive and obsolete”.<sup>21</sup>

14. Khieu Samphan’s claim that it is absolutely impossible for him to actively participate in any evidentiary hearings in Case 002/02,<sup>22</sup> even on the basis of a reduced hearing schedule, in parallel to drafting the appeal brief is in stark contrast to Nuon Chea’s position. Nuon Chea has constantly shown his determination to have the trial 002/02 move forward as soon as possible,<sup>23</sup> although with another panel of judges. As early as 12 December 2013, Nuon Chea’s Defence stated that:

*“...we agree that they are very complex legal issues to be decided, but that should not necessarily stop the commencement of a second trial as soon as possible, as the Supreme Court has indicated.”<sup>24</sup>*

15. On 11 February 2014, Nuon Chea’s Defence further stated that:

*“our client is very anxious to begin the trial in Case 002/02, and to have an opportunity to tell his story without artificial constraints on the scope of the evidence. So, accordingly, we believe that the Case 002/02 trial can and should start as soon as possible”.<sup>25</sup>*

16. Although Nuon Chea filed a notice of appeal that lists a larger number of appeal grounds than Khieu Samphan, he did not complain or attempt to delay the trial 002/02. On the contrary, any unjustified postponement of the evidentiary hearings would directly affect his right to be tried without undue delay.
17. Regarding the disqualification motion referred to in paragraph 22 of the Motion, the Co-Prosecutors note that the Trial Chamber has already referred it to the Special Panel

<sup>21</sup> E314/5/1 Khieu Samphan Motion, para. 16; E1/239.1 TC Transcript, Adversarial Hearing, 11 February 2014 (A. Vercken) at 10:03:29. [Where paradoxically, according to the Defence on 11 February 2014, questions pertaining to his health were completely unfounded: “But as far as Mr. Khieu Samphan is concerned, let me point out here that we are not concerned by the medical examination...is in good health, he is not dying.”].

<sup>22</sup> E314/5/1 Khieu Samphan Motion, paras. 2 & 4-21; E1/240.1 TC Transcript (Initial Hearing), 30 July 2014 (A. Guissé) at 10:27:00 [“...we certainly cannot be in a drafting phase of the appeal and in the hearings simultaneously if Case 002/02 is to commence, only following the final appeal judgment”].

<sup>23</sup> For example, E1/238.2 TC Transcript, Trial Management Meeting, 12 December 2013 (V. Koppe) at 13:37:20: “We are fully available for the whole of next year – the full 12 months”.

<sup>24</sup> E1/238.2 TC Transcript, Trial Management Meeting, 12 December 2013 (V. Koppe) at 11:37:16

<sup>25</sup> E1/239.1 TC Transcript, Adversarial Hearing, 11 February 2014 (V. Koppe) at 09:48:49; see also E1/240.1 TC Transcript (Initial Hearing), 30 July 2014 (V. Koppe) regarding the hearing schedule, at 10:25:22 [“The Nuon Chea Defence team is and remains available to participate in hearings in 2014 and 2015 and we strongly urge the Trial Chamber – that the trial Chamber commence – that trial commences as soon as possible”].

appointed to deal with that motion.<sup>26</sup> The other outstanding issues pointed out by the Defence amount to reminders addressed to the Trial Chamber and should not justify *per se* any postponement of the first evidentiary hearings.

### III. REQUEST

18. In order to ensure the fair and expeditious conduct of proceedings, the Co-Prosecutors therefore request the Trial Chamber to:

- a) **Deny** Khieu Samphan's request to delay the start of Case 002/02 until after the filing of their appeal brief in Case 002/01; and
- b) **Confirm** that, in accordance with Rule 34(5), the Chamber will proceed with all pre-trial and trial matters in Case 002/02 pending a final determination of the request for disqualification by the Special Panel.

Respectfully submitted,

Date	Name	Place	Signature
13 October 2014	CHEA Leang Co-Prosecutor	Phnom Penh	
	Nick KOUMJIAN Co-Prosecutor	Phnom Penh	

<sup>26</sup> **E314/5** Trial Chamber Decision on Khieu Samphan's request to Postpone the Commencement of Case 002/2, 19 September 2014, para. 9.