

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

FILING DETAILS

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**CO-PROSECUTORS' RESPONSE AND REQUEST ON CASE 002/01 APPEAL AND
RESPONSE BRIEFS EXTENSIONS**

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. The Case 002/01 Judgment was issued on 7 August 2014.¹ On 13 August 2014, the Nuon Chea Defence and Khieu Samphan Defence jointly filed a request for extension of time and page limits for the notices of their appeals and the appeal briefs themselves.² The Defence teams requested an extension to 150 pages each for their appeal briefs, and to 117 days for the completion of their briefs in French or English, plus the necessary time for translation.³
2. In a decision of 29 August 2014, the Supreme Court Chamber (“SCC”) recognized the need to grant time and page extensions for the appeal briefs, but deferred considering such requests until it was in receipt of the Parties’ Notices of Appeal.⁴
3. On 29 September 2014, the Parties filed their Notices of Appeal. The Co-Prosecutors notified the Chamber and Parties that they intended to appeal the Trial Chamber’s decision excluding the third form of the mode of liability of Joint Criminal Enterprise.⁵ The Nuon Chea Defence notified their intent to argue 223 grounds of appeal⁶, and the Khieu Samphan Defence notified their intent to argue approximately 150 grounds of appeal.⁷
4. On 2 October 2014, the Nuon Chea Defence filed a “Second Request for Extension of Time and Page Limits for Filing Appeals Against the Trial Judgment in Case 002/01”.⁸ The Nuon Chea Defence requested no page limits for the appeal briefs, or in the alternative, a limit of 500 pages.⁹ They seek an extension of 30 days (for a total of 90 days from submission of their Notice of Appeal) to transmit appeal briefs for translation, and then to be allowed to file whenever translation is complete.¹⁰ In the alternative, they seek an extension of 30 days to file, permission to file in one language only with a Khmer translation to follow when ready, and a requirement that the time for response briefs begin to run from the date of the filing of the appeal brief in a

¹ E313 Case 002/01 Judgment, 7 August 2014.

² 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.

³ 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, paras. 30, 31.

⁴ F3/3 Decision on Defence Motion for Extension of Time and Page Limits on Notices of Appeal and Appeal Briefs, 29 August 2014, para. 10.

⁵ E313/3/1 Co-Prosecutors’ Notice of Appeal of a Decision in Case 002/01, 29 September 2014.

⁶ E313/1/1 Notice of Appeal Against the Judgment in Case 002/01, 29 September 2014.

⁷ E313/2/1 Déclaration d’appel de la Défense de M. Khieu Samphan contre le jugement rendu dans le procès 002/01, 29 September 2014.

⁸ F6 Second Request for Extension of Time and Page Limits for Filing Appeals Against the Trial Judgment in Case 002/01, 2 October 2014.

⁹ F6 Second Request for Extension of Time and Page Limits for Filing Appeals Against the Trial Judgment in Case 002/01, 2 October 2014, paras. 3-12.

¹⁰ F6 Second Request for Extension of Time and Page Limits for Filing Appeals Against the Trial Judgment in Case 002/01, 2 October 2014, para. 15.

single language.¹¹ The Nuon Chea Defence estimate that if they are granted 500 pages, translation to Khmer will require approximately five months, whereas a 150 page brief would require 47 days.¹²

5. On 6 October 2014, the Defence for Khieu Samphan filed their second request for extension of page and time limits for their appeal from the Case 002/01 Judgment.¹³ In it, they request an extension to 300 pages in French¹⁴, and an additional 114 days (for a total of 174 days from submission of their Notice of Appeal) to file in both languages.¹⁵ The Khieu Samphan Defence estimate that if they are granted 300 pages, translation from French to Khmer will require 60-84 working days.¹⁶ The Khieu Samphan Defence argue that there should not be a requirement that Parties file in one language with Khmer translation to follow¹⁷, but that if such a requirement is imposed, and if the response time begins to run from that date, then the response time for the Khieu Samphan Defence should not begin to run until they receive the French translation of the Co-Prosecutors' appeal.¹⁸
6. The Co-Prosecutors hereby respond to the requests of the two Defence teams. They also submit that all Parties, as well as other ECCC offices and Chambers whose work will be affected by appellate proceedings in Case 002/01, would benefit for planning purposes from knowing as soon as possible the full briefing schedule for the appeal and response briefs. Therefore, in order to avoid unnecessary delay by submitting a separate filing, the Co-Prosecutors also include in this response a request for time and page extensions for their Response Brief.

II. RESPONSE AND REQUEST

A. Page Extensions

¹¹ F6 Second Request for Extension of Time and Page Limits for Filing Appeals Against the Trial Judgment in Case 002/01, 2 October 2014, para. 16.

¹² F6 Second Request for Extension of Time and Page Limits for Filing Appeals Against the Trial Judgment in Case 002/01, 2 October 2014, para. 14. The Defence originally estimated this same number of pages would require 42 calendar days. 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, para. 30 and fn. 39.

¹³ F7 Demande urgente de la Défense de M. Khieu Samphan aux fins de prorogation du délai et d'extension du nombre de pages du mémoire d'appel, 6 October 2014.

¹⁴ F7 Demande urgente de la Défense de M. Khieu Samphan aux fins de prorogation du délai et d'extension du nombre de pages du mémoire d'appel, 6 October 2014, para. 16.

¹⁵ F7 Demande urgente de la Défense de M. Khieu Samphan aux fins de prorogation du délai et d'extension du nombre de pages du mémoire d'appel, 6 October 2014, para. 20.

¹⁶ F7 Demande urgente de la Défense de M. Khieu Samphan aux fins de prorogation du délai et d'extension du nombre de pages du mémoire d'appel, 6 October 2014, fn. 18.

¹⁷ F7 Demande urgente de la Défense de M. Khieu Samphan aux fins de prorogation du délai et d'extension du nombre de pages du mémoire d'appel, 6 October 2014, para. 22.

¹⁸ F7 Demande urgente de la Défense de M. Khieu Samphan aux fins de prorogation du délai et d'extension du nombre de pages du mémoire d'appel, 6 October 2014, para. 23.

7. Pursuant to Practice Direction 5.2, the length of any document filed to the Supreme Court Chamber may not exceed 30 pages in English or French, or 60 pages in Khmer, unless otherwise ordered by the ECCC.¹⁹

i. Defence Requests for Appeal Briefs

8. The Co-Prosecutors, like the Supreme Court Chamber, recognize that reasonable time and page extensions are necessary under the circumstances.²⁰ For this reason, they did not object to the original request put forward jointly by the Defence teams for 150 pages in French or English each.²¹ However, the page extensions now requested by the Defence teams are excessive, unwarranted, and not in the interests of justice. The Nuon Chea Defence now seek either an infinite number of pages or, in the alternative, more than triple their originally requested amount. The Khieu Samphan Defence now seek double their originally requested amount.
9. The Co-Prosecutors acknowledge that an extension beyond 30 pages is warranted, for example, due to the point put forward by both Defence teams that limited opportunities for interlocutory appeal during trial resulted in a greater number of grounds of appeal following judgment.²² The Co-Prosecutors also note, however, that the Supreme Court Chamber's jurisdiction on appeal from judgment is circumscribed.²³ The Co-Prosecutors also submit that many of the reasons put forward in support of larger page limits, particularly by the Nuon Chea Defence, are not only frivolous, but indicative of the types of argument that can be expected to fill any pages beyond those strictly necessary that are granted to the Defence for their appeal briefs.
10. Arguments put forward by the Nuon Chea Defence in favour of larger page limits include claims that: 1) page limits for filings are not applicable at the ECCC²⁴; 2) greater page allocations should be allocated to remedy alleged investigatory and trial stage procedural errors that have yet to be proven²⁵; 3) they intend to make arguments regarding alleged errors of fact and law which, they admit, are outside of this Chamber's jurisdiction in regards to this appeal²⁶; and 4)

¹⁹ Practice Direction ECCC/01/2007/Rev.8, Filing of Documents before the ECCC, Art. 5.2.

²⁰ F3/3 Decision on Defence Motion for Extension of Time and Page Limits on Notices of Appeal and Appeal Briefs, para. 10.

²¹ F3/1 Co-Prosecutors' Response to the Khieu Samphan and Nuon Chea Defence Request for Extended Deadlines and Page Limits in Regards to Case 002/01 Judgment Appeals, 21 August 2014, para. 4.

²² F7 Demande urgente de la Défense de M. Khieu Samphan aux fins de prorogation du délai et d'extension du nombre de pages du mémoire d'appel, 6 October 2014, para. 15; F6 Second Request for Extension of Time and Page Limits for Filing Appeals Against the Trial Judgment in Case 002/01, 2 October 2014, para. 9.

²³ Internal Rule 104(1).

²⁴ F6 Second Request for Extension of Time and Page Limits for Filing Appeals Against the Trial Judgment in Case 002/01, 2 October 2014, para. 3.

²⁵ F6 Second Request for Extension of Time and Page Limits for Filing Appeals Against the Trial Judgment in Case 002/01, 2 October 2014, para. 5.

²⁶ F6 Second Request for Extension of Time and Page Limits for Filing Appeals Against the Trial Judgment in Case 002/01, 2 October 2014, para. 11.

“considerably longer appellate submissions”²⁷ are warranted because they intend to make requests for the Supreme Court Chamber to review the factual findings of the Trial Chamber *de novo*, contrary to this Chamber’s prior rulings on the issue.²⁸ None of these arguments arise from new facts not present just six weeks earlier when the Nuon Chea defence requested 150 pages and none of the arguments are valid in any event. The mere number of grounds of appeal listed in the Defences’ Notices of Appeal should be given little weight in determining reasonable length for appellate briefs. First, the quantity of grounds of appeal listed in a Notice of Appeal is entirely a product of the filing party, unchecked by any limitations as to merit. Second, there is no requirement that a Party actually submit argument on all of the grounds listed in its Notice of Appeal. There is, however, a prohibition on arguing a ground not contained in a notice of appeal.²⁹ Therefore, parties may be incentivized to be over-inclusive in their Notices of Appeal in order to choose and consolidate their strongest arguments as they proceed in their drafting. Third, by the time the Parties filed their Notices of Appeal they were on notice by this Chamber that their subsequent page and time extension requests would be decided, at least in part, based on the “parameters to be supplied in the notices of appeal”.³⁰ This appears to have provided a further incentive for the Defence teams to inflate grounds of appeal for the purposes of securing large time and page extensions.

11. Even a cursory perusal of the Defence grounds of appeal reveals that most of the grounds simply list factual findings or legal rulings with which they disagree without identifying how these could invalidate the judgment. Experienced advocates such as those representing Nuon Chea and Khieu Samphan, certainly know that a serious appeal would concentrate on a limited number of issues that had a serious effect on the Judgment for which there are credible arguments to put forward. The failure of the Defence to do so does not merely reflect a lack of confidence in the legitimacy of any of their arguments, their shotgun approach also means that the purpose of notice, to advise the Supreme Court Chamber and the opposing parties what the issues will be, is largely frustrated.
12. Unreasonably large page limits will simply delay the progress of proceedings without contributing to their quality. As the Co-Prosecutors have previously noted, Internal Rule 21 mandates not only that “ECCC proceedings shall be fair” and “preserve a balance between the

²⁷ F6 Second Request for Extension of Time and Page Limits for Filing Appeals Against the Trial Judgment in Case 002/01, 2 October 2014, para. 12.

²⁸ F6 Second Request for Extension of Time and Page Limits for Filing Appeals Against the Trial Judgment in Case 002/01, 2 October 2014, para. 12.

²⁹ Internal Rule 110(1).

³⁰ F3/3 Decision on Defence Motion for Extension of Time and Page Limits on Notices of Appeal and Appeal Briefs, 29 August 2014, para. 10.

rights of the parties”, but also that “[p]roceedings before the ECCC shall be brought to a conclusion within a reasonable time.”³¹ The Nuon Chea Defence submit that 500 pages would take approximately 5 months to translate into the requisite Khmer.³² Thus, by the Defence’s own calculations, if each team was granted the 500 pages requested by the Nuon Chea Defence, resulting in 1000 pages total of Defence briefs, and the prosecution was granted an equal amount of pages to respond, the translation of the 2000 pages of parties’ briefs would take 20 months. The sudden change in the Nuon Chea defence request from 150 pages to a wholly unreasonable 500 pages would appear to be a tactical manoeuvre.

13. As the two Defence teams have acknowledged “the quality and effectiveness of an appeal brief do not depend on its length, but on the clarity and cogency of the arguments presented.”³³ The Appeals Chamber of the ICTY has also stated that because of that principle, “excessively long briefs do not necessarily facilitate the efficient administration of justice.”³⁴ Excessively long briefs such as those requested by the Defence should therefore not be allowed here. Although the Co-Prosecutors submit that 150 pages in French or English, per Defence team, remains a reasonable page limit, they do not object to an extension of up to 200 pages in French or English per Defence team.

ii. Co-Prosecutors’ Request for Response Brief

14. The Co-Prosecutors request that the Supreme Court Chamber grant an extension of the page limit for their response to the two Defence appeal briefs at this time, so that all Parties, court offices, the Trial Chamber³⁵, and the public can plan around the briefing schedule.
15. The number of pages, and the amount of time, the Co-Prosecutors will need to respond to the Defence appeals correlates strongly with the extensions granted to the Defence for their appeal briefs. The Co-Prosecutors therefore request that they be granted the same number of pages for their response as the total combined pages of the appeal briefs for the two Defence teams (*i.e.*, if

³¹ Internal Rule 21(4) (emphasis added).

³² F6 Second Request for Extension of Time and Page Limits for Filing Appeals Against the Trial Judgment in Case 002/01, 2 October 2014, para. 14.

³³ 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, para. 29 (quoting *Prosecutor v. Stanišić and Zupljanin*, IT-08-91-A, Decision on Joint Defence Motion Seeking Extension of Time to File Notice of Appeal, 16 April 2013, p. 2).

³⁴ *Prosecutor v. Stanišić and Simatović*, IT-03-69-A, Decision on Stanišić’s Urgent Request for Extension of Word Limit, 31 October 2013, p.2.

³⁵ The Trial Chamber is will soon begin trial in Case 002/02 on a reduced schedule in order to accommodate the Parties’ work on briefing in the Case 002/01 Judgment Appeals. E316 Scheduling Order for Hearing on the Substance in Case 002/02, 19 September 2014, p. 3.

each Defence team is granted 200 pages in English or French, the Co-Prosecutors request 400 pages in English or French for their response).

16. It is rational and fair that the Co-Prosecutors be allocated the same amount of space to respond to the arguments that are made as it took to make them. This is reasonable because each of the two Defence teams may end up devoting their entire individual page allotments to entirely different appeal grounds, either by design or by coincidence, and therefore equality of arms would mandate that the Co-Prosecutors have the same amount of pages to rebut those arguments.³⁶ As a raw metric, by comparing the number of grounds in the two Defence notices of appeal it is evident that the Nuon Chea Defence have at least 73 grounds of appeal that the Khieu Samphan Defence do not. Additionally, even in situations where there may be some overlap between the Defence teams' arguments in terms of subject matter, those arguments could very well be made on separate bases, or rely on different authorities, thereby necessitating two separate responses on the same issue from the Co-Prosecutors.
17. Depending on the content of the Defence teams' briefs the Co-Prosecutors may not ultimately need their full page allotment equal to the cumulative pages granted to the Defence teams. It is possible that the two Defence appeal briefs will contain significant overlap, but also possible that they will contain no overlap at all. If the Co-Prosecutors can adequately deal with the issues with fewer pages we will file shorter briefs. However, as it is the content and structure of the Defence teams' appellate briefs that will be the determining factors as to the length needed by the Co-Prosecutors to respond, and these are yet unknown, the Co-Prosecutors should be given the benefit of the doubt.
18. The Co-Prosecutors also submit that it would be within their rights to respond individually to each of the Defence Appeal briefs, and should they do so they would currently get a page allowance equal to the combined Defence appeal briefs. At present, prior to any extensions being granted, both the appeal and response briefs are subject to a 30 page limit in English or French.³⁷ Thus the Co-Prosecutors would be responding to two 30 page appeal briefs with two 30 page response briefs. The Co-Prosecutors submit there is no reason that parity should not be maintained in the extensions when they respond jointly.

³⁶ See *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09, Decision on the Defence Application for extension of page limit for the Defence's Response to the Prosecutor's Application for leave to appeal, 18 March 2010, p.4 ("the principle of equality of arms between the parties demands that the Defence be entitled to file its response to the Prosecutor's Application for leave to appeal under the same conditions as the Prosecutor filed such Application").

³⁷ Practice Direction ECCC/01/2007/Rev.8, Filing of Documents before the ECCC, Art. 5.2.

19. For precision, the Co-Prosecutors note that all page totals mentioned herein are inclusive of footnotes, and should otherwise comply with the relevant Practice Directions.³⁸

B. Time Extension

20. Pursuant to Rule 107(4), appeal briefs are due within 60 days of the date of the filing of the Notice of Appeal, however, this Chamber has the power to extend this deadline.³⁹ No time limit is stated for responses to appeal briefs.

i. Defence Requests for Appeal Briefs

21. The Co-Prosecutors do not object to the request by the Nuon Chea Defence for an extension of 30 days (for a total of 90 days from the filing of Notices of Appeal) to file appeal briefs in one language only. However, as further discussed below in relation to response briefs, they object to the Nuon Chea Defence's suggestion that the response time should begin to run from the time of filing in a single language. The Co-Prosecutors object to the request by the Khieu Samphan Defence for 174 days from the filing of Notices of Appeal to file in two languages as excessive and not in the interests of justice, because it is not conducive to the timely resolution of proceedings. Under the timetable suggested by the Khieu Samphan Defence, allowing for a response time equivalent to the time granted to each of the Defence teams for their appeal would mean that briefing would not be completed until approximately September 2015. That would not constitute the conclusion of proceedings within a "reasonable time," as mandated by Rule 21.

ii. Co-Prosecutors' Conditional Request for Appeal Brief

22. The Co-Prosecutors request that should this Chamber extend the appeal brief deadline for other Parties in Case 002/01, the same deadline should be applied to the Co-Prosecutors for reasons of simplicity and uniformity of scheduling of any subsequent briefing or appeal hearings. Thus, whether the Chamber grants the defence a 30 day, 174 day, or any other extension, the same time limit should apply for the filing of the Prosecution appeal brief.

iii. Co-Prosecutors' Request for Response Brief

23. The Co-Prosecutors submit that the Defence teams should be ordered to file in a single language on or before the expiration of a 30 day extension, if granted, but that the response time should not begin to run until the translation in the second requisite language (presumably Khmer) is received. That response times do not begin to run until filings are submitted in Khmer and at

³⁸ The Co-Prosecutors note, in this regard, that the Nuon Chea Defence disregarded the requisite 1.5 line spacing for the majority of their Notice of Appeal. Practice Direction ECCC/01/2007/Rev.8, Filing of Documents before the ECCC, Art. 3.8.

³⁹ Practice Direction ECCC/01/2007/Rev.8, Filing of Documents before the ECCC, Art. 8.1; Internal Rule 39.

least either English or French is mandated by the Practice Directions⁴⁰ and standard practice at the ECCC. There is no reason to deviate from the standard practice here, and the Co-Prosecutors would be prejudiced should that occur, as the length of time during which the members of the Office of the Co-Prosecutors who work in Khmer, including the National Co-Prosecutor, would be curtailed. Such a curtailment would not only be prejudicial, but inappropriate for Chambers lodged in the Courts of Cambodia and for which the official language is Khmer.⁴¹

24. The Co-Prosecutors also request that the same extension granted to each Defence team for those teams' appeal briefs be granted to the Co-Prosecutors for their response brief. Thus, should the Chamber grant a 30 day extension (for a total of 90 days from Notice of Appeal) to each Defence team to file their appeal brief in a single language, the Co-Prosecutors would also be granted 90 days from the receipt of the Defence briefs in two languages in order to file their response in a single language. At the risk of stating the obvious, the Co-Prosecutors are therefore requesting only half the time to respond that was cumulatively spent by the Defence teams creating the appeal briefs to which they are responding. While this places the Co-Prosecutors at a disadvantage, it is a concession they are willing to make in the interests of timely justice.

III. REQUESTED RELIEF

25. For the foregoing reasons, the Co-Prosecutors request that this Chamber:
- a) **Grant** the Defence teams page extensions for their appeal briefs of no more than 200 pages, inclusive of footnotes, in English or French;
 - b) **Grant** the Co-Prosecutors a page extension for their response brief not less than the number of pages granted to the Defence teams for their appeal briefs combined;
 - c) **Grant** the Defence teams a 30 day extension to file their appeal briefs in a single language, with Khmer translation to follow as soon as possible;
 - d) **Set** the filing deadline for the Co-Prosecutors' and Defence teams' appeal briefs as the same date; and

⁴⁰ Practice Direction ECCC/01/2007/Rev.8, Filing of Documents before the ECCC, Art. 7.1.

⁴¹ ECCC Agreement, Art. 26(1).

- e) **Grant** the Co-Prosecutors the same extension to file their response brief in a single language as granted to each Defence team for their appeal brief, with Khmer translation to follow as soon as possible.

Respectfully submitted,

Date	Name	Place	Signature
16 October 2014	CHEA Leang Co-Prosecutor	Phnom Penh	
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