



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

**ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ**

Kingdom of Cambodia

Nation Religion King

Royaume du Cambodge

Nation Religion Roi

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber

Chambre de la Cour suprême

ឯកសារដើម
ORIGINAL/ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ (Date): 11-Dec-2014, 15:39
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Case File/Dossier N°. 002/19-09-2007/ECCC/SC

Before:

Judge KONG Srim, President

Judge Chandra Nihal JAYASINGHE

Judge SOM Sereyvuth

Judge Agnieszka KLONOWIECKA-MILART

Judge MONG Monichariya

Judge Florence Ndepele MWACHANDE-MUMBA

Judge YA Narin

Date:

11 December 2014

Language(s):

Khmer/English

Classification:

PUBLIC

DECISION ON DEFENCE MOTIONS FOR EXTENSION OF PAGES TO APPEAL AND TIME TO RESPOND

Co-Prosecutors

CHEA Leang

Nicholas KOUMJIAN

Co-Lawyers for NUON Chea

SON Arun

Victor KOPPE

Accused

KHIEU Samphân

NUON Chea

Co-Lawyers for KHIEU Samphân

KONG Sam Omn

Anta GUISSÉ

Arthur VERCKEN

Civil Party Lead Co-Lawyers

PICH Ang

Marie GUIRAUD

1. **THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Supreme Court Chamber” and “ECCC”, respectively) is seized of the “*Demande urgente de la Défense de M. KHIEU Samphân aux fins de prorogation du délai de réponse au mémoire d’appel des Co-Prosecuteurs*” filed on 1 December 2014,¹ and “NUON Chea’s Urgent Request for an Extension of Time to Respond to the Co-Prosecutor[s]’ Appeal against the Case 002/01 Judgment” filed on 2 December 2014 (“NUON Chea’s Request”),² to which the Co-Prosecutors responded in consolidated form on 4 December 2014.³
2. The Supreme Court Chamber is also seized of NUON Chea’s “Urgent Request for Reconsideration of Page Limits for Appeals against the Case 002/01 Judgment” filed on 2 December 2014,⁴ to which the Co-Prosecutors responded on 4 December 2014.⁵

BACKGROUND

3. On 7 August 2014, the Trial Chamber issued its judgment in Case 002/01 (“Trial Judgment”),⁶ convicting both KHIEU Samphân and NUON Chea of the crimes against humanity of extermination (encompassing murder), persecution on political grounds, and other inhumane acts (comprising forced transfer, enforced disappearances and attacks against human dignity), and sentencing them each to life imprisonment.⁷
4. On 29 September 2014, NUON Chea and KHIEU Samphân filed their notices of appeal against the Trial Judgment, advancing 223 and 148 grounds of appeal, respectively.⁸ The Co-Prosecutors also filed a notice of appeal on 29 September 2014, but on the sole

¹ Document Number F12 (“KHIEU Samphân’s Time Request”).

² Document Number F14 (“NUON Chea’s Time Request”).

³ Co-Prosecutors’ Joint Response to NUON Chea’s and KHIEU Samphân’s Urgent Requests for Extensions of Time to Respond to the Co-Prosecutors’ Appeal against the Case 002/01 Judgment, F12/1, 4 December 2014 (“OCP Time Response”).

⁴ Document Number F13 (“NUON Chea’s Page Request”).

⁵ Co-Prosecutors’ Response to the NUON Chea Request for Further Extended Page Limits in Regards to Case 002/01 Judgment Appeal, F13/1, 4 December 2014 (“OCP Page Response”).

⁶ Case 002/01 Judgment, E313, 7 August 2014.

⁷ Trial Judgment, p. 622.

⁸ Notice of Appeal against the Judgment in Case 002/01, E313/1/1, 29 September 2014; *Déclaration d’appel de la Défense de M. KHIEU Samphân contre le jugement rendu dans le procès 002/01*, E313/2/1, 29 September 2014. See also Decision on Defence Motion for Extension of Time and Page Limits on Notices of Appeal and Appeal Briefs, F3/3, 29 August 2014.

ground that the Trial Chamber allegedly erred in deciding to exclude consideration of the third form of joint criminal enterprise (“JCE III”) as a mode of responsibility.⁹

5. On 2 and 6 October 2014, NUON Chea and KHIEU Samphân requested extensions of time and pages for the filing of their appeal briefs.¹⁰ The Co-Prosecutors also requested an extension of time to file their appeal brief, and an extension of time and page limits to respond to NUON Chea’s and KHIEU Samphân’s appeal briefs.¹¹ On 31 October 2014, the Supreme Court Chamber granted the requests in part, allowing NUON Chea and KHIEU Samphân to file their respective appeal briefs no later than 29 December 2014, *i.e.* 90 days after their notices of appeal, in English or French.¹² The Supreme Court Chamber also permitted the Co-Prosecutors to file a consolidated response of no more than 280 pages, to be submitted within 30 days of the filing of the Khmer versions of NUON Chea’s and KHIEU Samphân’s appeal briefs, whichever is notified last.¹³ The Supreme Court Chamber granted no extension to the Co-Prosecutors to file their appeal brief,¹⁴ which they did, on 28 November 2014 (“Co-Prosecutors’ Appeal”).¹⁵

SUBMISSIONS

6. KHIEU Samphân requests permission to file his response to the French version of the Co-Prosecutors’ Appeal within 30 days after filing his own appeal brief (which is due no later than 29 December 2014), or within 30 days of the filing of the French translation of the Co-Prosecutors’ Appeal if the translation is not filed before 29 December 2014.¹⁶ He submits that the extension is necessary in light of the complexity of the questions raised in the Co-Prosecutors’ Appeal, the novelty of the issue before the Supreme Court Chamber, and the fact that he is currently occupied with drafting his own appeal brief.¹⁷ NUON Chea seeks leave for a similar extension of 30 days’ time from the filing of his appeal brief to file his response

⁹ Co-Prosecutors’ Notice of Appeal of a Decision in Case 002/01, E313/3/1, 29 September 2014.

¹⁰ Second Request for Extension of Time and Page Limits for Filing Appeals against the Trial Judgment in Case 002/01, F6, 2 October 2014; *Demande urgente de la Défense de M. KHIEU Samphân aux fins de prorogation de délai et d’extension du nombre de pages du mémoire d’appel*, F7, 6 October 2014.

¹¹ Co-Prosecutors’ Response and Request on Case 002/01 Appeal and Response Brief Extensions, F7/1, 16 October 2014 (“OCP Extension Response and Request”).

¹² Decision on Motions for Extensions of Time and Page Limits for Appeal Briefs and Responses, F9, 31 October 2014 (“Decision on Appeal Extensions”), para. 23.

¹³ Decision on Extensions, para. 23.

¹⁴ Decision on Appeal Extensions, para. 14.

¹⁵ Co-Prosecutors’ Appeal against the Judgment of the Trial Chamber in Case 002/01, F11, 28 November 2014.

¹⁶ KHIEU Samphân’s Time Request, para. 7.

¹⁷ KHIEU Samphân’s Time Request, para. 3.

to the Co-Prosecutors' Appeal, adopting KHIEU Samphân's reasoning in support of his motion, albeit without the caveat of a French translation.¹⁸

7. The Co-Prosecutors believe that an extension of time is warranted and do not oppose NUON Chea's and KHIEU Samphân's requests for 30 days' time from 29 December 2014 to file their responses.¹⁹ The Co-Prosecutors specify, however, that the Supreme Court Chamber should only grant the extension to KHIEU Samphân after receiving written confirmation that he and his Counsel will not use it to impede trial proceedings in Case 002/02.²⁰

8. NUON Chea also requests an additional 60 pages for his appeal brief,²¹ indicating that he "has sought in earnest to limit [his] submissions as far as possible", even "decid[ing] to withdraw some [...] grounds of appeal", but that "[i]n the absence of a further extension, [he] will be forced to choose between abandoning additional grounds of appeal and omitting key arguments in support of the appeals [he] does maintain".²² He submits that he "has now drafted a substantial majority of [his] appeal brief [...] [which] currently stands at 232 pages", but that "[i]mportant appeal grounds remain to be drafted" for which he "anticipates that the final page count will reach 280".²³

9. The Co-Prosecutors respond that NUON Chea's request "contains no relevant new facts or arguments, and that "their position [therefore] remains unchanged from the last response filed on 16 October 2014".²⁴ The Co-Prosecutors stated at the time that, "[a]lthough [...] 150 pages in English or French, per Defence team, remains a reasonable page limit, they do not object to an extension of up to 200 pages".²⁵

APPLICABLE LAW

10. Article 8.3 of the Practice Direction²⁶ provides that responses to any applications or pleadings shall be filed within 10 days of notification. According to Article 5.2 of the Practice Direction, the length of any document filed to the Supreme Court Chamber shall not

¹⁸ NUON Chea's Time Request, paras. 3-4.

¹⁹ OCP Time Response, paras. 2, 5(a).

²⁰ OCP Time Response, paras. 3-4, 5(b).

²¹ NUON Chea's Page Request, para. 5.

²² NUON Chea's Page Request, para. 2.

²³ NUON Chea's Page Request, para. 5.

²⁴ OCP Page Response, para. 1.

²⁵ OCP Extension Response and Request, para. 13.

²⁶ Practice Direction on the Filing of Documents before the ECCC, Revision 8, 7 March 2012 ("Practice Direction").

exceed 30 pages in English or French, or 60 pages in Khmer. Rule 39(2) of the Internal Rules²⁷ foresees that, unless provided otherwise in the Internal Rules, Judges may set time limits for pleadings, written submissions and documents relating to a request or appeal. Rule 39(4) of the Internal Rules also empowers judges to “extend any time limits set by them” or to “recognize the validity of any action executed after the expiration of a time limit prescribed in these [Internal Rules] on such terms, if any, as they see fit.”²⁸ Article 5.4 of the Practice Direction further provides that the relevant Chamber may, at the request of a party, extend applicable page limits in exceptional circumstances.

DISCUSSION

Requests for Extension of Time to Respond to Co-Prosecutors’ Appeal

11. The Supreme Court Chamber notes that the Co-Prosecutors’ Appeal is well within the statutory page limit for documentary filings at only 29 pages long, and deals with just a single issue, namely the Trial Chamber’s 2011 decision to exclude consideration of JCE III as a mode of responsibility,²⁹ which NUON Chea admits has already “been litigated twice before this Tribunal”.³⁰ Indeed, both NUON Chea and KHIEU Samphân have previously made written submissions on point at trial in opposition to the Co-Prosecutors’ desire to include JCE III in Case 002,³¹ and they have the benefit of similar submissions made at the time by IENG Sary and IENG Thirith.³² KHIEU Samphân, IENG Sary, and IENG Thirith had also filed lengthy written submissions before the Pre-Trial Chamber in opposition to an order by the Co-Investigating Judges’ holding joint criminal enterprise to be applicable in all three forms before the ECCC,³³ which the Pre-Trial Chamber overturned in part, ruling that JCE III

²⁷ Internal Rules of the ECCC, Revision 8, 3 August 2011 (“Internal Rules”).

²⁸ See also Article 8.1 of the Practice Direction.

²⁹ Decision on the Applicability of Joint Criminal Enterprise, E100/6, 12 September 2011.

³⁰ NUON Chea’s Page Request, para. 3.

³¹ Response to Co-Prosecutors’ Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, E100/5, 22 July 2011; *Réponse à la demande des co-procureurs relative à la troisième catégorie d’entreprise criminelle commune*, E100/3, 22 July 2011.

³² IENG Sary’s Response to the Co-Prosecutor[s]’ Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability and Request for an Oral Hearing, E100/2, 22 July 2011; Defence Response to Co-Prosecutors’ Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, E100/1, 22 July 2011.

³³ Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, D97/13, 8 December 2009; *Appel contre l’ordonnance sur l’application devant les CETC de la responsabilité dite “Entreprise criminelle commune”*, D97/16/1, 18 January 2010 (confidential); IENG Thirith Defence Appeal Against the Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise of 8 December 2009, D97/15/1, 18 January 2010; IENG Sary’s Appeal Against the OCIJ’s Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, D97/14/5, 22 January 2010.

did not form part of customary international law during the temporal jurisdiction of the ECCC.³⁴ NUON Chea and KHIEU Samphân are therefore clearly well-acquainted with and prepared to respond to the substance of the Co-Prosecutors' Appeal. The Supreme Court Chamber is accordingly not persuaded by contentions of complexity or novelty to justify an extension of time.

12. Nevertheless, the Supreme Court Chamber acknowledges that the 10-day time limit from notification of the Co-Prosecutors' Appeal for the filing of a response thereto, in accordance with Article 8.3 of the Practice Direction, would require NUON Chea and KHIEU Samphân to divert attention away from their appeal briefs, due at the end of this month.³⁵

13. Considering the relative importance of the appeal brief, the Supreme Court Chamber finds that it is appropriate to grant NUON Chea's and KHIEU Samphân's requests to file their respective responses to the Co-Prosecutors' Appeal with 30 days after the 29 December 2014 deadline for the filing of their own appeal briefs. Considering further that the trial in Case 002/02 is scheduled to resume on 8 January 2015, the Supreme Court Chamber expects that granting them this extension suffices to reconcile their obligations towards the ongoing trial, particularly with respect to attending trial proceedings in Case 002/02. In conclusion, NUON Chea and KHIEU Samphân may file their responses to the Co-Prosecutors' Appeal no later than Wednesday, 28 January 2015.

14. As to KHIEU Samphân's request to begin the 30-day time limit from the filing of the French translation of the Co-Prosecutors' Appeal in the event that it is filed after 29 December 2014, the Supreme Court Chamber recalls that the official working languages of the ECCC are Khmer, English, and French,³⁶ and that all documents before the ECCC must be filed in Khmer as well as in English *or* French,³⁷ the day after which associated

³⁴ Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, D97/15/9, 20 May 2010.

³⁵ In particular, the Supreme Court Chamber is cognizant that KHIEU Samphân and his defence team appear to have a problem meeting their workload, as demonstrated by their refusal to attend trial proceedings in Case 002/02 until after their appeal briefs are filed. *See* Decision on the Appointment of Court Appointed Counsel for KHIEU Samphan, E320/2, 21 November 2014, paras. 1-10, *and references cited therein*. *See also* Memorandum from Judge NIL Nonn, President of the Trial Chamber, entitled "Warning to Counsel for NUON Chea and KHIEU Samphan", E320, 24 October 2014, para. 1.

³⁶ Article 45 *new* of the Law on the Establishment of the ECCC, as amended on 27 October 2004 ("ECCC Law").

³⁷ Article 7.1 of the Practice Direction (emphasis added).

subsequent time limits will commence.³⁸ Article 8.5 of the Practice Direction provides that, in exceptional circumstances, “a Chamber may decide that the time limits commence on the first calendar day following the day of filing in all three languages”. KHIEU Samphân does not substantiate his request, which is in any event premature, to benefit from the exception provided at Article 8.5 of the Practice Direction; it is accordingly dismissed.

Request for Extension of Page Limit for NUON Chea’s Appeal

15. The Supreme Court Chamber recalls its previous determination that a limit of 210 pages each for NUON Chea’s and KHIEU Samphân’s appeal briefs, and a limit of 280 pages for the Co-Prosecutors’ consolidated response, are appropriate in the present case.³⁹ Such limits, however necessary, are to be tailored according to the needs of the parties in balance with the tenets of judicial efficiency.⁴⁰

16. The Supreme Court Chamber considered 210 pages to be appropriate for NUON Chea’s 223 grounds of appeal and the 16 distinct Trial Chamber decisions he indicated intending to argue. NUON Chea now indicates having decided to drop some grounds of appeal, but nevertheless requiring an additional 60 pages to properly argue the entirety of his appeal. The Supreme Court Chamber considers that NUON Chea’s latest submissions are reasonable enough to warrant granting the extension of pages sought.

³⁸ Article 8.5 of the Practice Direction.

³⁹ Decision on Appeal Extensions, para. 17.

⁴⁰ See Decision on Appeal Extensions, paras. 15-17.

DISPOSITION

17. For the foregoing reasons, the Supreme Court Chamber:

GRANTS the Requests, in part;

ALLOWS NUON Chea to file an appeal brief no longer than 270 pages in English, with its equivalent in Khmer; and,

ALLOWS NUON Chea and KHIEU Samphân to file their respective responses to the Co-Prosecutors' Appeal no later than Wednesday, 28 January 2015.

Phnom Penh, 11 December 2014

President of the Supreme Court Chamber



KONG Srim