

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



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**CO-PROSECUTORS' REPLY TO THE DEFENCE RESPONSE TO THE REQUEST
TO REMEDY DEFECTS IN KHIEU SAMPHAN'S SUBMISSIONS ON APPEAL**

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REPLY

I. Procedural History

1. On 30 September 2014, the Co-Prosecutors were notified of Khieu Samphan's notice of appeal ("Notice") against the Judgment of the Trial Chamber in Case 002/01 ("Trial Judgment").¹ On 29 December 2014, Khieu Samphan filed his submissions on appeal ("Appeal") to the Supreme Court Chamber ("Chamber"). On 31 December 2014, Khieu Samphan filed a corrected version ("Corrected Appeal").²
2. On 6 January 2015, the Co-Prosecutors requested the Chamber to order the Khieu Samphan Defence ("Defence") to cure defects that left the Parties uncertain as to the content and scope of the Appeal ("Request").³ On 13 January 2015, the Defence filed their response to the Co-Prosecutors' Request ("Response").⁴ In their Response, the Defence oppose the Request, characterising it as unwarranted and unhelpful.⁵ They suggest the Corrected Notice is clear and that the Co-Prosecutors are confusing paragraph numbers with grounds of appeal.⁶ Nonetheless, the Defence provided a supplementary Annex with a chart linking the paragraphs of the Notice to the corresponding paragraphs in the Corrected Appeal.⁷
3. The Co-Prosecutors request leave to submit this Reply in English as *per* Article 7.2 of the applicable Practice Direction, with the Khmer version to follow at the first opportunity and likely within 24 hours. The Co-Prosecutors do so owing to the exceptional circumstances, given the urgency of completing the pleadings phase of this litigation and the limited time available for submission of the Co-Prosecutors' substantive response to the Appeal.

II. Introduction

4. This Reply is necessary in order to clarify the nature of the original Request and to highlight the importance of the remedy sought. In short, it is respectfully submitted that

¹ **E313/2/1** Déclaration d'appel de la Défense de M. KHIEU Samphân contre le jugement rendu dans le procès 002/01, 29 September 2014 ("Notice").

² **F17/Corr. 1** Mémoire d'appel de la Défense de M.KHIEU Samphân contre le jugement rendu dans le procès 002/01, 31 December 2014 at FR 01052205 ("Corrected Appeal").

³ **F18** Co-Prosecutors' Request to Remedy Defects in KHIEU Samphân's Submissions on Appeal, 6 January 2015 ("Request").

⁴ **F18/1** Réponse de la Défense de M. KHIEU Samphân à la « Co-Prosecutors' Request to Remedy Defects in KHIEU Samphân's Submissions on Appeal », 12 January 2015 ("Response").

⁵ *Ibid.* at para. 5.

⁶ *Ibid.* at para. 9.

⁷ *Ibid.*, Annex.

the Corrected Appeal, taken together with the Response, remains defective insofar as it fails to set out each individual ground of appeal alleged as required by ECCC Internal Rule 105.⁸ This failure is not just a technical violation of the Rule and the required standards of advocacy for appellate review as set out in the relevant ECCC and international jurisprudence;⁹ but rather, the deficiencies pose real and substantial difficulties for all Parties, and most importantly for this Chamber, for the remainder of this Appeal process.

5. As it stands now, the precise grounds of appeal being alleged by the Defence are not enumerated nor individually described leaving their content unclear to all. Clarification of these matters is critical at this stage of the Appeal process and will greatly assist in ensuring a more efficient and effective process thereby maintaining the integrity of the proceedings.

III. Argument

6. In the Request, the Co-Prosecutors noted that the Corrected Appeal removed parenthetical references included in the Notice which appeared to refer to grounds of appeal. Taken together with the change in paragraph numbering between the Notice and Corrected Appeal, the Co-Prosecutors argued that it has become difficult to determine precisely what grounds of appeal are presently being alleged by the Defence and whether in fact some grounds of appeal had been abandoned.¹⁰ It was argued that the manner in which the Corrected Appeal had been filed leaves the Chamber and the Parties unable to correlate its *content* to the numbered grounds of appeal in the Notice.¹¹

⁸ Rule 105 (3) states: A party wishing to appeal a judgment **shall** file a notice of appeal setting forth the grounds. The notice shall, **in respect of each ground of appeal**, specify the alleged errors of law invalidating the decision and alleged errors of fact which occasioned a miscarriage of justice. The appellant **shall** subsequently file an appeal brief setting out the arguments and authorities **in support of each of the grounds**, in accordance with the requirements of paragraphs 2(a) and (c) of this Rule. [emphasis added]

⁹ According to the Chamber, appellants must plead their case with “adequate specificity” to enable the SCC to “identify the issues in dispute by reference to specific findings of the Trial Chamber”, see **CF001-F28** Appeal Judgment, 3 February 2012 (“*Duch* Appeal Judgment”), at paras. 41. The Chamber has similarly held that as a general rule, an appellant is required to set out clearly and transparently the grounds of appeal against the decision and the principal arguments in support, *ibid.* See also *Prosecutor v. Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, “Judgement”, Appeals Chamber, 13 December 2004, (“*Ntakirutimana* Appeal Judgement”), para. 396; *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, “Judgement”, Appeals Chamber, 17 December 2004, (“*Kordic and Cerkez* Appeal Judgement”), para. 23; *Prosecutor v. Kvočka*, IT-98-30/1-A, “Judgement”, Appeals Chamber, 28 February 2005, (“*Kvočka* Appeal Judgement”), para. 425.

¹⁰ Request, *supra* note 3 at para. 3.

¹¹ *Ibid.* at para. 5 [emphasis added].

7. Despite the Request for clarification, in their Response the Defence continues to advance grounds of appeal as broad-brush themes – so-called “categories”¹² of alleged errors. This problem is compounded by the lack of reference to *any* numbered or named grounds of appeal in the Corrected Appeal. Accordingly, it is unclear how many individual grounds of appeal are being raised by the Defence and where the delineations between the grounds should lie. Moreover, the Corrected Appeal fails to set out the nature of each of the alleged errors (whether errors of law, errors of fact, discernable errors in the exercise of discretion or mixed errors) and so the proper standard of review to be applied is unclear.
8. For example, the Defence alleges errors of law with respect to the definition of the elements of JCE all under the general heading “JCE”¹³ but does not set out any specific grounds of appeal within this category. From a review of the section, one interpretation would be that the section contains at least five different arguments: that there was no common plan; that the plan Khieu Samphan was part of was not criminal; that the Trial Chamber improperly imported the subjective legal requirement (*mens rea*) of JCE III into JCE I; that the Trial Chamber breached the temporal scope of the jurisdiction of the Court; and that the Trial Chamber erred in the application of the standards of proof.¹⁴ Any one of these arguments could support an individual ground of appeal either as an alleged error of law, of fact or as a mixed error of law and fact.
9. Where the Defence fails to name, list and categorise the errors alleged as in the example provided, it will fall to the Co-Prosecutors to do so in their Appeal Response. This invites misunderstandings and inefficiency, as the Co-Prosecutors may analyse and categorise the grounds differently than the Defence had intended or indeed, differently from how this Chamber understands the Defence arguments. It will fall to the Chamber to re-assess and re-categorise the grounds of appeal and determine the correct standard of review to apply in the circumstances. If this assessment is different than that understood by the Co-Prosecutors, the Chamber may have no response on point.
10. Further, there are a number of arguments raised by the Defence at different points in the Corrected Appeal which appear to relate to the same ground of appeal or which

¹² *Ibid.* at para. 9 [“En effet, les paragraphes d’une déclaration d’appel concernent une ou plusieurs erreurs alléguées tandis que des moyens d’appel sont des **categories** d’erreurs alléguées.”][emphasis added].

¹³ Notice, *supra* note 1 at para. 44; Corrected Appeal, at paras. 68-73.

¹⁴ Corrected Appeal, *supra* note 2 at paras. 68-73.

alternatively could support multiple, related grounds of appeal. In this respect, the Corrected Appeal leaves the submissions of the Defence ambiguous and undefined. For example, the issue of severance is addressed at least fourteen times in the Corrected Appeal,¹⁵ without any indication of the manner in which the Defence intends each of the arguments to be reviewed by the Chamber.

11. It also remains unclear, even with reference to the chart provided by the Defence in the Annex to the Response, which grounds of appeal may have been abandoned and warrant no further assessment by the Chamber. This is due to the fact that while the *structures* of the Notice and the Corrected Appeal do not vary significantly, in many instances the *content* of the Corrected Appeal does not correlate easily with the grounds of appeal described in the Notice.¹⁶ It is to the benefit of all the Parties to understand clearly which grounds of appeal the Defence intends to proceed with and which ones it may have chosen to abandon.

IV. Conclusion

For these reasons, the Co-Prosecutors submit that the Response provided by the Defence does not adequately remedy the defects identified in its Corrected Appeal. Accordingly, the Co-Prosecutors respectfully reiterate their Request that the Chamber order the Defence to supplement its Corrected Appeal by indicating which grounds of appeal are addressed in the Corrected Appeal and where each argument supporting the particular grounds of appeal appear.


12. The Co-Prosecutors do not request an order requiring the Defence to redraft its Corrected Appeal. Rather, we request an order that the Defence provide a supplementary index to the Corrected Appeal which: (i) enumerates the individual grounds of appeal alleged with reference to the corresponding paragraph in the notice of appeal, (ii) describes or names the ground of appeal, and (iii) categorises the ground of appeal as an error of fact, law, discretion or of a mixed character. A similar index

¹⁵ **F17/Corr. 1** Mémoire d'appel de la Défense de M.KHIEU Samphân contre le jugement rendu dans le procès 002/01, 31 December 2014 at FR 01052205, and Corrected Appeal, *ibid.* at paras. 11-12, 14, 47, 192, 288, 330, 339, 340, 426, 427, 484, 490, 496, 644 and 645.

¹⁶ Moreover, the Annex appears potentially deficient in its own right. For example, according to the table provided, the Parties could conclude that all the grounds of appeal set out in paragraphs 6 through 119 of the Notice have been merged into paragraph 11 of the Corrected Appeal. Yet the chart also suggests that paragraphs 62 through 119 have otherwise been replaced or merged by various other paragraphs in the Corrected Appeal.

was provided by the Nuon Chea Defence in its Appeal Brief, an excerpt of which is submitted as **Annex 1** to this Reply.

Respectfully submitted,

Date	Name	Place	Signature
15 January 2015	CHEA Leang Co-Prosecutor	Phnom Penh	
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