

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

**FILING DETAILS**

**Case No:** 002/19-09-2007-ECCC/SC

**Party Filing:** Co-Prosecutors

**Filed to:** Supreme Court Chamber

**Original Language:** English

**Date of Document:** 21 October 2015

**CLASSIFICATION**

**Classification of the document  
suggested by the filing party:** CONFIDENTIAL



**Classification by Supreme Court Chamber:** សម្ងាត់/Confidential

**Classification Status:**

**Review of Interim Classification:**

**Records Officer Name:**

**Signature:**

**CO-PROSECUTORS' OBSERVATIONS ON  
THE TIMETABLE FOR THE CASE 002/01 APPEAL HEARING**

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## I. Observations

1. On 9 October 2015, the Supreme Court Chamber (“SCC”) issued an order scheduling the appeal hearing in Case 002/01.<sup>1</sup> The Order set out a timetable for the hearing, including six general topics to be addressed and the time allotted to each party for each topic.<sup>2</sup> The SCC invited the parties to file their observations on the timetable, if any, by 21 October 2015. The SCC also informed the parties that it would identify in a subsequent decision specific questions that it expects the parties to focus on during oral submissions.<sup>3</sup> The Co-Prosecutors now file their observations on the timetable, including requests for additional time to make submissions on two of the six general topics identified by the SCC.
2. The Internal Rules provide that proceedings at the ECCC “shall be fair and adversarial and preserve a balance between the rights of the parties.”<sup>4</sup> Jurisprudence from other international courts also recognizes the right of all parties to fair proceedings.<sup>5</sup> The Internal Rules also provide that appeal hearings shall be public.<sup>6</sup>
3. While fair and adversarial proceedings do not necessarily require that each party have precisely the same number of pages for filings or the same amount of time to make oral submissions, it is required that each party have a reasonable and meaningful

<sup>1</sup> F30 Order Scheduling Appeal Hearing, 9 October 2015 (“Order”).

<sup>2</sup> F30.1 Timetable for the Hearing (Annex A to the Order) (“Annex A”).

<sup>3</sup> Order, p. 4.

<sup>4</sup> Internal Rule 21(1)(a).

<sup>5</sup> See, e.g., the following: ICTY Appeals Chamber: *Prosecutor v. Hardinaj*, IT-04-84-A, Appeal Judgment, 19 July 2010, para. 46 (“...this decision again inappropriately prioritized logistical considerations over the Prosecution’s right to a fair trial.”) & para. 49 (“Given the potential importance of these witnesses to the Prosecution’s case, the Appeals Chamber finds that, in the context of this case, the error undermined the fairness of the proceedings as guaranteed by the Statute and Rules and resulted in a miscarriage of justice.”); *Prosecutor v. Prlić et al*, IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber’s Ruling Reducing Time for the Prosecution Case, 6 February 2007, para. 14 (“The principle of equality of arms, failing within the fair trial guarantee under the Statute, applies to the Prosecution as well as the defence.”); *Prosecutor v. Aleksovski*, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 25 (“This application of a fair trial in favour of both parties is understandable because the Prosecution acts on behalf of and in the interests of the community, including the victims of the offences charged (in cases before the Tribunal the Prosecutor acts on behalf of the international community). This principle of equality does not affect the fundamental protections given by the general law of Statute to the accused, and the trial proceeds against the background of those fundamental protections. Seen in this way, it is difficult to see how a trial could ever be considered fair where the accused is favoured at the expense of the Prosecution beyond a strict compliance with those fundamental protections.”); *Prosecutor v. Tadić*, IT-94-1-A, Appeal Judgment, 15 July 1999, para. 48. ICC Pre-Trial Chamber: *Situation in the Democratic Republic of Congo*, ICC-01/04, Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, 31 March 2006, para. 38 (“In the view of the Chamber, fairness of the proceedings includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims as guaranteed by the relevant statutes[.]”).

<sup>6</sup> Internal Rule 109(1).

opportunity to make its submissions. What constitutes a meaningful opportunity to make submissions will depend on the circumstances of a given case, including particularly the legal and factual complexity of the matters being addressed.

4. With respect to two topics—the individual criminal responsibility of the Accused and the crimes for which the Accused were convicted—the Co-Prosecutors submit that, given the sheer number of grounds of appeal within these topics and the factual and legal complexity of the matters being addressed, they require additional time to make their submissions.

*The Individual Criminal Responsibility of the Accused*

5. The issues related to the Accused's individual criminal responsibility are factually and legally complex. Analysis of the Accused's individual responsibility necessarily requires an appreciation of the way in which many different sections of the Judgment and many different factual findings come together to support a final conclusion, as well as understanding of the large body of evidence on which the Trial Chamber relied. That can be contrasted with some other topical areas (for example, the Co-Prosecutors' appeal in regards to the mode of joint criminal enterprise liability known as JCE III) that deal with relatively confined and limited issues.
6. Given the complexity and importance of the issues and the size of the evidentiary record, it is unsurprising that individual responsibility is a central feature of both Accused's appeal briefs. For example, Nuon Chea devotes approximately 100 pages—more than a third of his total submissions—to arguments on the grounds of appeal that the SCC has identified as relevant to this topic. Also reflecting the importance of the topic, the SCC has granted the Accused a combined total of 100 minutes to address these issues.
7. This topic has become even more prominent in these appeal proceedings as a result of new evidence submitted and arguments made on appeal. The SCC has now heard witnesses and entertained motions for the admission of additional evidence that Nuon Chea contends is central to his individual responsibility. These filings have also made substantial additions and amendments to the defence arguments articulated in his appeal brief. The new evidence heard on appeal (as well as any additional evidence that the SCC may admit), and Nuon Chea's additional appellate arguments were, of course, not addressed in the Co-Prosecutors' final trial brief nor appeal response as they were not part of the trial record. Therefore, to the extent the SCC intends to entertain

consideration of these new arguments and evidence, this will be the first and only opportunity the Co-Prosecutors will have to formally address the meaning and significance of this evidence and argument comprehensively. Given the prominence of this new evidence in Nuon Chea's case theory on appeal, he can be expected to devote a considerable portion of his oral arguments to this topic. The Co-Prosecutors will need an adequate opportunity to respond.

8. The Co-Prosecutors also note that there is little overlap between Nuon Chea's and Khieu Samphan's theories in regards to individual criminal responsibility. For example, while Khieu Samphan may be broadly supportive of Nuon Chea's defence theory of an internal rift within the CPK, Khieu Samphan's own filings and arguments indicate that he primarily believes his role within Democratic Kampuchea was not significant enough to merit individual criminal responsibility. Nuon Chea, on the other hand, admits that he was one of the most significant leaders of Democratic Kampuchea. As a result of these differing approaches, the Co-Prosecutors cannot effectively respond at the same time to the arguments of both Accused regarding individual criminal responsibility, and will have to address the arguments of Nuon Chea and Khieu Samphan separately, necessarily requiring additional time to do so.
9. Accordingly, the Co-Prosecutors respectfully request that their time allocation for this topical area be increased from 35 to 80 minutes.

*The Crimes for Which the Accused Were Convicted*

10. The Co-Prosecutors submit that the topic related to the crimes for which the Accused were convicted is also a factually complex topic that requires that they be granted additional time to make their submissions. The SCC has identified 117 of Nuon Chea's grounds of appeal and more than 100 paragraphs of Khieu Samphan's appeal brief as being relevant to this topic.<sup>7</sup> The matters covered by this topical area range from highly specific, fact-based issues—such as many individual killings<sup>8</sup>—to very general legal issues, such as the question of whether crimes against humanity require a nexus to an armed conflict.<sup>9</sup> Once again, the Accused's arguments on a number of these issues are divergent. Reflecting this, and the importance of the topic, the SCC has granted the

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<sup>7</sup> Annex A, p. 01154379.

<sup>8</sup> See, e.g., E313/1/1 Notice of Appeal Against the Judgment in Case 002/01, 29 September 2014 ("Nuon Chea Appeal Notice"), Grounds 48-96, 133, 146, 148-150.

<sup>9</sup> F17 Mr Khieu Samphan's Defence Appeal Brief against the Judgment in Case 002/01, 29 December 2014 ("Khieu Samphan Appeal Brief"), paras 52-54.

Accused a combined total of 70 minutes to address these issues. The Co-Prosecutors respectfully request that their time allocation be increased from 25 to 60 minutes to deal with the factual and legal grounds of appeal related to this area.

*Public Nature of Appeal Hearing and Possible Changes to Legal Characterization of Crimes*

11. While the Co-Prosecutors submit that their request for additional time is fully justified by the complexity of the matters to be addressed in each topical area, there are two additional factors that also support the Co-Prosecutors' request.
12. The first of these additional factors is the public nature of proceedings at the ECCC. There is a strong public interest in proceedings that are as open and accessible as possible to the public. It is therefore appropriate for the SCC to consider the impact of its timetable on the public nature of the proceedings and the public's understanding of proceedings at the ECCC. Allowing the Prosecution less than half of the time available to the two Accused to discuss the key issues of the crimes committed and the Accused's responsibility for those crimes would compromise the public's access to the proceedings and risk giving the public a misleading view of the evidence in the case and the matters at issue on appeal.
13. Finally, the Co-Prosecutors note that there is a possibility that they will be required to respond to written submissions of the Accused on the appropriateness of a change in characterization of the crimes during the two topical segments for which the Co-Prosecutors are requesting additional time.<sup>10</sup> This possibility is another factor supporting the Co-Prosecutors' request.

**II. Relief Requested**



14. For the reasons set forth above, the Co-Prosecutors respectfully request that the Supreme Court Chamber:
  - 1) increase the time available for the Co-Prosecutors to make submissions on the Accused's individual criminal responsibility from 35 to 80 minutes and

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<sup>10</sup> Order, p. 5.

- 2) increase the time available for the Co-Prosecutors to make submissions on the crimes for which the Accused were convicted from 25 to 60 minutes.

Respectfully submitted,

| Date            | Name                               | Place      | Signature  |
|-----------------|------------------------------------|------------|--|
| 21 October 2015 | CHEA Leang<br>Co-Prosecutor        | Phnom Penh |  |
|                 | Nicholas KOUMJIAN<br>Co-Prosecutor |            |  |