

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

**FILING DETAILS**

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**NUON CHEA'S URGENT FIRST REQUEST FOR AN EXTENSION OF TIME  
AND PAGE LIMITS FOR FILING HIS NOTICE OF APPEAL AGAINST  
THE TRIAL JUDGEMENT IN CASE 002/02**

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## **PART 1. INTRODUCTION**

1. Pursuant to Rule 39 of the ECCC Internal Rules (“Internal Rules”) and Article 5.4 of the Practice Direction on Filing of Documents, the Co-Lawyers for Nuon Chea (the “Defence”) hereby urgently request at least:
  - (a) a 150-day extension of the 30-day time limit to file Nuon Chea’s notice of appeal against the Case 002/02 trial judgement, to a total of **180** days; and
  - (b) a 70-page extension of the 30-page limit for the notice of appeal, to a total of **100** pages in English;(the “Request”).

## **PART 2. BACKGROUND**

### **I. THE TRIAL JUDGEMENT IN CASE 002/02**

2. On 16 November 2018, the Trial Chamber issued its informal summary judgement in Case 002/02 against Nuon Chea and Khieu Samphân (the “Judgement Summary”). In it, the Trial Chamber noted that “the time limit for filing a notice of appeal, if any, will commence on the first calendar day following the day of service of the notification of the fully reasoned, written Judgement”.<sup>1</sup>
3. On 28 March 2019, the Trial Chamber issued its fully-reasoned, written judgement in Case 002/02 against Nuon Chea and Khieu Samphân (the “Judgement”).<sup>2</sup> Parties were notified of the judgement issuance after hours at 8.37pm the same day. Despite the informality of the prior Judgement Summary, the Judgement issued on 28 March 2019 nonetheless bears the same date as the Judgement Summary, *i.e.*, 16 November 2018.
4. In addition, the Defence notes that the original Judgement Summary distributed on 16 November 2018 – which was marked “COURTESY COPY – NOT CHECKED AGAINST DELIVERY” – has been replaced on the ECCC website by a revised version that is not so marked. It is unclear at this stage what additional differences, if any, there may be between the two versions. The Defence has not received any notification from the Trial Chamber explaining the nature of changes made.

<sup>1</sup> ‘Trial Chamber Summary of Judgement Case 002/02’, 16 Nov 2018 (“Judgement Summary”).

<sup>2</sup> **E465**, ‘Case 002/02 Judgement’, 16 Nov 2018 [*sic* – 28 Mar 2019] (“Judgement”).

## II. RESOURCES IN THE NUON CHEA DEFENCE TEAM

5. On 1 October 2017, immediately following the Defence's filing of its amended closing trial brief in Case 002/02, the Defence's budget for its legal support team was reduced to a skeleton budget equivalent to the full-time salaries of one senior national and one senior international consultant. This prompted the termination of the contracts of two consultants who had been key members of the Case 002/02 trial team. From 1 October 2017 onwards, the team consisted only of three (and eventually four) part-time consultants, together with the two Co-Lawyers. The budget only reverted back to the level it had been set at during trial (excluding additional funding granted owing to repeated and voluminous evidence disclosures from Case 003 and the various Case 004 cases) on 16 November 2018 due to the issuance of the Judgement Summary.
6. On 29 November 2018, the Defence's then-Senior Legal Consultant, Doreen Chen, resigned,<sup>3</sup> as did the Junior Legal Consultant. On 13 December 2018, the Chief of the ECCC Defence Support Section ("DSS") terminated Nuon Chea's then-International Co-Lawyer Victor Koppe from his position, to take effect retroactively on 11 December 2018.<sup>4</sup> His termination prompted the other (part-time) Senior Legal Consultant to resign. From late December 2018 therefore, the Nuon Chea Defence Team consisted of only the National Co-Lawyer and one Senior Evidence Analyst.
7. On 23 January 2019, Doreen Chen was appointed as the new International Co-Lawyer for Nuon Chea.<sup>5</sup> The Co-Lawyers then immediately began the expedited recruitment of a new team. On 1 March 2019, the Senior Evidence Analyst was reappointed and another six full- and part-time consultants appointed to the legal support team.

## PART 3. APPLICABLE LAW

### I. RIGHT TO A FAIR TRIAL

8. Article 33 *new* of the ECCC Establishment Law provides:

The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure[s] do not deal with a particular matter, or if there is

<sup>3</sup> E-mail from Defence Senior Legal Consultant to Co-Lawyers for Nuon Chea, 29 Nov 2018 (**Attachment 1**).

<sup>4</sup> **E378/8/14**, 'Letter from Chief of ECCC Defence Support Section to International Co-Lawyer for Nuon Chea', 13 Dec 2018, para. 2.

<sup>5</sup> **E464**, 'Assignment of New Foreign Co-Lawyer, Doreen Chen, to Represent Nuon Chea', 24 Jan 2019.

uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard[s], guidance may be sought in procedural rules established at the international level.

9. Article 35 *new* of the ECCC Establishment Law, essentially mirroring Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”), provides:

In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights. [...] b. to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing.<sup>6</sup>

10. In interpreting Article 14 of the ICCPR, the UN Human Rights Committee (“HRC”) has held that “[t]he right of an accused person to have adequate time and facilities for the preparation of his or her defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms.”<sup>7</sup>

## II. NOTICE OF APPEAL

11. Internal 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.

12. Internal Rule 110(1) stipulates that “[t]he scope of the appeal shall be limited to the issues raised in the notice”. The Internal Rules do not, however, explicitly provide for any opportunity to amend a notice of appeal after it has been filed.

<sup>6</sup> Article 14(3) of the ICCPR uses identical language: “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”. Fair trial protections under the ICCPR are also directly incorporated into Cambodian law through Article 31 of the Constitution of the Kingdom of Cambodia, which provides: “The Kingdom of Cambodia recognizes and respects human rights as enshrined in the United Nations Charter, the Universal Declaration of Human [R]ights and all the treaties and conventions related to human rights, women’s rights and children’s rights.”

<sup>7</sup> *Wright v. Jamaica*, HRC, Comm. No. 349/1989, CCPR/C/45/D/349/1989 (1992), 18 Aug 1992, para. 8.4 (**Attachment 2**). See also *Sawyers and McLean v. Jamaica*, HRC, Comm. Nos. 226/1987 and 256/1987, CCPR/C/41/D/226/1987, 11 Apr 1991, para. 13.6 (**Attachment 3**).

13. According to Internal Rule 107(4), “[n]otice of appeal against a judgment of the Trial Chamber, as provided in Rule 105(3), shall be filed within 30 (thirty) days of the date of pronouncement of the judgment or its notification, as appropriate”.

### **III. EXTENSION OF PAGE LIMIT**

14. Article 5.2 of the Practice Direction on the Filing of Documents provides:

A document filed to the Pre-Trial Chamber or the Supreme Court Chamber of the ECCC shall not exceed 30 pages in English or French or 60 pages in Khmer, unless otherwise provided in the Internal Rules or this Practice Direction or ordered by the ECCC.

15. According to Article 5.4 of the Practice Direction on the Filing of Documents, “the relevant Chamber may, at the request of a participant, extend the page limit in exceptional circumstances”.

### **IV. EXTENSION OF TIME LIMIT**

16. According to Internal Rule 39(4), chambers may “at the request of the concerned party or on their own motion [...] extend any time limits set by them”.
17. The HRC provides some guidance on what constitutes “adequate time” for the preparation of an accused’s defence pursuant to Article 14 of the ICCPR:

What counts as “adequate time” depends on the circumstances of each case. If counsel reasonably feel that the time for the preparation of the defence is insufficient, it is incumbent on them to request the adjournment of the trial. [...] There is an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offence and additional time for preparation of the defence is needed.<sup>8</sup>

### **V. FACTORS CONSTITUTING GOOD CAUSE FOR EXTENSIONS TO STATUTORY LIMITS**

18. In determining whether there is good cause to vary procedural limits, the Supreme Court Chamber (the “Chamber”) has considered the following factors: (i) the size and

<sup>8</sup> HRC, ‘General Comment No. 32: Article 14, Right to equality before courts and tribunals and to fair trial’, CCPR/C/GC/32, 23 Aug 2007, para. 32 (**Attachment 4**).

complexity of the case; (ii) the novelty of issues being examined; and (iii) the appointment of new counsel.<sup>9</sup>

19. Likewise, chambers at the International Tribunal for the Former Yugoslavia (“ICTY”), International Criminal Tribunal for Rwanda (“ICTR”) and International Criminal Court (“ICC”) have recognised that the length of the trial judgement;<sup>10</sup> the size of the case record;<sup>11</sup> the complexity and/or novelty of issues examined;<sup>12</sup> or the issue of the lack of resources allocated to the Defence,<sup>13</sup> constitute good cause for granting extensions of time. The hierarchical position or high profile of the accused has also been considered when determining variations to procedural limits.<sup>14</sup>

<sup>9</sup> *Case 001 - F6/2*, ‘Decision on Request of the Co-Lawyers for Kaing Guek Eav *Alias* Duch to Extend the Time Limit for Filing of an Appeal Brief Against the Judgement of the Trial Chamber’, 26 Jul 2010 (“Decision on Extension of Time Limit for Filing Appeal Brief in Case 001”), paras 8 and 10.

<sup>10</sup> *Prosecutor v. Karadžić*, MICT-13-55-A, ‘Decision on Motion for Extension of Time to File Notice of Appeal’, 21 Apr 2016 (“*Karadžić* First Decision on Extension”), p. 1; *Prosecutor v. Prlić et al.*, IT-04-74-A, ‘Decision on Motions for an Extension of Time to File Notices of Appeal and Other Relief’, 21 Jun 2013 (“*Prlić* Decision on Extension”), p. 3; *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A, ‘Decision on Joint Defence Motion Seeking Extension of Time to File Notice of Appeal’, 16 Apr 2013 (“*Stanišić* Decision on Extension”), p. 1; *Prosecutor v. Taylor*, SCSL-03-01-A, ‘Decision on Defence Motion for Extension of Time to File Notice of Appeal’, 20 Jun 2012, p. 2; *Prosecutor v. Sainović et al.*, IT-05-87-A, ‘Decision on Motions for Extension of Time to File Notices of Appeal’, 23 Mar 2009 (“*Sainović* Decision on Extension”), p. 3; *Prosecutor v. Hadžihasanović and Kubara*, IT-01-47-A, ‘Decision on Motions for Extension of Time, Request to Exceed Page Limit, and Motion to File a Consolidated Response to Appeal Briefs’, 27 Jun 2006, para. 7; *Prosecutor v. Mladić*, MICT-13-56-A, ‘Decision on Motion for Extension of Time to File Notice of Appeal’, 21 Dec 2017 (“*Mladić* Decision on Extension”), p. 1.

<sup>11</sup> *Karadžić* First Decision on Extension, p. 1; *Stanišić* Decision on Extension, p. 1; *Prosecutor v. Popović et al.*, IT-05-88-A, ‘Decision on Joint Motion for Extension of Time to File Notice of Appeal’, 25 Jun 2010, (“*Popović* Decision on Extension”), p. 2; and *Sainović* Decision on Extension, p. 3.

<sup>12</sup> *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-2046, ‘Decision on Requests for An Extension of the Time Limit for the Filing of the Documents in Support of the Appeal’, 23 Nov 2016, para. 18; *Prosecutor v. Bemba*, ICC-01/05-01/08-3370, ‘Decision on Mr Bemba’s Request for an Extension of Time for the Filing of His Document in Support of the Appeal’, 15 Apr 2016, para. 6; *Prlić* Decision on Extension, p. 3; *Popović* Decision on Extension, fn. 4; *Sainović* Decision on Extension, p. 3; *Prosecutor v. Stakić*, IT-97-24-A, ‘Decision on the Defence Motion for Extension of Time’, 26 Apr 2004, para. 5; *Prosecutor v. Karadžić*, MICT-13-55-A, ‘Decision on a Motion for a Further Extension of Time to File a Notice of Appeal’, 15 Jun 2016 (“*Karadžić* Second Decision on Extension”), p. 3; *Prosecutor v. Karadžić*, MICT-13-55-A, ‘Decision on Request for Review on Registrar’s Remuneration Decision for Appeal Phase I’, 15 Jun 2016 (“*Karadžić* Decision on Remuneration for Appeal Phase I”), para. 23; *Mladić* Decision on Extension.

<sup>13</sup> *Karadžić* Second Decision on Extension, p. 3: “Recalling the Decision on Request for Review of Review of Registrar’s Remuneration Decision for Appeal Phase I in which I found that Karadžić was put at a disadvantage in the preparation of his appeal”. *Cf. Karadžić* Decision on Remuneration for Appeal Phase I, para. 23: “It goes without saying that the complexity of this case does not only warrant granting additional time to Karadzic and his defence team for the adequate preparation of a notice of appeal. The volume and unprecedented nature of the case also mean that Karadzic’s defence team would have to comprise more legal staff members than those assigned to the defence in other appeals adjudicated by the ICTY, the ICTR or the MICT”.

<sup>14</sup> *Sainović* Decision on Extension, p. 3 and *Karadžić* First Decision on Extension, p. 1.

#### **PART 4. ARGUMENTS**

##### **I. THE PROPOSED EXTENSION OF TIME AND PAGE LIMITS IS CRUCIAL TO GUARANTEEING RESPECT FOR NUON CHEA'S FAIR TRIAL RIGHTS**

##### **A. FAIR TRIAL RIGHTS DICTATE THAT NUON CHEA MUST HAVE ADEQUATE TIME AND FACILITIES TO PREPARE A MEANINGFUL DEFENCE**

20. The Defence emphasises that the present Request should be examined in view of the right of an individual to have adequate time and facilities to prepare their defence. This is one of the minimum guarantees of a fair trial, as enshrined in Article 14 of the ICCPR and recognised by the ECCC and other international courts and tribunals, as well as by Cambodia through its Constitution.
21. In particular, the European Court of Human Rights ("ECtHR") has repeatedly held that legal provisions on human rights, including fair trial rights, are "intended to guarantee not rights that are theoretical and illusory but rights that are practical and effective".<sup>15</sup> It follows that in determining whether time and facilities are adequate for an individual to prepare their defence, a chamber must consider whether the time and facilities in question are practically and effectively adequate provisions for a meaningful defence.
22. In line with the ECtHR's position, this Chamber in Case 002/01 granted the two defendants extensions of time and page limits to file appeal briefs, so as to guarantee them "sufficient time and space to meaningfully plead".<sup>16</sup> Similarly, in *Abu Garda*, the single judge of ICC Pre-Trial Chamber I gave due consideration to the right of the accused "to have adequate time for a meaningful preparation of his defence" when establishing the procedural calendar of the case.<sup>17</sup>

##### **B. THE NOTICE OF APPEAL IS A CRUCIAL PART OF NUON CHEA'S PREPARATION OF A MEANINGFUL DEFENCE**

23. At the ECCC, Internal Rules 105(3) and 110(1) require a party seeking to appeal a judgement to file a notice of appeal setting out the specific grounds it seeks to have reviewed. The appellant must then file an appeal brief explaining the arguments and

<sup>15</sup> *Artico v. Italy*, ECtHR, App. No. 6694/74, 'Judgement', 3 May 1980, para. 33 (emphasis added) (**Attachment 5**).

<sup>16</sup> **F9**, 'Decision on Motions for Extensions of Time and Page Limits for Appeal Briefs and Responses', 31 Oct 2014 ("Second Decision on Time and Page Limits in Case 002/01 Appeal"), para. 13.

<sup>17</sup> *Prosecutor v. Abu Garda*, ICC-02/05-02/09-18, 'Decision Scheduling a Hearing on Issues relating to Disclosure between the Parties', 30 May 2009, para. 14.

authorities in support of each of these grounds. The ECCC's statutory framework does not provide any avenue for the parties to amend grounds of appeal once a notice has been filed, apparently limiting the scope of the appeal to the issues raised therein.

24. In contrast, the ICTY and ICTR's respective Rules enable a party to vary the grounds of appeal set out in its notice.<sup>18</sup> In practice, variations to this effect have frequently been authorised.<sup>19</sup> The ICC Regulations afford even greater flexibility, only requiring that a notice of appeal include the name and number of the case; the date of the decision; whether the appeal is directed against the whole decision or part thereof; and the relief sought.<sup>20</sup> Grounds of appeal are instead listed directly in the appeal brief, which is filed within 90 days of notification of the judgement and can be amended after filing.<sup>21</sup>
25. Furthermore, notwithstanding that other international courts and tribunals afford parties opportunities to amend their grounds of appeal, they have also frequently granted extensions of time for filing notices of appeal as well, so as to allow sufficient time for parties to plead meaningfully. These decisions are discussed below in this Request.
26. In the present case, given the requirement to specify each ground of appeal and the absence of a clear opportunity to amend these grounds once submitted, Nuon Chea's notice of appeal must serve as an authoritative roadmap for his appeal proceedings.<sup>22</sup> It is therefore incumbent on the Defence to, at the outset of the appeal process, comprehensively identify all relevant legal, factual, and procedural issues arising from the Judgement and the trial proceedings. A rushed, incomplete, or vague notice of appeal

<sup>18</sup> Rule 108 of the ICTY Rules of Procedure and Evidence. Rule 108 of the ICTR Rules of Procedure and Evidence uses identical language.

<sup>19</sup> *Prosecutor v. Šainović et al.*, IT-05-87-A, 'Decision on Dragoljub Ojdanić's Second Motion to Amend his Notice of Appeal', 4 Dec 2009; *Prosecutor v. Šainović et al.*, IT-05-87-A, 'Decision on Nebojša Pavković's Motion to Amend His Notice of Appeal', 9 Sep 2009; *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, 'Decision on the Prosecutor's Motion to Pursue the Oral Request for the Appeals Chamber to Disregard Certain Arguments Made by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007', 5 Mar 2007.

<sup>20</sup> Regulation 57 of the Regulations of the International Criminal Court provides that "the appellant shall file a notice of appeal which shall state: (a) The name and number of the case; (b) The date of the decision of conviction or acquittal, sentence or reparation order appealed against; (c) Whether the appeal is directed against the whole decision or part thereof; (d) The relief sought." See also, e.g., *Prosecutor v. Bemba*, ICC-01/05-01/08-3348, 'Defence Notice of Appeal against the Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343', 4 Jun 2016.

<sup>21</sup> Regulations 58 and 61 of the Regulations of the Court of the ICC.

<sup>22</sup> The importance of a clear notice of appeal is emphasised in *Karadžić* Second Decision on Extension, p. 3: "the preparation of the notice of appeal determined the framework in which any appeal will be considered and that it is the interests of justice to ensure that Karadzic has sufficient time to prepare his notice in full conformity with the applicable provisions". See also, *Mladić*, Decision on Extension, p. 2: "it is in the interests of justice to ensure that parties have sufficient time to prepare meaningful notices of appeal in full conformity with the applicable Provisions".



owing to page and time limitations would effectively deprive Nuon Chea of a meaningful defence, as he would be bound by the scope of such deficient notice in subsequent proceedings. In this way, the notice of appeal is a crucial and substantive aspect of Nuon Chea's preparation of a meaningful defence.

27. Nuon Chea is accordingly entitled to adequate time and facilities to prepare his notice of appeal as a minimum guarantee of his fair trial rights.
28. In addition, it is in the interests of justice that the Defence be given sufficient time and space to prepare a meaningful notice of appeal. This case is not only the last against Nuon Chea before the ECCC – and likely the last at the ECCC altogether – but this appeal will be the final stage of proceedings against the highest-ranking and most high-profile living members of the Communist Party of Kampuchea. In short, this will be the last opportunity for the ECCC to assist in ascertaining the truth of events that occurred in and in connection with Democratic Kampuchea (“DK”). In this context, having a comprehensive notice of appeal clearly articulating the grounds of appeal will not only honour Nuon Chea's right to a fair trial but also facilitate the proper conduct of appeal proceedings overall.<sup>23</sup>

**C. EXPEDIENCY MUST NOT OUTWEIGH THE FAIRNESS OF A TRIAL**

29. Moreover, the Defence reminds the Chamber that while expediency is a relevant consideration in judicial proceedings, it must not outweigh the proceedings' fairness.
30. As the ECtHR noted in this regard in *Papadakis v. Former Yugoslav Republic of Macedonia*, concerns over the possible prolongation of the proceedings “cannot justify the serious limitations of the applicant's defence rights” because “the right to the fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed to expediency”.<sup>24</sup>

<sup>23</sup> *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2272, ‘Decision Providing further Directions on the Closing Briefs’, 13 Apr 2018, para. 10 (“noting the interest for the parties, participants, and the Chamber to have closing briefs which are comprehensive and accurate to the greatest extent possible, the Majority considers that it is appropriate in these circumstances to grant the extension of pages sought”).

<sup>24</sup> *Papadakis v. Former Yugoslav Republic of Macedonia*, ECtHR, App. No. 50254/07, ‘Judgement’, 26 May 2013, para. 94 (see E409.1.2).

31. Likewise, in *OAO Neftyanaya Kompaniya Yukos v. Russia*, the ECtHR held that, in relation to the time allocated to the defence to read the case file prior to a court hearing:

even though it is [...] important to conduct proceedings at good speed, this should not be done at the expense of the procedural rights of one of the parties, especially given the relatively short overall duration of the proceedings for a case of such magnitude and complexity.<sup>25</sup>

## **II. THE PROPOSED EXTENSION OF TIME AND PAGE LIMITS IS FAIR AND REASONABLE**

### **A. THE JUDGEMENT AND CASE FILE ARE COMPLEX AND EXTENSIVE**

32. The Judgement is one of the longest of any of the international criminal tribunals, spanning 2,259 pages and 14,446 footnotes in English. The number of documents purportedly supporting the Trial Chamber's conclusions is extensive, requiring a careful review to identify potential errors of fact. Many of these findings also involve potential procedural errors that may have occurred during a complicated and lengthy trial.
33. The nature of the Judgement and the current 30-day time limit for filing a notice of appeal presents the Defence with a "catch 22" – *i.e.* a paradoxical dilemma. That is, it is difficult to precisely determine Nuon Chea's needs for his notice of appeal without first reading and analysing the Judgement. However, the Defence conservatively estimates that, given the length of the Judgement and obvious density of content, it will take at least 15 working days (*i.e.*, three weeks) simply to read the main text. This is based on a reading rate of 20 pages per hour, amounting to 150 pages per eight-hour working day. Moreover, this estimate excludes the time that would be required in order to conduct an initial analysis of the contents by cross-referencing it against the footnotes and annexes, parties' briefs, and Closing Order – let alone to formulate and draft grounds of appeal. Nor does the estimate take into account the slower pace at which Nuon Chea reads and communicates generally in light of his advanced age and commensurate decreases in his eyesight, physical stamina, and memory, as the Chamber will be well aware given Nuon Chea periodically undergoes court-mandated assessments of his fitness to stand trial and receives regular medical care. Neither does it contemplate the lengthier time the Defence will thus need to confer with Nuon Chea as a result of these constraints.

<sup>25</sup> *OAO Neftyanaya Kompaniya Yukos v. Russia*, ECtHR, App. No. 14902/04, 'Judgement (Merits)', 20 Sep 2011, para. 540 (**Attachment 6**).

34. Therefore, although it is currently impossible to accurately determine Nuon Chea's needs in respect of his notice of appeal, what the Defence can undoubtedly confirm at this initial stage is that 30 calendar days is manifestly insufficient to identify the relevant errors of law, fact, and procedure that the Judgement may contain and set them out appropriately in a notice of appeal. Extensive additional time will be necessary to safeguard Nuon Chea's right to a fair trial by ensuring that the Defence is able to prepare a notice of appeal that is focused and well-considered, and prepared following adequate consultation with Nuon Chea.
35. Moreover, it is impossible to determine at this point the length of time (or pages) that may be sufficient, although the Defence has used its best endeavours to do so later in this Request. Therefore, it may nevertheless become necessary to revisit the question of necessary time and pages for the notice of appeal. It is for this reason that the Defence has identified this Request as Nuon Chea's first on this issue.
36. Relatedly, it is because of the current 30-day limit for filing a notice of appeal and the anticipated length of time that it will take to read and initially analyse the Judgement that the Defence has also characterised this Request as an urgent one. The Chamber's expedited notification of at least its disposition as to the present Request is necessary and would be appreciated in order to ensure the effective use of the time and facilities Nuon Chea is afforded in the preparation of his defence. In particular, it would prevent the Defence from wasting time and resources by attempting the insurmountable task of preparing a notice of appeal of any meaningful quality within the 30-day limit.

#### **1. Comparison with Case 002/01**

37. In Case 002/01, the Chamber rightfully recognised the length of the trial judgement (at 623 pages in English),<sup>26</sup> and the need to thoroughly discuss its contents within the team and with the client, as important considerations when setting time limits for both the notice of appeal and the appeal brief. The Chamber initially granted the defence teams an extension of 23 days for filing their notices of appeal,<sup>27</sup> for a total of 53 days. Following a similar rationale, *i.e.*, a consideration of the "size and complexity of the

<sup>26</sup> See E313, 'Case 002/01 Judgement', 7 Aug 2014.

<sup>27</sup> F3/3, 'Decision on Defence Motion for Extension of Time and Page Limits on Notices of Appeal and Appeal Briefs, 29 Aug 2014, ("First Decision on Time and Page Limits in Case 002/01 Appeal"), para. 9.

case and Trial Judgement”,<sup>28</sup> the Chamber later granted the defence teams two successive extensions of time and pages to file their appeal briefs,<sup>29</sup> so as to allow “sufficient time and space to meaningfully plead”.<sup>30</sup>

38. Importantly, however, the Case 002/02 Judgement is nearly four times the length of the one rendered in Case 002/01. The underlying case file is one of the largest and most complex ever collated among international criminal tribunals. It also includes material from Cases 001, 002/01,<sup>31</sup> 003, 004, 004/01, and 004/02. In particular, a tsunami of new evidence – primarily in the form of ‘written records of interview’ (“WRIs”) from Cases 003, 004, 004/01 and 004/02 – periodically flooded into Case 002/02 while the trial was unfolding, with investigators sometimes re-interviewing individuals as a result of their courtroom testimony in the Case 002/02 trial.
39. The Trial Chamber itself has admitted that it had “previously underestimated the time necessary to assess and deliberate on the huge amount of evidence of this very complex case” in justifying delays as to the issuance of the Judgement.<sup>32</sup> Indeed, the amount of time and space the Trial Chamber took to render the Judgement and its need to revise its projected date of delivery is, alone, fair indication as to the number and complexity of issues addressed within.
40. Even without reading the Judgement, it is already clear that Case 002/02 Judgement far eclipses its Case 002/01 counterpart in the sense of its scope and complexity. By way of simple illustration, the Judgement’s chapter on Security Centres, Execution Sites and Internal Purges alone is, at 661 pages in English, longer than the *entire* trial judgement in Case 002/01. Case 002/02 covers – consistent with this Chamber’s prescriptions as to appropriate scope<sup>33</sup> – a “representative” sample of 22 charges against Nuon Chea involving eight major crime sites, four ‘targeted’ groups, and five major policies, with

<sup>28</sup> **F3/3**, First Decision on Time and Page Limits in Case 002/01 Appeal, para. 10.

<sup>29</sup> **F9**, Second Decision on Time and Page Limits in Case 002/01 Appeal, para. 13; **F13/2**, ‘Decision on Defence Motions for Extension of Pages to Appeal and Time to Respond’, 11 Dec 2014, paras 15-16.

<sup>30</sup> **F3/3**, First Decision on Time and Page Limits in Case 002/01 Appeal, para. 10.

<sup>31</sup> On the commonality of evidence between Cases 002/01 and 002/02, *see* **E301/9/1/1/3**, ‘Decision on KHIEU Samphân’s Immediate Appeal Against the Trial Chamber’s Decision on Additional Severance of Case 002 and Scope of Case 002/02’, 29 Jul 2014 (“Decision on Khieu Samphân Severance Appeal”), paras 74-75.

<sup>32</sup> ECCC Completion Plan (Rev. 17), 30 Jun 2018, para. 31 (**Attachment 7**).

<sup>33</sup> **E284/4/8**, ‘Decision on Immediate Appeals against Trial Chamber’s Second Decision on Severance of Case 002’, 25 Nov 2013 (“Decision on Appeals against Second Case 002 Severance”), paras 65, 70, and 76 (on “reasonable representativeness” and what this entailed for Case 002/02).

alleged events taking place nationwide and across the entire DK period and ECCC temporal jurisdiction.

41. Moreover, not only does Case 002/02 encompass the in-court testimony of 114 witnesses, eight expert witnesses, and 63 civil parties spanning 282 hearing days and more than 29,000 pages of trial transcripts, but all testimony (and all other forms of evidence) from Case 002/01 fall within the scope of Case 002/02 as well, and appear at first glance to have been heavily relied upon in the Judgement.
42. A statistical analysis starkly illustrates the difference between the two trials:

	Case 002/01	Case 002/02	Greater Size of 002/02 Compared to 002/01
<b>Judgement Pages (EN)</b>	623	2,259	3.6 times
<b>Judgement Footnotes (EN)</b>	3,298	14,446	4.7 times
<b>Modes of Liability</b>	4	6	1.5 times
<b>Charges/Counts</b>	6	22	3.7 times
<b>Trial Days*</b>	222	505	2.3 times
<b>Pages of Trial Transcripts (EN)*</b>	27,077	56,320	2.1 times
<b>Unique Exhibits*</b>	5,858	10,804	1.8 times
<b>In-Court Witnesses*</b>	58	172	2.97 times
<b>In-Court Experts*</b>	3	11	3.7 times
<b>In-Court Civil Parties*</b>	31	94	3.0 times
* Indicates where the Case 002/02 totals are cumulative totals encompassing Case 002/01.			

43. Based on the comparative data set out above, it follows that if the number of pages in a judgement are considered as the most important measure of the length of time needed for the preparation of a notice of appeal against such judgement, the length of time that the Chamber should grant the Defence for its notice of appeal is 190 days. This represents 3.6 times the length of time granted to the defence teams for the preparation of the notice of appeal in Case 002/01 (*i.e.*, 53 days).

## 2. Novelty of Issues Examined

44. The Chamber has also found the novelty of issues examined in a case to constitute good cause for determining time limits.<sup>34</sup> In this respect, the Judgement not only covers a wide

<sup>34</sup> *Case 001 – F6/2*, Decision on Extension of Time Limit for Filing Appeal Brief in Case 001, paras 8 and 10.

range of legal and factual issues not previously subject to appellate review at the ECCC, *e.g.*, genocide,<sup>35</sup> but makes a number of legal pronouncements on issues relatively novel within the field of international criminal law altogether, *e.g.*, forced marriage and rape in the context of forced marriage.<sup>36</sup> Such forays into uncharted legal territory present a heightened challenge for the Defence in identifying and formulating all relevant issues to put before the Chamber. This further justifies an extension to page and time limits for filing Nuon Chea's notice of appeal.

### 3. Comparison with Practices at Other International Criminal Tribunals

45. Like this Chamber, chambers at other international criminal tribunals have frequently accepted the length and complexity of trial judgements, the size of case files, and the novelty of issues examined, as "good cause"<sup>37</sup> to extend statutory time limits. For instance, in *Mladić*, the pre-appeal judge considered "the length of the Trial Judgement and the significant complexity of this case" in allowing the parties to file their notice of appeal within 120 days of the issuance of the trial judgement.<sup>38</sup> Similarly, in *Karadžić*, the pre-appeal judge considered the length of the trial judgement; the significant complexity of the case; the high profile of the accused; and the resources allocated to the Defence team,<sup>39</sup> when granting the parties a 90-day extension to file their notices of appeal, giving them a total of 120 days.<sup>40</sup> Similar extensions (of primarily 90 days in total, and occasionally 60 days in total) were granted for filing the notices of appeal in, *e.g.*, *Popović et al.*,<sup>41</sup> *Sainović et al.*,<sup>42</sup> and *Nyiramasuhuko et al.*<sup>43</sup>

<sup>35</sup> See, *e.g.*, **E465**, Judgement, 16 Nov 2018, sections 13.2.10.10 and 13.3.10.5.

<sup>36</sup> See, *e.g.*, **E465**, Judgement, 16 Nov 2018, section 14.4. Only a handful of international criminal cases have examined these issues, *e.g.*, *Prosecutor v. Brima et al.*, SCSL-2004-16-A, 'Judgment', 22 Feb 2008; *Prosecutor v. Sesay et al.*, SCSL-04-15-A, 'Judgment', 26 Oct 2009; *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-717, 'Decision on the Confirmation of Charges', 30 Sep 2008 (forced marriage and rape in the context of forced marriage being encapsulated under the crime of sexual slavery committed either as a crime against humanity or a war crime); *Prosecutor v. Ongwen*, ICC-02/04-01/15-422-Red, 'Decision on the Confirmation of Charges against Dominic Ongwen', 23 Mar 2016; and *Prosecutor v. Al Hassan*, ICC-01/12-01/18-2-tENG, 'Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud', 27 Mar 2018 (reclassified on 14 May 2018).

<sup>37</sup> Rule 127(A)(i) of the ICTY Rules, and Rule 116(A) of the ICTR Rules.

<sup>38</sup> *Mladić* Decision on Extension, p. 2.

<sup>39</sup> *Karadžić* Second Decision on Extension, p. 3.

<sup>40</sup> *Karadžić* First Decision on Extension, p. 1; *Karadžić* Second Decision on Extension. The Appeals Chamber initially granted a 60-day extension and subsequently granted an additional 30-day extension taking into account the delayed funding of the defence team.

<sup>41</sup> *Popović* Decision on Extension, p. 2.

<sup>42</sup> *Sainović* Decision on Extension, p. 3.

<sup>43</sup> *Nyiramasuhuko et al. v. Prosecutor*, ICTR-98-42-A, 'Decision on Motions for Extension of Time for the Filing of Appeal Submissions', 22 Jul 2011, para. 9.

46. While Case 002/02 is broadly comparable to these cases in terms of complexity, it is also distinguished from these cases in important ways that warrant a greater extension of time and pages for filing Nuon Chea's notice of appeal. Unlike *Mladić* and *Karadžić* cases, for instance, the case against Nuon Chea examines twice as many charges, covering not only a much broader crime base but one that is often less precisely identified. In *Mladić* and *Karadžić*, the indictments specify the time (down to the exact dates); the location; the number of victims; and other details in relation to each alleged crime, which are known as "Scheduled Incidents" (*i.e.*, incidents listed in several Schedules attached to the indictments). The Closing Order in Case 002, on the other hand, simply makes vague and sweeping allegations such as that "many" were killed in the country, or that "some" disappeared from a region throughout the DK period. It is naturally more difficult and complicated to prepare a targeted and effective defence against vague and sweeping allegations than against allegations that are sufficiently specified. The Defence, in turn, will require additional time to review the supposed facts underlying the Trial Chamber's conclusions, and additional space to articulate its grounds of appeal against such pronouncements. For these reasons, even if the Chamber were inclined to follow the approach in the other international tribunals on appropriate extensions of time than its own approach in Case 002/01, the 120-day total period granted in *Mladić* and *Karadžić* for the preparation of notices of appeal would still be insufficient in the present case.
47. Furthermore, *Popović et al.*, *Sainović et al.* and *Nyiramasuhuko et al.* had considerably smaller trial judgements and case files than Case 002/02 and involved numerous co-accused. By way of comparison, the *Popović et al.* trial judgement is 832 pages long and involves seven individuals; the *Sainović et al.* trial judgement is 1,435 pages long and involves six individuals; and the *Nyiramasuhuko et al.* trial judgement is 1,469 pages long and involves six individuals. In contrast, almost all of the 2,259 pages in the Judgement are directly relevant to Nuon Chea. Indeed, in this regard, it is also relevant to highlight that in any case, the Trial Chamber has repeatedly characterised Nuon Chea throughout its Judgement as the person with "ultimate decision-making" authority and control alongside only Pol Pot.<sup>44</sup> The relatively-greater proportion of judgement pages being relevant to Nuon Chea in comparison with the accused at other international

<sup>44</sup> See, *e.g.*, **E465**, Judgement, paras 561, 3888, 4080, 4107, 4110, 4127, 4158, 4171, 4187, 4196, and 4377.

criminal tribunals again justifies more time being given to the Defence to prepare and file Nuon Chea's notice of appeal to the Judgement.

**B. THERE ARE NO INTERLOCUTORY APPEALS BEFORE THE ECCC**

48. In addition to identifying errors in the Judgement, the Defence's notice of appeal must cover decisions rendered throughout the trial proceedings not subject to immediate appeal. Appeals from such decisions "must demonstrate a lasting *gravamen* on the part of the appellant; as such, they must relate to one or more [...] permissible grounds of the appeal from the Trial Judgment."<sup>45</sup>

49. Throughout trial proceedings in Case 002/02, the Trial Chamber rendered numerous written decisions in addition to frequent oral decisions, among which the Defence has identified at least 56 which may give rise to appealable errors. It will take a substantial amount of time for the Defence to assess their ultimate impact on the case against Nuon Chea in light of the Judgement, and to determine whether they properly pertain to one or more of the permissible grounds of appeal arising from the Judgement.

**C. THE DEFENCE HAS FACED HUMAN RESOURCES CHALLENGES FOLLOWING THE ISSUANCE OF THE SUMMARY JUDGEMENT**

50. Moreover, even if the Judgement Summary constituted an adequate basis on which the Defence could prepare for its appeal – which it does not, for reasons discussed below – the Defence was functionally unable to conduct any meaningful analysis of it due to the many human resources challenges it has faced in recent months. On 29 November 2018, less than two weeks after the rendering of the Judgement Summary, the current International Co-Lawyer (then-Senior Legal Consultant) resigned from the team, as did a Junior Legal Consultant. Shortly thereafter, the former International Co-Lawyer was terminated on 13 December 2018 without completing any apparent handover of the case. This prompted the remaining part-time Senior Legal Consultant to resign, leaving only one Senior Evidence Analyst on the legal support team.

51. The current International Co-Lawyer was only appointed on 23 January 2019<sup>46</sup> (and had initially joined the team as a Senior Legal Consultant only after the conclusion of the Case 002/01 trial proceedings). The complete legal support team has only been

<sup>45</sup> F9, Second Decision on Time and Page Limits in Case 002/01 Appeal, para. 16.

<sup>46</sup> E464, Assignment of New Foreign Co-Lawyer.



constituted since 1 March 2019. All three senior consultants are working part-time. Only two of the seven current consultants were on the team at the time the Judgement Summary was published. Two new Legal Consultants who have never before worked in connection with the ECCC are largely unfamiliar with the factual background of the case, while two part-time Senior Legal Consultants are returning to the case after more than one and a half years' break in service,<sup>47</sup> and a third Legal Consultant is returning after completing her six-month legal internship with the team over two years ago.

52. As a consequence of the human resources situation, the Co-Lawyers have spent much of their time since the appointment of the new International Co-Lawyer on 23 January 2019 on administrative requirements for the recruitment of the legal support team, team orientation, and the implementation of internal systems and workflows. This has left little time for substantive preparation for the appeal or revisiting the case and its strategy more broadly in light of the team's new leadership.
53. In addition, the Defence should also note that the Chief of the DSS separated from the ECCC on 25 March 2019. At this stage, the Defence has only been informed that the ECCC Office of Administration is in the process of searching for a replacement for the role. The Defence has not been informed of any interim measures that are to be put in place with respect to decision-making and guidance over the Defence's administrative needs while this search is ongoing. If such measures are not introduced in a timely and effective manner, these administrative issues could generate further delays or issues in the Defence's substantive work moving forward.
54. The various human resources challenges identified above alone justify an extension in time for the filing of the notice of appeal in order to guarantee respect for Nuon Chea's right to adequate time and facilities for his defence. Such a delay would allow all team members to familiarise or re-familiarise themselves with the case; determine the defence strategy; and complete the implementation of new workflows required to manage Nuon Chea's case on appeal. The Defence stresses that such extension should be considered supplementary to any extension that the Chamber might otherwise be inclined to grant in light of other arguments made in this Request.

<sup>47</sup> In Case 001, the Supreme Court Chamber considered the appointment of a new co-lawyer, in combination with other factors, constituted good cause for granting an extension of time for filing the appeal brief. See *Case 001 – F6/2*, Decision on Extension of Time Limit for Filing Appeal Brief in Case 001, paras 8 and 10.

**D. SEVERAL FACTORS ARE IRRELEVANT TO THE CHAMBER'S DECISION-MAKING PROCESS**

55. It is also important to emphasise that there are several factors that are irrelevant to the Chamber's decision-making process in respect of this Request. The first of these is budget considerations. Despite the fact that – in the ECCC's own words – the “effective functioning of the [ECCC] has in the past been hampered by significant and persistent financial insecurity”,<sup>48</sup> this Chamber has previously and correctly held nevertheless that:

While Judges are at all times certainly obligated to be mindful of the efficiency of proceedings, they must always act within the *sacrum* sphere of the law, the tenets of which cannot be overridden by the *profanum* of budgetary savings. [...] If there is insufficient funding to guarantee a trial driven by law, all ECCC proceedings must be terminated and the court must close down. Barring this, proceedings must go on without individual decisions on matters of law and fact being unduly influenced by financial considerations.<sup>49</sup>

56. Nor should the existence of findings made on appeal in Case 002/01 factor into the decision to extend page and time limits in this case. Following the decision to sever Cases 002/01 and 002/02, the Chamber held that “[e]ven though evidence remains formally common to the severed cases, this commonality does not extend to findings, and common factual elements in all cases resulting from Case 002 **must be established anew**.”<sup>50</sup> The same position must be adopted here; *i.e.*, the Chamber should not draw findings from the Case 002/01 appeal into Case 002/02, nor use the existence of these findings to refuse the requested extensions.

57. Furthermore, the issuance of the Judgement Summary should have no bearing on the Chamber's decision in relation to the present Request. The Judgement Summary is a 31-page document absent of any footnotes, exhibits, or witness statements that allegedly support its findings. By the Trial Chamber's own admission, it is not authoritative; rather, “[t]he only authoritative account of the findings is contained in the full written Judgement, which will be available [...] in due course.”<sup>51</sup> Instead, the Judgement Summary is clearly intended to inform the general public of the outcome of the trial proceedings, rather than informing the Defence of the basis for conviction. It therefore cannot constitute a basis for the Defence's preparatory work for appeal prior to the

<sup>48</sup> ECCC Completion Plan (Revision 19), 31 Dec 2018, para. 13 (**Attachment 8**).

<sup>49</sup> **E284/4/8**, Decision on Appeals against Second Case 002 Severance, para. 75.

<sup>50</sup> **E301/9/1/1/3**, Decision on Khieu Samphân Severance Appeal, para. 85 (emphasis added).

<sup>51</sup> Judgement Summary.

rendering of the full Judgement on 28 March 2019 or, by extension, a basis on which to limit the additional pages and time granted to the Defence to prepare its notice of appeal.

## **PART 5. CONCLUSION**

58. The Defence reiterates that at this early stage – *i.e.*, without having had the opportunity to properly review the Judgement’s contents – it considers that an extension of 150 days (for a total of 180 days) is the minimum amount of time that would be reasonable and appropriate to prepare and file Nuon Chea’s notice of appeal. Indeed, if the Chamber follows its own approach in Case 002/01, an extension of 160 days (for a total of 190 days) would be merited.
59. The Defence further considers, again at this stage, that an extension of 70 pages (for a total of 100 pages) may be necessary to provide the minimum amount of space to list all the issues it seeks to bring for appellate review. The Defence reiterates that it will notify the Chamber immediately upon subsequently determining that additional pages or time may be necessary in order to adequately complete the notice of appeal.
60. For similar reasons, the Defence anticipates that reasonable extensions to page and time limits will also be necessary for filing the appeal brief itself. However, given the Chamber’s view that it is premature at this stage to determine the time and pages needed for the brief,<sup>52</sup> the Defence will make any such request after the filing of the notice of appeal. Likewise, although requests for additional resources may also be necessary owing either to a need for additional assistance or additional time, the Defence is not yet in a position to make a determination of its precise needs in this regard and will file any such requests at later stages of the appeal proceedings.

## **PART 6. RELIEF**

61. For the foregoing reasons, the Defence requests that the Supreme Court Chamber urgently grant it an extension of at least:
- (a) an additional 150 days (for a total of **180** days); and
  - (b) an additional 70 pages (for a total of **100** pages in English),

<sup>52</sup> F3/3, First Decision on Time and Page Limits in Case 002/01 Appeal, para. 10.

to prepare and file its notice of appeal against the Judgement.

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