

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

**FILING DETAILS**

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

**Filing Party:** Mr KHIEU Samphan

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**KHIEU Samphân's Reply and Response to the Prosecution  
on Extension of Time and Number of Pages for Notices of Appeal**

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Before:

**The Supreme Court Chamber**

Judge KONG Srim

Judge Chandra Nihal JAYASINGHE

Judge SOM Sereyvuth

Judge Florence Ndepele MWACHANDE-

MUMBA

Judge MONG Monichariya

Judge Phillip RAPOZA

Judge YA Narin

**The Co-Prosecutors**

CHEA Leang

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**All Civil Party Lawyers**

**NUON Chea's Defence**

**MAY IT PLEASE THE SUPREME COURT CHAMBER**

1. On 16 November 2018, in open court, the Trial Chamber (the “Chamber”) found KHIEU Samphân guilty of genocide (of the Vietnamese), crimes against humanity and grave breaches of the Geneva Conventions, and sentenced him to life imprisonment.<sup>1</sup> The Chamber noted that the full reasons for its judgment would be notified in writing “in due course”.<sup>2</sup>
2. On 19 November 2018, KHIEU Samphân's Defence (the “Defence”) appealed against the judgment and requested the Supreme Court Chamber (the “Supreme Court”) to annul it on grounds of procedural defects and lack of reasoning.<sup>3</sup> On 13 February 2019, the Supreme Court ruled the appeal inadmissible.<sup>4</sup> On 20 March 2019, the Defence requested the annulment of the decision on the grounds that the panel of judges that issued it was then not properly constituted.<sup>5</sup>
3. On 28 March 2019, the parties were notified of the full reasons for the Case 002/02 Judgment of 16 November 2018 in the three official languages of the ECCC.<sup>6</sup>
4. On 3 April 2019, the Defence requested the Supreme Court to confirm its intention to postpone the starting point of the appeal time-limit to the day after the said notification and to allow it to file a 100-page notice of appeal in French and the required Khmer equivalent within 240 days (including 30 days required for translation) as of said notification (the “Request”).<sup>7</sup> On the same day, the NUON Chea Defence filed a “first” request for extensions, with a view to being able to file a 100-page notice of appeal within 180 days.<sup>8</sup>

<sup>1</sup> E1/529.1 Trial Transcript (“T”) 16 November 2018, pp. 64-68, between 11:28 and 11:38.

<sup>2</sup> E1/529.1 T. 16 November 2018, p. 3, at about 9:35.

<sup>3</sup> E463/1 KHIEU Samphân’s Urgent Appeal Against the Summary of Judgment Pronounced on 16 November 2018, 19 November 2018, notified on 20 November 2018 (“E463/1 Appeal”).

<sup>4</sup> E463/1/3 Decision on KHIEU Samphân’s Urgent Appeal Against the Summary of Judgment Pronounced on 16 November 2018, 13 February 2019.

<sup>5</sup> KHIEU Samphân’s Request to Annul Decision E463/1/3 on his Urgent Appeal Against the Summary of Judgment Pronounced 16 November 2018, 20 March 2019. This request was filed on 20 March 2019 at 11:52 but **has still not been notified** at the time of submission of the present application for translation.

<sup>6</sup> E465 Case 002/02 Judgment, 16 November 2018.

<sup>7</sup> F39/1.1 KHIEU Samphân Defence Request for Extension of Time and Number of Pages to File Notice of Appeal, 3 April 2019 (“Request”), notified on 5 April 2019.

<sup>8</sup> F40/1.1 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, 3 April 2019, notified on 5 April 2019.

5. On 18 April 2019, the parties were notified of the Prosecution's response to these applications, in which it objects to the applications and requests that all parties be allowed to file a 30-page notice of appeal within 75 days (the "Response/Request").<sup>9</sup>
6. By the present submissions, whereas it has not even completed a first reading of the reasons for the judgment 26 days after their notification, the Defence replies to this indecent response (I) and responds to this egregiously opportunistic request (II).

### **I. AN INDECENT RESPONSE**

7. In essence, the Prosecution bases its objection to the defence teams' requests on so-called preparation prior to the issuance of the reasons for the judgment of 28 March 2019 (A) and above all on the case law of the International Criminal Tribunals ("ICT"), from which Case 002/02 would not be differentiated (B).

#### **A. Prior preparation**

8. The Prosecution argues that the Defence was able to begin preparing since November 2018 thanks to the summary of the judgment,<sup>10</sup> as well as during the period of deliberations on interlocutory decisions, from which it is only possible to appeal at the same time as the judgment on the merits.<sup>11</sup> However, in the absence of complete written reasons for the judgment, the Defence could not begin preparing its notice of appeal.
9. As the Defence has already reiterated, the summary read in court on the day the judgment was pronounced has no legal value (unlike the operative part) and does not contain any element allowing the identification of errors of fact and law.<sup>12</sup> The Chamber did not indicate in any way the evidence on which it relied and the law it applied. It did so only in the reasons provided on 28 March 2019.

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<sup>9</sup> F41 Co-Prosecutors' Response to Defence Requests for Additional Time and Page Limits for Notice of Appeal, 11 April 2019, ("Response/Request"), notified on 18 April 2019. Due to a shortage of translators, the Translation Unit (ITU) was unable to provide a French translation of the Response within the time requested by the Defence. In order not to delay the Supreme Court's decision on requests for extension, the Defence did not request an extension of time to reply but worked on the basis of a first unrevised draft translation, received from ITU on 21 April 2019.

<sup>10</sup> Response/Request, paras. 2, 10-11.

<sup>11</sup> Response/Request, para. 9.

<sup>12</sup> E463/1 Appeal, paras. 59-61; KHIEU Samphân's Reply to the Prosecution's Response to His Urgent Appeal Against the Summary of Judgment Pronounced 16 November 2018, 20 December 2018, E463/1/2/1 ("Reply"), paras. 51-53; Request, footnote ("fn.") 20.

10. Moreover, as the Supreme Court has already pointed out, appeals from interlocutory decisions “must demonstrate a lasting gravamen on the part of the appellant” and “as such, they must relate to one or more of permissible grounds of appeal from the trial judgment.”<sup>13</sup> It is therefore only by identifying its grounds of appeal that the Defence can know which interlocutory decisions it can/will appeal,<sup>14</sup> which it could not do until 28 March 2019.

### **B. Case law of the ICT and Case 002/02**

11. The Prosecution bases the rest of its objection to the defence teams' requests on the rules and case law of the ICT.<sup>15</sup> Concealing most of the differences identified by the Defence (and the Supreme Court) that make the relevance of the ICT very limited,<sup>16</sup> the Prosecution is not ashamed to argue that the appeal in Case 002/02 is not “distinguishable from other large international cases”,<sup>17</sup> whereas it rightly stated at the end of 2016:

**“Case 002/02 is, by the standards of any previous trial before any international or hybrid court, an unusually large case.** It concerns a wide range of allegations of serious crimes committed in many different geographical locations over an extended period of time, involves an exceptionally large volume of documentary and testimonial evidence and will require complex legal and factual argument by all parties.”<sup>18</sup>

12. The peculiarities of Case 002/02 have not changed since the Prosecution requested sufficient time and space for its closing arguments. Only the needs and interests of the Prosecution have changed, now that the accused are pleading for sufficient time and space to appeal their conviction of almost all the crimes charged.

13. Still acting in its own interest rather than in the interests of justice, the Prosecution tries to make it appear that the issue of severance has already been debated several times and is of minor

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<sup>13</sup> F9 Decision on motions for extension of time and page limits appeal briefs and responses, 31 October 2014, para.16.

<sup>14</sup> Request, para. 21.

<sup>15</sup> Response/Request, paras. 7, 14-15, 17-19.

<sup>16</sup> Request, paras. 8, 18-20 (references to the Supreme Court at para. 18).

<sup>17</sup> Response/Request, para.14.

<sup>18</sup> E421/5/3 Co-Prosecutors' Response to NUON Chea's Request Regarding the Page Limit, Time Limit, and Content of His Closing Brief, 21 October 2016, para. 5 (emphasis added). The international Co-Prosecutor also stated that: “[This is an extremely large case, the evidence is immeasurable. There are very complex legal issues such as genocide, elements of forced marriages. And all this will require detailed explanations]”, E1/509.1 T. 8 December 2016, p. 20, at about 9:41.

importance in the Case 002/02 appeal.<sup>19</sup> However, while the question of the impact of the severance on the Case 002/01 Judgment was discussed in Case 002/01, the question of the impact of the severance on the Case 002/02 Judgment has never been discussed before. Moreover, in one of the paragraphs of the Case 002/01 Appeal Judgment on which the Prosecution relies, the Supreme Court notes that it does not consider some of the arguments put forward by the Defence because of their influence on Case 002/02 and not on Case 002/01 which was before it at the time.<sup>20</sup> *A fortiori*, the question of the impact of this severance -- unique in the world -- on the Case 002/02 Judgment is considerably more significant than in Case 002/01. For example, questions about the value of 002/01 trial transcripts in Case 002/02, or whether or not some witnesses who testified in Case 002/01 should be recalled in Case 002/02, or again whether the findings in Case 002/01 have any influence on Case 002/02 (and this is only part of the tip of the iceberg).

14. Moreover, the Prosecution's objection to any extension of the number of pages in light of the rules of the ICT<sup>21</sup> further demonstrates its total lack of objectivity. Indeed, these rules were the same when in Case 002/01,<sup>22</sup> the Prosecution did not object to the Defence request for extension of the number of pages for its notice of appeal against a judgment of 695 pages in English, 1106 in Khmer and 854 in French, whereas it now has 3.5 times more pages in Case 002/02 and the difference in size between the two cases is staggering!<sup>23</sup>
15. It is also shocking to read that the Defence's "suggestion" that one month out of the eight requested is necessary for the translation into Khmer of its notice of appeal "must be ignored", as the necessity to translate submissions is "not unique to KHIEU Samphân".<sup>24</sup> Indeed, the Defence has done nothing other than to be transparent in calculating the time limit requested by taking into account translation constraints, which are certainly not unique to KHIEU Samphân but are unique to the ECCC as noted by the Supreme Court (as clearly recalled in the Request among the

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<sup>19</sup> Response/Request, para. 14.

<sup>20</sup> Case 002/01 Appeal Judgment, para. 228 mentioned in fn. 28 of the Response/Request.

<sup>21</sup> Response/Request, paras. 18-19

<sup>22</sup> F3/1 Co-Prosecutors' Response to the KHIEU Samphân and NUON Chea Defence Request for Extended Deadlines and Page Limits in Regards to Case 002/01 Judgment Appeals, 21 August 2014, ("F3/1 Response"), paras. 2 and 3.

<sup>23</sup> Request, para. 20.

<sup>24</sup> Response/Request, para. 21.

differences with the ICT).<sup>25</sup> In Case 002/01, the Defence had also indicated the translation time within the requested time limit,<sup>26</sup> which did not trigger such an objection or condescension on the part of the Prosecution at the time.<sup>27</sup>

16. Moreover, the fact that the Prosecution bases its objection on the case law of the ICT while ignoring the unique impossibility for the ECCC to change its grounds of appeal after the filing of the notice of appeal<sup>28</sup> is again very revealing of its bad faith and its determination to prevent the Defence from doing its work properly.

17. The less time and space available to defence teams for their notices of appeal, the less they will be able to reverse convictions. The Prosecution's opportunistic objection is nothing other than a reflection of a strategy to sabotage the work and rights of the Defence, contrary to the interests of justice. The Prosecution's response is all the more indecent as its request is very revealing.

## **II. AN EGREGIOUSLY OPPORTUNISTIC REQUEST**

18. The Prosecution argues that a 30-page notice of appeal filed within 75 days would allow “all” parties to clearly identify the alleged errors, but that the accused's requests for extensions are patently excessive.<sup>29</sup> In other words, the Prosecution does not need more than the authorized 30 pages but needs 75 days for its notice of appeal and the defence teams should have the same. However, the Prosecution's needs show that the needs of defence teams are much greater and actually support the Defence's request for extensions.

19. Indeed, given the tiny number of acquittals in Case 002/02, the scope of the Prosecution's appeal is undoubtedly minimal compared to the scope of the appeal of KHIEU Samphân's 78 convictions. Moreover, the Prosecution does not have to discuss a judgment of thousands of pages and its appeal with an accused who will soon be 88 years old with slow faculties, and for whom the stakes are incomparable.

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<sup>25</sup> Request, para.18 and fn. 26.

<sup>26</sup> F3 Urgent Application for Extension of Time Limits for Submission on Appeal by the Defence for Mr KHIEU Samphân and the Defence for Mr NUON Chea, 13 August 2014, paras.19 and 31.

<sup>27</sup> F3/1 Response.

<sup>28</sup> Request, paras. 7-9, 18.

<sup>29</sup> Response/Request, para. 22.

20. Despite this and the fact that the Prosecution's workload in the cases under investigation has drastically decreased,<sup>30</sup> it requests 75 days (22 days longer than the 53-days time-limit given to the accused in Case 002/01) to appeal a small number of acquittals, which means that the accused ought to be granted much more than 75 days.
21. In fact, as the Supreme Court noted, the extensions of the number of pages and days sought by a party “must be commensurate to the scope of the appeal” and not merely mirror those requested by other applicants.<sup>31</sup> The Supreme Court also noted that:
- “there is a fundamental difference between the position of the accused in a criminal trial, whose liberty is at stake and who enjoys the fair trial rights set out, in particular, in Article 14(2) and (3) of the International Covenant on Civil and Political Rights (“ICCPR”), and that of the prosecution, which is representing the public interest that justice be done in accordance with the law”.<sup>32</sup>
22. Accordingly, since the scope of the Case 002/02 appeals is considerably greater than that of the Case 002/01 appeals, it is quite normal that the number of pages and days in Case 002/02 should be considerably greater than in Case 002/01. Similarly, since the scope of KHIEU Samphan's appeal in Case 002/02 is significantly greater than that of the Prosecution's appeal, it is also quite normal that the number of pages and days of the former should be considerably greater than that of the latter. It is therefore quite normal for the Defence to need 100 pages and 240 days while the Prosecution only needs 30 and 75. There is nothing neither “extraordinary”<sup>33</sup> nor “patently excessive”<sup>34</sup> in that. On the contrary, it is even consistent and reasonably proportional in light of all the circumstances of the case.
23. If the Prosecution really believed that 30 pages and 75 days were sufficient for the Defence to file its notice of appeal in Case 002/02, it should not have logically and objectively requested any extension for its own notice of appeal (especially in view of its own arguments on prior preparation and the rules of the ICT), let alone request exactly the same.

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<sup>30</sup> Case 004/1 is closed. In Case 004/2, all the appeals have been filed. In Case 003, the appeal briefs were filed. In Case 004, the Investigating Judges are drafting their Closing Order.

<sup>31</sup> F3/3 Decision on Motions for Extensions of Time and Page Limits for Notices of Appeal and Appeal Briefs, 29 August 2014, para.10; F9 Decision, para.14.

<sup>32</sup> F26/2/2 Decision on Co-Prosecutors and Civil Party Lead Co-Lawyers' Request for Additional Time for Examination of SCW-5, 30 June 2015, para. 6.

<sup>33</sup> Response/Request, para.6, where the Prosecution describes the length of the extensions requested by the defence teams as extraordinary.

<sup>34</sup> Response/Request, para. 22, where the Prosecution argues that the extensions requested by the defence teams are patently excessive and would unduly delay the proceedings.

24. However, the Prosecution is well aware that Case 002/02 is out of the ordinary<sup>35</sup> and that the Defence needs much more time and space for the appeal than it does. In reality, it seeks to reverse the handful of acquittals while preventing the Defence from being able to reverse the very large number of convictions. It is as simple and outrageous as that.

### CONCLUSION

25. While the Defence is accustomed to the exaggerations and bad faith<sup>36</sup> of the Prosecution, it is now deeply shocked by its indecent attempt to prevent it from availing itself of an effective right of appeal, against the interests of justice that the Prosecution is nevertheless supposed to serve. Indeed, the Co-Prosecutors have the duties to “always” protect the accused's right to a fair trial, to serve and protect the public interest, to perform their duties impartially and act objectively.<sup>37</sup>

26. If the Prosecution had done so and shown a minimum of intellectual honesty in the face of the difference in the stakes between the parties, it would not have objected to the Defence's request. Especially since it has recently argued that it is in the interests of justice that it should be given an extension of time-limit and meaningful opportunity to review the (legal) sources of a 17-page appeal in order to draft a full response to this appeal.<sup>38</sup> *A fortiori*, it is in the interests of justice that the Defence should be granted the extensions it is requesting so that it may have the opportunity to examine the reasons for the judgment and their factual and legal sources in order to draft a complete notice of appeal.

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<sup>35</sup> See *supra*, para.11 and fn. 18.

<sup>36</sup> For example: Response/Request, para. 22, where the Prosecution states that in Case 002/01, the Defence did not clearly specify the alleged errors in its notice of appeal, thereby failing to comply with the provisions of the Internal Rules. It refers in footnote 54 to a Supreme Court decision which it partially cites in a manner that misleads the reader. In fact, it was an annex to a Defence response to a request by the Prosecution that failed to link the Defence's notice of appeal and appeal brief. The Supreme Court expressly noted that the links were obvious even though they did not appear in the appendix provided to assist the Prosecution, and that the approach followed by the Defence in its notice of appeal and appeal brief was valid. The Defence does not understand why the Prosecution refers to it in its Request/Response, furthermore distorting the facts, and sees it as nothing other than a petty attempt to make the Defence look incompetent.

<sup>37</sup> **E363/2.1.2** Standards of professional responsibility and Declaration of the Essential Rights and Duties of Prosecutors, adopted by the International Association of Prosecutors on 23 April 1999, approved by the Commission on Crime Prevention and Criminal Justice on 17 April 2008 (E/CN.15/2008/L.10/Rev.2), convinced that they complement the Guidelines on the Role of Prosecutors adopted in 1990, Articles 1-f, 1-g, 3-a, 3-c.

<sup>38</sup> **E463/1/1** Co-Prosecutors' Request to File Their Response to KHIEU Samphân's Appeal Dated 19 November 2018 in One Language, 27 November 2018, para. 2. The Supreme Court largely granted this request: Decision on the co-Prosecutors' request for leave to file their response in only one language, 30 November 2018, **E463/1/1/1**, para.10.



27. Although the Prosecution opportunely suggests the opposite, the Defence is asking for nothing more or less than what it needs and has no interest in delaying the appeal process. The Prosecution and the Supreme Court are well aware that the Defence would have liked to have been able to appeal on the merits as soon as the judgment was rendered several months ago. It was the only party to complain that the reasons for the judgment were not given within the 30-day appeal period prescribed by the Internal Rules. The lack of reasons for the judgment on 16 November 2018 did not bother any party other than the Defence. On the contrary, the Prosecution defended the Chamber's violation of the Internal Rules.<sup>39</sup> Yet, in other circumstances where the Internal Rules had not been violated, it had already vigorously complained about the lack of grounds for a decision by the Chamber, when the stakes were high for it.<sup>40</sup>

28. **FOR THESE REASONS**, the Defence:

1) MAINTAINS its Request to the Supreme Court

- to CONFIRM that it is POSTPONING the starting point of KHIEU Samphân's appeal time-limit to the day after notification on 28 March 2019 of the full written reasons for the judgment delivered on 16 November 2018;
- to AUTHORIZE the Defence to file a 100-page notice of appeal in French and the required equivalent in Khmer within 8 months (240 days) of such notification;

2) DOES NOT OBJECT to the Prosecution's proportional request for leave to file a 30-page notice of appeal within 75 days, SPECIFYING that if the Supreme Court were not to grant the Defence's Request, the Prosecution's request should be dismissed.

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<sup>39</sup> E463/1/2 Co-Prosecutors' Response KHIEU Samphân's Appeal against the judgment pronounced 16 November 2018, 30 November 2018.

<sup>40</sup> E163/5/1/13/2 Co-Prosecutors' Request for an Urgent Order to the Trial Chamber to Issue a Reasoned Decision on the Severance of Case 002, 23 April 2013.

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