

**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: 22 July 2019

CLASSIFICATION

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



Classification by Supreme Court Chamber: សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

**CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN'S REQUEST FOR
ADDITIONAL TIME AND PAGE LIMITS FOR APPELLATE BRIEFS**

Filed by:

Co-Prosecutors
CHEA Leang
Brenda J. HOLLIS
(Reserve)

Distributed to:

Supreme Court Chamber
Judge KONG Srim, President
Judge C. N. JAYASINGHE
Judge SOM Sereyvuth
Judge Florence Ndepele MUMBA
Judge MONG Monichariya
Judge Phillip RAPOZA
Judge YA Narin

Accused
NUON Chea
KHIEU Samphan

Lawyers for the Defence
SON Arun
LIV Sovanna
Doreen CHEN
KONG Sam Onn
Anta GUISSÉ

Copied to:

Civil Party Lead Co-Lawyer
PICH Ang

I. INTRODUCTION

1. The Co-Prosecutors oppose the excessive extensions of time and page limits requested by Khieu Samphan for his appeal brief.¹ The proposed extensions are unprecedented, unwarranted in the circumstances, and not in the interests of justice. At the same time, the Co-Prosecutors recognise that extensions of the time and page limits are justified for the appellate briefs in this case, however such extensions must be reasonable.

II. PROCEDURAL HISTORY

2. On 28 March 2019, the Trial Chamber provided its full reasoned judgment.² On 3 April 2019, Khieu Samphan requested a total of 240 days and 100 pages in French to file his notice of appeal.³ On the same day, Nuon Chea requested a total of 180 days and 100 pages in English to file his notice of appeal.⁴
3. On 26 April 2019, the Supreme Court Chamber granted the Parties an extension of two months and increased the page limits from 30 to 60 pages for the notice of appeal.⁵ On 3 May 2019, Khieu Samphan sought review of the Supreme Court Chamber's decision,⁶ claiming that he would be unable to fully identify the errors in the Trial Judgment in the extended time and pages provided by the Supreme Court Chamber.⁷ The Supreme Court Chamber dismissed Khieu Samphan's request on 7 June 2019, noting that it was "largely repetitive" of his original request and reply to the Co-Prosecutors' response.⁸

¹ **F45** Demande de la Défense de KHIEU Samphân aux fins d'extension du délai et du nombre de pages de son mémoire d'appel, 10 July 2019 ("Khieu Samphan Request").

² **E465** Case 002/02 Trial Judgement, 28 March 2019.

³ **F39/1.1** Demande de la Défense de KHIEU Samphân aux fins d'extension du délai et du nombre de pages de sa déclaration d'appel, 3 April 2019, para. 42 ("Khieu Samphan Notice of Appeal Requests").

⁴ **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, para. 1.

⁵ **F43** Decision on Nuon Chea and Khieu Samphan's Requests for Extensions of Time and Page Limits on Notices of Appeal, 26 April 2019, para. 11 ("Notice Decision").

⁶ **F44** Demande de KHIEU Samphân de réexamen de la décision sur l'extension du délai et du nombre de pages des déclarations d'appel, 3 May 2019.

⁷ *Ibid*, para. 10.

⁸ **F44/1** Decision on Khieu Samphan's Application for Review of Decision on Requests for Extensions of Time and Page Limits on Notices of Appeal, 7 June 2019 ("Decision on Khieu Samphan Review Request").

4. On 1 July 2019, Khieu Samphan filed his notice of appeal⁹ containing what he has since clarified to be 1,824 grounds of appeal and 355 appealable decisions.¹⁰ The same day, Nuon Chea filed his notice of appeal alleging 351 grounds of appeal.¹¹
5. On 10 July 2019, Khieu Samphan requested a total of 10.5 months and 950 pages for his appeal brief.¹² Khieu Samphan further requested 40 days to respond to the Co-Prosecutors' appeal brief, to commence after the filing of his appeal brief, or in the alternative, requested the Supreme Court Chamber to schedule a public hearing on the issues.¹³

III. RESPONSE

(i) Khieu Samphan fails to justify his excessive request for additional time and pages for his appeal brief

6. The Co-Prosecutors acknowledge that an extension to the page and time limits to file appeal briefs is warranted in this case. However, the size and complexity of the Case 002/02 Trial Judgment does not justify extensions of the extraordinary length requested by Khieu Samphan.
7. By no calculus is Khieu Samphan's request reasonable. Contrary to Khieu Samphan's position,¹⁴ the total number of pages is too simplistic a means of calculating the necessary time and page limits required. Determining appropriate deadlines and lengths of submissions should not be a mechanical process and Khieu Samphan fails to demonstrate how a judgment which is three times longer necessarily requires an appeal that is three times as long. As a basic calculation, it fails to take account, for example, of the substantial factual overlap between cases 002/01 and 002/02. Similarly, Khieu Samphan's reliance on the comparatively larger number of footnotes in the Case 002/02 Judgment disregards the extensive cross-citing to other parts of the Judgment.¹⁵
8. Khieu Samphan also fails to show that his current level of resources warrants the extensions requested. As in his request for extra time and pages to file his notice of appeal, Khieu Samphan repeats his claim of being short of resources in comparison to the trial

⁹ E465/4/1 Déclaration d'appel de Khieu Samphan (002/02), 1 July 2019.

¹⁰ F45 Khieu Samphan Request, para. 9.

¹¹ E465/3/1 Nuon Chea's Notice of Appeal against the Trial Judgment in Case 002/02, 1 July 2019.

¹² F45 Khieu Samphan Request, para. 19.

¹³ F45 Khieu Samphan Request, paras 38, 40.

¹⁴ F45 Khieu Samphan Request, para. 16.

¹⁵ F45 Khieu Samphan Request, para. 16.

phase.¹⁶ However, an appeal is not supposed to be the same as the trial stage. As the Supreme Court Chamber has stated, “the Trial Chamber is ‘the central body tasked with making factual findings’ and the Supreme Court Chamber’s role is to verify that the burden of establishing the elements of charges beyond reasonable doubt is fulfilled, without engaging in a *de novo* evaluation of the evidence”.¹⁷

(ii) Khieu Samphan’s inadequate notice of appeal is not a justification for additional time and pages for his appeal brief

9. Khieu Samphan fails to demonstrate how his choice to file an inadequate notice of appeal can justify the voluminous time and page extensions he now requests. Khieu Samphan claims that he did not have sufficient time to verify the legal and factual support underlying the Trial Chamber’s findings and asserts that the time and pages request for his appeal brief is, in part, to carry out work he was unable to complete for his notice of appeal.¹⁸ This is not a legitimate basis for his request. In any criminal case, the parties are given a finite length of time to fulfil their obligations. It is up to each party to then organise its resources within that time to get the work done.¹⁹ Permitting Khieu Samphan extra time during the appeal brief process to complete work he failed to accomplish during the notice of appeal stage would defeat the purpose of setting deadlines in the first place.
10. Further, it is illogical that Khieu Samphan would need such a substantial page extension if, in fact, his plan is to make his notice of appeal more comprehensible.²⁰ Even a cursory review of Khieu Samphan’s notice of appeal shows numerous grounds that are very similar or the same in substance,²¹ something which might have been expected to have been

¹⁶ **F45** Khieu Samphan Request, para. 17. *See also*, **F39/1.1** Khieu Samphan Notice of Appeal Requests, paras 28-34.

¹⁷ **F36** Case 002/01 Appeal Judgment, 24 November 2016, para. 29 (“Case 002/01 Appeal Judgment”).

¹⁸ **F45** Khieu Samphan Request, para. 18.

¹⁹ *See, e.g.*, **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 of 26 July 2010, 18 October 2010, para. 9: “Regarding the resources available to the Accused, the Supreme Court Chamber emphasizes that, in exercising his right to choose legal representation, the Accused must bear in mind the need to respect procedural time limits in order not to unduly protract proceedings.”

²⁰ *See, e.g.*, *Prosecutor v Milorad Krnojelac*, IT-97-25-A, Decision on Prosecution’s Request for Authorisation to Exceed Prescribed Page Limits, 26 July 2002, p. 2: “CONSIDERING that the quality and effectiveness of appeal briefs does not depend on their length but on the clarity and cogency of the presented arguments and that, therefore, excessively long briefs do not necessarily serve the cause of an efficient administration of justice”.

²¹ For example, redundant grounds in Khieu Samphan’s notice of appeal include: Grounds 18.206 and 18.35 (both addressing purges inextricably linked to security centres and execution sites); Grounds 16.206 and 16.237 (both addressing the policy to identify, isolate, and crush the most dangerous enemies); Grounds 16.231, 12.110, 16.354, and 16.350 (all addressing political persecution at S-21); Grounds 16.221, 12.108, and 16.222 (all addressing the crime of murder at S-21); Grounds 16.349 and 18.255 (both addressing the

noticed at the time of drafting. Given that the appeal brief should amalgamate such overlapping grounds, the number of pages required will necessarily be less. Additional time is usually granted to ensure that parties can prepare more focused submissions, thereby reducing the number of pages required. Practically, a considerable time extension should be accompanied by a more moderate page extension.

11. Granting Khieu Samphan's request would be tantamount to encouraging parties to file a notice of appeal containing as many grounds as possible, no matter how poorly articulated or unsubstantiated, in order to enable the parties to justify subsequent requests for vast time and page extensions to draft appeal briefs.

(iii) Khieu Samphan disregards relevant considerations

12. Khieu Samphan wrongly suggests that the Supreme Court Chamber has signalled favouring speed of the proceedings over the rights of the defence.²² The sole basis cited, and indeed emphasised,²³ is the decision on the request for time and page extensions for the Parties' notices of appeal. Therein, the Supreme Court Chamber merely noted that it is "COGNIZANT of the need to ensure expeditious proceedings in accordance with the ECCC's legislative framework and international standards".²⁴
13. Khieu Samphan's request disregards the rights and interests of victims and Civil Parties, particularly given their advanced ages and health concerns, not to have the judicial process unduly delayed.²⁵ The need for expeditious conduct of proceedings is not, as Khieu

murder of former Khmer Rouge at S-21 and Kraing Ta Chan); Grounds 16.300, 16.302, 16.303, 16.305, 16.307, 16.309, 16.310, 16.313, and 16.314 (all addressing grave breaches of the Geneva Conventions against Vietnamese at S-21); Grounds 4.34, 18.239, and 18.87 (all addressing Khieu Samphan's knowledge of the protected status of detainees at S-21); Grounds 18.348, 18.213, and 18.70 (all addressing Khieu Samphan's awareness of arrests, detentions, ill-treatment, and executions); Grounds 18.40, 18.41, 18.64, and 18.207 (all addressing Khieu Samphan's awareness of crimes against former Khmer Rouge leaders); Grounds 18.205 and 18.34 (both addressing Khieu Samphan's contribution to the purges); and Grounds 12.27, 12.28, and 5.37 (all addressing the link between CPK leaders and S-21).

²² F45 Khieu Samphan Request, para. 23.

²³ F45 Khieu Samphan Request, fn. 27.

²⁴ F44/1 Decision on Khieu Samphan Review Request, p. 3.

²⁵ See, e.g., *Prosecutor v Thomas Lubanga*, ICC-01/04-01/06, Decision Setting the Size of the Reparations Awards for which Thomas Lubanga Dyilo is Liable, 15 December 2017, para. 234: "Although the individual identification of a greater number of victims to set the size of the reparations award would have been desirable, the necessary consultations would have unduly prolonged the proceedings, prejudicing not only Mr Lubanga's right to notice within a reasonable time [...] but also the right of the victims to receive prompt reparations. In that connection, the Chamber recalls that it must strike a fair balance between the rights and interests of the victims and those of the convicted person"; International Criminal Court Rules of Evidence and Procedure, Rule 101(1): "In making any order setting time limits regarding the conduct of any proceedings, the Court shall have regard to the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defence and the victims."

Samphan appears to conceive, a way of undermining defence rights.²⁶ It is a legitimate consideration for the Supreme Court Chamber which is mandated by the Internal Rules and the Establishment Law.²⁷

14. Indeed, the Supreme Court Chamber in Case 002/1 pointed out that the preclusion of pronouncing a conviction and sentence on appeal and prohibition on remanding a case for re-trial “signifies focus on expeditiousness of proceedings”,²⁸ and that the *limited* appeal process at the ECCC is, in fact, “disposed to protect the interest of the defence.”²⁹

(iv) Khieu Samphan’s request is excessive and unreasonable compared to extensions granted in similar-sized cases at the international level

15. The Supreme Court Chamber has noted that the Case 002/02 Trial Judgment “is comparable in length to the trial judgments of some of the most complex criminal proceedings litigated before other international(ized) tribunals”.³⁰ Indeed, some of the judgments referred to by the Supreme Court Chamber were longer than the Case 002/02 Trial Judgment, namely those judgments issued against Radovan Karadžić (2,590 pages), Charles Taylor (2,532), and Ratko Mladić (2,478). Notably, these were also single accused trials, meaning that all pages of these trial judgments were directly relevant to the convicted person on appeal, unlike the present situation.
16. As set out in the table below, comparing the time and page limit extensions allowed in these cases to Khieu Samphan’s request for 10.5 months (approximately 315 days) and 950 pages to file his appeal brief demonstrates that the requested extensions greatly exceed the norm in international criminal law. Khieu Samphan’s request is 2.5 to 4.5 times the amount of time granted and approximately 4 times the number of pages granted in similarly sized international trials.

²⁶ **F45** Khieu Samphan Request, para. 25.

²⁷ *See*, Extraordinary Chambers in the Courts of Cambodia, Internal Rules (rev. 16 January 2015), rule 21(4): “Proceedings before the ECCC shall be brought to a conclusion within a reasonable time” (“Internal Rules”). *See also*, rule 79(7): “In order to facilitate the fair and expeditious conduct of the proceedings, the Chamber may confer with the parties or their representatives, as applicable, by holding a trial management meeting [...]”; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea, NS/RKM/1004/006, 27 October 2004, art. 33*new*: “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”.

²⁸ **F36** Case 002/01 Appeal Judgment, para. 94.

²⁹ *Ibid.*

³⁰ **F43** Notice Decision, para. 8.

		Mladić	Karadžić	Taylor
Appeal Briefs	Applicable Rules on Time	75 days (from notice of appeal) ³¹		21 days (from notice of appeal) ³²
	Time granted	135 days ³³	135 days ³⁴	74 days ³⁵
	Applicable Rules on Length	30,000 words ³⁶		100 pages or 30,000 words ³⁷
	Words/Pages granted	75,000 words ³⁸ (250 pages approx)	75,000 words ³⁹ (250 pages approx)	400 pages or 120,000 words – for the total of both appeal and response brief ⁴⁰

(v) Co-Prosecutors' submission on deadline and page extensions for appellate briefs

17. The Co-Prosecutors submit that a period of five months and 300 pages for each Defence team to file an appeal brief, in one language, is reasonable. This is based on a consideration of: (i) the larger size of Case 002/02 compared to Case 002/01 in terms of the type, scope, and number of crimes adjudicated; (ii) the period of 3 months and 210 pages allowed for the filing of Defence appeal briefs in Case 002/01 by virtue of extensions of 30 days and approximately 180 pages being granted; (iii) the practice of other international tribunals in similarly sized cases; (iv) the right to adequate time to prepare submissions; (v) the need for proceedings to be expeditious; and (vi) the interests of victims in seeing justice completed in a reasonable time.

³¹ International Residual Mechanism for Criminal Tribunals, Rules of Procedure and Evidence (rev. 4 March 2019) rule 138.

³² Special Court for Sierra Leone, Rule of Procedure and Evidence (rev. 31 May 2012) rule 111.

³³ *Prosecutor v Mladić*, MICT-13-56-A, Decision on Ratko Mladić's Motion for Extensions of Time and Word Limits, 22 May 2018 ("Mladić Extension Decision") p. 4.

³⁴ *Prosecutor v Karadžić*, MICT-13-55-A, Decision on A Joint Motion for Extension of Time to File Appeal and Response Briefs, 9 August 2016, p. 3.

³⁵ *Prosecutor v Taylor*, SCSL-03-01-A, Decision on Prosecution and Defence Motions for Extension of Time and Page Limits for Written Submissions Pursuant to Rules 111, 112 and 113, 7 August 2012 ("Taylor Extension Decision"), p. 13; *Prosecutor v Taylor*, SCSL-03-01-A, Decision On Defence Motion For Reconsideration Or Review Of "Decision On Prosecution And Defence Motions For Extension Of Time And Page Limits Pursuant To Rules 111, 112 And 113" and Final Order On Extension Of Time For Filing Submissions, 21 August 2012, p. 3.

³⁶ International Residual Mechanism for Criminal Tribunals, Practice Direction on Lengths of Briefs and Motions (rev. 6 August 2013) para. 6.

³⁷ Special Court for Sierra Leone, Practice Direction on dealing with Documents in The Hague Sub-Office (amd. 25 April 2008) art. 6(E)(i).

³⁸ Mladić Extension Decision, p. 4.

³⁹ *Prosecutor v Karadžić*, MICT-13-55-A, Decision on a Motion for an Extension of a Word Limit, 8 September 2016, p. 3.

⁴⁰ Taylor Extension Decision, p. 13.

18. The Co-Prosecutors do not oppose a reasonable extension for the Defence response to the Co-Prosecutors' appeal brief, bearing in mind that the Co-Prosecutors will file their brief within the time and page limits provided for in the Internal Rules. The Co-Prosecutors request that any extensions granted to the Defence for filing their appeal briefs be extended in a proportionate manner to the Co-Prosecutors for filing their response brief(s), to ensure equity between the Parties, as far as possible.

(vi) The Parties should clearly structure their appeal briefs in accordance with the Internal Rules and ECCC jurisprudence

19. The Co-Prosecutors note the lack of clarity in Khieu Samphan's notice of appeal and recall the Supreme Court Chamber's finding in Case 002/01 that the Khieu Samphan Defence had "omit[ted] to correlate a conspicuous number of paragraphs in its appeal brief to corresponding grounds of appeal in its notice of appeal, and yet some of these arguments appear[ed] to be covered by some grounds of appeal".⁴¹
20. Consequently, the Co-Prosecutors request that the Parties be directed to (i) clearly identify the ground(s) or sub-ground(s) from their notice of appeal being argued in a particular ground of appeal in the appeal brief; (ii) argue each ground or sub-ground only once in the appeal brief; (iii) identify any grounds or sub-grounds from the notice of appeal which have not been included in the appeal brief;⁴² and (iv) "demonstrate a lasting *gravamen*" and relation between any interlocutory decision appealed and one or more permissible grounds of the appeal from the Trial Judgment.⁴³

(vii) Khieu Samphan's alternative request for a public hearing

21. The Co-Prosecutors do not oppose a public hearing, should one be necessary. However, Khieu Samphan fails to justify his request for a public hearing in the present circumstances.⁴⁴ His reasons for this request are to make the proceedings more "humane" and allow him to ensure that the "material constraints" he refers to are presented before the Supreme Court Chamber.⁴⁵ However, as Khieu Samphan has repeatedly raised the same issues,⁴⁶ the Supreme Court Chamber is fully aware of his concerns and is in a

⁴¹ **F18/3** Decision on Co-Prosecutor' Requests Relating to Khieu Samphan's Appeal Brief, 16 January 2015, p. 4.

⁴² See Internal Rule 105(3).

⁴³ **F9** Decision on Motions for Extensions of Time and Page Limits for Appeal Briefs and Responses, 31 October 2014, para. 16.

⁴⁴ **F45** Khieu Samphan Request, para. 40.

⁴⁵ **F45** Khieu Samphan Request, para. 40.

⁴⁶ See, **F39/1.1** Khieu Samphan Notice of Appeal Requests, paras 28-34; **F41/1** Réplique et réponse de KHIEU Samphân à l'Accusation sur l'extension du délai et du nombre de pages des déclarations d'appel, 23 April

position to contact the Office of Administration and the Internal Translation Unit for more information, if required.

IV. REQUESTED RELIEF

22. Based on the foregoing, the Co-Prosecutors respectfully request the Supreme Court Chamber to: (i) deny the Khieu Samphan request for 10.5 months and 950 pages for his appeal brief and grant a reasonable extension; (ii) grant a proportionate amount of any extensions afforded to the Defence for their appeal briefs to the Co-Prosecutors for their response brief(s); and (iii) instruct the Parties to structure their briefs in a way that clearly mirrors and substantiates their notices of appeal, avoids unnecessary repetition, and follows the Internal Rules and ECCC jurisprudence.

Respectfully submitted,

Date	Name	Place	Signature
22 July 2019	CHEA Leang National Co-Prosecutor	Phnom Penh	
	William SMITH International Deputy Co-Prosecutor for Brenda J. HOLLIS Reserve International Co-Prosecutor		

2019, paras 18-24; **F42/1** Réplique de KHIEU Samphân aux Parties civiles sur l'extension du délai et du nombre de pages des déclarations d'appel, 25 April 2019, paras 9-11.