

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

**FILING DETAILS**

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

**Party Filing:** Mr KHIEU Samphân

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**KHIEU Samphân's Defence Reply to the Responses to its Request for Extension of Time  
and Page Limits for Filing his Appeal Brief**

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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

Nicholas KOUMJIAN

**All Civil Party Lawyers**

**Mr NUON Chea's Defence**

**MAY IT PLEASE THE SUPREME COURT CHAMBER**

1. On 10 July 2019, the KHIEU Samphân Defence (the “Defence”) requested the Supreme Court Chamber (the “Supreme Court”) to allow it to file a 950-page appeal brief in French 10.5 months after the filing of its notice of appeal, with translation into Khmer to follow as soon as possible. It also requested leave to respond to the Prosecution’s appeal brief within 40 days of the filing of its own appeal brief.<sup>1</sup>
2. On 22 July 2019, the Civil Parties responded to the request.<sup>2</sup> They do not oppose a reasonable extension of the time limit for the brief (but “urged” that any such extension take into account the rights and interests of Civil Parties) and leave the submissions regarding the extension of the page limit to the sound discretion of the Supreme Court.<sup>3</sup> They say nothing about the time requested for the response to the Prosecution’s brief.
3. On 23 July 2019, the parties received notification of the Prosecution’s Response to the Request.<sup>4</sup> The Prosecution does not object to a reasonable extension of the time limit for responding to its appeal brief,<sup>5</sup> but opposes the requests for extensions with respect to the Defence appeal brief arguing that 5 months to file the brief in one language initially and 300 pages are sufficient.<sup>6</sup>
4. On the same day, the NUON Chea Defence filed a “first” request for extensions for the filing of its appeal brief. It requested leave to file a 1,000-page brief in one language initially within 10.5 months of filing its notice of appeal.<sup>7</sup>

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<sup>1</sup> Khieu Samphân’s Request for an Extension of Time and Page Limits for Filing his Appeal Brief, 10 July 2019, **F45** (“Request **F45**”).

<sup>2</sup> Civil Party Lead Co-Lawyer’s Response to KHIEU Samphân’s Request for Extension of Time and Page Limits for Appeal Brief, 22 July 2019, **F45/1** (“Response **F45/1**”).

<sup>3</sup> Response **F45/1**, paras 8-9.

<sup>4</sup> Co-Prosecutors’ Response to Khieu Samphân’s Request for Additional Time and Page Limits for Appellate Briefs, 22 July 2019, **F45/2** (“Response **F45/2**”), notified in French on 26 July 2019.

<sup>5</sup> Response **F45/2**, para. 18.

<sup>6</sup> Response **F45/2**, paras 17 and 22.

<sup>7</sup> NUON Chea’s First Request for an Extension of Time and Page Limits for Filing his Appeal Brief Against the Trial Judgement in Case 002/02, 23 July 2019, **F47**.

5. The Defence hereby replies to the responses of the Prosecution and the Civil Parties to its request for extensions with respect to the filing of its appeal brief, which it maintains more strongly.

### **REPLY**

6. The Defence notes the Prosecution's somewhat more measured and less condescending tone compared to the tone used in its response to the request for extensions regarding the notice of appeal.<sup>8</sup> Nevertheless, it notes that the Prosecution is still opportunistically trying to make the Defence look incompetent<sup>9</sup>, only seeking to slow down the proceedings and that it is still seeking to ensure that KHIEU Samphân's convictions are not overturned.

### **ON THE REASONABLENESS AND JUSTIFIABILITY OF THE REQUEST**

7. Contrary to what the Prosecution claims,<sup>10</sup> the Defence is fully aware that the appeal phase is different from the trial phase, with all which that implies. So also was the Defence in Case 002/01, when it requested 2 months and 50 pages to file its notice of appeal and then 3 months and 300 pages to file its appeal brief (exclusive of translation times)<sup>11</sup>. Eventually, it was granted 7 weeks to file in one language and 30 pages,<sup>12</sup> and 3 months to file in one language and 210 pages.<sup>13</sup> At the time, the Defence was already fully aware that it was in its interest to be concise, and had pointed out that it was not in the habit of taking more time or

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<sup>8</sup> Co-Prosecutors' Response to Defence Requests for Additional Time and Page Limits for Notice of Appeal, 11 April 2019, **F41** ("Response/Request **F41**").

<sup>9</sup> In fact, the Defence is beginning to get tired of the Prosecution's repetitive and particularly bad faith about the alleged defects in its notice of appeal in Case 002/01 (Response **F45/2**, para. 19; Response/Request **F41**, para. 22) and refers to its previous submissions (Khieu Samphân's Reply and Response to the Prosecution on Extension of Time and Number of Pages for Notices of Appeal, 23 April 2019, **F41/1**, footnote 36).

<sup>10</sup> Response **F45/2**, para. 8.

<sup>11</sup> Urgent Application for Extension of Time and Page Limits for Submissions on Appeal by the Defence for Mr Khieu Samphân and the Defence for Mr Nuon Chea, 13 August 2014, **F3**, paras 30-31; Mr. Khieu Samphân's Defence Urgent Application for Extensions of Time and Page Limits for the Appeal Brief, 6 October 2014, **F7** ("Request **F7**"), paras 19 and 24.

<sup>12</sup> Decision on Defence Motion for Extension of Time and Page Limits on Notice of Appeal and Appeal Briefs, 29 August 2014, **F3/3**; E-mail from Sheila PAYLAN dated 16 September 2014 at 13:54 entitled "Re: Request to file notices of appeal in one language".

<sup>13</sup> Decision on Motions for Extensions of Time and Page Limits for Appeal Briefs and Responses, 31 October 2014, **F9**.

using more space than necessary.<sup>14</sup> This is still the case today in Case 002/02, as is evidenced by the fact that the Defence has used less than the prescribed space and time to which it was entitled for all submissions it has filed before the Supreme Court since the judgement was rendered on 16 November 2018.<sup>15</sup>

8. The present request seeking 10.5 months and 950 pages for the appeal brief in Case 002/02 is just as reasonable as the one made in Case 002/01. As in that case, the request here is based on all the relevant circumstances of the case.
9. Regardless of what the Prosecution claims,<sup>16</sup> had the Defence proceeded mechanically by making a simple mathematical calculation, it would have requested much more. It would have requested at least 3.5 times the time granted in Case 002/01 for the notice of appeal and appeal brief (5 months) by deducting the time already granted for the notice of appeal in Case 002/02 (3 months), i.e. 14.5 months. It would also have calculated the difference between the number of interlocutory decisions impugned in Case 002/01 and in Case 002/02 (at least 100), which it would have multiplied by the number of pages to which it would have been entitled had it been able to appeal against those decisions during the course of the trial (30) which it would have added to 3.5 times the number of pages granted for the appeal brief in Case 002/01 (210), i.e. more than 4,000 pages.
10. Regardless of what the Prosecution claims,<sup>17</sup> the Defence took into account the numerous cross references in the footnotes in the reasons for judgement (as was the case in Case 002/01). It has also considered the fact that some individual footnotes span entire pages or almost (perhaps more than in Case 002/01).<sup>18</sup>

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<sup>14</sup> See, for example, Request F7, para. 10.

<sup>15</sup> For example: Khieu Samphan's Urgent Appeal against the Judgement Pronounced on 16 November 2018, 19 November 2018, E463/1, for which the Defence used only 3 days (out of 30) and 17 pages (out of 30).

<sup>16</sup> Response F45/2, para. 7.

<sup>17</sup> Response F45/2, para. 7.

<sup>18</sup> For example: Judgement in Case [002/02], 16 November 2018, E465, footnote 7,956 (alone spanning close to 3 pages), footnote 7,960 (alone spanning close to 2 pages), or footnote 13,385 (alone spanning one page).

11. Regardless of what the Prosecution claims,<sup>19</sup> the Defence took into account the factual overlap between Case 002/01 and Case 002/02. On the contrary, this justifies more time and space than was the case in Case 002/01. Indeed, the Prosecution was certainly careful to note that the Trial Chamber drew different conclusions in Case 002/02 from those drawn in Case 002/01 regarding some of the overlapping facts. Also, the Prosecution fails to mention the fact that this overlap also raises unprecedented complex legal issues (before the ECCC and elsewhere).
12. The Prosecution claims that the Defence “decided” to file an “inadequate” notice of appeal, that it did not lack time or space (either because it was poorly organized or because it is lying) and that it raised as many grounds of appeal as possible to justify vast time and space extensions for the brief.<sup>20</sup> The Defence does not intend to repeat herein the constraints it has had to face, but wishes to point out the lack of perspective still being shown by the Prosecution. It is disingenuous for the Prosecution to deny the fact that the Defence barely “had” more time than in Case 002/01 (only 1.35 times more).<sup>21</sup> Under the circumstances, without having the resources of the Office of the Co-Prosecutors, the Defence did the best it could in the extreme circumstances in which it had to work. Also, the Prosecution states totally erroneously that the Defence raised 1,824 “grounds of appeal”, several of which overlap,<sup>22</sup> even though the Defence clearly and consistently referred to 1,824 “errors” (which is not the same thing),<sup>23</sup> some of which it admitted, with complete transparency, might overlap.<sup>24</sup> The Defence request for time and space for its brief takes this overlapping into account.

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<sup>19</sup> Response F45/2, para. 7.

<sup>20</sup> Response F45/2, paras 9-11.

<sup>21</sup> In Case 002/01, the Defence was granted leave to file its notice of appeal in only one language 7 weeks after notification of the judgement. In Case 002/02, it had to file its notice of appeal in 2 languages 3 months after notification of the reasons for judgement, which amounts to 9.5 weeks excluding translation time.

<sup>22</sup> Response F45/2, paras 4, 10 and 11.

<sup>23</sup> KHIEU Samphân’s Notice of Appeal (002/02), 1 July 2019, E465/4/1 (“Notice of appeal E465/4/1”), para. 15 (see also paras 10-13 and 16-34); Request F45, para. 9.

<sup>24</sup> Notice of appeal E465/4/1, para. 12. It should be noted that the numbering of errors by section in the Defence notice of appeal was unquestionably intended to allow for the easy identification of errors that would ultimately be

**ON THE COMPARISON WITH OTHER CASES AT THE INTERNATIONAL LEVEL**

13. The Prosecution persists in pointing to the practice of other international or internationalized criminal courts and tribunals.<sup>25</sup> In order not to be repetitive, the Defence expressly refers to its submissions and the Supreme Court's jurisprudence that the comparison is of limited relevance to an appeal before the ECCC, except to show that appellants before the ECCC must have more time and space.<sup>26</sup>
14. To appreciate this, one need only add a column to the Prosecution's table showing the number of pages granted before the ECCC for appeal briefs in Case 002/01:

Case	Mladić	Karadžić	Taylor	Case 002/01 (2 co-accused) <sup>27</sup>
<b>Number of pages of the judgement in English</b>	2 478	2 590	2 532	623
<b>Number of pages granted for the appeal brief</b>	± 250	± 250	± 400 for both appeal and response brief	210 (KHIEU Samphân) 270 (NUON Chea)

**ON THE PROSECUTION'S STRATEGY**

15. By arguing that the Defence teams should be granted 5 months to submit a 300-page brief in one language, i.e. barely more than in Case 002/01, the Prosecution seeks to secure and reinforce the advantage it had already gained at the time of the notice of appeal.

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grouped together in the course of the drafting of the appeal brief.

<sup>25</sup> Response F45/2, paras 15-16.

<sup>26</sup> Khieu Samphân Defence Request for Extension of Time and Number of Pages to File Notice of Appeal, 3 April 2019, F39/1.1, paras 18-19; Request F45, para. 14.

<sup>27</sup> As in Case 002/01, the fact that the Prosecution states that Case 002/02 concerns 2 co-accused and not one only, unlike the cases highlighted by the Prosecution (Response F45/2, para. 15), has little impact on the comparison. Indeed, as in Case 002/01, a very small number of pages are devoted solely to each accused. Thus, while the reasons for judgement in Case 002/02 include 2,828 pages in French (2,387 pages in English), including annexes, for two co-accused, it should be noted that 91 pages in French (78 in English) are devoted to the roles and responsibilities of NUON Chea, while 137 pages in French (92 in English) are devoted to the roles and responsibilities of KHIEU Samphân. Everything else is common to both co-accused.

16. With respect to the appeal briefs, the Prosecution now argues that the Defence teams should be granted a little bit more than in *Mladić* and *Karadžić* (in which the accused was granted 4.5 months and about 250 pages),<sup>28</sup> while in the case of notices of appeal it had argued that all parties should have 2.5 months to submit their notice of appeal in 2 languages despite the fact that *Mladić* and *Karadžić* were granted 4 months (to file their notice of appeal in one language).<sup>29</sup> Logically, KHIEU Samphân should therefore have had more time than in these two cases to file his notice of appeal. According to its own comparative reasoning, the Prosecution should not seek to contradict the Defence by stating that the 9.5 weeks granted to it were enough. It should therefore not object to the fact that the Defence should now be granted the time that it did not have, notably, to verify the factual and legal support underlying the Chamber's findings.
17. Similarly, the Prosecution now argues that the Defence teams should be granted a little more than what they had in Case 002/01, when it described Case 002/02 as an usually large case while pleading for enough time and space for its closing brief.<sup>30</sup> In fact, it is not without significance that the parties had much more time and space in Case 002/02 than in Case 002/01 for their closing briefs and statements.
18. The Defence notes that the proposed 5 months are even less than what would be available having regard to the logic and spirit of the rules which grant at least twice the time for the appeal brief as for the notice of appeal (based on this logic, the Defence should have at least 6 to 7.5 months).<sup>31</sup>

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<sup>28</sup> Response F45/2, para. 16 (table).

<sup>29</sup> Reply/Request F41, paras 7, 15, 22.

<sup>30</sup> Co-Prosecutors' Response to NUON Chea's Request Regarding the Page Limit, Time Limit, and Content of His Closing Brief, 21 October 2016, E421/5/3, para. 5: "**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." (emphasis added). The International Co-Prosecutor also stated: "this is a huge case. There's a huge amount of evidence, there's complicated legal issues such as genocide, the elements of forced marriage. So it is something that will require significant explanation.", T. 8 December 2016, E1/509.1, p. 17, around 9:41.

<sup>31</sup> 30 days for the notice of appeal and 60 days for the appeal brief before the ECCC (Internal Rule 107, to which the

19. The Defence also notes that the number of pages proposed -- 300 -- is well below the number of pages of its closing brief (550 pages). However, the difference between the work undertaken at the trial stage and on appeal justified that in Case 002/01 the Defence had more space for its appeal brief than for its closing brief.
20. The Prosecution (which will have had 5 months to appeal against a single finding of the Chamber) knows perfectly well that the time and space it proposes are woefully inadequate for the Defence to fully and meaningfully plead its case on appeal, as it did when it opposed the extensions requested for notices of appeal. The Prosecution is keenly aware that with only 300 pages in 5 months, the Defence would be compelled to abandon several grounds of appeal and/or insufficiently substantiate them, which would result in their summary dismissal. Indeed, it should come as no surprise that the Prosecution should request that the Defence be ordered to identify the grounds of appeal in its notice of appeal that would have been abandoned.<sup>32</sup> Contrary to the interests of justice, the Prosecution is thus always conveniently seeking to prevent the Defence from doing its work properly, thereby limiting its ability to obtain the reversal of KHIEU Samphân's numerous convictions.

#### **ON THE RIGHTS AND INTERESTS OF CIVIL PARTIES**

21. The Prosecution argues that the Defence disregards the rights and interests of Civil Parties, particularly given their advanced age and health concerns.<sup>33</sup> In order not to be repetitive, the Defence hereby expressly refers to its submissions in reply to the response of the Civil Parties to its request for extensions of time and page limits to file its notice of appeal,<sup>34</sup> which they repeat here almost word for word with respect to the appeal brief.<sup>35</sup>

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Supreme Court refers when it states that "the preparation of notices of appeal is intended to be a temporally and substantively limited procedure compared to the preparation and filing of fully-reasoned submissions on appeal": Decision on Khieu Samphân's application for review of decision on requests for extensions of time and page limits on notices of appeal, 7 June 2019, F44/1, p. 3; 30 days for the notice of appeal and then 75 days for the appeal brief before the MICT (Response F45/2, para. 16, table and footnote 31).

<sup>32</sup> Response F45/2, para. 20 (iii).

<sup>33</sup> Response F45/2, para. 13.

<sup>34</sup> Reply from KHIEU Samphân to the Civil Parties on the Extension of the Time Limit and Number of Pages of the



## CONCLUSION

22. As in Case 002/01, the Defence request for extensions of time and page limits for its appeal brief in Case 002/02 is reasonable and warranted by the particular circumstances of the case. In this case, it is based on a holistic consideration and assessment of the following factors:

- the scope of his notice of appeal,
- the nature of its notice of appeal, raising particularly complex and often novel legal and factual issues (whether before the ECCC or before other courts and tribunals), including issues relating to the impact of the severance on the Chamber's findings in Case 002/02 (including the legal and factual issues raised by the overlaps with Case 002/01),
- the size and complexity of Case 002/02 compared to Case 002/01,
- the specificities of appeal proceedings before the ECCC compared to appeal proceedings before other international courts and tribunals (decisions cannot be sent back to the Trial Chamber, interlocutory decisions, translation constraints, consideration of the law and facts from more than 40 years ago),
- the jurisprudence of the Supreme Court,
- the lack of time at the time of the notice of appeal, which now makes it necessary for the Defence to be able to carry out the fundamental work of verifying the law and facts in support of the Trial Chamber's findings, and ensuring that it has not missed any grounds of appeal,
- the limited resources of the Defence, including members who did not attend the trial,
- the fact that days are only 24 hours long and that the Defence is composed of human beings and not machines,
- KHIEU Samphân's advanced age and his right to participate in his defence,
- KHIEU Samphân's advanced age and his interest in filing his appeal brief against his heavy sentence as soon as possible,
- drafting in French (which is always longer than in English),
- KHIEU Samphân's rights to the presumption of innocence, to be tried without undue delay, to have adequate time and facilities for the preparation of his defence, to have his conviction and sentence reviewed by a higher court or tribunal,
- the duty of the Defence to fully defend its client,

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Notices of Appeal, 25 April 2019, F42/1, paras 9, 11-13.

<sup>35</sup> Response F45/1.

- the duty of the Supreme Court to guarantee to KHIEU Samphân a real and meaningful right of appeal and not a theoretical or illusory one,
- the interest of justice.

23. **FOR THESE REASONS**, the Defence MAINTAINS its request to the Supreme Court.

Mr KONG Sam Onn	Phnom Penh	[signed]
Ms Anta GUISSÉ	Paris	[signed]