

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

FILING DETAILS

Case No: 002/19-09-2007-ECCC/SC
Filing Party: Nuon Chea Defence Team
Filed To: Supreme Court Chamber
Original Language: English
Date of Document: 23 July 2019



CLASSIFICATION

Classification Suggested by the Filing Party: PUBLIC
Classification of the Supreme Court Chamber: សាធារណៈ/Public
Classification Status:
Review of Interim Classification:
Records Officer Name:
Signature:

**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**

Filed By

Nuon Chea Defence Team:
SON Arun
LIV Sovanna
Doreen CHEN
PRUM Phalla
Xiaoyang NIE
Marina HAKKOU
DY Socheata
Gaëlle BUCHET
Stephanie ERIAN
Khady BÂ

Distributed To

Supreme Court Chamber:
Judge KONG Srim, President
Judge Chandra Nihal
JAYASINGHE
Judge SOM Sereyvuth
Judge Florence Ndepele
Mwachande MUMBA
Judge MONG Monichariya
Judge Phillip RAPOZA
Judge YA Narin

Co-Prosecutors:

CHEA Leang
Brenda J. HOLLIS (Reserve)

Co-Lawyers for the Civil Parties:

PICH Ang

Co-Lawyers for Khieu Samphân:

KONG Sam Onn
Anta GUISSÉ

PART 1. INTRODUCTION

1. Pursuant to Rule 39 of the ECCC Internal Rules and Article 5.4 of the Practice Direction on Filing of Documents, the Co-Lawyers for Nuon Chea (the “Defence”) hereby request:
 - (a) an extension of 8.5 months to the 60-day time limit to file Nuon Chea’s appeal brief against the Case 002/02 trial judgement, for a total of **10.5 months** from the filing of Nuon Chea’s notice of appeal;
 - (b) an extension of 970 pages to the 30-page limit for the appeal brief, for a total of **1,000** pages in English; and
 - (c) the filing of Nuon Chea’s appeal brief in English by the set deadline, with the Khmer version to follow as soon as possible after this date,(the “Request”).

PART 2. BACKGROUND

2. On 16 November 2018, the Trial Chamber issued its informal summary judgement in Case 002/02 against Nuon Chea and Khieu Samphân.¹
3. On 23 January 2019, Doreen Chen was appointed as the new International Co-Lawyer for Nuon Chea.² 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.
4. 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”).³ As the Judgement was notified after business hours at 8:37pm, the Supreme Court Chamber (the “Chamber”) deemed the Judgement to have been notified on 29 March 2019.⁴

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

² **E464**, ‘Assignment of New Foreign Co-Lawyer, Doreen Chen, to Represent Nuon Chea’, 24 Jan 2019.

³ **E465**, ‘Case 002/02 Judgement’, 16 Nov 2018 [*sic* – 28 Mar 2019] (“Judgement”).

⁴ **F43**, ‘Decision on NUON Chea and KHIEU Samphân’s Requests for Extensions of Time and Page Limits on Notices of Appeal’, 26 Apr 2019 (“Decision on Extension of Time and Page Limits for Filing Notice of Appeal in Case 002/02”), para. 12.

5. On 3 April 2019, the Defence requested an extension of time and pages for filing its notice of appeal to the Judgement.⁵ The Defence also indicated that it would submit requests for extensions of time and page limits to file the appeal brief once it was in a position to do so.⁶ On 26 April 2019, the Chamber partially granted the Defence's request, granting an extension of 60 days and 30 pages for the filing of the notice of appeal.⁷
6. On 1 July 2019, the Defence filed its notice of appeal to the Judgement (the "Notice of Appeal" or "Notice") setting out 351 grounds and 192 sub-grounds of appeal, for a total of 543 errors.⁸ On the same day, the Khieu Samphân Defence Team filed its notice of appeal to the Judgement, which identifies 1,824 errors and 355 interlocutory decisions for potential appeal.⁹
7. On 10 July 2019, the Khieu Samphân Defence Team submitted a request for an extension of 920 pages and 8.5 months to the statutory limits for the filing of the appeal brief, for a total of 950 pages and 10.5 months from the filing of the notice of appeal.¹⁰

PART 3. APPLICABLE LAW

8. Article 35 *new* of the ECCC Establishment Law, essentially mirroring Article 14 of the International Covenant on Civil and Political Rights, guarantees the individual the right to have adequate time and facilities for the preparation of their defence.¹¹
9. Internal Rule 105(3) provides that "[a] party wishing to appeal a judgment shall file a notice of appeal setting forth the grounds. [...] The appellant shall subsequently file an appeal brief setting out the arguments and authorities in support of each of the grounds".

⁵ 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 Apr 2019 ("Nuon Chea's Request for Extensions to File his Notice of Appeal").

⁶ F40/1.1, Nuon Chea's Request for Extensions to File his Notice of Appeal, para. 60.

⁷ F43, Decision on Extension of Time and Page Limits for Filing Notice of Appeal in Case 002/02, para. 13.

⁸ E465/3/1, 'Nuon Chea's Notice of Appeal against the Trial Judgement in Case 002/02', 1 Jul 2019 ("Notice of Appeal").

⁹ E465/4/1, 'Déclaration d'appel de Khieu Samphân (002/02)', 1 Jul 2019, para. 15.

¹⁰ 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 Jul 2019.

¹¹ 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."

According to Internal Rule 107(4), “[t]he appeal brief shall be filed within 60 (sixty) days of the date of filing the notice of appeal.” Additionally, Internal Rule 39(4) provides that chambers may “at the request of the concerned party or on their own motion [...] extend any time limits set by them”.

10. Article 5.2 of the Practice Direction on the Filing of Documents states that a document filed to the Pre-Trial Chamber or Supreme Court Chamber of the ECCC shall not exceed 30 pages in English or French. Article 5.4 of the Practice Direction further provides that “the relevant Chamber may, at the request of a participant, extend the page limit in exceptional circumstances”.
11. In determining whether there is good cause to vary procedural limits, the Chamber has considered the following factors: (i) the size and complexity of the case;¹² (ii) the novelty of issues being examined;¹³ (iii) the appointment of new counsel;¹⁴ and (iv) the impact of the accused’s advanced age and health on defence counsel’s ability to effectively obtain instructions.¹⁵
12. Similarly, chambers at the International Tribunal for the Former Yugoslavia (“ICTY”), International Criminal Court (“ICC”) and Special Court for Sierra Leone (“SCSL”) have recognised that the length of the trial judgement,¹⁶ the size of the case record,¹⁷ the

¹² *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; and **F43**, Decision on Extension of Time and Page Limits for Filing Notice of Appeal in Case 002/02, para. 8.

¹³ *Case 001, F6/2*, Decision on Extension of Time Limit for Filing Appeal Brief in Case 001, paras 8 and 10; and **F43**, Decision on Extension of Time and Page Limits for Filing Notice of Appeal in Case 002/02, para. 8.

¹⁴ *Case 001, F6/2*, Decision on Extension of Time Limit for Filing Appeal Brief in Case 001, paras 8 and 10; and **F43**, Decision on Extension of Time and Page Limits for Filing Notice of Appeal in Case 002/02, para. 9.

¹⁵ **F43**, Decision on Extension of Time and Page Limits for Filing Notice of Appeal in Case 002/02, para. 9.

¹⁶ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2946, ‘Decision on Mr Lubanga’s Request for an Extension of the Page Limit’, 29 Nov 2012 (“*Lubanga* Decision on Extension of Page Limit”), para. 5; *Prosecutor v. Katanga*, ICC-01/04-01/07-3454, ‘Decision on the Requests of Mr Germain Katanga and the Prosecutor Relating to the Time Limits for their Filings on Appeal’, 4 Apr 2014 (“*Katanga* Decision on Extension of Time Limit”), para. 18; *Prosecutor v. Šainović et al.*, IT-05-87-A, ‘Decision on Nikola Šainović and Dragoljub Odžanić’s Joint Motion for Extension of Word Limit’, 11 Sep 2009 (“*Šainović* Decision to Extend Word Limit”), p. 4; *Prosecutor v. Prlić et al.*, IT-04-74-A, ‘Decision on Appellant’s Requests for Extension of Time and Word Limits’, 9 Oct 2014 (“*Prlić* Decision to Extend Word and Time Limits”), p. 4; *Prosecutor v. Karadžić*, MICT-13-55-A, ‘Decision on a Motion for an Extension of a Word Limit’, 8 Sep 2016 (“*Karadžić* Decision on Extension of Word Limit”), p. 2; *Prosecutor v. Karadžić*, MICT-13-55-A, ‘Decision on a Joint Motion for Extension of Time to File Appeal and Response Briefs’, 9 Aug 2016 (“*Karadžić* Decision on Extension of Time Limit”), p. 2; and *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 Aug 2012 (“*Taylor* Decision on Extension of Time and Page Limits”), para. 25.

¹⁷ *Karadžić* Decision on Extension of Word Limit, p. 2; and *Taylor* Decision on Extension of Time and Page Limits, para. 26.

novelty and complexity of issues examined,¹⁸ the scope of the appeal,¹⁹ the fact that the convictions subject to appeal concern numerous criminal incidents covering diverse geographical locations,²⁰ and the appointment of a new defence counsel²¹ constitute good cause for granting extensions to procedural limits. The lack of resources allocated to the defence²² and the hierarchical position or high profile of the accused have also been considered when determining variations to procedural limits.²³

PART 4. ARGUMENTS

I. THE PROPOSED EXTENSIONS ARE NECESSARY TO PROTECT NUON CHEA'S FAIR TRIAL RIGHTS

A. NUON CHEA MUST HAVE ADEQUATE TIME AND FACILITIES TO PREPARE HIS DEFENCE

13. This Request must 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.
14. 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

¹⁸ *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 ("*Bemba et al.* Decision on Extension of Time Limit"), 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 ("*Bemba* Decision on Extension of Time Limit"), para. 6; *Prosecutor v. Bemba*, ICC-01/05-01/08-3405, 'Decision on Mr Bemba's Request for an Extension of Page Limit for his Document in Support of the Appeal', 11 Jul 2016 ("*Bemba* Decision on Extension of Page Limit"), para. 10; *Lubanga* Decision on Extension of Page Limit, para. 5; *Šainović* Decision to Extend Word Limit, p. 4; *Prlić* Decision to Extend Word and Time Limits, p. 2; *Karadžić* Decision on Extension of Word Limit, p. 2; *Karadžić* Decision on Extension of Time Limit, p. 2; *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, 'Decision on Urgent Joint Defence and Prosecution Motion for an Extension of Time for the Filing of Appeal Briefs and Extension of Page Limits for Appeal Briefs', 7 Nov 2007 ("*Fofana* Decision on Extension of Time and Page Limits"), p. 4; and *Taylor* Decision on Extension of Time and Page Limits, para. 25.

¹⁹ *Bemba* Decision on Extension of Page Limit, para. 10; and *Karadžić* Decision on Extension of Word Limit, p. 2.

²⁰ *Šainović* Decision to Extend Word Limit, p. 4; and *Taylor* Decision on Extension of Time and Page Limits, para. 26.

²¹ *Fofana* Decision on Extension of Time and Page Limits, p. 3.

²² *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, p. 3.

²³ *Prosecutor v. Šainović et al.*, TI-05-87-A, 'Decision on Motions for Extension of Time to File Notices of Appeal', 23 Mar 2009, p. 3; and *Prosecutor v. Karadžić*, MICT-13-55-A, 'Decision on Motion for Extension of Time to File Notice of Appeal', 21 Apr 2016, p. 1.

rights that are theoretical and illusory but rights that are practical and effective”.²⁴ 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 to prepare a meaningful defence.

15. In line with the ECtHR’s position, this Chamber granted the two defendants extensions of time and page limits to file their appeal briefs to the Case 002/01 trial judgement in order to guarantee “sufficient time and space to meaningfully plead”.²⁵ The Chamber further held that page limits “are to be tailored according to the needs of the parties”.²⁶
16. Chambers at other international(ised) criminal tribunals have similarly recognised the right of litigating parties to have adequate time and space to submit meaningful appeal briefs.²⁷ For example, the Pre-Appeal Judge in *Prlić et al.* held it to be “in the interests of justice to ensure that the parties have sufficient time to prepare meaningful briefs in full conformity with the relevant provisions”.²⁸
17. Accordingly, as a minimum guarantee of his fair trial rights, Nuon Chea is entitled to adequate time and facilities to prepare his appeal brief in accordance with the relevant ECCC rules. The current statutory time and page limits for the filing of his appeal brief to the Judgement are patently inadequate in this regard. They must be revised to ensure that Nuon Chea has the time and space necessary to plead meaningfully before the Chamber, and to prevent Nuon Chea’s right to appeal from being rendered theoretical. Indeed, the Chamber appears to have already acknowledged the relative size and complexity of the task of drafting appeal briefs. In its decision rejecting the Khieu Samphân Defence Team’s request to reconsider its decision on the page and time limits for notices of appeal, the Chamber noted that “the preparation of notices of appeal is

²⁴ *Artico v. Italy*, ECtHR, App. No. 6694/74, ‘Judgement’, 3 May 1980, para. 33 (emphasis added) (*see* **F40/1.1.1.5**).

²⁵ **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 the Case 002/01 Appeal”), para. 13.

²⁶ **F13/2**, ‘Decision on Defence Motions for Extension of Pages to Appeal and Time to Respond’, 11 Dec 2014, para. 15.

²⁷ See, for *e.g.*, *Karadžić* Decision on Extension of Time Limit, p. 2; *Karadžić* Decision on Extension of Word Limit, p. 2; *Prosecutor v. Mladić*, MICT-13-56-A, ‘Decision on Ratko Mladić’s Motion for Extensions of Time and Word Limits’, 22 May 2018 (“*Mladić* Decision on Extension of Time and Word Limits”), p. 4.

²⁸ *Prlić* Decision to Extend Word and Time Limits, p. 3; *Mladić* Decision on Extension of Time and Word Limits, p. 4.

intended to be a temporally and substantively limited procedure compared to the preparation and filing of *fully-reasoned submissions* on appeal”.²⁹

B. THIS IS THE FINAL OPPORTUNITY FOR NUON CHEA TO PRESENT HIS CASE

18. This case is not only the last against Nuon Chea before the ECCC – and likely the last at the ECCC altogether – but this appeal is the final stage of proceedings against the highest-ranking and most high profile surviving member of the Communist Party of Kampuchea. As such, it is the last opportunity for the ECCC to ascertain the truth of events that occurred during the Democratic Kampuchea (“DK”) period.
19. Whereas trial proceedings involve numerous hearings and the presentation of oral submissions, the appeal brief comprises the core of Nuon Chea’s case on appeal and the primary basis for the Chamber to formulate its appeal judgement. In this context, having a coherent appeal brief will assist the Chamber in its decision-making, facilitate the overall conduct of appeal proceedings, and give practical effect to Nuon Chea’s right to present his case. In view of the scope and complexity of the case and of Nuon Chea’s grounds of appeal, this unavoidably necessitates the production of a document of considerable length.

C. JUDICIAL ECONOMY MUST NOT OUTWEIGH THE FAIRNESS OF PROCEEDINGS

20. In addition, it must be emphasised that judicial economy, while an important consideration in the conduct of proceedings, must not undermine the fairness of proceedings or an individual’s right to a fair trial. As noted by the ECtHR in *Papadakis v. Former Yugoslav Republic of Macedonia*, concerns over the possible prolongation of 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”.³⁰ Likewise, in *OAO Neftyanaya Kompaniya Yukos v. Russia*, the ECtHR held that “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”.³¹

²⁹ 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 Jun 2019, p. 2 (emphasis added).

³⁰ *Papadakis v. Former Yugoslav Republic of Macedonia*, ECtHR, App. No. 50254/07, ‘Judgement’, 26 May 2013, para. 94 (see E409.1.2).

³¹ *OAO Neftyanaya Kompaniya Yukos v. Russia*, ECtHR, App. No. 14902/04, ‘Judgement (Merits)’, 20 Sep 2011, para. 540 (see F40/1.1.1.6).

21. In its determination of this Request, the Chamber must also maintain the distinction between “judicial economy” and “judicial convenience”. In *Burmych and Ors v. Ukraine*, the ECtHR condemned the abuse of the notion of “judicial economy” in the following terms:

[A]lthough lowering the number of cases pending before the Court might make the administrative situation of the institution look brighter, this does not mean that the human rights situation in Europe is any better. Au contraire! The Court was set up specifically to respond to these violations as an independent judicial body, and not to concentrate on statistics. [...] **Nor could a failure to deal with these fundamental rights cases be classified under judicial economy, judicial efficiency, or the Brighton philosophy. This is simply momentary judicial convenience.**³²

22. It follows that neither budgetary considerations nor the ECCC’s Completion Plan should form part of the Chamber’s decision to extend the time and page limits for the filing of Nuon Chea’s appeal brief. Nor can these factors reasonably fall within the purview of judicial economy. Although the “effective functioning of the [ECCC] has in the past been hampered by significant and persistent financial insecurity”,³³ this Chamber has itself previously emphasised 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.³⁴

23. The Defence notes that the current Completion Plan sets the expected timeline for filing appeals to the Judgement for 2019 and the issuance of the appeal judgement by the fourth quarter of 2020.³⁵ Considering that it took 21 months for the Chamber to issue the Case 002/01 appeal judgement, which was much more narrow in scope, it is obvious that the expected date for issuing the Case 002/02 appeal judgement will ultimately be significantly extended. The Defence should therefore not be set an unrealistic and unfair

³² *Burmych and others v. Ukraine*, ECtHR, App. Nos 46852/13 et al., ‘Judgement’, 12 Oct 2017, para. 39 (**Attachment 1**) (emphasis added).

³³ ECCC Completion Plan (Revision 20), 31 Mar 2019, para. 14 (**Attachment 2**).

³⁴ **E284/4/8**, ‘Decision on Immediate Appeals against Trial Chamber’s Second Decision on Severance of Case 002’, 25 Nov 2016, para. 75.

³⁵ ECCC Completion Plan (Revision 20), 31 Mar 2019, paras 12(i) and 38 for the filing of appeals, and paras 12(ii) and 39 for the issuance of the appeal judgement.

deadline for filing its appeal brief in order to meet current policy considerations that are completely divorced from the reality of these proceedings and clearly subject to revision.

24. It should also be highlighted that many of the Co-Prosecutors' submissions have not been subject to the constraints of judicial economy, including their introductory, supplementary, and final submissions in Case 002. This has given the Co-Prosecutors enormous influence over the pace of the proceedings. Nuon Chea has been in custody since 2007. That it has taken this long for Case 002 to be conducted is a matter entirely beyond his control. In fact, had there been greater emphasis on timeliness at an earlier stage of the proceedings – or a properly representative severance of Case 002 by the Trial Chamber from the outset – such concerns would be less pertinent at this time. The burden of “judicial economy” should not now be placed on the Defence when it has had far fewer opportunities than the Co-Prosecutors to set out its case, particularly if doing so would undermine Nuon Chea's right to present a meaningful defence.
25. Finally, the Chamber must also avoid *proprio motu* consideration of Nuon Chea's age and health as a matter relevant to judicial economy. In its decision extending the time and page limits for the filing of the notices of appeal, the Chamber held that the age and health of the accused required the parties to employ conscientious work practices.³⁶ However, Nuon Chea's age and health are factors for him and the Defence alone to consider. They cannot and should not be used by the Chamber to undermine Nuon Chea's ability to make decisions as to the conduct of his defence, nor to undermine Nuon Chea's fair trial right to adequate time and facilities to prepare his case, especially when the Defence is best placed to determine the time required to prepare Nuon Chea's appeal.

II. THE PROPOSED EXTENSIONS ARE FAIR AND REASONABLE

A. THE JUDGEMENT AND CASE FILE ARE EXTENSIVE

1. Scope of the Appeal

26. The size of the Judgement and the underlying case file has been well noted. As recognised by this Chamber when deciding to extend the time and page limits for the filing of the notices of appeal:

the Trial Judgement – at 4,101 pages in Khmer, 2,387 pages in English and 2,828 pages in French – is the longest issued by the ECCC and is comparable in length to the trial

³⁶ F43, Decision on Extension of Time and Page Limits for Filing Notice of Appeal in Case 002/02, para. 10.

judgments of some of the most complex criminal proceedings litigated before other international(ized) tribunals. The **unprecedented size and complexity** of the Case 002/02 proceedings is underscored by various factors including the duration of the trial proceedings, the number of witnesses, experts and civil parties who gave evidence at trial, the number of exhibits put before and considered by the Trial Chamber, the geographic and temporal scope of the charges, and the novelty of certain issues litigated at trial for the first time at the ECCC.³⁷

27. Nuon Chea’s appeal is equally extensive, with the Defence having identified at least 543 errors arising from the Judgement and the conduct of Case 002/02 trial proceedings to put before the Chamber for appellate review, including 24 decisions rendered during the trial.³⁸ By comparison, the Defence’s notice of appeal to the Case 002/01 trial judgement contained 223 appeal grounds.³⁹
28. The Chamber has previously held that “extensions sought for [...] appeal briefs must be commensurate to the scope of the appeal by the applicant”.⁴⁰ An extension of the time and page limits must therefore turn on the proposed scope of the Defence’s appeal, providing adequate time and space to develop each ground in accordance with the Internal Rules.⁴¹ In turn, and commensurate with the scope of this appeal, the Defence reasonably requires at least 10.5 months from the filing of the Notice of Appeal (*i.e.* an 8.5-month extension) and 1,000 pages (*i.e.* a 970-page extension) to file its appeal brief.

2. Lack of Interlocutory Appeals

29. As part of its appeal, the Defence has identified 24 decisions issued during the Case 002/02 trial proceedings that it considers to have violated Nuon Chea’s fair trial rights. The unavailability of interlocutory appeals at the ECCC has meant that these decisions must be raised in the appeal brief. Had it been possible to appeal these decisions during the course of the trial, the Defence would have benefitted from a 30-page allowance for each interlocutory appeal.⁴² In view of the number of impugned procedural decisions

³⁷ **F43**, Decision on Extension of Time and Page Limits for Filing Notice of Appeal in Case 002/02, para. 8 (emphasis added).

³⁸ **E465/3/1**, Notice of Appeal, p. 6. Ground 9 lists the following decisions: E336/3, E346/2/2, E346/3, E347/4, E350/8, E367, E370/4, E380/2, E388, E395/1, E396/4, E399/5, E405/2, E408/4, E408/5, E409/3, E415, E416/4, E418/3, E443/10, E444/1, E449/3/6, E457/6, E459.

³⁹ **F36**, ‘Nuon Chea’s Appeal against the Judgement in Case 002/01’, 29 Dec 2014 (“Nuon Chea’s Appeal Brief in Case 002/01”).

⁴⁰ **F3/3**, ‘Decision on Defence Motion for Extension of Time and Page Limits on Notices of Appeal and Appeal Briefs’, 29 Aug 2014 (“Decision on Extension of Time and Pages for Notices and Appeal Briefs in Case 002/01”), para. 10.

⁴¹ *See*, in particular, Internal Rule 105(3).

⁴² **F9**, Second Decision on Time and Page Limits in the Case 002/01 Appeal, para. 16.

arising from the Case 002/02 trial proceedings, this amounts to 720 pages of submissions.

30. This Chamber has emphasised that appeals from such decisions “must demonstrate a lasting *gravamen* on the part of the appellant; as such, they must relate to one or more of permissible grounds of the appeal from the Trial Judgment.”⁴³ Now that the Judgement has been rendered, the full impact of procedural decisions issued throughout trial proceedings has become apparent, as indicated in its Notice of Appeal.⁴⁴ The Defence accordingly requires an appropriate extension of pages to address each of these decisions in turn.

3. Comparative Data

31. On 29 March 2019, the Trial Chamber rendered its 2,259-page Judgement on Case 002/02 – 26 months after the conclusion of the substantive hearings, and 21 months after closing statements.⁴⁵ The length of the Judgement and the time taken by the Trial Chamber to issue it demonstrate the scope and complexity of the issues involved.
32. Case 002/02 covers 22 charges involving five nationwide policies, eight crime sites, and countless alleged events across the entire DK period. Nearly 11,000 pieces of evidence were admitted and 172 witnesses were heard. Nuon Chea has at least 78 convictions, with nearly 300 underlying individual counts – although the vague nature of the Judgement makes this challenging to determine precisely. Case 002/01, on the other hand, dealt with six charges, one policy (Movement of the Population, phase 1 and part of phase 2) and one crime site. Less than 6,000 exhibits were admitted and 58 witnesses called to testify. The Case 002/01 trial judgement was also a fraction of the length of the Case 00/02 Judgement. Still, the Chamber considered that extensions would “certainly need to be granted in light of the size and complexity” of that case.⁴⁶ This is as relevant, if not more so, in the present case.
33. Below the Defence has set out an estimate of time and pages needed for its appeal brief to address all relevant issues raised by the Case 002/02 Judgement in comparison with Case 002/01:

⁴³ F9, Second Decision on Time and Page Limits in the Case 002/01 Appeal, para. 16.

⁴⁴ E465/3/1, Notice of Appeal, p. 6, ground 9.

⁴⁵ E465, Judgement, para. 13.

⁴⁶ F3/3, Decision on Extension of Time and Pages for Notices and Appeal Briefs in Case 002/01, para. 10.

	Pages in Judgement	Time for appeal brief (from the filing of the notice of appeal)	Pages for appeal brief
Case 002/01	623	90 days	270 pages
Case 002/02	2,259	324 days	972 pages
Number of times by which the Case 002/02 Judgement is larger than its Case 002/01 counterpart	3.6		

34. Based on this calculation, the Defence should be allowed at least 324 days (*i.e.* approximately 11 months) and a minimum of 972 pages for submission of its appeal brief. When counting an additional 30 pages to respond to each of the 24 procedural decisions that were not open to interlocutory appeal during the trial proceedings, the page allowance for the appeal brief increases to 1,692 pages.
35. Nevertheless, while the Defence must be allocated sufficient space to articulate its grounds of appeal, the Defence is fully cognisant that the quality of an appeal brief does not depend on its length.⁴⁷ For this reason, and in view of the number and complexity of the issues on appeal, the Defence is only requesting an allowance of 1,000 pages. This is the minimum necessary to prepare a coherent appeal brief that respects Nuon Chea's right to present a meaningful defence. Any less would require the Defence to abandon some of the already-carefully curated grounds of appeal identified in the Notice.
36. It is crucial that the Chamber defer to the Defence's own assessment of the time and space necessary to meaningfully exercise Nuon Chea's rights. In the context of the general size and scope of Case 002/02, the extensions sought are modest. Indeed, recalling that the Defence has identified 543 errors in the Judgement, a 1,000 page-long appeal brief would require the Defence to properly articulate and respond to each error in only 1.8 pages. In comparison, the Co-Prosecutors will be entitled to file a 30-page brief to substantiate a single ground of appeal. It follows that additional time and pages are also required to preserve the equality of arms.

⁴⁷ See, *e.g.*, *Karadžić* Decision on Extension of Word Limit, p. 2.

37. The following table illustrates the practical consequences of the 1,000-page limit for the filing of the appeal brief and shows that, once divided among the 21 sections of the Notice of Appeal, a 1,000-page limit is more than reasonable.

#	Section of Notice of Appeal	Relevant pages in Judgement ⁴⁸	Number of convictions	Number of appeal grounds	Allocated pages per section at a 1000-page limit projection
1.	Tier 1. Errors invalidating the entire Judgement	2,259	78	11	71
2.	Right to a fair trial	2,259	78	25	129
3.	Historical background/CPK's communication and administrative structures	196	78	9	23
4.	Nuon Chea's roles and functions	27	78	5	18
5.	Chapeau elements	46	78	11	41
6.	Applicable law	68	78	12	35
7.	Common purpose	180	78	33	76
8.	Crocodile	102	78	25	59
9.	Individual criminal responsibility	51	78	31	59
10.	Tram Kak Cooperatives	270	6	30	38
11.	Trapeang Thma Dam Worksite	173	6	22	38
12.	1 st January Dam Worksite	166	6	52	38
13.	Kampong Chhnang Airfield Construction Site	114	5	33	38
14.	S-21 Security Centre	318	9	51	49
15.	Kraing Ta Chan Security Centre	160	8	31	38
16.	Au Kanseng Security Centre	111	6	21	26
17.	Phnom Kraol Security Centre	102	7	16	23
18.	Treatment of Buddhists	29	1	9	18

⁴⁸ The calculation of the number of pages in the Judgement relevant to a specific section of the Notice of Appeal encompasses all relevant pages in the Judgement addressed by that section. For example, the figure of 270 pages given in relation to the Tram Kak Cooperatives represents the sum of the pages of Section 10.1, Section 16.4.1, Section 17.1.2.1, and Section 17.2.2.1.

19.	Treatment of the Cham	109	7	41	54
20.	Treatment of the Vietnamese	92	4	24	54
21.	Treatment of the former Khmer Republic Officials	489 ⁴⁹	5	20	32
22.	Regulation of Marriage	94	2	38	43

38. As demonstrated by the above table, the 1000-page limit is not simply reasonable, but will require the Defence to expend significant additional energy and resources into the production of a radically synthesised draft. To offer a concrete example by way of illustrating this challenge, the Judgement dedicates 166 pages to the 1st January Dam worksite in which it finds Nuon Chea guilty of six counts of crimes against humanity. The Defence will have to develop the 52 grounds of appeal related to this crime site in a mere 38-page section, which amounts to 0.7 pages per ground of appeal.
39. Granting any less than 1,000 pages will increase the risk of forcing the Defence to drop appeal grounds simply due to the sheer lack of space and time, as the Defence was forced to do during the Case 002/01 appeal proceedings.⁵⁰ It should go without saying that the Defence should not be forced to choose between grounds of appeal and key arguments in support of the appeal as a result of page limits.

B. THE ISSUES ON APPEAL ARE NOVEL AND COMPLEX

40. Case 002/02 has generated several novel legal issues that have not previously been dealt with by an international criminal court or tribunal, let alone by the ECCC. These include, but are not limited to:
- discriminatory grounds for an attack to be considered a crime against humanity;
 - the definition of “civilian population” for the purposes of a crime against humanity where a significant portion of the population in an area are members of the armed forces;
 - underlying acts that constituted a crime against humanity in 1975;

⁴⁹ The Trial Chamber’s findings on the treatment of the former Khmer Republic officials are contained in one single paragraph (para. 3521). However, footnote 11,841 refers to entire sections of the Judgement: “Section 10.1: Tram Kak Cooperatives; Section 11.2: 1st January Dam Worksite; Section 12.2: S-21 Security Centre; Section 12.3: Kraing Ta Chan Security Centre. See also Section 16.4.3.4: Common Purpose: Targeting of Specific Groups: Former Khmer Republic Officials”. The figure of 489 pages is the sum of all the pages referred to in this footnote as well as the number of pages directly relevant in Section 19: The Criminal Responsibility of Nuon Chea.

⁵⁰ **F13**, ‘Urgent Request for Reconsideration of Page Limits for Appeals against the Case 002/01 Judgment’, 2 Dec 2014, para. 2.

- the applicability and foreseeability of the crime against humanity of murder with *dolus eventualis* in 1975;
- the impact of a state of emergency on the characterisation of certain crimes of which Nuon Chea has been convicted;
- the legality of re-characterising facts during the deliberation phase without prior notice to the accused; and
- the definition of forced marriage.

41. These are complex issues that require substantial time and space if they are to be addressed in a coherent manner. The requested extensions to time and page limits will allow the Defence to do just that, *i.e.*, to put before the Chamber all relevant information for it to render its determination on these unique and important issues.

C. THE STANDARD FOR APPELLATE REVIEW NECESSITATES THE MAKING OF EXTENSIVE ARGUMENTS

42. The standard for appellate review at the ECCC necessitates the making of extensive arguments. As explained by the Chamber in the Duch Appeal Judgement:

Where the Supreme Court Chamber finds an error of law in a trial judgement arising from the application of the wrong legal standard by the Trial Chamber, the Supreme Court Chamber will determine the correct legal standard and review the relevant factual findings of the Trial Chamber. In so doing, the Supreme Court Chamber not only corrects the legal error, but applies the correct legal standard to the evidence contained in the trial record, where necessary, and determines whether it is itself convinced on the relevant standard of proof as to the factual finding challenged by a party before that finding is confirmed on appeal.⁵¹

43. This threshold means that an appealing party must be able to formulate each ground of appeal and provide sufficient information to assist the Chamber in its review. This task is even greater where mixed errors of law and fact are involved, as these require explanation of the erroneous legal finding, its impact on various factual findings, and the way in which the outcome would have differed had the correct legal standard been applied. Given that most appeal grounds set out in Nuon Chea's Notice are mixed errors, the Defence will require more time and space to make its case.

⁵¹ *Case 001, F28, 'Appeals Judgement'*, 3 Feb 2012, para. 16 (emphasis added).

44. In the Case 002/01 appeal judgement, only after careful analysis of the facts was the Chamber able to enter a series of acquittals.⁵² Similarly, it took a full-day hearing for the Chamber to determine that witness Sam Sithy, who testified primarily on one specific event, was “neither credible nor reliable”.⁵³ These examples illustrate that, in order to make a compelling argument and satisfy the standard of review of the Chamber, the Defence needs a considerable extension to the statutory time and page limit to meaningfully set out its case on appeal.

D. THE REQUESTED EXTENSIONS ARE CONSISTENT WITH THE PRACTICE AT OTHER INTERNATIONAL(ISED) CRIMINAL TRIBUNALS

45. Litigating parties in comparable cases at the ICTY have likewise been given substantial time to file their appeal briefs. The defence in *Karadžić* and *Mladić*, for instance, were given more than eight months to file their appeal briefs following the issuance of the trial judgement.⁵⁴ The defendants in *Prlić et al.* had over seven months from the issuance of the trial judgement to file their appeal briefs.⁵⁵

46. The ICC Appeals Chamber has typically doubled the statutory time and page limits for the filing of appeal briefs.⁵⁶ Given that, up until July 2017, the notice was simply a declaration of a party’s intention to appeal, ICC defence teams were able to start working on their appeal briefs from the moment the trial judgement is rendered.⁵⁷ Conversely, parties at the ECCC must first present a detailed roadmap of their appeal in the form of the notice, and only after this has been submitted can the parties begin substantive work on their appeal briefs.

47. Importantly, all cases before other international(ised) criminal courts and tribunals have dealt with **limited subject matter** when compared to the geographical and temporal scope of Case 002/02. For example, *Karadžić* and *Mladić* were each convicted on 10

⁵² F36, Nuon Chea’s Appeal Brief in Case 002/01, paras 537, 631, and 704.

⁵³ F36, Nuon Chea’s Appeal Brief in Case 002/01, paras 537, 631, and 704.

⁵⁴ *Karadžić* Decision on Extension of Time Limit, p. 3; and *Mladić* Decision on Extension of Time and Word Limits, p. 4.

⁵⁵ *Prlić* Decision to Extend Word and Time Limits, p. 4.

⁵⁶ See, for *e.g.*, *Bemba et al.* Decision on Extension of Time Limit, para. 18; *Bemba* Decision on Extension of Time Limit, para. 8; *Bemba* Decision on Extension of Page Limit, para. 13; *Katanga* Decision on Extension of Time Limit, para. 21.

⁵⁷ In its current version, Regulation 57 of the ICC Regulations of the Court (amended on 12 July 2017 and entered into force on 20 July 2017) require the Notice of appeal to state “the grounds of appeal, cumulatively or in the alternative, specifying the alleged errors and how they affect the appealed decision”. However, this requirement did not exist at the time of the case law cited above.

counts of international crimes committed across select municipalities in Serbia and Bosnia and Herzegovina. The *Lubanga* case, where the defendant had over eight months to file his appeal brief,⁵⁸ revolved around a single conviction.⁵⁹ In *Katanga*, the Defence was granted six months to file its appeal brief⁶⁰ against a trial judgement that dealt with four charges under one mode of liability, all of which related to a single attack that took place on one day.⁶¹ Similarly, the *Bemba* case involved five charges under one mode of liability⁶² and the Defence was permitted to file its appeal brief within six months from notification of the trial judgement.⁶³

48. By comparison, the case against Nuon Chea involves 22 counts of international crimes (at least 78 convictions in total, with nearly 300 underlying individual counts) and numerous incidents committed across the entire territory of Cambodia over a period of nearly four years. The scope of Case 002/02, which is vague and significantly greater than the most comparable cases at other international criminal mechanisms, therefore warrants greater time and space being given to the Defence to prepare Nuon Chea's appeal brief.

III. REQUEST TO FILE IN ONE LANGUAGE

49. Finally, the Defence requests that the Chamber permit the filing of the appeal brief in one language by the set deadline, with the Khmer version to follow as soon as possible. As has been previously argued by the Defence, the requirement to file in two working languages is unique to the ECCC and effectively results in the shortening of time limits as documents have to be translated before submission.⁶⁴ Filing in one language is the only fair solution that ensures that the Defence has adequate time to file its appeal brief while also maintaining the expeditiousness of proceedings.
50. Based on the translation rates typically provided by the Interpretation and Translation Unit ("ITU"), the Defence estimates that that every 100 pages will require 20 working

⁵⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, 'Judgement of the Appeal of Mr Thomas Lubanga Dyilo against his Conviction', 1 Dec 2014, paras 8-9.

⁵⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, 'Judgment pursuant to Article 74 of the Statute', 14 Mar 2012, para. 1358.

⁶⁰ *Katanga* Decision on Extension of Time Limit, para. 21.

⁶¹ *Prosecutor v. Katanga*, ICC-01/04-01/07-3436-tENG, 'Judgment pursuant to article 74 of the Statute', 7 Mar 2014.

⁶² *Prosecutor v. Bemba*, ICC-01/05-01/08-3343, 'Judgment pursuant to Article 74 of the Statute', 21 Mar 2016.

⁶³ *Bemba* Decision on Extension of Time Limit, para. 8.

⁶⁴ **F3**, '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 Aug 2014, para. 19.

days (*i.e.*, four weeks) for translation. For a 1,000-page brief, this would amount to 10 months of full-time work by ITU. Moreover, given that ITU has often assigned multiple staff to working on a document at this scale, it has also ordinarily required additional time at the end to merge, harmonise, and revise the completed translation. The Defence will of course endeavour to submit completed sections of the brief to ITU on a rolling basis to minimise any delay in the filing of the Khmer version. However, as the Chamber is aware, ITU serves multiple sections of the court and cannot guarantee turnaround times. It is apparent that, whatever time the Chamber allocates for completing the appeal brief, a substantial portion will be taken up by translation alone.

51. In Case 002/01, the Chamber was cognisant of this issue and permitted the parties to file the appeal brief in English or French with the Khmer version to follow.⁶⁵ The Defence requests that the same approach be applied to the present case, *i.e.*, that it be allowed to file Nuon Chea's appeal brief in one language with the Khmer version to follow.

PART 5. CONCLUSION

52. Given the scope and complexity of the issues raised by the Judgement, and in order to give effect to Nuon Chea's fair trial rights, the Defence reasonably requires a minimum extension of 8.5 months (for a total of 10.5 months from the filing of the Notice of Appeal) and 970 pages (for a total of 1,000 pages) for the filing of Nuon Chea's appeal brief. Should anything less than this be granted, the Defence may be forced to consider requesting additional resources to meet the deadline for filing of the appeal brief.

PART 6. RELIEF

53. For the foregoing reasons, the Defence requests that the Supreme Court Chamber:
- (a) urgently grant an extension of:
 - (i) an additional 8.5 months, for a total of **10.5 months** from the filing of the Notice of Appeal; and
 - (ii) an additional 970 pages, for a total of **1,000** pages in English, for the Defence to prepare and file Nuon Chea's appeal brief; and

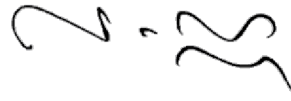
⁶⁵ F9, Second Decision on Time and Page Limits in the Case 002/01 Appeal, para. 19.

- (b) order the Defence's appeal brief to be submitted in English by the set deadline with the Khmer version to follow as soon as possible after this date.

CO-LAWYERS FOR NUON CHEA



SON Arun



LIV Sovanna



Doreen CHEN