



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

**ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ**

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber

Chambre de la Cour suprême

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Case File/Dossier N°. 002/19-09-2007-ECCC/SC

Before: Judge KONG Srim, President
Judge Chandra Nihal JAYASINGHE
Judge SOM Sereyvuth
Judge Florence Ndepele MWACHANDE-MUMBA
Judge MONG Monichariya
Judge Maureen Harding CLARK
Judge YA Narin

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DECISION ON CO-PROSECUTORS' REQUEST FOR ADDITIONAL PAGES TO RESPOND TO KHIEU SAMPHAN'S APPEAL BRIEF OF THE CASE 002/02 JUDGEMENT

Co-Prosecutors

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Accused

KHIEU Samphân

Civil Party Lead Co-Lawyers

PICH Ang
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Co-Lawyers for KHIEU Samphân

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THE SUPREME COURT CHAMBER of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Supreme Court Chamber” or “Chamber”, and “ECCC”, respectively) is seised of the “Co-Prosecutors’ Request For Additional Pages To Respond to Khieu Samphân’s Appeal of the Case 002/02 Judgement” (“Co-Prosecutors’ Request” or “Request”)¹ filed on 20 March 2020.

A. BACKGROUND

1. On 16 November 2018, the Trial Chamber pronounced its summary findings and disposition regarding the culpability and sentences of the Accused in Case 002/02 and on 28 March 2019, the Trial Chamber provided its reasoned judgement.²
2. On 1 July 2019, KHIEU Samphân filed his Notice of Appeal³ and on 10 July 2019, KHIEU Samphân requested an extension of time (10.5 months) and page limits (950 pages) for filing his Appeal Brief.⁴ On 19 August 2019, the Co-Prosecutors filed a request to be granted the same time and page extensions as any granted to KHIEU Samphân.⁵
3. On 23 August 2019, the Supreme Court Chamber granted KHIEU Samphân an extension to file a brief not exceeding 750 pages and directed the Co-Prosecutors to file their response not exceeding 350 pages.⁶
4. On 27 February 2020, KHIEU Samphân filed his Appeal Brief (“KHIEU Samphân’s Appeal Brief”) in French.⁷

¹ Co-Prosecutors’ Request for Additional Pages to Respond to KHIEU Samphan’s Appeal of the Case 002/02 Judgement (“Co-Prosecutors’ Request” or “Request”), **F55**, 20 March 2020.

² Case 002/02 Trial Chamber Judgement (“Judgement”), **E465**, 28 March 2019.

³ KHIEU Samphân’s Notice of Appeal (002/02), **E65/4/1**, 1 July 2019.

⁴ KHIEU Samphân’s Request for an Extension of Time and Page Limits for Filing His Appeal Brief, **F45**, 10 July 2019.

⁵ Co Prosecutors’ Amendment of Request for Additional Time and Pages for Appeal Response Brief, **F48**, 19 August 2019.

⁶ Decision on KHIEU Samphân’s Request for Extension of Time and Page Limits for Filing His Appeal Brief, **F49**, 23 August 2019.

⁷ KHIEU Samphân’s Appeal Brief (002/02), **F54**, 27 February 2020.

5. On 20 March 2020, the Co-Prosecutors filed their Request. KHIEU Samphân filed his response on 27 March 2020 (“KHIEU Samphân’s Response” or “Response”).⁸ On 31 March 2020, the Co-Prosecutors filed a Reply.⁹

B. SUBMISSIONS

Co-Prosecutors’ Request

6. The Co-Prosecutors request the Chamber to grant an additional 145 pages to enable them to substantively respond to KHIEU Samphân’s Appeal Brief as they submit that his 750 page Brief is accompanied by a 76 page Annex (“Annex A”), and at least 236 pages of previous submissions incorporated by reference, both of which expand the substance of his Brief and warrant additional pages to allow an effective response.¹⁰

7. The Co-Prosecutors argue that Annex A, entitled “Summary of Grounds of Appeal of KHIEU Samphân (002/02) with identification errors in the appeal statement”, is integral to KHIEU Samphân’s Appeal Brief as it provides the grounds of appeal that are supported by the arguments therein. The Co-Prosecutors contend that Annex A is furnished by KHIEU Samphân to remedy the different manner in which his Appeal Brief and Notice of Appeal are organised, and note that Annex A identifies and particularises the grounds of appeal, the portions of the Trial Judgement subject to his appeal, the alleged errors and rights violated and the consequences of these violations. The Co-Prosecutors therefore submit that Annex A is essential to the Chamber and opposing parties to enable them to identify the grounds of appeal and establish if they meet the standard of appellate review.¹¹

8. The Co-Prosecutors further note that KHIEU Samphân has incorporated by reference at least 236 pages of previous arguments from his Appeal Brief in Case 002/01 and Closing Brief in Case 002/02 in order to avoid repetition.¹² The Co-Prosecutors contend that KHIEU

⁸ KHIEU Samphân’s Response to the Co-Prosecutors’ Request for Additional Pages to Respond to KHIEU Samphân’s Appeal Brief of the Case 002/02 Judgement (“KHIEU Samphân’s Response” or “Response”), **F55/1**, 27 March 2020.

⁹ Co-Prosecutors’ Reply to KHIEU Samphân’s Response to the Co-Prosecutors’ Request for Additional Pages to Respond to KHIEU Samphan’s Appeal of the Case 002/02 Judgement (“Co-Prosecutors’ Reply” or “Reply”), **F55/2**, 31 March 2020.

¹⁰ Co-Prosecutors’ Request, paras 1, 8, 10-11.

¹¹ Co-Prosecutors’ Request, para. 8.

¹² Co-Prosecutors’ Request, para. 9.

Samphân's Appeal Brief now totals 1, 062 pages, which is a minimum of 312 additional pages in excess of the Chamber's prescribed 750-page limit when it afforded the Co-Prosecutors 350 pages to respond.¹³

9. The Co-Prosecutors argue that granting an additional 145 pages is proportionate and necessary to ensure fairness in the treatment of parties to the appeal and to enable them to effectively and comprehensively respond to KHIEU Samphân's allegations.¹⁴

KHIEU Samphân's Response

10. According to KHIEU Samphân, Annex A contains no additional allegations, noting that all legal arguments to which the Co-Prosecutors shall respond are contained within the 750-page Appeal Brief. KHIEU Samphân states that Annex A consists of tables summarising the arguments of his Appeal Brief, linking his Brief to the errors identified in his Notice of Appeal that was structured very differently. KHIEU Samphân submits that Annex A is neither 'integral' nor essential to his Appeal Brief but is a "tool" to enable the reader to better navigate the 750-page Appeal Brief in relation to his Notice of Appeal.¹⁵

11. KHIEU Samphân also submits that the purpose of incorporating previous arguments by reference was to avoid repetition, arguing that the Co-Prosecutors could equally opt to do the same, in line with the Chamber's previous jurisprudence.¹⁶

12. KHIEU Samphân finally argues that the 145-page extension requested by the Co-Prosecutors would cause unwarranted delay to the appeals proceedings, particularly taking into consideration the subsequent extension of time needed for translation, which will effectively determine the commencement periods for setting filing deadlines.¹⁷ Accordingly, KHIEU Samphân requests the Chamber to deny the Co-Prosecutors' Request.

¹³ Co-Prosecutors' Request, para. 10.

¹⁴ Co-Prosecutors' Request, para. 11.

¹⁵ KHIEU Samphân's Response, paras 4-5.

¹⁶ See KHIEU Samphân's Response, para. 6, *citing* F23/1 Decision on Co-Prosecutors' Request for Page and Time Extensions to Respond to the Defence Appeals of the Case 002/01 Judgement, para. 9: "*As to any arguments by NUON Chea or KHIEU Samphân that may be incorporated by reference to earlier submissions, the Supreme Court Chamber considers this to be an efficient way of avoiding repetition, which is available to the Co-Prosecutors as well*".

¹⁷ KHIEU Samphân's Response, para.7.

Co-Prosecutors' Reply

13. The Co-Prosecutors submit that if the Chamber accepts KHIEU Samphân's argument that Annex A adds nothing substantial to his Appeal Brief, then it should be dismissed. However, in the alternative, should the Chamber consider that Annex A substantially adds to KHIEU Samphân's Appeal Brief, the Co-Prosecutors' Request for additional pages must be granted.¹⁸

14. The Co-Prosecutors describe Annex A as a roadmap of KHIEU Samphân's Appeal Brief which provides guidance and clarifications in relation to the content of his Brief, and further contains a summary of arguments KHIEU Samphân had intended to make in his Brief but did not do so in order to avoid exceeding the 750-page limit granted by the Chamber. The Co-Prosecutors argue that KHIEU Samphân's choice has the effect of disadvantaging parties opposing his appeal and can be remedied by allowing the present Request.¹⁹ To ensure equal treatment, the Co-Prosecutors request an additional 35 pages to respond to Annex A.²⁰

15. In addition, the Co-Prosecutors note that KHIEU Samphân erroneously assumes they can respond to his incorporation of previous submissions by reference in the same manner as he utilised whereas the submissions made prior to the Trial Judgement may have been made for reasons that are different to the present appeal.²¹

16. The Co-Prosecutors submit that KHIEU Samphân's contention that granting the Request will cause undue delay is unfounded particularly as he fails to demonstrate how his rights to be tried without undue delay will be violated or that it will prevent proceedings from concluding within a reasonable time.²²

17. In their summation, the Co-Prosecutors state that to restrict their response to be heard at the oral hearings would inevitably deny the Chamber the opportunity to fully assess each response before the oral hearing and would further deprive the Chamber the benefit of the Civil Parties' ability to review the Co-Prosecutors' response in order to prevent overlap and repetition.²³ The Co-Prosecutors hence request the Chamber to grant their Request to facilitate

¹⁸ Co-Prosecutors' Reply, paras 2-4.

¹⁹ Co-Prosecutors' Reply, paras 3-4.

²⁰ Co-Prosecutors' Reply, para. 5.

²¹ Co-Prosecutors' Reply, para. 6.

²² Co-Prosecutors' Reply, para. 9.

²³ Co-Prosecutors' Reply, para. 10.

their ability to file a comprehensive response to KHIEU Samphân's Appeal Brief.²⁴ They request the Chamber to i) dismiss Annex A or grant an additional 35 pages to respond to it, and ii) to grant an additional 110 pages to effectively respond to the previous submissions incorporated by reference in KHIEU Samphân's Appeal Brief.²⁵

C. APPLICABLE LAW

18. Article 5.4 of the Practice Direction on Filing of Documents before the ECCC ("Practice Direction") provides that the relevant Chamber, may, at the request of a party, extend applicable page limits in exceptional circumstances.

D. DISCUSSION

19. As a preliminary observation, the Supreme Court Chamber recalls that KHIEU Samphân filed his Appeal Brief in French with Khmer and English versions to follow. The Chamber is currently seised of the Co-Prosecutors' Request while still awaiting the official translations of KHIEU Samphân's Appeal Brief in Khmer and English from the Interpretation and Translation Unit ("ITU"). However, in the interests of expedition and fairness to all parties, the Chamber has relied on unofficial translations as well as the parties' submissions to adjudicate this Request. The Chamber relies on the parties to have presented their submissions as a true representation of the contents of the Annex A.

(i) Annex A

20. As both parties agree to the usefulness of Annex A as either a tool or a roadmap that facilitates the reading of KHIEU Samphân's Appeal Brief, there is nothing to be gained by rejecting Annex A. As the Co-Prosecutors appear to have no objection to the Chamber receiving KHIEU Samphân's Appeal Brief in its entirety, it accordingly grants the Co-Prosecutors' Request for 35 additional pages to address any issues contained in Annex A.

(ii) Previous Submissions Incorporated by Reference

²⁴ Co-Prosecutors' Reply, para. 11.

²⁵ Co-Prosecutors' Reply, para. 12.

21. As to the incorporation by reference of 236 pages of previous submissions from KHIEU Samphân's Case 002/01 Appeal Brief and Case 002/02 Closing Brief, the Chamber agrees that this can be a means of avoiding repetition. The Chamber notes that submissions presented to the Trial Chamber in this manner in this case were rejected on the basis that the *approach constitutes an impermissible attempt to circumvent the page limits imposed by the Chamber on the parties' respective briefs*.²⁶ This Chamber therefore iterates that acceptance of a brief with appendices does imply any tacit acceptance of the relevance and admissibility of any argument raised.

22. Returning to the motion before it, the Chamber is not convinced that the Co-Prosecutors can necessarily respond in the same manner by reference to previous submissions. Such previous submissions relate to findings and evidence relevant to a different trial or to the Trial Chamber before its judgement was rendered in the case under appeal. The Chamber agrees with the Co-Prosecutors that the circumstances under which submissions were made prior to the Case 002/02 Trial Judgement may differ from the present proceedings and consequently finds that responses cannot always be meaningfully addressed through simple referencing to previous submissions.

23. The Chamber therefore grants to the Co-Prosecutors an additional 110 pages specifically to respond to the 236 pages of previous submissions incorporated by reference in KHIEU Samphân's Appeal Brief.

iii) *Arguments relating to undue delay*

24. KHIEU Samphân submits that to grant the Co-Prosecutors' Request would unnecessarily delay the appeal proceedings due to the subsequent delays in translations.²⁷ The Chamber observes that he provides no information on how his fair trial rights will be adversely affected. The Chamber thereby rejects KHIEU Samphân's argument as unfounded.

iv) *Conclusion*

25. The Chamber considers that the inclusion of the 76-page Annex A that both parties agree is a useful tool, coupled with at least 236 pages of previous submissions spread over two trials constitutes an exceptional circumstance as envisaged in Article 5.4 of the Practice

²⁶ Trial Judgement, E465, para. 3705.

²⁷ KHIEU Samphân's Response, para. 7.

Direction and hence considers it appropriate to grant the Co-Prosecutors' Request for an additional 145 pages to enable an effective response to KHIEU Samphân's Appeal Brief.

E. DISPOSITION

26. For the foregoing reasons, the Supreme Court Chamber:

GRANTS the Co-Prosecutors' Request for:

- (i) 35 additional pages to respond to Annex A and
- (ii) 110 additional pages to respond to the previous submissions incorporated by reference in KHIEU Samphân's Appeal Brief.

Phnom Penh, 24 April 2020

President of the Supreme Court Chamber



KONG Srim