

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

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**CO-PROSECUTORS' REQUEST FOR PAGE AND TIME EXTENSION TO
RESPOND TO THE DEFENCE APPEALS OF THE CASE 002/01 JUDGMENT**

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I. Introduction and Procedural History

1. Pursuant to Internal Rule 39(4)¹ and Practice Direction Article 5.4 and 8.2,² the Co-Prosecutors respectfully request the leave of the Supreme Court Chamber (“Chamber”) for an extension of 180 pages and 20 days in relation to the filing of their consolidated response (“Consolidated Response”) to Nuon Chea’s and Khieu Samphan’s appeal briefs (“Accused Appeal Briefs”).
2. On 7 August 2014, the Judgment in Case 002/01 was filed in the Khmer, English, and French languages.³ On 29 September 2014, Nuon Chea and Khieu Samphan (together, the “Appellants”) filed their notices of appeal from the Judgment.⁴ On 29 December 2014 – 20 weeks and four days after the Judgment became available in all three languages – the Appellants filed their Appeal Briefs with a combined total of 480 pages.⁵
3. Prior to the filing of the Accused Appeal Briefs, the Co-Prosecutors had sought leave to file a Consolidated Response equal in length to the combined length of the Accused Appeal Briefs and requested a deadline for the Consolidated Response 90 days after the date on which the Accused Appeal Briefs were filed in two languages.⁶ The Chamber granted the Co-Prosecutors leave to file a Consolidated Response of 280 pages⁷ (200 pages less than the combined Accused Appeal Briefs⁸) and set a deadline for the filing of the Consolidated Response of 30 days after the filing of the last-filed Khmer version of the Accused Appeal Briefs.⁹

¹ Internal Rule 39(4).

² Practice Direction on the Filing of Documents before the ECCC, ECCC/01/2007/Rev.8.

³ **E313**, Judgment, 7 August 2014.

⁴ **E313/1/1**, Notice of Appeal against the Judgment in Case 002/01, 29 September 2014; **E313/2/1**, *Déclaration d’appel de la Défense de M. KHIEU Samphân contre le jugement rendu dans le procès 002/01*, 29 September 2014.

⁵ **F16**, Nuon Chea’s Appeal against the Judgment in Case 002/01, 29 December 2014; **F17**, *Mémoire d’appel de la Défense de M. KHIEU Samphân contre le jugement rendu dans le procès 002/01*, 29 December 2014.

⁶ **F7/1**, Co-Prosecutors’ Response and Request on Case 002/01 Appeal and Response Brief Extensions, 16 October 2014, paras. 15-16, 23-24.

⁷ **F9**, Decision on Motions for Extensions of Time and Page Limits for Appeal Briefs and Responses, 31 October 2014 (“Decision on Time and Page Limits”), para. 17.

⁸ The Appellants had originally been granted a combined total of 420 pages (210 pages each) for their Appeal Briefs. Decision on Time and Page Limits, para. 17. Nuon Chea was subsequently granted an extension to 270 pages following an application therefor.

⁹ Decision on Time and Page Limits, para. 21.

4. On 25 March 2015, the Khmer translation of the Khieu Samphan Appeal Brief was filed,¹⁰ thereby establishing 24 April 2015 as the current deadline for the filing of the Consolidated Response.

II. Argument

A. Page Extension

(1) Requiring the Co-Prosecutors to file a Consolidated Response of less than 460 pages would impact on the integrity of the Co-Prosecutors' arguments and would therefore be contrary to the interests of justice.

5. Currently, Nuon Chea and Khieu Samphan combined have 70 percent more space to make their arguments in this appeal than the Co-Prosecutors, 480 pages compared to 280 pages. This difference of 200 pages is an imbalance that not even the most skilful and economic drafting can reasonably overcome to effectively respond to both Appeal Briefs.¹¹
6. Although significant work remains to be done, the Co-Prosecutors now have first drafts of a substantial portion of their Consolidated Response. Based on the drafts that have been completed to date, the Co-Prosecutors estimate that their complete first draft of the Consolidated Response will be approximately 550 pages. During the drafting process and following the completion of the first draft, the Co-Prosecutors will undertake a comprehensive editing process informed by the need to balance judicial efficiency and its duty to present its case.¹²
7. The Co-Prosecutors intend to reduce this 550 page first draft to 460 pages, a reduction of 90 pages or more than 15 percent. It is believed that reductions beyond this will necessitate them to abandon responses on important grounds of appeal in order to preserve the coherence and integrity of their responses on the most difficult and complex matters raised by the Appellants. It is submitted that requiring cuts of this nature would not be in the interest of justice, the interests of this Chamber, nor in the

¹⁰ **F17**, *Mémoire d'appel de la Défense de M. KHIEU Samphân contre le jugement rendu dans le procès 002/01*, 29 December 2014, Khmer version filed 25 March 2015.

¹¹ This is particularly true in light of the problems discussed below regarding the pleading of the Khieu Samphan Appeal Brief.

¹² See **F13/2**, Decision on Defence Motions for Extension of Pages to Appeal and Time to Respond, 11 December 2014, para. 15 (Page limits "are to be tailored according to the needs of the parties in balance with the tenets of judicial efficiency.")

interest of the public and victims who deserve to know the Co-Prosecutors' responses to the challenges levelled by the Defence at the Judgment.¹³

(2) The Appellants incorporation of other arguments by reference effectively extends the length of their briefs.

8. The Co-Prosecutors' burden in responding to the Appeal Briefs is considerably greater than would appear to be from a simple calculation of the number of pages filed by the Appellants. One major reason is that both Appellants incorporate lengthy arguments from other filings by reference.
9. For example, on the issue of the legal requirement of a nexus between crimes against humanity and armed conflict, Nuon Chea states that "[i]n light of the page restrictions on the instant submissions and the extensive argument required for other grounds of appeal, the Defence considers that the most efficient mode of proceeding is to refer the Chamber to its substantive submissions before the Trial Chamber."¹⁴ Nuon Chea also incorporates by reference Ieng Sary's arguments on the same subject.¹⁵
10. These incorporated arguments are 27 pages in length.¹⁶ The Co-Prosecutors cannot assume that the SCC will not address these arguments and therefore have no option but to respond. The Co-Prosecutors have cut their draft submissions on this subject from 18 to 14 pages in length, but they cannot realistically cut their submissions further and still effectively respond to Nuon Chea's 27 pages of incorporated arguments.
11. This is not the only subject on which Nuon Chea relies on incorporated arguments. He also incorporates by reference arguments related to the bias of the Chamber,¹⁷ alleged

¹³ Cf. **F13**, Urgent Request for Reconsideration of Page Limits for Appeals against the Case 002/01 Judgment, 2 December 2014, para. 2; **F13/2**, Decision on Defence Motions for Extension of Pages to Appeal and Time to Respond, 11 December 2014, paras. 15-16; Case 001-**F5/1**, Co-Prosecutors' Application for a Further Extension of Page Limit to File their Appeal Brief, 29 September 2010, para. 2; Case 001-**F5/2**, Decision on Co-Prosecutors' Two Applications for Extension of Page Limit for their Appeal Brief, 18 October 2010, paras. 6-7.

¹⁴ NC Appeal, para. 468.

¹⁵ NC Appeal, para. 468.

¹⁶ **E95/5**, Response to the Co-Prosecutors' Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes against Humanity, 22 July 2011. This filing is nine pages in total; substantive arguments occupy about six pages. **E95/81/1**, Ieng Sary's Appeal against the Trial Chamber's Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes against Humanity, 25 November 2011. Paragraphs 20 to 61, cited by Nuon Chea, span approximately 21 pages.

¹⁷ NC Appeal, paras. 52, 54.

conflict within the CPK,¹⁸ the lawfulness of the evacuation of Phnom Penh,¹⁹ and joint criminal enterprise.²⁰

12. Similarly, Khieu Samphan incorporates by reference 42 pages of arguments regarding severance²¹ and also incorporates by reference arguments related to his right to be informed of charges,²² the right to adversarial debate,²³ the requirement for a nexus with armed conflict for crimes against humanity,²⁴ and the situation in Phnom Penh prior to 17 April 1975.²⁵ This is a non-exhaustive list.
13. These incorporations constitute a significant addition to the 480 pages of the Appeals Briefs. It is in the interest of justice that the Co-Prosecutors be given additional pages to respond to these referenced arguments which circumvent the page limits imposed on the Appeals Briefs.

(3) Khieu Samphan's arguments, due to their ambiguity and vagueness, require a considerably greater number of pages to properly respond to than what was required to draft them.

14. As previously noted by the Co-Prosecutors, Khieu Samphan's Appeal Brief lacks clarity as to the actual grounds of appeal and which arguments in the brief supported which appeal grounds.²⁶ Unlike the traditional manner of organizing an appeal brief where specific arguments are listed under specific grounds of appeal, the brief does not indicate which grounds of appeal are covered in which sections or specify what are the exact legal or factual errors being alleged.
15. The most prominent flaw in the Khieu Samphan Appeal Brief is the failure to articulate exactly what is being assigned as error. Khieu Samphan makes an allegation that an error exists relating to a particular topic or issue, but he often fails to specify (i) whether

¹⁸ NC Appeal, para. 257 & fn 658.

¹⁹ NC Appeal, para. 434 & fn 1145.

²⁰ NC Appeal, para. 487 & fn 1297.

²¹ KS Appeal, para. 12, fn 16, *incorporating E275/2/1/1 Request for an immediate stay of proceedings*, 01 August 2013, paras 19-51 (pp. 6-16); **E295/6/4** Final Submissions, 26 September 2013, paras 1-9 (pp. 5-7); T.25 October 2013, pp. 3-30.

²² KS Appeal, para. 16-17, fn 34-35 *incorporating E275/2/1/1 Request for an immediate stay of proceedings*, 01 August 2013, paras 54-68 (pp. 17-20); **E275/2/1/3** Addendum to the request (p. 1).

²³ KS Appeal, para. 23, fn 50 *incorporating E275/2/1/1 Request for an immediate stay of proceedings*, 01.08.2013, paras 78-91 (pp. 23-27); **E275/2/1/3** Addendum to the request (p. 1).

²⁴ KS Appeal, para. 53, fn 515 *incorporating E95/3 Response of Khieu Samphan*, 22.07.2011, paras 21-22 (pp. 6-8); **E95/8/1/1** Ieng Sary's Appeal, 25.11.2011, paras 26-56 (pp. 10-26).

²⁵ KS Appeal, para. 224, fn 515 *incorporating E295/6/4* Final Submissions, 26 September 2013, paras 34-53 (pp. 16-27); T. 25 October 2013, p. 66-84.

²⁶ See **F18** Co-Prosecutors' Request to Remedy Defects in Khieu Samphan's Submissions on Appeal, 6 January 2015; **F18/2** Co-Prosecutors' Reply to the Defence Response to the Request to Remedy Defects in Khieu Samphan's Submissions on Appeal, 15 January 2015.

- he is alleging a factual or legal error; (ii) if a legal error, precisely what legal standard has been incorrectly determined and what the correct standard is; (iii) if a factual error, precisely which fact has been incorrectly found and what the correct finding would be; and (iv) in either case how the alleged error affects the Judgment. Although this Chamber has held that any arguments that are not substantiated will be considered to have been abandoned,²⁷ the Co-Prosecutors cannot at this point know which arguments this Chamber will or will not consider substantiated, and therefore out of an abundance of caution must reply to all potential arguments fully. As a result, the Co-Prosecutors are often required to plan and draft a three- or four-part response to a three or four line argument. Responding to these often ambiguous and vague arguments necessitates significantly greater space and time than it took to make them.
16. For example, at paragraph 438 of his Appeal Brief, Khieu Samphan argues the Trial Chamber erred as it found that “...there is no evidence that he knew of the specific nature of the crimes being committed at Tuol Po Chrey...” and that this finding prevents the conclusion beyond reasonable doubt that Khieu Samphan intended for the crimes to be committed. This is the sum total of the argument; no further explanation or jurisprudence is provided in support.
 17. It is therefore unclear from this assertion what error Khieu Samphan is alleging. It is possible that he is alleging an error of law, claiming that specific knowledge of the crimes is required to prove intent. Based on that possible interpretation, the Co-Prosecutors must examine the *mens rea* requirements for all potentially applicable modes of liability.²⁸ On the other hand, he may be alleging an error of fact, or suggesting that certain of the Chamber’s findings are mutually exclusive. This one-line assertion thus requires a two paragraph response. Khieu Samphan’s Appeal Brief is full of assertions like this one: short, vague arguments requiring sufficient submissions for a comprehensive response, if the Co-Prosecutors are to usefully assist the Chamber in this Appeal.
 18. The paucity of argument in Khieu Samphan’s Corrected Appeal is compounded by his “thematic” approach to the allegations he raises in respect of his criminal liability. This is a departure from his Notice, in which he alleges errors according to modes of

²⁷ **F18/3**, Decision on Co-Prosecutors’ Requests Relating to KHIEU Samphan’s Appeal Brief, 16 January 2015, p. 4.

²⁸ This analysis must be conducted for each mode; aiding and abetting, for example, requires that the accused have knowledge of the elements of the crimes.

liability. Thus, for example, Khieu Samphan alleges the Trial Chamber erred in fact and in law in its findings on his attendance at meetings throughout the revolutionary and DK periods.²⁹ He asks the Supreme Court Chamber to apply essentially this same argument equally to JCE, planning, and instigation without further elaboration.

19. In order to respond properly, the Co-Prosecutors must therefore: (1) Reorganize the thematic allegations in respect of the “grounds” Khieu Samphan set out in his Notice, that is, according to modes of liability. Thus, in respect of meetings, for example, where Khieu Samphan raises the allegation once, it is necessary for the Co-Prosecutors to respond three times – once in respect of each mode of liability cited; (2) Set out the required law in respect of the allegations which Khieu Samphan entirely omits; and (3) Set out the Trial Chamber’s differing analysis and findings in respect of the evidence as applied to the law in respect of each mode of liability which Khieu Samphan’s blanket allegations fail to take into account. Thus, where Khieu Samphan may raise an allegation in one or two paragraphs, or even in one or two lines, six to nine paragraphs may be required to set out a coherent and accurate response – two to three paragraphs for each mode of liability.
20. It is ultimately for the Chamber to decide how much assistance they require in this appeal. However, it is submitted that by granting more space to the Co-Prosecutors to respond to these ambiguous and vague arguments that lead to multiple interpretation the Chamber will be better informed to make its findings on the many grounds raised.

B. Time Extension

(4) The Chamber will be better assisted if the parties have a more equal opportunity to make their arguments.

21. It is accepted that equal time for pleadings is not to be mechanically granted where not justified by objective circumstances.³⁰ Yet, the time given to a party to prepare its submissions is relevant to the time required for a party to prepare an effective response. The Appellants have received 20 weeks to file their response following the Judgment, which was issued in all three languages, whereas, as it stands now, the Co-Prosecutors will have just over 16 weeks to respond after receiving the Appeal Briefs in one language only. This 25 percent more time the Appellants have had to prepare their appeals than the Co-Prosecutors have to respond to them is significant in and of itself,

²⁹ Khieu Samphan Corrected Appeal at paras 296-298, 443 & 602-605.

³⁰ **F9**, Decision on Motions for Extension of Time and Page Limits for Appeal Briefs and Responses, 31 October 2014, para. 14.

but especially so when considering the additional factors impacting those relative time periods laid out below.³¹

(5) The Appellants' boycott of the Case 002/02 trial proceedings secured for them a significant, unfair strategic advantage that the Chamber should take into account.

22. In addition to the 25 percent extra time the Appellants have had to prepare their Appeal Briefs they also had the advantage of greater actual drafting time which they gained from the defence boycott of the trial proceedings during November and December 2014. By not attending and stating their intention not to attend the trial in this period they forced the Trial Chamber to adjourn the proceedings thereby allowing the Appellants to work solely on their Appeal Briefs.
23. Khieu Samphan and his Defence Team were explicit that the aim of the boycott was to obtain more effective time to draft their Appeal Brief. On 17 October 2014 Khieu Samphan stated to the Trial Chamber: "My counsel has advised me that they cannot on the one hand, participate in the proceedings and on the other hand, preparing comprehensive appeal before the Supreme Court Chamber. [...] I am compelled to advise my counsel to make the utmost endeavour to prepare the appeal. [...] In this respect, the counsel will not be able to participate in the proceedings of Case 002/02 that is ongoing now."³² Immediately following Khieu Samphan's remarks, his and Nuon Chea's counsel walked out of the courtroom without the Trial Chamber's leave,³³ and thereby obtained the benefit of continuing to devote themselves entirely to their Appeals Briefs for the following two and a half months.³⁴

³¹ The fact that Appellants spent a portion of those 20 weeks preparing and drafting their notices of appeal does not change this analysis. It is not appropriate to think of the appeal-writing process as somehow beginning only after the notices of appeal are filed; in fact, the process of sketching out arguments and organizing them into grounds of appeal is an integral part of the appeal process.

³² **E1/242.1**, T. 17 Oct 2014, pp. 76-77.

³³ **E1/242.1**, T. 17 Oct 2014, pp. 91.

³⁴ Even in the midst of the Appellants' boycott of the Case 002/01 trial, this Chamber was sympathetic to the Appellants' arguments that drafting their Appeal Briefs was a full-time job. On 1 and 2 December 2014, the Appellants sought extensions of their deadlines to respond to the Co-Prosecutors' appeal because of their work on their own Appeal Briefs. This Chamber found it appropriate to grant these requests for extension because working on a response to the Co-Prosecutors' appeal "would require NUON Chea and KHIEU Samphan to divert attention away from their appeal briefs, due at the end of this month." **F13/2**, Decision on Defence Motions for Extension of Pages to Appeal and Time to Respond, 11 December 2014, paras. 1, 6, 11-14. Accepting that the Appellants could not simultaneously work on their Appeal Briefs and a response to the Co-Prosecutors' appeal even in the absence of any trial responsibilities while simultaneously declining to take account of the Co-Prosecutors' trial responsibilities for purposes of setting their deadline to respond to the Appeal Briefs would represent an alarming disparity in treatment.

24. While not condoning the walkout, nonetheless the International Co-Prosecutor understood the Appellants' difficulty of effectively engaging in two processes at the same time "When the defence talks about the difficulty of doing the appeal and the trial [at] the same time, I am sympathetic, because we face exactly the same situation and we simply plan to do both."³⁵
25. In contrast to the Appellants, the Co-Prosecutors have not sought to delay the trial proceedings in Case 002/02 while working on their appeal response. Rather, they have done everything possible to ensure that trial began, as the Chamber ordered, "as soon as possible"³⁶ and that it proceeds as expeditiously as possible. Concurrently with the trial of Case 002/02 and appeal response, the Co-Prosecutors have been actively engaged in investigations in Cases 003 and 004. Further, they have simultaneously been conducting the very time consuming but critical task of reviewing over 800 statements from those investigations and making appropriate motions for disclosure of relevant information. The Chamber recently affirmed the importance of this work and ordered the Co-Prosecutors to make further efforts in this regard.³⁷
26. There is no doubt that the Appellants derived a real strategic advantage from their actions. Their boycott ensured them months of uninterrupted focus on the drafting of their appeals. In contrast, the Co-Prosecutors have met their multiple obligations in the appeal, trial and investigations processes concurrently. To ensure fairness in this process, the Co-Prosecutors request that the Chamber take into account the substantially heavier workload of the Co-Prosecutors during this period and the Appellants' boycott of the proceedings which combine to create substantially more drafting time for the Appellants than for the Co-Prosecutors. Failure to do so will crystallize and make permanent the advantage that the Appellants secured by boycotting the trial. This Chamber should not reward the Appellants' behaviour in this way particularly when it will operate to the detriment of the Co-Prosecutors.

(6) Requiring the Consolidated Response to be filed 30 days after the filing of the Khmer versions of the Appeals Briefs does not give national and international staff adequate time to work together, as this Chamber has stated is required.

³⁵ **E1/242.1**, T. 17 Oct 2014, pp. 87.

³⁶ **E284/4/7**, Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002 Summary of Reasons, 23 July 2013, para. 11.

³⁷ **F2/4/2**, Decision on Part of NUON Chea's Third Request to Obtain and Consider Additional Evidence in Appeal Proceedings of Case 002/01, 16 March 2015, paras. 17-20.


27. In determining the request for the time extension, the Chamber should also consider the availability of the Appeal Briefs in the Khmer language. As the Chamber has correctly stated, “[T]he importance of Khmer versions of filings cannot be overstated[.] [...] The Khmer version of any filing before the ECCC is therefore a crucial component of the proceedings at this Court, as international and national elements of each organ must work together to achieve results.”³⁸
28. As noted above, the Appellants had access to the Judgment in Khmer, English, and French for 20 weeks before the day they were required to file their Appeals Briefs. The Co-Prosecutors, in contrast, will have access to the Khmer version of the Appeal Briefs for only 30 days before being required to file the Consolidated Response. This deadline does not truly allow “international and national elements” of the Office of the Co-Prosecutors to “work together to achieve results” as the Chamber has ruled is required.
29. At this particularly important juncture in the proceedings, the National and International Co-Prosecutors need to be, and need also to be seen to be, equal partners in the prosecution of Case 002/01. Any actions that risk placing or appearing to place one of the Co-Prosecutors in a subordinate position as compared to the other must be strenuously avoided.

³⁸ F9, para. 21.

III. Relief Requested

30. For the foregoing reasons, the Co-Prosecutors respectfully request that the Chamber:
- i. set 14 May 2015 as the filing deadline for the Consolidated Response; and
 - ii. set the page limit for the Consolidated Response at 460 pages.

Respectfully submitted,

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