

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

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**CO-PROSECUTORS' SUBMISSIONS ON
PROCEEDING WITH APPEAL HEARINGS**

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I. INTRODUCTION

1. The Co-Prosecutors respectfully make the following submissions regarding modalities to move forward in the appeal proceedings in Case 002/01. These submissions take note of Nuon Chea's indications that he wishes to rely on his written appeal submissions and has instructed his counsel not to make further oral submissions, and of the instructions given by the President of the Supreme Court Chamber ("SCC") to the Defence Support Section on 19 November 2015.¹
2. The Co-Prosecutors submit that the proceedings should resume as soon as possible. The ECCC has provided Nuon Chea with a well-resourced team of lawyers and this Chamber has given him every opportunity to be heard on issues in this appeal. After consultation with counsel, Nuon Chea has decided to rest his appeal on the written submission made by his team, and the speech he made at the hearing of 17 November 2015. In these circumstances, further delay in the proceedings is unwarranted.
3. The Co-Prosecutors respectfully submit that appointment of standby counsel is not a practical solution to the current obstruction of these appeal proceedings. Given the complexity of the appeal and trial record, any counsel appointed would likely indicate he or she would need months to be prepared to participate in the appeal, significantly increasing the cost of the proceedings and delaying the delivery of a final appeal judgment. This is contrary to the right of both accused to an expeditious trial, as well as to the interest of the victims and the people of Cambodia in securing a timely conclusion of proceedings in Case 002/01.
4. Nuon Chea has made it clear that he is satisfied with his currently assigned counsel and has not sought their replacement. He has made it clear that their refusal to participate in the appeal proceedings is in compliance with his own explicit instructions. Appointment of standby counsel is legally unnecessary. While the SCC might benefit from receiving the views of a standby counsel, or "amicus counsel", advocating for the positions of Nuon Chea, this nevertheless might lead to a misperception that the Court is imposing unprepared counsel on Nuon Chea. The reality is that Nuon Chea has a fully prepared, well-funded legal team available at the Court, and he has chosen to instruct them not to present arguments on his behalf. He clearly has conferred with his

¹ **F30/15** Follow-up to Supreme Court Chamber's Instruction to Appoint Standby Counsel for NUON Chea, 19 November 2015 ("SCC Follow-up Instruction").

counsel before making this decision, and thus any consequences of that informed choice are Nuon Chea's to bear.

II. PROCEDURAL HISTORY

5. On 28 October 2015, the International Co-Lawyer for Nuon Chea sent an email to the Senior Legal Officer of the SCC, in which he stated that his client was considering withdrawing his appeal.² Nuon Chea's International Co-Lawyer further stated that, in addition or in the alternative, he and/or Nuon Chea might elect to not participate in the appeal hearings.
6. At the first session of the first day of the appeal hearings, on 17 November 2015, Nuon Chea's International Co-Lawyer was absent from the proceedings.³ His National Co-Lawyer was present. Nuon Chea gave a speech for over 20 minutes, in which he made a number of remarks of direct relevance to his grounds of appeal relating to his right to a fair trial. He then informed the SCC that he had already instructed his International Co-Lawyer not to participate in the proceedings, and that he was now giving the same instruction to his National Co-Lawyer, including a direction not to respond to any questions posed by the Judges or other Parties. Nuon Chea also stated that he intended to leave the proceedings himself after finishing making his comments.⁴ However, Nuon Chea "stopped short of withdrawing [his] appeal altogether", confirming that he had chosen to "rest on the arguments made in [his] appeal brief".⁵
7. Thereafter, the National Co-Lawyer for Nuon Chea confirmed his client's instructions that he should not participate in the appeal hearing and should leave the courtroom at the next break. In the meantime, he should not respond to any questions or comments.⁶ The SCC informed Nuon Chea's National Co-Lawyer that he was under an obligation to be present in the courtroom, notwithstanding his client's instructions and irrespective of whether he intended to exercise a right to respond to issues raised during the proceedings.⁷ In response, the National Co-Lawyer asserted that he was obliged to

² Email from International Co-Lawyer for Nuon Chea Victor Koppe to Senior Legal Officer of the Supreme Court Chamber Volker Nerlich, 28 October 2015 (**Confidential Annex 1**).

³ **F1/4.1** Appeal Hearings Transcript, 17 November 2015, p. 1 at 09.01.52.

⁴ **F1/4.1** Appeal Hearings Transcript, 17 November 2015, p. 17 at 09.41.03-09.44.48.

⁵ **F1/4.1** Appeal Hearings Transcript, 17 November 2015, pp. 17-18 at 09.41.03-09.44.48.

⁶ **F1/4.1** Appeal Hearings Transcript, 17 November 2015, pp. 18-19 at 09.44.48-09.46.00.

⁷ **F1/4.1** Appeal Hearings Transcript, 17 November 2015, pp. 19-21 at 09.46.00-09.53.13; pp. 27-28 at 10.06.46.

follow his client's instructions.⁸ The SCC further reminded Nuon Chea's National Co-Lawyer that it was his last opportunity to make oral responses in relation to Nuon Chea's appeal in Case 002/01.⁹

8. The SCC ruled that Nuon Chea was obliged to attend proceedings subject to the leave of the Chamber. Following receipt of a medical report from Nuon Chea, the SCC then granted his request to follow the proceedings from the holding cell.¹⁰
9. Neither Nuon Chea's International nor National Co-Lawyer was present after the break for the second session of proceedings.¹¹ Having heard comments and observations from the parties, the SCC retired to consider how to proceed in these circumstances. At the third session of 17 November 2015, the SCC decided to adjourn the appeal hearing and to instruct the Defence Support Section to appoint standby counsel for Nuon Chea.¹² The National Co-Lawyer for Nuon Chea was present at this third session.
10. On 18 November 2015, the National Co-Lawyer for Nuon Chea confirmed his willingness to abide by the Chamber's order to be present in the courtroom for the appeal hearings, but further indicated that he intends to follow Nuon Chea's instruction not to make any submissions or respond to any kind of questions by the judges or other parties.¹³
11. On 19 November 2015, the Co-Prosecutors filed an earlier version of the present submission in English only, which the Greffier of the SCC deemed to be deficient because, *inter alia*, "the matter has been disposed of by the Supreme Court Chamber on 17 November 2015 by way of oral decision".¹⁴
12. Later on 19 November 2015, the President of the SCC issued public instructions to DSS in which he provided further clarification regarding the appointment of standby counsel for Nuon Chea. The President said, *inter alia*:

The role of the standby counsel will not be that of replacing NUON Chea's chosen lawyers. His or her responsibility will be to prepare and maintain capacity to take over the defence of NUON Chea during

⁸ **F1/4.1** Appeal Hearings Transcript, 17 November 2015, pp. 20-22, 09.49.42, 09.51.43, 09.53.13.

⁹ **F1/4.1** Appeal Hearings Transcript, 17 November 2015, p. 31 at 10.15.49.

¹⁰ **F1/4.1** Appeal Hearings Transcript, 17 November 2015, pp. 25-26 at 10.02.14; p. 37 at 14.08.50.

¹¹ **F1/4.1** Appeal Hearings Transcript, 17 November 2015, p. 33 at 10.50.02.

¹² **F1/4.1** Appeal Hearings Transcript, 17 November 2015, p. 39 at 14.12.02.

¹³ **F30/13** Response of Mr Son Arun to the Oral Decision by the Supreme Court Chamber regarding the Events of 17 November 2015, 18 November 2015.

¹⁴ Email from SCC Greffier to OCP Greffier, 20 November 2015.

the appeal hearings before the Supreme Court Chamber, should NUON Chea's International and National Co-Lawyers fail to be present in the courtroom when the hearings resume, or absent themselves in the course of the hearings. Accordingly, standby counsel shall attend all appeal hearings in Case 002/01, shall be independent of the present Defence team for NUON Chea and shall not consult with, or take direction from, NUON Chea, unless so ordered by this Chamber. Standby counsel will, upon reasoned request, be granted adequate time to familiarise him or herself with the case, with particular reference to the judgment of the Trial Chamber in Case 002/01, NUON Chea's and KHIEU Samphan's respective appeal briefs, the Co-Prosecutors' and Civil Party Lead Co-Lawyers' respective responses, as well as the Co-Prosecutors' appeal brief. Standby counsel will not be granted a right of audience until this Chamber has directed him or her to take over the defence of NUON Chea.

I envisage that this role would be better served by a national lawyer, assigned from the list mentioned under Internal Rule 11 (2)(d)(i), preferably demonstrating an established familiarity with proceedings before the ECCC.¹⁵

III. APPLICABLE LAW

13. Article 35 new of the ECCC law provides, in relevant part, that the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights:

- b. to be tried without delay;
- c. to be tried in their own presence and to defend themselves in person or with the assistance of counsel of their own choosing, to be informed of this right and to have legal assistance assigned to them free of charge if they do not have sufficient means to pay for it;
- d. to examine evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them.¹⁶

14. Internal Rule¹⁷ 81 provides, in relevant part:

- 1. The Accused shall be tried in his or her presence, except as provided in this Rule.

[...]

¹⁵ F30/15 SCC Follow-up Instruction, pp. 3-4.

¹⁶ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

¹⁷ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015 ("Internal Rules").

3. Where the Accused refuses to attend the proceedings, he or she shall be brought before the Chamber, by public force if necessary, where he or she shall be notified of the inalienable right to be assisted by a lawyer of choice, to have one assigned as provided in these IRs or to represent him or herself.

4. If the Accused, following an initial appearance and having been duly summoned to the subsequent hearing, continues to refuse or fails to attend the proceedings, or is expelled from them in accordance with these IRs, the proceedings may continue in his or her absence. In such cases, the Accused may be defended during the proceedings by his or her lawyer. Where the Accused refuses to choose a lawyer, the Chamber shall order that the accused be represented by a lawyer and request the Defence Support Section to assign him or her a lawyer, from the lists mentioned at Rule 11.

5. Where, due to health reasons or other serious concerns, the Accused cannot attend in person before the Chamber but is otherwise physically and mentally fit to participate, the Chamber may either continue the proceedings in the Accused's absence with his or her consent or, where the Accused's absence reaches a level that causes substantial delay and, where the interests of justice so require, order that the Accused's participation before the Chamber shall be by appropriate audio-visual means. In such cases, the Accused may be defended during the proceedings by his or her lawyer. Where the Accused refuses to choose a lawyer, the Chamber shall order that the accused be represented by a lawyer and request the Defence Support Section to assign him or her a lawyer, from the lists mentioned at Rule 11.

[...]

7. Where no lawyer of the Accused is present without justification during the hearing, the Chamber may either adjourn the hearing or, if the Accused requests assistance of a lawyer, request the Defence Support Section to temporarily assign him or her a lawyer, from the lists mentioned at Rule 11. As soon as the assigned lawyer has had sufficient time to acquaint him or herself with the file, the Chamber continues its hearing.

15. Internal Rule 21(4) provides:

Proceedings before the ECCC shall be brought to a conclusion within a reasonable time.

16. Internal Rule 22(4) provides:

In the performance of their duties, lawyers shall be subject to the relevant provisions of the Agreement, the ECCC Law, these IRs, ECCC Practice Directions and administrative regulations, as well as the Cambodian Law on the Statutes of the Bar and recognised

standards and ethics of the legal profession. They have an obligation to promote justice and the fair and effective conduct of proceedings.

17. Article 7 of the Administrative Regulations of the Defence Support Section provides, in relevant part:

7.1 Subject to any order of the ECCC, Co-Lawyers shall conduct the case to finality. Failure to do so, absent just cause approved by the ECCC, may result in forfeiture of fees in whole or in part, as determined by the ECCC.

[...]

7.3 *Withdrawal of lawyers.* Co-lawyers may apply to the ECCC to withdraw from a case to which they are engaged or assigned. Co-lawyers may only be permitted to withdraw from a case in exceptional circumstances. The co-lawyers shall continue to represent the suspect, charged person or accused until a replacement lawyer has been assigned or engaged.¹⁸

18. Article 301 of the Criminal Procedure Code of Cambodia provides:

The assistance of a lawyer is compulsory in the following cases:

Felony;

The accused person is a minor.

If the accused person has not selected a lawyer, the lawyer shall be appointed upon the initiative of the court president in accordance with the Law on Statute of Lawyers.¹⁹

19. Internal Rule 108(4) provides that the SCC “shall issue its decision on any appeal against a judgement within a reasonable period”, *i.e.* appeal proceedings must be concluded within a reasonable period.²⁰

IV. SUBMISSIONS

The SCC should satisfy itself that Nuon Chea has knowingly waived the right to have counsel participate in the appeal hearings

20. At the very final stage of Case 002/01, Nuon Chea has refused to attend the proceedings, and has instructed his national and international counsel not to present arguments on his behalf.
21. Since the beginning of appeal proceedings, Nuon Chea has filed a Notice of Appeal setting out 223 grounds of appeal, a 270-page appeal brief, and a 24-page response to

¹⁸ Administrative Regulations of the Defence Support Section, Art. 7.

¹⁹ Cambodian Criminal Procedure Code, September 2008, Art. 301.

²⁰ **F2/4/3** Interim Decision on Part of Nuon Chea’s First Request to Obtain and Consider Additional Evidence in Appeal Proceedings of Case 002/01, 1 April 2015, para. 18.

the Co-Prosecutors' appeal on the applicability of the extended form of joint criminal enterprise ("JCE3") at the ECCC. In addition, he has filed six new evidence requests, some of which contained arguments on the Judgment and evidence directly applicable to his appeal grounds, made other submissions addressing the significance of various items of evidence, examined new witnesses called by the SCC at his request who testified over the course of three days, and read prepared remarks at the 17 November 2015 hearing reiterating his allegations of the unfairness of proceedings and his version of the history of the DK regime. Nuon Chea expressly confirmed on 17 November 2015 that he does not intend to abandon his appeal, but that "we choose instead to rest on the arguments made in my appeal brief".²¹

22. It is thus clear that Nuon Chea's intention is to knowingly and voluntarily waive his right to make further submission with the assistance of counsel in respect of the three elements which remain in these proceedings: (a) his oral reply to the Prosecution's written response to his appeal; (b) his oral submissions on the Prosecution's appeal concerning JCE3; and (c) his oral response to five legal questions posed by the SCC. Nuon Chea's total submissions on all three elements were scheduled by the SCC to take approximately 160 minutes of Court time.²²
23. In the ICTR's *Nahimana* case, the examination of four Prosecution witnesses continued without the lawyers for the accused Barayagwiza, who had instructed them not to participate.²³ The ICTR Appeals Chamber, in a discussion concerning the effect of the accused Barayagwiza's total boycott of the trial proceedings,²⁴ rejected an argument that the Trial Chamber should have recalled witnesses who were not examined by lawyers for the accused due to his boycott. The Appeals Chamber held that "the Appellant's attitude amounted to a waiver of the right to examine or to have examined the witnesses who were being heard at the time".²⁵ The Appeals Chamber also noted

²¹ **F1/4.1** Appeal Hearings Transcript, 17 November 2015, p. 17.

²² **F30/4.1** Annex A - Final Timetable for the Hearing, 5 November 2015.

²³ *The Prosecutor v. Nahimana et al.*, ICTR-99-52-T, Judgement and Sentence (Trial Chamber I), 3 December 2003, para. 83.

²⁴ The Appeals Chamber noted: "from 23 October 2000, the first day of hearing, until 22 August 2003, the last day of hearing, Appellant Barayagwiza, who was in detention at the Tribunal's Detention Facility, failed to appear at the hearings". *Nahimana et al. v. Prosecutor*, ICTY-99-52-A, Judgement (Appeals Chamber), 28 November 2007 ("*Nahimana* Appeal Judgement"), para. 95.

²⁵ *Nahimana* Appeal Judgement, para. 125.

that the European Court of Human Rights (“European Court”) has recognized that an accused can waive his right to examine or cross-examine a witness.²⁶

24. The SCC might wish to make further enquiries to further confirm that Nuon Chea fully understands the consequences of his decision to instruct his counsel not to participate in the appeal hearings. The Special Court for Sierra Leone (“SCSL”) Appeals Chamber has emphasized the importance of ensuring that the waiver of rights by an accused is knowing and informed, and is a waiver by the *accused*, rather than his counsel.²⁷
25. The European Court has said that “neither the letter nor the spirit of Article 6 of the [European Convention on Human Rights (“Convention”)] prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial.”²⁸ The waiver of a right guaranteed by the Convention, insofar as it is permissible, must be established in an unequivocal manner, and must not run

²⁶ *Nahimana* Appeal Judgement, para. 125, fn. 292, citing *Vaturi v. France*, No. 75699/01, ECHR (first section), Judgement of 13 April 2006, para. 53, and *Craxi v Italy*, No. 34896/97, ECHR (first section), Judgement of 5 December 2002, paras 90-91.

²⁷ In *Taylor*, the Defence did not file a final brief by the deadline imposed by the Trial Chamber, per Taylor's instructions. The final brief was filed 20 days after the deadline, which was a few days prior to scheduled oral arguments. The final brief was rejected by a majority of the Trial Chamber. At oral arguments, Lead Defence Counsel said: “... we do not feel that it could be appropriate for us to take part in the oral presentation when a majority of you have refused to accept our written submissions. And we have Mr. Taylor's instructions to that effect. We feel it is our professional duty to withdraw pending a decision on our motion to appeal yesterday's decision which will be filed today.” (See *Prosecutor v. Taylor*, SCSL-03-01-T, Oral Arguments Transcript, 8 February 2011, p. 49138.) The matter then went to the SCSL Appeals Chamber which said, “The right to be heard at the conclusion of the trial is the right of the accused, not his Counsel. The exercise of that right under Rule 86 is discretionary, but it is the discretion of the accused that must be exercised, not his Counsel.” See *Prosecutor v. Taylor*, SCSL-03-01-T-1223, Decision on Defence Notice of Appeal and Submissions Regarding the Decision on Late Filing of Defence Final Trial Brief, para. 49. It continued at para. 57: “[W]hen, as in this case, the forfeiture signifies a waiver of fundamental rights of the Accused, there is an obligation on the Court to assure itself that the Accused understands that the consequences of the actions and representations of Counsel could be construed to be a waiver of the Accused's right to be heard and to defend at the conclusion of the trial.” The Appeals Chamber said that, given the circumstances, it was unreasonable for the Trial Chamber to conclude from the silence of the Accused that he agreed and understood that by doing so he might be waiving fundamental rights. The Appeals Chamber stated at paras. 64-66: “The Trial Chamber should have determined whether the Accused understood that he was waiving his rights to present written and/or oral closing arguments and could have done so in a variety of ways, including with a simply colloquy that did not in any way invade the attorney-client privilege. The Trial Chamber did not establish that there was a knowing, intelligent and voluntary waiver by the Accused. Absent facts sufficient to determine a waiver, the Trial Chamber erred in assuming that the Accused had waived his rights and in proceeding as if he had. [...] [I]f uncorrected, could occasion a miscarriage of justice. To rule otherwise would be to disadvantage the uninformed Accused for the actions of his Counsel, which would be unfair, particularly as there are other means by which the Trial Chamber can sanction Counsel without affecting the Accused's fundamental rights.” Without a clear waiver, the Appeals Chamber ordered the Trial Chamber to accept the defence's final brief and to set a date to hear the Defence closing arguments. Finally, the Appeals Chamber concluded at para. 67: “*If Counsel for the Defence attempts by word or action to waive the Accused's right to oral argument, the Trial Chamber is instructed to assure itself that the Accused himself is knowingly, intelligently and voluntarily waiving this right.*” (Emphasis added).

²⁸ *Hermi v Italy*, no. 18114/02, Judgment, 18 October 2006, para. 73

counter to any important public interest.²⁹ The European Court has also pointed out that “before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention it must be shown that he could reasonably have foreseen what the consequences of his conduct would be.”³⁰

26. The SCC should, therefore, put whatever questions it deems appropriate to Nuon Chea until it is satisfied that Nuon Chea’s conduct amounts to a fully informed waiver. The Chamber may consider reminding Nuon Chea that he will have to bear the consequences of his decision to offer no further argument in respect of his appeal, or in respect of the Co-Prosecutors’ appeal. In particular, the SCC should verify that Nuon Chea understands that while all written submissions presented on his behalf will be considered by the SCC, his instructions to counsel not to participate in the hearings will mean that counsel will not present arguments on his behalf during the appeal hearings or be able to object to arguments of other parties or answer any questions from the Judges of the SCC. Nuon Chea should be further informed that he is free to instruct his counsel to resume representation at any time but that proceedings heard during the period of non-participation by his counsel will not be repeated.
27. The Co-Prosecutors submit that, once the SCC is satisfied that Nuon Chea’s waiver is voluntary and informed, his choice not to respond to arguments orally is no different from a decision not to respond to arguments contained in a written submission. He continues to be represented by counsel of his choice, and to conduct his defence in the method he, on the advice of his counsel, believes most effective for the ends he seeks.

The SCC must ensure the proper use of the Court’s limited resources

28. When dealing with matters relating to the representation of counsel, the SCC can and should take into account the reality that the Court operates in the context of limited resources. The Appeals Chamber of the ICTR in *Akayesu*, when considering the right of an indigent accused to counsel of his own choosing, said that this “raises the issue of balancing two requirements: on the one hand, affording the accused as effective a

²⁹ *Hermi v. Italy*, no. 18114/02, Judgment, 18 October 2006, § 73; *Sejdovic v. Italy*, no. 56581/00, Judgment, 1 March 2006, § 86.

³⁰ *Hermi v. Italy*, no. 18114/02, Judgment, 18 October 2006, § 74; *Sejdovic v. Italy*, no. 56581/00, Judgment, 1 March 2006, § 87.

defence as possible to ensure a fair trial, and on the other hand, proper use of the Tribunal's resources."³¹

29. The ECCC has spent millions of dollars ensuring that Nuon Chea and Khieu Samphan each have a highly qualified defence team throughout the proceedings, which began with their arrests in 2007. The Court has funded those teams in order to enable them to carry out legal research on many complex areas of national and international procedural and substantive law, as well as to familiarize themselves with the vast trial and appeal record in this case – including extensive quantities of testimonial and documentary evidence – in order to present arguments on their clients' behalf. At this very late stage of the proceedings in Case 002/01, the Court should not be expected to fund standby counsel for Nuon Chea, when a large defence team, intimately familiar with the record and the issues on appeal and funded by the Court for many years, already exists.

Appointment of standby counsel will negatively affect the right of both accused, and the victims, to conclusion of these proceedings without undue delay

30. Any counsel appointed to represent Nuon Chea's interests at this stage of the proceedings is likely to request a very significant postponement in the oral appeal in order to familiarize himself or herself with the case and the material identified by the President of the SCC in the memorandum of 19 November 2015, inevitably leading to a further delay in the delivery of a final judgment on appeal in this case.
31. The negative impact of an accused's decisions on an accused's own right to an expeditious trial is a relevant factor to take into account in cases concerning the provision of counsel.³² As the SCC has itself noted: "Given the advanced age and declining health of the Co-Accused, as well [as] the gravity of the alleged crimes remaining in the Indictment, it is imperative that the ECCC utilize every available day to ensure a final determination of the remaining charges as expeditiously as possible."³³

³¹ *The Prosecutor v. Akayesu*, ICTR-96-4-A, Judgment (Appeals Chamber), 1 June 2001, para. 62.

³² At the ICTY, the *Blagojević and Jokić* Trial Chamber said: "One aspect of the right to a fair trial is the right to an expeditious trial. Immediately before or at any time after the commencement of trial proceedings, only the most exceptional motions for withdrawal of counsel will be entertained, as any replacement of counsel will have an effect on the accused's right to be tried expeditiously." See *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojević's Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003, para. 119.

³³ **E163/5/1/13** Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 8 February 2013, para. 51.

Internal Rules 81(4), 81(5) and 81(7) do not require the SCC to suspend the appeal proceedings in order to appoint standby counsel

32. Internal Rule 81(4) refers to a circumstance where the Accused continues to refuse or fails to attend the proceedings, or is expelled from them. Internal Rule 81(5) refers to the scenario where an accused, for medical reasons, is following the proceedings by audio visual link. In both circumstances, the Accused may be defended during the proceedings by his or her lawyer. Both rules also provide: “Where the Accused refuses to choose a lawyer, the Chamber shall order that the accused be represented by a lawyer and request the Defence Support Section to assign him or her a lawyer”.
33. Neither provision applies here. Nuon Chea has not refused to choose a lawyer. As in *Barayagwiza*, Nuon Chea has counsel of his choice and is not complaining about their representation. Judge Gunawardana, concurring in *Barayagwiza*, called Barayagwiza’s instruction to his counsel not to participate “a form of protest” and noted that “he is not dissatisfied with the conduct or competence of his counsel and, in fact, has full confidence in them”.³⁴ The same applies here. The oral remarks by Nuon Chea on 17 November 2015 make it clear that he is not dissatisfied with his counsel. He does not want to change lawyers, rather, he does not want any lawyer to present arguments on his behalf at the appeal hearings in an attempt to delegitimize the proceedings. The SCC has authorized neither his national nor his international lawyers to withdraw in accordance with Rule 22(4) and Article 7 of the Administrative Regulations of the Defence Support Section.³⁵ There is no requirement for the SCC to appoint any other lawyer in light of Nuon Chea’s decision not to seek assistance during the final appeal hearings from his large and well-funded Defence team.
34. However, if Nuon Chea follows the proceedings from a holding cell by audio-visual link in accordance with Rule 81(5), the SCC might wish to ensure that either he is able to communicate with his lawyer in the courtroom (facilities for which already exist and are regularly used when Nuon Chea follows proceedings from the holding cell) or, if no counsel is present in court, a court officer is present in the holding cell and able to

³⁴ *The Prosecutor v. Barayagwiza*, ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, 2 November 2000, Concurring and Separate Opinion of Judge Gunawardana.

³⁵ Counsel’s duty is to vigorously defend their clients’ interests within the bounds of the rules of the court. There are no procedural or ethical rules that permit counsel to simply defy court orders on their clients’ instructions. No criminal court can function effectively if it is left to the accused to decide which court orders their counsel will or will not obey.

- communicate with the SCC, should Nuon Chea wish to address the Court on any matter arising during the appeal hearings or re-consider his decision to instruct his lawyers to boycott the proceedings.
35. Rule 81(7) is also inapplicable here. This provides that where “no lawyer of the Accused is present without justification during the hearing, the Chamber may either adjourn the hearing or, if the Accused requests assistance of a lawyer, request the Defence Support Section to temporarily assign him or her a lawyer”. It is apparent that this provision is intended to cover situations in which the lawyer's absence is unrelated to actions of the accused: hence the reference to the possibility of appointing counsel at the request of the accused where there is no justification for the absence. Here, Nuon Chea has a national and international co-lawyer assigned to him. He has instructed them not to participate. The scenario that Rule 81(7) is designed to remedy – where an accused is in a courtroom without access to the assistance of counsel against his will – does not exist here.
36. The Co-Prosecutors note the Chamber’s view that “the legal framework applicable to proceedings before the ECCC indicates that, when appearing before the Supreme Court Chamber, an accused in a case involving a felony must be assisted by a lawyer, and that, therefore, a lawyer for the accused must be present in the courtroom throughout the appeal hearing, independent of the accused person’s possible wishes to the contrary.”³⁶
37. The Co-Prosecutors note, however, that Article 301 of the Cambodian Criminal Procedure Code – which indicates that on a felony charge the “assistance” of counsel is mandatory – does not indicate that the “attendance” of counsel at a hearing or their participation in oral appeal arguments is mandatory. In any event, the National Co-Lawyer assigned to Nuon Chea has confirmed his willingness to sit in the courtroom during future appeal hearings.³⁷
38. Proceeding with the appeal hearings without standby counsel would not violate Article 301 as Nuon Chea continues to enjoy the “assistance” of counsel of his choice and a large team of lawyers and other assistants. He has consulted with them and clearly they

³⁶ **F30/15** SCC Follow-up Instruction.

³⁷ **F30/13** Response of Mr Son Arun to the Oral Decision by the Supreme Court Chamber regarding the Events of 17 November 2015, 18 November 2015.

have worked together in implementing his strategy towards the appeal hearings. Nuon Chea has made it clear that he is satisfied with the assistance of his legal team, but if the Chamber has any doubts about that, this can be clarified with Nuon Chea.

The SCC must ensure that the proceedings are not obstructed

39. The Chamber should also take into account the overriding interest of ensuring that the administration of justice in this case is reasonably expeditious, that the Court's limited resources are used appropriately, and that parties are not rewarded for tactics which have the effect of causing undue delay to the proceedings and frustrating the administration of justice.³⁸
40. An ICTR Trial Chamber in *Barayagwiza* confirmed its view that an accused who chooses to boycott his trial and to instruct his counsel not to defend him should be seen as an attempt to obstruct judicial proceedings:

In the present case, Mr Barayagwiza is actually boycotting the United Nations Tribunal. He has chosen both to be absent in the trial and to give no instructions as to how his legal representation should proceed in the trial or as to the specifics of his strategy. *In such a situation, his lawyers cannot simply abide with his "instruction" not to defend him. Such instructions, in the opinion of the Chamber, should rather be seen as an attempt to obstruct judicial proceedings.* In such a situation, it cannot reasonably be argued that Counsel is under an obligation to follow them, and that not [to] do so would constitute grounds for withdrawal.³⁹

41. It is particularly important for the SCC to ensure that attempts to obstruct judicial proceedings – whether by boycott, instructing counsel not to appear, or by attempts to force the Court into long delays at the very final appellate stage of the proceedings – do not succeed. The SCSL has observed that criminal law does not allow an absent or disruptive accused “to impede the administration of justice or frustrate the ends of justice.”⁴⁰

³⁸ See, e.g., *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on Request by Accused Mucić for Assignment of New Counsel, 24 June 1996. The Trial Chamber permitted the withdrawal of counsel but said that the overriding interest of the administration of justice meant that the accused should not be permitted to seek withdrawal of his assigned counsel without establishing good cause. It also considered whether there was a desire to pervert justice such as by causing additional delay.

³⁹ *The Prosecutor v. Barayagwiza*, ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, 2 November 2000, para. 24 (emphasis added).

⁴⁰ *Prosecutor v. Sesay et al.*, SCSL-04-15-T-285, (Trial Chamber) Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court of Sierra Leone on 7 July 2004 and Succeeding Days, 12 July 2004, para. 8. Similarly, In the United States Supreme Court case of *Ferretta v. California*, Justice Blackmun said: “I cannot agree that there is anything in the Due Process Clause or the Sixth Amendment that requires the States to subordinate the solemn business of conducting a criminal

42. French law recognizes that the absence of a lawyer cannot be permitted to undermine the orderly administration of justice and the need to ensure that accused are judged within a reasonable time.⁴¹ French law also recognizes that the absence of the accused and his lawyers from all or part of the hearings cannot of itself invalidate the hearing (unless the absence is the fault of the court or the prosecution) and cannot constitute an obstacle to the continuation of the hearings with the aim of ensuring judgement within a reasonable time.⁴²
43. For example, the French *Cour de Cassation* addressed a situation where the two defence lawyers assigned to an accused decided to leave the courtroom, as did the accused. One of the two court-appointed lawyers refused his mission for reasons that the president of the court did not accept. Despite this, the lawyer left the courtroom. Thereafter, hearings took place in the absence of the accused (who did not comply with the summons regularly addressed to him) and of his court-appointed lawyer. The *Cour de Cassation* upheld the decision of the president of the lower court to proceed and held that the absence of the accused and of his defence lawyer during all or part of the hearings could only invalidate the hearings when the absence was caused by the Chamber, the president or the prosecution. Voluntary absence cannot halt the proceedings, which have to continue in order to try the accused in a reasonable time.⁴³
44. The predicament in which the SCC currently finds itself is due entirely to the decision of Nuon Chea, and is seriously detrimental to the interest of the victims, the people of Cambodia, and the international community in bringing case 002/01 to an expeditious conclusion. No court should allow the tactics of parties to a case to halt or delay proceedings without good cause.

prosecution to the whimsical - albeit voluntary - caprice of every accused who wishes to use his trial as a vehicle for personal or political self-gratification". *Feretta v. California*, 422 U.S. 806 (1975) at 849.

⁴¹ "Si l'article 274 de ce Code, comme l'article 6.3c de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, reconnaissent à l'accusé le droit de choisir librement son défenseur, la nécessité d'assurer la continuité du cours de la justice et celle de permettre le jugement des accusés dans un délai raisonnable, font obstacle à ce que l'absence du défenseur choisi entraîne nécessairement le renvoi de l'affaire." See Cass. Crim., 5 December 1990, No. 90-81761. In that case, as the lawyers chosen by the accused were absent, a new lawyer was appointed by the court and an extension of time was granted for him to prepare his defence. This is to be distinguished from the present circumstances, where the Defence team for Nuon Chea is present at the Court premises and is familiar with the voluminous record at trial and on appeal.


⁴² See Cass. Crim., 26 November 2014, No. 13-84914 and Cass. Crim., 13 February, 2008, No. 07-83168. In both of these, the *Cour de Cassation* said: "Attendu que l'absence de l'avocat d'un accusé pendant tout ou partie des débats n'entraîne la nullité de la procédure qu'autant qu'elle est le fait de la cour, du président ou du ministère public."

⁴³ See Cass. Crim., 24 June 2015, No. 14-84221.

V. CONCLUSION

45. For the foregoing reasons, the Co-Prosecutors respectfully request the Chamber not to proceed with the appointment of standby counsel, and:
- a) to question Nuon Chea in person in order to determine whether Nuon Chea's decision to waive the right to assistance of national and international counsel during the appeal hearings is a decision made by Nuon Chea himself;
 - b) to determine whether Nuon Chea understands that his waiver means that no counsel will present arguments supplementing his written arguments, object to or reply to arguments of other parties, or answer any questions from the Judges; that he is free to instruct his counsel to resume representation at any time, but that proceedings heard during the period of absence of his counsel or without their active participation will not be repeated;
 - c) if, rather than being present in the courtroom, Nuon Chea follows the proceedings from a holding cell by audio-visual link in accordance with Rule 81(5) and none of his counsel are present in courtroom with whom he can communicate, to ensure that a court officer is present in the holding cell and able to communicate with the SCC, should Nuon Chea wish to address the Court on any matter arising during the appeal hearings;
 - d) to invite Nuon Chea to indicate in person on each day of the appeal hearings whether he wishes to continue to waive his right to further participate in the appeal hearings; and
 - e) to resume the appeal hearings as soon as possible.

Respectfully submitted,

Date	Name	Place	Signature
23 November 2015	SENG Bunkheang Acting Co-Prosecutor	Phnom Penh	
	Nicholas KOUMJIAN Co-Prosecutor		