

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

FILING DETAILS

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

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**KHIEU Samphân's Request for an Extension of Time and Page Limits for Filing his Appeal
Brief**

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Before:

The Supreme Court Chamber

Judge KONG Srim

Judge Chandra Nihal JAYASINGHE

Judge SOM Sereyvuth

Judge Florence Ndepele MWACHANDE-MUMBA

Judge MONG Monichariya

Judge Phillip RAPOZA

Judge YA Narin

The Co-Prosecutors

CHEA Leang

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Mr NUON Chea's Defence

MAY IT PLEASE THE SUPREME COURT CHAMBER

1. On 16 November 2018, at a public hearing, the Trial Chamber (“Chamber”) found KHIEU Samphân guilty of genocide (of the Vietnamese), crimes against humanity and grave violations of the Geneva Conventions and sentenced him to life imprisonment.¹ The Chamber stated that the full written reasons for its Judgement would be notified “in due course”.²
2. On 19 November 2018, the KHIEU Samphân Defence (“Defence”) appealed against the Judgement and requested the Supreme Court Chamber (“Supreme Court”) to annul the Judgement for procedural defect and lack of reasoning.³ On 13 February 2019, the Supreme Court found the appeal inadmissible.⁴
3. On 20 March 2019, the Defence requested the annulment of the decision on the ground that the panel of judges that rendered it was improperly constituted at the time.⁵ The Supreme Court only caused the request to be notified on 3 July 2019, or more than three months later.⁶
4. On 28 March 2019, the parties received notification of the full written reasons for the Judgement in Case 002/02, dated 16 November 2018 and totalling 4,101 pages in length in Khmer, 2,828 pages in French and 2,387 pages in English (including annexes), with 14,446 footnotes (“written Judgement”).⁷

¹ Transcript of the hearing (“T.”) of 16 November 2018, **E1/529.1**, pp. 53-57, between 11:25 and 11:38.

² T. 16 November 2018, **E1/529.1**, p. 3, around 9:36.

³ Khieu Samphân’s Urgent Appeal against the Judgement Pronounced on 16 November 2018, 19 November 2018, **E463/1**.

⁴ Decision on KHIEU Samphân’s Urgent Appeal against the Summary of Judgement Pronounced on 16 November 2018, 13 February 2019, **E463/1/3**. On 14 February 2019, the Defence requested that the decision be translated into French. The said translation was notified on 27 February 2019.

⁵ KHIEU Samphân’s Request for Annulment of Decision E463/1/3 on his Urgent Appeal against the Judgement of 16 November 2018, 20 March 2019, **E463/1/4**.

⁶ The request was filed on 20 March 2019 at 11:52, but was only notified on 3 July 2019, at 10:28.

⁷ Case 002/02 Judgement, 16 November 2018, **E465** (« written judgement »).

5. On 3 April 2019, the Defence requested to be granted 8 months and 100 pages for the filing of its notice of appeal in two languages while the NUON Chea Defence requested 6 months and 100 pages for its own notice of appeal.⁸ On 26 April 2019, the Supreme Court granted 3 months and 60 pages to all parties.⁹
6. On 3 May 2019, the Defence requested the review of the decision on the ground that it was flawed and had the effect of seriously infringing KHIEU Samphân's right to the time and facilities necessary for the preparation of his defence and his right to equality of arms.¹⁰ More than a month later, on 7 June 2019, the Supreme Court dismissed the request.¹¹
7. On 21 June 2019, the Prosecution filed its notice of appeal in which it raised only one error committed by the Chamber.¹²
8. On 1 July 2019, the NUON Chea Defence filed its notice of appeal in which it set out 351 grounds of appeal.¹³
9. On the same day, the Defence filed its notice of appeal in which it identified, under conditions unworthy of a fair trial and human considerations, at least 1,824 errors committed by the Chamber and 355 decisions subject to appeal at the same time as an appeal against the judgement on the merits.¹⁴
10. The Defence hereby requests an extension of the time and page limits for filing its appeal brief (I). It also requests an extension of the time limit for responding to the Prosecution's

⁸ KHIEU Samphan Defence Request for Extension of Time and Number of Pages to File Notice of Appeal, 3 April 2019, **F39/1.1** (« Request **F39/1.1** »); 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 April 2019, **F40/1.1**.

⁹ Decision on NUON Chea and KHIEU Samphân's Requests for Extensions of Time and Page Limits on Notices of Appeal, 26 April 2019, **F43**.

¹⁰ KHIEU Samphân Application for Review of Decision on Requests for Extensions of Time and Page Limits on Notices of Appeal, 3 May 2019, **F44** (« Request **F44** »).

¹¹ Decision on Khieu Samphân's Application for Review of Decision on Requests for Extensions of Time and Page Limits on Notices of Appeal, 7 June 2019, **F44/1** (« Decision **F44/1** »).

¹² Co-Prosecutors' Notice of Appeal of the Trial Judgement in Case 002/02, 21 June 2019, **E465/2/1**.

¹³ NUON Chea's Notice of Appeal against the Trial Judgement in Case 002/02, 1 July 2019, **E465/3/1**.

¹⁴ *Déclaration d'appel de KHIEU Samphân (002/02)*, 1 July 2019, **E465/4/1**.

appeal brief (II). Further, it invites the Supreme Court to consider holding a trial management meeting at a public hearing (III).

I. EXTENSION OF TIME AND PAGE LIMITS

1. Applicable Law

11. Internal Rule 107(4) provides that the appeal brief shall be filed within 60 days of the date of filing the notice of appeal. According to article 5.2 of the Practice Direction on the Filing of Documents Before the ECCC (“Practice Direction”), a document filed to the Supreme Court of the ECCC “shall not exceed 30 pages in English or French or 60 pages in Khmer”.
12. Under Internal Rule 39(2), “the judges may set time limits for the filing of pleadings, written submissions and documents relating to a request or appeal, taking into account the circumstances of the case”. Under Internal Rule 39(4), the judges “may, at the request of the concerned party or on their own motion: a) extend any time limits set by them; or b) recognise the validity of any action executed after the expiration of a time limit prescribed in these IRs on such terms, if any, as they see fit”. By contrast, article 5.4 of the Practice Direction specifies that “the relevant Chamber” may, at the request of a participant, “extend the page limit in exceptional circumstances”.

2. Necessary extensions

13. The 60-day time limit and the 30-page page limit prescribed by the texts are inadequate and extremely insufficient in this case. These textual requirements do not allow the Defence to file “an appeal brief setting out the arguments and authorities in support of each of the grounds” set out in the notice of appeal as required by Internal Rule 105(3).
14. This was already the case in Case 002/01, where the Defence appealed a judgement totalling 1,106 pages in Khmer, 854 in French and 695 in English (including annexes). In that case, the Supreme Court granted leave to the Defence teams to initially file a 210-page

appeal brief in one language 3 months after the notification of their notices of appeal.¹⁵ It had taken into account “the size and complexity of the case and Trial Judgment” as well as the fact that it was apparent from the notices of appeal that the appeals would be “extensive” and could only be “meaningfully plead[ed]” if the appellants were granted “sufficient time and space”.¹⁶ It also recalled that the extensions had to be commensurate with the scope of the appeals,¹⁷ as well as the differences between appellate proceedings before the ECCC and those before other international or internationalized criminal courts and tribunals.¹⁸

15. In this case, the size and complexity of the trial in Case 002/02 and of the written Judgement are significantly more extensive than in Case 002/01. Logically, it is apparent from KHIEU Samphân’s notice of appeal in Case 002/02 that his appeal would be considerably more extensive than in Case 002/01.
16. The Defence has already explained at length and clearly the special features of Case 002/02 in its previous submissions. In order to avoid being repetitive, the Defence expressly refers to it.¹⁹ It simply points out here that the written Judgement is 3.5 times longer than the judgement in Case 002/01, that it contains 4.4 times more footnotes than in Case 002/01, that the series of facts under consideration are almost 4 times more than in Case 002/01, that the number of convictions of KHIEU Samphân is 6 times higher than in Case 002/01, and that the legal issues in this case are not only particularly complex but also unprecedented (whether as compared to Case 002/01 or cases before other international courts and tribunals).
17. It further recalls that, unlike in Case 002/01, a very large amount of new evidence was admitted during the trial in Case 002/02 (until the end of the substantive hearings) and that

¹⁵ Decision on Motions for Extensions of Time and Page Limits for Appeal Briefs and Responses, 31 October 2014, **F9** (« Decision **F9** »).

¹⁶ Decision **F9**, para. 13.

¹⁷ Decision **F9**, para. 14.

¹⁸ Decision **F9**, paras 16 and 18.

¹⁹ Request **F39/1.1**, paras 17-23; KHIEU Samphân’s Reply and Response to the Prosecution on Extension of Time and Number of Pages for Notices of Appeal, 23 April 2019, **F41/1**, paras 11 and 13.

while the Defence received additional resources during the trial, this is no longer the case today, despite its anticipatory requests to the administration in order to limit the impact on the time limits for appeal.²⁰

18. It should be added that the Defence was severely short of time and space for its notice of appeal in Case 002/02. In particular, the Defence was unable to adequately review the legal and factual authorities supporting the Chamber's conclusions. A convicted person's right to appeal which is guaranteed by article 14(5) of the International Covenant on Civil and Political Rights is the right to have the "conviction and sentence [reviewed], both as to sufficiency of the evidence and of the law".²¹ The Defence must be able to ensure that it has not missed any grounds of appeal. Moreover, the Defence was unable to set out the errors it identified in a document that could have served as an outline for its brief and was compelled to identify them very cursorily. However, to be substantiated, the one-line errors identified in the notice of appeal require at least several paragraphs and often several pages of elaboration in the brief. This is so, especially because it is necessary to include therein appeals against interlocutory decisions.
19. In order to complete the unavoidable work that it was unable to complete at the time of the notice of appeal and to support all the very many grounds stated, the Defence requests that it be granted leave to file a **950-page** appeal brief in French within **10.5 months** of the filing of its notice of appeal, with translation into Khmer to follow as soon as possible. As was the case in Case 002/01, the Defence should be able to file its appeal brief **initially in one language**. Unlike other parties, it does not have internal translation resources. The French/Khmer translator post in the Defence Support Section was abolished at the end of 2018 and the resources of the Translation Unit ("ITU") are much more limited than before.

²⁰ Request **F39/1.1**, paras 28-34.

²¹ *Bandajevsky v. Belarus*, Communication No. 1100/2002, findings adopted by the Human Rights Committee on 28 March 2006, paras 10.13.

In addition, the Defence stresses that it is counterproductive, both for itself and for ITU, to have a constantly modified document translated on an on-going basis.²²

20. This request for an extension of time and page limits is **extremely** reasonable since it is seeking the **strict minimum** that must be available to the Defence in view of the size of Case 002/02 compared to Case 002/01 mentioned above.²³ Without this strict minimum in terms of time and space, KHIEU Samphân’s appeal cannot be meaningfully pleaded.

3. **“Expeditious” (“rapide”) appellate proceedings in Case 002/02 and meaningful and effective right of appeal**

21. The Defence has rightly noted that in dismissing its application for review, the Supreme Court stated that “the preparation of notices of appeal is intended to be a temporally and substantively limited procedure compared to the preparation and filing of fully reasoned submissions on appeal”.²⁴ It added that there is no absolute prohibition on the amendment of grounds of appeal after the filing of notices of appeal.²⁵ It also noted that its initial decision on requests for extensions of time and page limits “was rendered without prejudice to future requests for extensions of time or page limits on appeal briefs”.²⁶

22. Nevertheless, the Defence, which did not expect such restrictive conditions to be imposed on the rights of the Defence in relation to the notice of appeal, fears that the Supreme Court would not allow the Defence to complete its work properly even in relation to the appeal brief.

23. Indeed, in view of all the latest decisions rendered by the Supreme Court, the Defence has the clear impression that the Supreme Court disregards the needs and rights put forward by the Defence in favour of giving priority to “the need to ensure *expeditious* proceedings

²² Request F39/1.1, para. 25. Moreover, contrary to what the Supreme Court has stated, there is no established practice at the ECCC that voluminous documents are forwarded for translation on an on-going basis. In reality, these documents are first filed before being translated. See Request F44, para. 7 and footnotes 15-17.

²³ See *supra*, paras 14-17.

²⁴ Decision F44/1, p. 3.

²⁵ Decision F44/1, p. 4.

²⁶ Decision F44/1, p. 4.

(*rapide*)” in accordance with the ECCC’s legislative framework and international standards”.²⁷

24. However, the ECCC legislative framework and international standards make no reference to “expeditious” (*rapide*) proceedings. The ECCC Law provides that the Chambers “shall ensure that trials are fair and expeditious (*dans un délai raisonnable*) (...) with full respect for the rights of the accused” and that they shall exercise their jurisdiction in accordance with the International Covenant on Civil and Political Rights.²⁸ This Covenant guarantees to the accused person the right to be tried “without undue delay”²⁹ immediately after his right to have adequate time and facilities for the preparation of his defence.³⁰
25. Thus, concerns about the “expeditiousness” of proceedings should in no way deprive an accused person of his or her rights guaranteed by international standards and the ECCC legislative framework. The right to an expeditious (*rapide*) trial is not one of them. In no case is the right to an expedient trial one of them.
26. The Defence insists that KHIEU Samphân is the person most concerned by the duration of the proceedings. He has no interest in delaying the proceedings, quite the contrary.
27. KHIEU Samphân is in no way responsible for having been jailed and charged in 2007 at the age of 76 years and only being able to appeal in 2019 at 88 years of age. He is not responsible for the scope of the Prosecution’s submissions, the years taken by the judicial investigation, the Chamber’s severance decisions and the holding of two trials against him over several years. He is not responsible for the mass introduction of new evidence during the second trial nor for the time it took the Chamber to draft the reasons for its judgement totalling thousands of pages.

²⁷ Decision F44/1, p. 3 (emphasis added).

²⁸ Articles 33(1) and (2) new and article 37 new of the ECCC Law. See also Internal Rule 21(1).

²⁹ Article 14-3-c.

³⁰ Article 14-3-b.

28. Today, KHIEU Samphân is asking for nothing more and nothing less than what he needs to have a meaningful and effective right of appeal against his heavy conviction and his heavy sentence.
29. The fact that the ECCC is still facing financial difficulties does not mean that KHIEU Samphân's appeal in Case 002/02 must be "expeditious" ("*rapide*") or expedient. In the words of the Supreme Court, "[i]f there is insufficient funding to guarantee trial driven by law, all ECCC proceedings must be terminated and the court must close down".³¹
30. Moreover, the fact that KHIEU Samphân is old and/or has already been convicted in Case 002/01 does not mean that his appeal in Case 002/02 must be "expeditious" ("*rapide*") or expedient. If the purpose of holding a second trial was only to do some semblance of justice, there should have been no need to bother.
31. KHIEU Samphân and his Defence are human beings. KHIEU Samphân remains presumed innocent in Case 002/02. His Defence has a duty not to pretend to defend him. While the Defence is used to not counting its hours, it cannot keep up with the unseemly pace imposed on it for the notice of appeal with the resources at its disposal. It needs a reasonable time to prepare the appeal brief. KHIEU Samphân is also entitled to be able to follow and contribute to his defence, considering his age and the difficulties associated therewith.³²

II. RESPONSE TO THE PROSECUTION'S APPEAL BRIEF

32. In order to be able to focus on its appeal brief, the Defence is hereby requesting an extension of the time limit to respond to the Prosecution's appeal brief, which is due to be filed on 20 August 2019 at the latest.³³

³¹ Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, **E284/4/8**, para. 75.

³² *Procurateur écrit autorisant à interjeter appel (règle 106-3 du Règlement intérieur)*, 27 June 2019, **E465/4/1.2**; *Déclaration d'appel de KHIEU Samphân (002/02)*, 1 July 2019, **E465/4/1**, para. 9.

³³ Internal Rule 107(4).

33. Article 8.3 of the Practice Direction provides that any response to an application or pleadings shall be filed within 10 calendar days of notification of the document to which the participant is responding. Internal Rules 39(2) and 39(4) empower the judges to extend time limits.³⁴
34. According to the jurisprudence of the Supreme Court, the complexity of the issues raised and the workload may justify postponing the starting point of the time limit for responding as well as an extension of the time limit.³⁵ In Case 002/01, the Supreme Court granted the Defence teams' requests to respond to the Prosecution's appeal brief within 30 days of the filing of their own briefs.³⁶ It had considered "the relative importance of the appeal brief"³⁷ and noted that the time limit granted under article 8.3 of the Practice Direction "would require NUON Chea and KHIEU Samphân to divert attention away from their appeal briefs".³⁸
35. In this case, the Prosecution's notice of appeal in Case 002/02 announces that it would be appealing on a complex and novel question of law and fact, which has never been raised before the Supreme Court (or before other international or internationalized courts or tribunals). Unlike the purely legal issue raised on appeal by the Prosecution in Case 002/01 (the applicability of the third form of joint criminal enterprise before the ECCC),³⁹ the question of law and fact it raises today (the establishment of the crime of other inhumane acts against male victims of forced marriage who were coerced to have sexual intercourse) has not been the subject of many conclusions and decisions at the investigation and trial stages.

³⁴ See *supra*, para. 12.

³⁵ Decision on Co-Prosecutors' Request for Extension of Time to Respond to NUON Chea's Immediate Appeal Under Internal Rule 104(4)(D), 18 October 2011, **E116/1/2/1**, para. 6; Decision on Request by Co-Lawyers for KHIEU Samphân for Extension of Time to Respond to Co-Prosecutors Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, 20 November 2012, **E163/5/1/2/1**, para. 7; Decision on IENG Sary's Expedited Request to File Appeal in English Only with Khmer Translation to Follow, 30 January 2013, **E254/3/1/1.2**, para. 5.

³⁶ Decision on Defence Motions for Extension of Pages to Appeal and Time to Respond, 11 December 2014, **F13/2** ("Decision **F13/2**).

³⁷ Decision **F13/2**, para. 13.

³⁸ Decision **F13/2**, para. 12.

³⁹ Decision **F13/2**, para. 11.

36. Moreover, since KHIEU Samphân has not been convicted on this point, it is quite obvious that in preparing his own appeal brief, the scope of which is not commensurate with that of the Prosecution, the Defence will not deal with the applicable law and the evidence relating to this question.
37. In any event, whether the Prosecution files its appeal brief before 20 August 2019 or on 20 August 2019, the Defence will be preparing its own appeal brief and must be able to focus on it. Indeed, it is perhaps worth recalling that the stakes for KHIEU Samphân on appeal from his conviction and sentence are extremely higher than for the Prosecution.
38. For all these reasons, the Defence should be allowed to file its response to the Prosecution's appeal brief within 40 days of the filing of its own appeal brief.

III. POTENTIAL TRIAL MANAGEMENT MEETING

39. Pursuant to Internal Rules 79(7) and 104 *bis*, the Supreme Court may decide to hold a trial management meeting in camera or in public for the purpose of “*inter alia* [...] allow[ing] exchanges between the parties to facilitate the setting of the date of the [...] hearings and to review the status of the case by allowing the Accused to raise issues in relation thereto, including his or her mental and physical condition”.
40. If the Supreme Court were to consider granting less time and space than what is requested herein, it should consider holding a trial management meeting at a public hearing. Such a meeting could help to make the appeal process more humane and concrete. Above all, the Supreme Court could convene representatives of the administration and the Translation Unit to the meeting. This would enable the Supreme Court to ensure that the material constraints mentioned by the Defence are quite real, in case the Supreme Court does not take its word for it
41. **FOR THESE REASONS**, the Defence requests the Supreme Court to:
- GRANT LEAVE to the Defence to file a 950-page appeal brief in French within 10.5 months of the filing of its notice of appeal initially in one language, with translation into Khmer to follow as soon as possible;

- GRANT LEAVE to the Defence to file its response to the Prosecution's appeal brief within 40 days of the filing of its own brief;
- *in the alternative*, CONSIDER holding a trial management meeting at a public hearing.

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