

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

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**KHIEU Samphan's Defence Response to the Prosecution's Request Concerning its Appeal  
Brief (F47/1, paras. 25-26(ii))**

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**MAY IT PLEASE THE SUPREME COURT CHAMBER**

1. On 10 July 2019, the KHIEU Samphan Defence (the “Defence”) requested the Supreme Court Chamber to permit it to file a 950-page appeal brief in French within 10.5 months of the filing of its notice of appeal, with the translation into Khmer to follow as soon as possible.<sup>1</sup>
2. On 23 July 2019, the parties received notification of the Prosecution’s Response to the Request.<sup>2</sup> Therein, the Prosecution opposes the Request, contending that a period of five months and 300 pages suffice for each defence team to initially file [an appeal brief] in one language.<sup>3</sup> It requested that any extensions granted to the Defence be “extended [to it] in a proportionate manner” for filing its response brief.<sup>4</sup>
3. On the same day, the NUON Chea Defence filed a first request for an extension of time and page limits for filing its appeal brief. It requested leave to initially file in one language a 1000-page brief within 10.5 months of filing its notice of appeal.<sup>5</sup>
4. On 29 July 2019, the Defence replied to the Prosecution.<sup>6</sup> It did not oppose the Prosecution’s request concerning its reply brief, as it seemed reasonable as it stood at that time.
5. On 2 August 2019, the parties received notification of the Prosecution’s Response to the NUON Chea Defence’s Request for an extension of the time limits, which request it opposed.<sup>7</sup> Therein, it requested to be afforded “70% of the combined total of pages and 50% of the combined time granted to both Defence teams” for filing its response brief.<sup>8</sup>
6. On 4 August 2019, NUON Chea died.

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<sup>1</sup> Khieu Samphan’s Request for an Extension of Time and Page Limits for Filing His Appeal Brief, 10 July 2019, **F45**.

<sup>2</sup> Co-Prosecutors’ Response to Khieu Samphan’s Request for Additional Time and Page Limits for Appellate Briefs, 22 July 2019, **F45/2** (“Response **F45/2**”), notified in French on 26 July 2019.

<sup>3</sup> Response **F45/2**, paras. 17 and 22.

<sup>4</sup> Response **F45/2**, paras. 18 and 22.

<sup>5</sup> NUON Chea’s First Request for an Extension of Time and Page Limits for Filing His Appeal Brief Against the Trial Judgement in Case 002/02, 23 July 2019, **F47**.

<sup>6</sup> Khieu Samphan’s Defence Reply to the Responses to its Request for Extension of Time and Page Limits for Filing His Appeal Briefs, 29 July 2019, **F45/3**, notified on 30 July 2019.

<sup>7</sup> Co-Prosecutors’ Response to NUON Chea’s Request for Additional Time and Page Limits for His Appeal Brief, 1 August 2019, **F47/1** (“Response/Request **F47/1**”). The Defence relied on an initial partial draft translation into French which was provided by ITU, since ITU was unable to translate the document in time.

<sup>8</sup> “Response/Request **F47/1**, paras. 25-26(ii).

7. The Defence hereby opposes the Prosecution's new supplemental request, and deems it evolving in nature and unsubstantiated (I), unreasonable (II) and untimely (III).

**I. THE REQUEST IS EVOLVING IN NATURE AND UNSUBSTANTIATED**

8. On appeal in Case 02/01, the Prosecution systematically requested extensions of time and/or page limits proportionate to those granted to the defence teams, for filing its response to the appeal briefs or even for examining witnesses.<sup>9</sup> The Supreme Court Chamber systematically denied such requests, considering that they lacked substantiation.<sup>10</sup> Owing to the Prosecution's "obduracy",<sup>11</sup> the Supreme Court Chamber even felt compelled to recall that there is a fundamental difference between the position of an accused in a criminal trial and that of the prosecution.<sup>12</sup>
9. More specifically in regard to the Prosecution's Response to the appeal briefs of both defence teams, the Supreme Court Chamber granted the Prosecution the same number of pages plus one third (and not the combined total, as the Prosecution had requested)<sup>13</sup> and less than one third of the time granted to the defence teams (and not the same amount of time, as the Prosecution had requested).<sup>14</sup> So whereas the defence teams were granted 90 days and 210 pages for filing their

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<sup>9</sup> In regard to the appeal briefs, the Prosecution requested for its response the same amount of time as that afforded to the defence teams, as well as and a page limit equivalent to the combined total of the two appeal briefs (references in the next footnote).

<sup>10</sup> Decision on Defence Motion for Extension of Time and Page Limits on Notices of Appeal and Appeal Briefs, 29 August 2014, **F3/3**, paras. 5 and 10; Decision on Motions for Extensions of Time and Page Limits for Appeal Briefs and Responses, 31 October 2014, **F9** ("Decision **F9**"), paras. 8-9, 15, 17, 20-21, 23; Decision on Co-Prosecutors' Request for Page and Time Extensions to Respond to the Defence Appeals of the Case 002/01 Judgment, 21 April 2015, **F23/1** ("Decision **F23/1**"), paras. and 11; Decision on Co-Prosecutors' and Civil Party Lead Co-Lawyers' Request for Additional Time for Examination of SCW-5, 30 June 2015, **F26/2/2** ("Decision **F26/2/2**"), paras. 6-8.

<sup>11</sup> Decision on the Co-Prosecutors' Request for Page Extension for Their Prospective Response to NUON Chea's Sixth Request for Additional Evidence, 5 October 2015, **F2/8/2/1**, p. 3: "the Co-Prosecutors, notwithstanding the Supreme Court Chamber's consolidated view on this issue, obdurately justified the relief sought by making reference to the other party's request".

<sup>12</sup> Decision **F26/2/2**, para. 6: "the Supreme Court Chamber recalls that there is a fundamental difference between the position of the accused in a criminal trial, whose liberty is at stake and who enjoys the fair trial rights set out, in particular, in Article 14(2) and (3) of the International Covenant on Civil and Political Rights ("ICCPR"), and that of the prosecution, which is representing the public interest that justice be done in accordance with the law".

<sup>13</sup> Decision **F9**, paras. 15 and 17. The Supreme Court Chamber relied on the regulations of the international or internalised criminal tribunals in cases involving multiple accused. Pursuant to those regulations, with one appellant, the respondent is allowed the same number of pages for the response to the appellant (para. 15 and footnotes 30-31).

<sup>14</sup> Decision **F9**, paras. 20-21 ("The Supreme Court Chamber bears in mind that the *ad hoc* tribunals normally granted approximately half the time for response briefs as they do for appeal briefs, and considers that the Co-Prosecutors would be able to hold discussions and conduct a significant amount of preliminary work on their response upon receiving the appeal briefs in either English or French", para. 20).

briefs in one language, the Prosecution was granted 30 days and 280 pages for filing its response in both languages.<sup>15</sup>

10. For its response to the defence appeal briefs Case 002/02, the Prosecution requested extensions that are simply “proportionate” to those granted to the Defence teams.<sup>16</sup> The Defence understood this to mean that the Prosecution had abandoned its unsubstantiated requests in Case 002/01 and was finally deferring to the Supreme Court Chamber and its Case 002/01 jurisprudence.
11. However, 10 days thereafter, in its Response to the NUON Chea Defence, it adopted different position. This time, it requested “at least 70% of the combined total of pages and at least 50% of the combined time afforded to the Defence”. It also requested that the deadline for filing its response, “in one language”, should be “at least 45 days after the Defence briefs have been filed in Khmer”.<sup>17</sup>
12. Not only does the Prosecution omit to explain its abrupt change of position, but it also omits to substantiate its requests. It simply cites the reasons why, according to it, the defence teams should be afforded only five months in one language and 300 pages, and in rather contradictory fashion, the “volume of issues” that NUON Chea and KHIEU Samphan intend to appeal.<sup>18</sup> While it is not requesting page limits equivalent to the combined total of the two appeal briefs, as it did in Case 002/01, it omits to explain why it should be afforded at least 70% of the combined total, i.e. more than the same page limits augmented by one third, as was granted in Case 002/01. Similarly, it omits to explain why, as it did in Case 002/01, it is requesting the same time limits as those afforded to the defence teams,<sup>19</sup> i.e. a lot more than less than one third, as was granted in Case 002/01. It also omits to explain why it ought to be permitted to file in one language only. In other words, the Prosecution fails to provide any good reason why the Supreme Court Chamber should depart from its Case 002/01 jurisprudence.
13. The truth of the matter is that it simply cannot. Its unreasonable request is only aimed at wrongfully scaring the Supreme Court Chamber regarding the time limits requested by the defence teams.

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<sup>15</sup> Decision F9, para. 23.

<sup>16</sup> Response F45/2, paras. 18 and 22.

<sup>17</sup> Response/Request F47/1, paras. 25 and 26(ii).

<sup>18</sup> Response/Request F47/1, para. 25.

<sup>19</sup> “50% of the combined time” afforded to the Defence is equivalent to the time afforded to those teams.

## **II. THE REQUEST IS UNREASONABLE AND AIMED AT SCARING THE SUPREME COURT CHAMBER**

14. There is no good ground to grant the Prosecution any proportionate increase in the time and page limits for its response in Case 002/02, as it was granted in Case 002/01. Such was already the case when it filed its response to two appeal briefs, and it is much more so today after NUON Chea has died.
15. When filing its Response, the Prosecution was well aware that Cases 002/01 and 002/02 both entailed the trial of two Accused, and that the Accused were convicted of participation in a joint criminal enterprise (“JCE”). The Prosecution was also well aware that, as was the case in Case 002/01, it could start preparing its response upon receipt of the appeal briefs in one language and file it in both languages shortly after receiving notification of the appeal briefs in Khmer.
16. In responding to the two appeals, the Prosecution was well aware the issues that the two accused were going to raise in their respective appeals were bound to overlap to a large extent. This is evidenced by the mere fact that in the segment on the written reasons for the judgement, very few pages out of the grand total are devoted to each of the accused in particular:

	Total number of pages, including annexes	Number of pages relating to NUON Chea’s roles and responsibilities	Number of pages relating to KHIEU Samphan’s roles and responsibilities
In French	2828	91 (3.21%)	137 (4.84%)
In English’s	2387	78 (3.26%)	92 (3.85%)

17. Most of the issues raised on appeal are common to the two Co-Accused (conduct of the proceedings; the law applicable to the crimes, modes of responsibility, assessment of evidence). Moreover, the Co-Accused were convicted mainly of participation in a common JCE, the common purpose of which was allegedly implemented by means of five “policies” (each entailing the commission of multiple crimes), which both accused allegedly supported and participated in.
18. Accordingly, in order to respond to appeals which were bound to overlap to a large extent, the Prosecution did not need any more than the proportion it had been afforded in Case 002/01. This is especially true given that here again it was at liberty to avail itself of the period during which the defence teams’ briefs were being translated into Khmer. It omits to mention this while instead

claiming rather exaggeratedly that granting the defence teams' requests would mean that the time for the Defence appeal briefs alone in Khmer would be almost two years.<sup>20</sup>

19. In filing its Request, the Prosecution was well aware that whereas much more time should legitimately be devoted to appealing the briefs than in Case 002/01, the time devoted to translating those briefs into Khmer would not be time lost, much to the contrary. As happened in Case 002/01, that time would be devoted to, for example, 1) in part, preparing the defence teams' responses to the Prosecution's appeal brief,<sup>21</sup> and 2) in whole, preparing the Prosecution's response to the defence teams' appeal briefs.
20. In Case 002/01, the Supreme Court Chamber highlighted the fact that the Prosecution was in a position to prepare its response upon receipt of the appeal briefs in one language.<sup>22</sup> The Defence adds that the Prosecution can assign virtually all its resources to Case 002/02<sup>23</sup> and that it has in-house translators (unlike the Defence).<sup>24</sup>
21. The Supreme Court Chamber should therefore order the Prosecution to file its response in both languages no later than 15 days after receiving notification of the Defence appeal brief in Khmer.
22. From that perspective, the Prosecution will be quite capable of filing a comprehensive response to the Defence appeal brief without occasioning any delay to the appellate proceedings.

### **III. THE REQUEST IS UNTIMELY**

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<sup>20</sup> Response/Request **F47/1**, para. 23: "*This would mean that the time for the Defence appeal briefs alone in Case 002/02 would be almost two years.*" (emphasis supplied)

<sup>21</sup> Decision on Defence Motions for Extension of Pages to Appeal and Time to Respond, 11 December 2014, **F13/2**, paras. 12-13 and 17 (the Supreme Court Chamber extended the time limit for filing the Defence teams' responses until the filing of their appeal briefs, in one language).

<sup>22</sup> Decision **F9**, para. 20 (see footnote 14. *supra*); Decision **F23/1**, para. 11 ("As to the contention that 30 days is insufficient for national and international elements of the Office of the Co-Prosecutors to work together, the Supreme Court Chamber considers it evident that such cooperation should have been taking place from the time of the filing of the appeal briefs in one language only. The fact that the Co-Prosecutors have themselves regularly requested filing documents in one language with Khmer translations to follow is a testament to early cooperation.").

<sup>23</sup> Case 004/1 had ended. Case 004/2 is at the deliberations stage before the Pre-Trial Chamber. Case 003 is at the appellate replies stage. It is only in Case 004 that the appeals against the Closing Orders started last month.

<sup>24</sup> See for example the Co-Prosecutors' email of 1 June 2016 at 1306 hours, entitled: "OCP Response to Nuon Chea's Request to Recall Prak Khan – Request to File in One Language", **E409/2.1.2**, p. 2, second paragraph.

23. The practice of entertaining supplemental requests filed in response to motions is justifiable in some instances even though it may add to the length of time for issuing a decision. Even so, the Defence fails to see why the Prosecution did not file the Request at hand 10 days earlier, when it filed its Response to the Defence motion. It thus would not have had to again put resources into addressing this issue, and moreover, it had to do this in urgent fashion so as to respond as quickly as possible to avoid delaying the Supreme Court Chamber's decision. Indeed, the said decision ought to be rendered as quickly as possible, because it will determine the remainder of the on-going proceedings and enable the parties to organize their work more efficiently.

24. **FOR THESE REASONS**, the Defence requests the Supreme Court Chamber:

- to DENY the Prosecution's request for proportionate extensions, pursuant to its Case 002/01 jurisprudence;
- to DECIDE all the pending requests on an urgent basis, even if this means initially issuing the dispositions, and its reasoning in due course.

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