BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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OBSERVATIONS CONCERNING TRIAL CHAMBER'S REQUEST TO RECEIVE FINAL LEGAL SUBMISSIONS BY 21 DECEMBER 2012

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I. INTRODUCTION

1. In preparation for its most recent Trial Management Meeting on 17 August 2012 ('TMM'), the Trial Chamber issued a memorandum indicating that it was 'considering' limiting closing briefs to 75 pages for the Co-Prosecutors, 50 pages for each defence team and 50 pages for the civil parties.[1] At the TMM itself, all of the parties objected that in light of the complexity of Case 002/01, more space was required in order to fully brief the relevant issues.[2] Counsel for Ieng Sary suggested that if parties were to file their legal submissions prior to the conclusion of trial, they would be able to use the full length of their final briefs to focus on the application of the law to the facts.[3]

2. In a memorandum issued on 8 October 2012 ('Memorandum'), the Chamber stated as follows:

> To assist the Chamber in the concluding phases of the trial, the Chamber requests that portions of the Closing Briefs concerning the applicable law be submitted in advance of the conclusion of the hearing of evidence in Case 002/01. It would assist the Chamber if these portions of the Closing Brief could be filed no later than Friday 21 December 2012, although the Chamber will entertain extension of this deadline if required by the parties. These submissions shall be no more than 20 pages in length (in English or French, or 40 pages in Khmer). It follows from this direction that the Closing Briefs requested soon after the close of the hearing of evidence in Case 002/01 may focus exclusively or mainly on the factual allegations at issue in the trial.[4]

3. In light of the Chamber's relatively permissive language, it is not clear to the Defence whether the Memorandum was intended as something other than a request, and similarly what would be the consequence of failing to file legal submissions prior to the conclusion of trial. The Defence has determined that filing legal submissions prior to the conclusion of trial would be detrimental to the interests of Nuon Chea – especially at this early stage – but is unable to settle on an appropriate course of action until it receives greater clarity concerning the nature of the Memorandum. The Defence is of the view that legal

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[1] Document No. **E-218**, 'Scheduling of Trial Management Meeting to Enable Planning of the Remaining Trial Phases in Case 002/01 and implementation of Further Measures Designed to Promote Trial Efficiency', 3 August 2012, ERN 00831321-00831326, para. 20
[2] Document No. **E-1/114.2**, 'Transcript of Trial Management Meeting', 27 August 2012, ERN 00843658-00843708, pp. 14:14-18:19, 20:20-33:18.
[3] Document No. **E-1/114.2**, 'Transcript of Trial Management Meeting', 27 August 2012, ERN 00843658-00843708, pp. 21:17-22:25.
[4] Document No. **E-163/5**, 'Notification of Decision on Co-Prosecutors' Request to Include Additional Crime Sites Within the Scope of Trial in Case 002/01 (E163) and Deadline for Submission of Applicable Law Portion of Closing Briefs', 8 October 2012, ERN 00852350-00852353, para. 4.

submissions should be filed as part of a single comprehensive closing brief at the end of trial. That view is based on the crucial consideration that legal submissions are inseparable from the evidence adduced at trial; 'the law' is not an abstract notion that can be briefed as such, but is necessarily linked to the facts of the case. Moreover, the Defence submits that there is no legal basis for the procedure proposed by the Chamber and the trial management benefits of the proposed procedure are limited, if any.

4. The Defence is also concerned that the page limit imposed by the Chamber is far too short to accommodate the size and complexity of Case 002/01. It is obvious to the Defence that twenty pages cannot possibly cover all subjects falling under the heading 'legal issues in Case 002/01'. Depending on the Chamber's clarifications with respect to the Memorandum, the Defence may therefore seek an extension of the page limit with regard to such submissions.

II. OBSERVATIONS

A. All Legal Issues in Case 002/01 Cannot be Confined to Twenty Pages

5. The view of the Defence with regard to the length of its submissions on the law derives from its preliminary assessment at this stage that such submissions may have to include, among other subjects:

   a. the status under customary international law between 1975 and 1977 of several of the modes of liability charged in the Closing Order;

   b. the status under customary international law between 1975 and 1977 of various crimes against humanity and war crimes charged in the Closing Order;

   c. the appropriate remedy and relevant legal framework for fair trial violations flowing from a judicial investigation where systemic flaws in the investigative approach have been demonstrated and not remedied and the thwarting of the right of the defence to explore the effect of those flaws on witness credibility in the course of its examination;

   d. the appropriate remedy and relevant legal framework for an observed pro-prosecution bias by both the OCIJ during the investigative stage and the Trial Chamber during the trial stage;

e. the appropriate remedy and relevant legal framework for the refusal to call certain crucial defense witnesses, leading to an impossibility to buttress or even raise certain defenses.

f. the curtailing of the right to make oral submissions, including but not limited to those on fair trial concerns, in the course of trial and the relevant legal framework surrounding this;

g. the fitness of the Accused to stand trial and the proper legal test to be applied, also in light of any developments between the last such assessment by the Chamber and the conclusion of trial;

h. the appropriate remedy for government interference in the trial proceedings, including the non-appearance of witnesses and public statements impacting on the rights of the Accused, and the relevant legal framework surrounding this issue;

i. the proper legal framework surrounding the proper assessment of the evidence to be relied upon, especially in light of inadequate information as to the chain of custody and provenance;

j. the nature and definitions of available 'grounds permitted under international law' as a defence to forced transfer; and

k. jurisprudence from international courts evaluating the responsibility of top-level officials for alleged widespread criminal conduct of subordinate lower level cadres.

6. It should be self-evident that a twenty page brief could not possibly cover these subjects in adequate detail, or in some cases, at all. The Chamber's proposed page limit would therefore constitute a *de facto* bar on at least some of the defenses that the Defence will want and need to raise and would cause (also in light of the extreme departure from generally accepted standards at other international criminal courts[5]) a violation of the right to present a defence.

[5] The length of a closing brief at the ICTR has been limited to 30,000 words; at the ICTY, 60,000 words. At both tribunals, the parties may seek the authorization of the Chamber to extend the word limit (ICTR Practice Direction on Length and Timing of Closing Briefs and Closing Arguments, 3 May 2010, paras. 1.3 and 5; ICTY Practice Direction on the Length of Briefs and Motions, 16 September 2005, paras. 4 and 7). The ICTY

B. Filing Legal Submissions Prior to and Independent of the Final Brief is Detrimental to the Interests of Nuon Chea

i – Legal Submissions are Inseparable from the Evidence Adduced at Trial

7. The Defence's main concern with the Chamber's proposed separation of the law from the facts is simply that there is too much left to be done in the Case 002/01 trial for a logical and comprehensive approach to drafting legal submissions to be possible. Dozens of witnesses remain to be heard, including Philip Short, Elizabeth Becker, Henri Locard, Anne Yvonne-Guillou, Ea Meng-Try and perhaps even Stephen Heder – that is, all but one of the experts scheduled by the Chamber. In light of the parties' requests at the TMM (and since) that certain witnesses be called, the Chamber has not yet even determined with finality *which* witnesses will be heard over the course of the trial.[6] The Trial Chamber's recent indications to that effect only *add* uncertainty, listing a series of provisional witnesses who may or may not be called to appear.[7] Filing legal submissions

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has in several recent cases granted the Defence substantial word extensions. See *e.g. Prosecutor v. Gotovina et al.*, Case No. IT- 06-90-T, 'Scheduling Order', 16 June 2010, p. 4 (all parties were granted 90,000 words); *Prosecutor v. Stanisic and Zupljanin,* Case No.IT-08-91-T, 'Order on Final Trial Briefs and Closing Arguments', 30 March 2012, p. 1 (the Stanisic Defence was granted 80,000 words); Prosecutor v. Tolimir, Case No. IT-05-88/2-T, 'Scheduling Order on Final Trial Briefs and Closing Arguments', 14 February 2012, p.p. 1 (all parties were granted 120,000 words). The ICC Trial Chamber in the Lubanga case limited the length of the Defence's final submissions to 300 pages (*Prosecutor v. Lubanga Dyilo,* Case No. ICC-01/04-01/06, 'Order on the Timetable for Closing Submissions', 12 April 2011, para. 3 (c)). At the SCSL, the length of a final trial brief 'shall not exceed 200 pages or 60,000 words, whichever is greater' (Article 6 (B) of the SCSL Practice Direction on Filing Documents before the Special Court for Sierra Leone, 10 June 2005). However, the Court determined that the parties in the Taylor case were allowed to file final trial briefs not exceeding 600 pages (*Prosecutor v. Taylor,* Case No. SCSL-03-01-T, 'Order Setting a Date for Closure of the Defence Case and Dates for Filing of Final Trial Briefs and the Presentation of Closing Arguments', 22 October 2010, p. 2). The ECCC Trial Chamber in case 001 granted the defence, in accordance with international practice, 160 pages to file its final submissions (*Prosecutor v. Kaing Guek Eav alias Duch,* Case No. 001/18-07-2007-ECCC/TC, Document No. E-159, 'Direction on the Proceedings Relevant to Preparations and on Filing of Final Written Submissions', 27 August 2009, ERN 00367274-00367276, para. 3). In other contexts, the Chamber has regularly sought guidance in procedural rules established at the international level as a consequence of complexity of this case (see *e.g.* Document No. **E-96/7**, 'Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents before the Trial Chamber', 20 June 2012). It would be strange if the Chamber held at the same time that final submissions ought to be so much shorter than the norm.

[6] Indeed, even the scope of the allegations at issue remains unknown as a consequence of the Co-Prosecutors' recent appeal against this Chamber's decision to exclude S-21 and executions at District 12 from the scope of Case 002/01. *See* Document No. **E-163/5/1/1**, 'Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 with Annex I and Confidential Annex II, 7 November 2012, ERN 00859078-859107.

[7] Document No. **E-236/1**, Memorandum from President of Trial Chamber re 'Preliminary indication of individuals to be heard during population movement trial segments in Case 002/01', 2 October 2012, ERN 00850147-00850147, para. 3.

at this juncture will require a great deal of guesswork with potentially deleterious effect on the ability to prepare a defence.[8]

8. Developments through the course of the trial which could impact on the formulation of final legal arguments include, among others:

   a. The Defence has sought numerous witnesses to testify concerning pre-1975 context, which would provide the key factual predicate to several of its principal defences to the charges arising from population movement phases I and II, including whether any of the evacuations were justified by a 'ground permitted under international law.'[9] The Chamber has indicated that one such witness is now scheduled to be heard and that two more may be scheduled at a later date. Without knowing who will testify or what exactly those who do testify will say (having been unable to interview any witnesses prior to their appearance at trial), it is impossible to gauge the relative strength of that defence and hence the emphasis it deserves in final submissions. The scope and definition of permissible 'grounds permitted under international law' is unsettled and would require substantial legal submissions if it were to be relied upon as a significant aspect of Nuon Chea's defence.[10]

   b. Several witnesses have thus far testified to facts suggesting the existence of a disconnect between the leaders of the regime and the conduct of lower level officials, including, for instance, that factions within the political[11] and military

[8] These concerns would be even more acute in the event the Chamber adheres to the page limit proposed in the Memorandum. If the Defence were limited to a total of twenty pages to articulate *all* of its legal arguments, it would be forced to make difficult and strategic choices about which arguments are critical to its case and which are more peripheral. While this would already be highly problematic at the end of the hearing of the evidence, the Defence cannot reasonably expected to make these choices a year or so prior to the conclusion of trial.
[9] Document No. **E-182**, 'Request to Hear Defence Witnesses and to Take Other Procedural Measures in Order to Properly Assess Historical Context', 16 March 2011, ERN 00790415-00790430, paras 18-21.
[10] Moreover, considering that this issue is one of the core defenses that the Defence seeks to advance, as well as the breadth and complexity of the topic, the Defence simply cannot accept the limited number of witnesses that might be called to testify on this issue. Accordingly, we will continue to make submissions on this issue (not unlike the OCP's approach in Document No. **E-236**, 'Co-Prosecutors' Request Regarding Forced Movement Witnesses', 13 November 2012, ERN 00860107-00860109), in the hope that the Trial Chamber can be convinced of the merit of our position, possibly also based on the testimony of those witnesses that do appear before the Chamber. In short, this issue is far from settled, as far as the Defence is concerned, simply because it would be deleterious to the rights of our client to effectively abandon this defence.
[11] Document No. **E-1/132.1**, 'Transcript of Trial Proceedings', 9 October 2012, ERN 00854778-00854894, pp. 19:15-22:23 (describing Ta Mok's autonomy).

structure[12] operated independently of the rest of the regime and that officials at much lower levels acted with substantial discretion.[13] Other such evidence exists on the case file.[14] Needless to say, the present picture is incomplete and may look entirely different by the end of trial, including with respect to whether such a defence is generally feasible and the precise ways in which the chain of command between Nuon Chea and lower level actors was broken. Depending on the nature of that evidence, a substantial discussion of the jurisprudence of other international courts concerning the responsibility of upper level leaders in a variety of factual contexts may or may not be essential. Certainly, at this juncture, it is unknown which international case law will be most relevant to the precise facts and circumstances that will be 'uncovered' during trial.[15]

c. The Defence may conclude, following a holistic review of the Case 002/01 trial proceedings, that submissions are warranted concerning the right to present a defence and the right to an adequate opportunity to make submissions. Such an assessment obviously cannot be made prior to the conclusion of trial. More specifically, numerous Defence motions which bear on such an assessment are presently outstanding. These include two Rule 87(4) motions in connection with scheduled witnesses, a request for a public, oral hearing on witnesses, a request to hear witnesses in connection with pre-1975 context, and a request to hear a variety

[12] Soldiers have testified that they were restricted to the area of Phnom Penh controlled by their division. *See* Document No. **E-1/139.1**, Transcript of Trial Proceedings', 25 October 2012, ERN 00857798-00857881, pp. 73:24-75:7; Document No. **E-1/140.1**, 'Transcript of Trial Proceedings', 5 November 2012, ERN 00859482-00859600, pp. 88:9-13, 91:14-92:19 and 96:24-97:17. That testimony corroborates other evidence of factionalization. See fn 14, *infra*.

[13] Document No. **E-1/94.1**, 'Transcript of Trial Proceedings', 23 July 2012, ERN 00829800-00829959, pp. 65:5-68:8.

[14] Document No. **E-190.1.398**, 'Reassessing the Role of Senior Leaders and Local Officials in Democratic Kampuchea Crimes: Cambodian Accountability in Comparative Perspective', ERN 00661455-00661491, p. 12; Document No. **D-222/1.17**, 'Cambodia: 1975:1982', ERN 00396894-00392784, pp.73-74 (describing highly varied practices and conditions across districts and villages), 74-81 (describing military factionalization of Phnom Penh immediately after liberation), pp. 71-148 (more generally); Document No. **E-3/9**, 'Pol Pot – The History of a Nightmare', ERN 00396177-00396757, pp. 273-276 (describing separation between zones, clashes between divisions and attempt to 'delineate clear divisions for each sector').

[15] If allegations concerning S-21 are ultimately added to the scope of Case 002/01 as a consequence of the Co-Prosecutors' appeal, Duch's credibility and the sources of his knowledge will instantly become one of the most important issues to the case of the Defence. Numerous legal questions would then require greater emphasis, including the probative value of co-perpetrator testimony and testimony tainted by facts learned by the witness after the events at issue.

of other witnesses concerning, *inter alia*, the judicial investigation and political interference at the ECCC.[16]

d. Also, the Defence is almost certain to request, at the conclusion of trial proceedings, a remedy in connection with ongoing political interference in the work of the ECCC. The precise nature of the remedy sought will depend in part on developments in the Case 002/01 trial.

e. Discovery of further information concerning the provenance and chain of custody of DC-Cam documents, a question still subject to (time-consuming and slow) research by the Defence, may affect the remedy sought in that regard.[17]

f. Discovery of further evidence of irregularities in the judicial investigation may affect the remedy sought in that regard.

g. Further developments in the fitness of the Accused to stand trial may affect whether submissions are made, and the remedy sought in that regard.

9. While these examples may seem like suppositions, the Chamber ought to consider that this uncertainty is exactly the point: the most confounding developments between now and the end of trial are the ones the Defence does not yet know about. If the trial really is a process of *discovering* truth, the Defence can only assume that, in the coming year of hearing evidence, the Chamber anticipates discovering facts it does not yet know about. There is a real possibility (indeed, likelihood) that such facts will affect the emphasis due respective Defence positions and the substance of those positions. Only if the Chamber has, in effect, already made up its mind about the relevant facts could legal submissions at this stage have any real value.

[16] Document No. **E-212**, 'Request for a Public Oral Hearing Regarding the Calling of Witnesses', 22 June 2012, ERN 00818577-00818588; Document No. **E-226**, 'Rule 87 Request to Use Documents During Cross-Examination of Witness Philip Short', 3 September 2012, ERN 00843581-00843584; Document No. **E-232**, 'Rule 87 Request to Use Documents During Cross-Examination of Witness Elizabeth Becker', 20 September 2012, ERN 00848299-00848302; Document No. **E-163/5/1/4**, 'Response to Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01', 19 November 2012, ERN 00863643-00863658, paras 19-21 (describing submissions concerning further witnesses made orally before the Chamber and in an email communication to the Chamber, copying the parties).

[17] *See* Document No. **E-211**, 'Notice to the Trial Chamber Regarding Research at DC-CAM', 19 June 2012, ERN 00818156-00818163.

ii – No Basis in Law

10. There is no support anywhere in the applicable law or international practice for the procedure proposed by the Chamber. The Internal Rules provide, in Rule 92, that the 'parties may, up until the closing statements, make written submissions as provided in the Practice Direction on Filing.' Article 5.3 of the Practice Direction on Filing states that, '[u]nless otherwise ordered by the ECCC, the page limit shall not exceed 100 pages in English'.[18] Neither provision authorizes the Chamber to dictate the substance of the parties' final submissions or to limit the length of those submissions to less than 100 pages.[19]

iii – No Trial Management Benefit

11. The suggestion to sever the legal submissions from the final briefs was first made orally by counsel for Ieng Sary at the TMM. The discussion which prompted the suggestion concerned the length of parties' closing briefs. Counsel noted that the page limits on closing briefs considered by the Chamber might be more palatable to the parties if legal submissions were filed separately, allowing parties to focus their closing briefs on factual issues.[20]

12. With due respect to its fellow defence team, the Defence has difficulty understanding the benefit of this approach. If the purpose of filing legal submissions prior to trial is to preserve space in the final briefs for argument on the facts, the same objective could be accomplished by extending final briefs by the length of the preliminary legal submissions now being proposed. If some other goal is served by the approach, it should be articulated and justified by the Chamber.

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[18] Practice Direction ECCC/01/2007/Rev. 7, 'Filing of Documents Before the ECCC', as amended on 3 August 2011 ('Practice Direction on Filing'), Art. 5.3. Although the Practice Direction does not specifically indicate that Article 5.3 concerns final submissions, such is evident from the greater context of the rule. The general page limit applicable to filings before the Chamber is set in Article 5.1, which provides that a 'document filed to the Investigating Judges or the Trial Chamber of the ECCC shall not exceed 15 pages in English or French...unless otherwise provided...' It is clear that Article 5.3 is intended as an exception to that general rule, and the only filing which might merit a 100 page submission is the closing brief. It can therefore be inferred that Article 5.3 was intended to apply specifically to the closing briefs.

[19] Article 5.3 states that the page limit may not *exceed* 100 pages, unless otherwise ordered. Thus, it contemplates orders to exceed the 100 page limit – as the Defence has requested in this case – but not to reduce that limit. The Practice Direction could easily have indicated the contrary intention had it simply stated, '[u]nless otherwise ordered by the ECCC, the page limit shall *be* 100 pages in English...'.

[20] Document No. **E-1/114.2**, 'Transcript of Trial Management Meeting', 27 August 2012, ERN 00843658-00843708, pp. 21:17-22:25.

13. There is also no question of expediting the filing of closing briefs at the end of trial. Although the Defence finds the Chamber's deadline of one month following the hearing of evidence unduly short,[21] that concern is unrelated to the burden of preparing legal submissions, which would be completed parallel to trial under the Chamber's proposed approach in any event.

14. Indeed, it seems to the Defence that the approach proposed by the Chamber is likely to do little more than *complicate* the process. For reasons already discussed, it is likely that developments during trial will cause parties to make adjustments to their legal positions. Some legal arguments might even become moot by the end of trial, while others will gain in importance. Any such developments are likely to raise a series of vexing questions: Are there any circumstances under which parties would be permitted to modify their prior position? How would any such modification be viewed by the Chamber?[22] Clear answers to these questions are likely to be elusive and cause debate and confusion at the end of trial.

15. A further source of uncertainty concerns the timeline for the Chamber's ruling with respect to such legal submissions. It is unclear to the Defence whether the Chamber would envision rendering a decision with regard to any of the issues briefed prior to the conclusion of trial, if so, whether any such decision would be irrevocable in the final judgment, and if so, whether an appeal would therefore lie to the Supreme Court Chamber, since such a decision would functionally constitute an aspect of the final judgment. If such a decision were not irrevocable, it would again raise the question of whether and to what extent further submissions are contemplated following the conclusion of trial. Once again, there is no obvious answer to these questions because the procedure is not provided for anywhere in the applicable law.

[21] Document No. **E-1/114.2**, 'Transcript of Trial Management Meeting', 27 August 2012, ERN 00843658-00843708, pp. 25:14-26:19.
[22] If negatively, such *de facto* restrictions on the ability of Accused persons to freely articulate arguments at the end of trial would constitute a violation of the right to present a defence.

III. Conclusion and Relief Requested

16. For all of these reasons, the Defence submits that the filing of legal submissions prior to the conclusion of the evidence, and especially at this juncture, comes with little benefit and at great cost to the interests of our client. The Defence hereby informs the Chamber that it intends to file legal submissions following the conclusion of the hearing of the evidence as part of its final brief. The Defence furthermore reiterates its opposition to the Chamber's initial indication that final briefs may be limited to 50 pages per defence team and repeats its request to file a 180 page brief.[23]

17. The Defence furthermore respectfully requests that the Chamber provide clarity with regard to the following questions of procedure:

    a. Has the Chamber decided on the length of final submissions, and if so, what pages limits has it decided to impose?

    b. If the Memorandum was intended as a request, will parties who decline to respond to that request be limited to the same page limit allowance in their final brief as parties who do respond to that request? Or will they be permitted to make use of the pages accorded to legal submissions in the Memorandum as part of their final brief?

    c. If the Memorandum was intended as something other than a request, does it follow that legal submissions are not permitted (and will therefore not be considered, to the extent they are made) in final briefs?

    d. Will the Chamber rule on any such legal submissions prior to (or at the time of) the conclusion of the hearing of the evidence?

    e. If so, will such a ruling be irrevocable or constitute a preliminary indication of the Chamber's views?

[23] Document No. **E-1/114.2**, 'Transcript of Trial Management Meeting', 27 August 2012, ERN 00843658-00843708, pp. 23:13-24:22, 26:15-19.

18. In the event the Chamber informs the Defence that the failure to file legal submissions prior to the conclusion of trial will adversely affect in any way its overall entitlement to make submissions in connection with the Case 002/01 judgment, the Defence will file a reasoned request for an extension of the time and page limit to do so, and will also file a request that the Chamber rule on those legal submissions before the conclusion of the hearing of the evidence in Case 002/01, so that all parties can effectively tailor their submissions on the facts. Accordingly, the Defence requests the Trial Chamber to inform the parties of its intentions as soon as possible ahead of December 21, 2012.

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