

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

FILING DETAILS

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**KHIEU Samphân's Request for Annulment of Decision E463/1/3 on his Urgent Appeal
against the Judgement of 16 November 2018**

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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

Nicholas KOUMJIAN

All Civil Party Lawyers

Mr NUON Chea's Defence

MAY IT PLEASE THE SUPREME COURT CHAMBER

1. On 16 November 2018, 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 It 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 (“Appeal”).³ On 30 November 2018, by leave of the Supreme Court,⁴ the Prosecution filed its response to the Appeal in English only.⁵ On 20 December 2018, i.e. the day following the notification of the Khmer version of that response,⁶ the Defence filed its reply.⁷
3. On 13 February 2019, the President of the Supreme Court appointed Reserve Judge RAPOZA to sit in place of Judge KLONOWIECKA-MILART for the remainder of the proceedings (“Order Appointing Reserve Judge”).⁸ On the same day, the Supreme Court issued its

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** (“Appeal”), notified on 20 November 2018.

⁴ Decision on Co-Prosecutors’ Request to File Response in One Language, 30 November 2018, **E463/1/1/1** (“Decision on the Prosecution’s Request for Extension”).

⁵ Co-Prosecutors’ Response to Khieu Samphan’s Appeal against the Judgment Pronounced on 16 November 2018, 30 November 2018, **E463/1/2**, notified on 3 December 2018. The Defence requested that the Response be translated into French. The translation was notified on 7 December 2018.

⁶ The Supreme Court had granted leave to the Prosecution to file its response in Khmer no later than 7 December 2018 (Decision on the Prosecution’s Request for Extension, disposition, para. 10). The Prosecution filed it on 4 December 2018. The response in Khmer was only notified 15 days later on 19 December 2018.

⁷ *Réplique de KHIEU Samphân à la réponse de l’Accusation à son appel urgent contre le jugement prononcé le 16 novembre 2018*, 20 December 2018, **E463/1/2/1** (“Reply”), notified on 28 December 2018.

⁸ Order Appointing Reserve Judge, 12 February 2019, **F38**. The original version of the order in English is entitled “Order Appointing Reserve Judge” and dated 13 February 2019 (“Order Appointing Reserve Judge”). The Defence has informed the Interpretation and Transcription [sic] Unit of these and other errors in the translation, but the Order has not been corrected to date.

decision on the Appeal, in which it found that the Appeal was not admissible (“Decision on the Appeal”).⁹

4. The Defence hereby requests the Supreme Court to annul its Decision on the Appeal because the decision was rendered in violation of the applicable rules (I) and of KHIEU Samphân’s right to a tribunal established by law (II).

I. IRREGULARITY OF THE COMPOSITION OF THE PANEL OF JUDGES

5. It is apparent from the procedural chronology that at the time the Decision on the Appeal was made and rendered, the panel of the Supreme Court was not composed in accordance with the applicable rules.
6. On 30 November 2018, when the Supreme Court rendered its Decision on the Prosecution’s Request for Extension, it was composed of 7 judges, including Judge KLONOWIECKA-MILART.¹⁰
7. On 13 February 2019, the President appointed Reserve Judge RAPOZA to sit in place of Judge KLONOWIECKA-MILART for the remainder of the proceedings because of the latter’s resignation (without specifying the date) and the need for a decision on the Appeal to be made by a “full panel and issued in timely manner”.¹¹ The Order Appointing Reserve Judge was notified at 15:06.¹² Accordingly, the Order Appointing Reserve Judge only became effective (Judge RAPOZA was formally appointed sitting Judge only) as from 13 February 2019, at 15:06.¹³

⁹ Decision on KHIEU Samphân’s Urgent Appeal against the Summary of Judgement Pronounced on 16 November 2018, 13 February 2019, E463/1/3 (“Decision on the Appeal”). On 14 February 2019, the Defence requested that the decision be translated into French. The said translation was notified on 27 February 2019.

¹⁰ Decision on the Prosecution’s Request for Extension, cover page.

¹¹ Order Appointing Reserve Judge, p. 2.

¹² See notification e-mail dated 13 February 2019, at 15:06.

¹³ As a matter of logic, under the Internal Rules and the Practice Direction on the Filing of Documents Before the ECCC, all documents (requests, decisions...) take effect as of their notification.

8. On the same day, the Supreme Court issued its Decision on the Appeal, with the cover page indicating that Judge RAPOZA was part of the panel of judges. The decision was placed on the case file at 14:53,¹⁴ i.e. 13 minutes **before** the notification of the Order Appointing Reserve Judge and thus the effective appointment of Judge RAPOZA, and then notified at 15:17. Also, the Supreme Court had to have ruled **before** the final stages of the translation and editorial process of its written decision.¹⁵ Consequently, the Decision on the Appeal was made **before** the appointment of Judge RAPOZA as a sitting judge.
9. In the absence of information on the date on which Judge KLONOWIECKA-MILART resigned, this chronology suggests two scenarios, both involving an irregularity in the composition of the panel of judges who rendered the Decision on the Appeal : 1) either Judge RAPOZA took no part in the Decision on the Appeal, 2) or he did take part in the decision as a Reserve Judge.
10. **Scenario No. 1** : It may be that Judge KLONOWIECKA-MILART took part in the Decision on the Appeal and resigned on the eve of its issuance, the decision having by then been made and drafted in two languages. Judge RAPOZA would then not have been able to take part in the Decision on the Appeal and the decision should not have been issued in his name, especially because he had not yet been appointed.
11. **Scenario No. 2** : In the event that Judge KLONOWIECKA-MILART resigned several days or even several weeks before 13 February 2019, Judge RAPOZA would then have taken part in the Decision on the Appeal even though he had not yet been appointed.
12. However, under the ECCC Law and the Internal Rules, decisions of the Chambers must be made and rendered by a **full** panel of **sitting** Judges.

¹⁴ See the stamp on the cover page of the original versions in Khmer (14:52) and in English (14:53).

¹⁵ See, for example, Decision on NUON Chea's Immediate Appeal against Trial Chamber Decision on Application for Immediate Action Pursuant to Rule 35, 25 March 2013, E189/3/1/8, at para. 10, where the Supreme Court explained that it could not take into account a request to consider additional evidence notified **one week before** issuing its decision, as it had already decided on the appeal and the written decision was in the final stages of the translation and editorial process.

13. The ECCC Law provides that the Supreme Council of Magistracy shall appoint sitting judges to act as judges and reserve judges to replace a sitting judge if that judge is absent or is unable to continue sitting.¹⁶ The Internal Rules provide that in case of absence of a sitting judge, the President of the Chamber may, after consultation with the remaining judges, “decide to adjourn the proceedings or designate a Reserve Judge to sit in place of the absent Judge for the remainder of the proceedings in question.”¹⁷ Reserve judges “shall not have the right to express any opinion or to make any decision unless and until appointed to replace a sitting judge”.¹⁸ Chapter V of the ECCC Law which deals with “Decisions of the Extraordinary Chambers” provides that the Presidents shall convene the “appointed” judges at the appropriate time to proceed with the work of the Extraordinary Chambers,¹⁹ and that when there is no unanimity, the decision of the Extraordinary Chambers “shall contain the opinions of the majority and the minority”.²⁰
14. In the two scenarios described above, at the time the Decision on the Appeal was placed on the case file, the panel of Judges of the Supreme Court included only 6 sitting Judges out of the 7 required.²¹ Whether or not Reserve Judge RAPOZA was present at the time of the Chamber's work in reaching this decision, he could neither express an opinion nor take part in the decision before his appointment as a sitting Judge to replace the resigning Judge KLONOWIECKA-MILART.
15. The Decision on the Appeal must therefore be invalidated, especially because it violates KHIEU Samphân's fundamental right to a tribunal established by law.

B. VIOLATION OF KHIEU SAMPHÂN’S RIGHT TO A TRIBUNAL ESTABLISHED BY LAW

16. The ECCC Law provides that the Chambers shall ensure that trials “are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the

¹⁶ ECCC Law, article 11 new.

¹⁷ Internal Rules 79(4) and 104 *bis*.

¹⁸ Internal Rule 79(3).

¹⁹ ECCC Law, article 15.

²⁰ ECCC Law, article 14 new.

²¹ ECCC Law, article 9(2) new: the Supreme Court shall be “composed of seven judges”.

rights of the accused”. The Chambers shall exercise their jurisdiction “in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights”.²²

17. Under article 14(1) of the International Covenant on Civil and Political Rights, “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. This provision is incorporated in article 6(1) of the European Convention for the Protection of Human Rights and is the subject of extensive European Court of Human Rights case law.

18. The European Court of Human Rights has consistently stated that a “tribunal” must always be “established by law” and that this expression reflects the principle of the rule of law.²³ The “law” referred to here is not only the legislation on the establishment and competence of judicial organs, but also any other provision of domestic law of which any breach would cause the participation of one or more judges in the examination of the case to be unlawful.²⁴ The phrase “established by law” covers not only the legal basis for the very existence of a “tribunal” but also the composition of the bench in each case,²⁵ and the tribunal’s compliance with the particular rules by which it is governed.²⁶

19. For example, the European Court of Human Rights has held that an applicant’s right to a tribunal established by law had been violated as a result of the flagrant breach of the relevant domestic legislation requiring that the transcript of a hearing should state why a titular judge had not been able to sit and had been replaced by a substitute judge on the day of the

²² ECCC Law, articles 33 new and 37 new.

²³ Case of *Kontalexis v. Greece* (Application No. 59000/08), Judgement, 31 May 2011 (“*Kontalexis v. Greece*”), para. 38; Case of *Pandjigidzé et al. v. Georgia* (Application No. 30323/02), Judgement, 27 October 2009 (“*Pandjigidzé et al. v. Georgia*”), para. 103; Case of *Gorguiladzé v. Georgia* (Application No. 4313/04), Judgement, 20 October 2009 (“*Gorguiladzé v. Georgia*”), para. 67; Case of *Lavents v. Latvia* (Application No. 58442/00), Judgement, 28 November 2002 (“*Lavents v. Latvia*”), para. 114.

²⁴ *Kontalexis v. Greece*, para. 38; *Pandjigidzé et al. v. Georgia*, para. 104; *Gorguiladzé v. Georgia*, para. 68; *Lavents v. Latvia*, para. 114.

²⁵ *Kontalexis v. Greece*, para. 42; *Pandjigidzé et al. v. Georgia*, para. 104; *Gorguiladzé v. Georgia*, para. 68; Case of *Posokhov v. Russia* (Application No. 63486/00), Judgement, 4 March 2003, para. 39; *Lavents v. Latvia*, para. 114.

²⁶ *Pandjigidzé et al. v. Georgia*, para. 105; *Gorguiladzé v. Georgia*, para. 69; Case of *Sokurenko et Strygun v. Ukraine* (Application Nos. 29458/04 and 29465/04), Judgement, 20 July 2006, para. 24.

hearing.²⁷ The European Court of Human Rights has also noted that the absence of a detailed record of the reasons why a judge could not sit was enough to cause a doubt as to the transparency of the replacement process and the reality of the reasons therefor.²⁸

20. In this case, the non-compliance with the provisions of the ECCC Law and the Internal Rules requiring that a decision of the Supreme Court be made and rendered by a full panel of 7 sitting judges has resulted in the violation of KHIEU Samphân's right to a tribunal established by law.
21. This violation is highly prejudicial to KHIEU Samphân, who is being tried by a UN tribunal that is supposed to uphold the principles of the rule of law and the fundamental rights of the accused. The Supreme Court, whose decisions are final and cannot be sent back to the Trial Chamber,²⁹ is supposed to be the ultimate guarantor of due process and of KHIEU Samphân's rights. It cannot therefore afford to violate them without seriously undermining the confidence of the accused (and the national and international public) in the legitimacy of the Tribunal.
22. **IN CONCLUSION**, the Defence therefore has no alternative but to raise this nullity on public policy grounds and to request the Supreme Court, which caused it, to remedy it. The Supreme Court has no alternative, but to set aside the decision made by the improperly composed panel of judges and to render a new decision on the Appeal, this time in accordance with respect for due process and KHIEU Samphân's rights. Perhaps, a new decision, this time rendered by a full panel of 7 sitting judges, i.e. with the effective and regular participation of Judge RAPOZA, will make it possible to avoid the many material errors in the defective decision and the distortion of the subject matter of the Appeal (which did not concern the summary of the Judgement but its disposition).

²⁷ *Kontalexis v. Greece*, paras 42-44.

²⁸ *Kontalexis v. Greece*, para. 43.

²⁹ ECCC Law, article 36 new; Internal Rule 104(3).

23. **FOR THE FOREGOING REASONS**, the Defence requests the Supreme Court to ANNUL the Decision on the Appeal and to RENDER a new decision in accordance with respect for due process and KHIEU Samphân's fundamental rights.

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