



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia

Nation Religion King

Royaume du Cambodge

Nation Religion Roi

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber

Chambre de la Cour suprême

សំណុំរឿងលេខ: ០០២/១៩-កញ្ញា-២០០៧-អ.វ.ត.ក/អ.ជ.ត.ក

Case File/Dossier N°. 002/19-09-2007-ECCC/SC

ឯកសារដើម

ORIGINAL/ORIGINAL

ថ្ងៃ ខែ ឆ្នាំ (Date): 22-Nov-2019, 15:22

CMS/CFO: Sann Rada

Before:

Judge KONG Srim, President

Judge Chandra Nihal JAYASINGHE

Judge SOM Sereyvuth

Judge Florence Ndepele Mwachande MUMBA

Judge MONG Monichariya

Judge Maureen Harding CLARK

Judge YA Narin

Date:

22 November 2019

Language(s):

Khmer/English

Classification:

PUBLIC

**DECISION ON URGENT REQUEST CONCERNING THE IMPACT ON APPEAL PROCEEDINGS OF
NUON CHEA'S DEATH PRIOR TO THE APPEAL JUDGEMENT**

Co-Prosecutors

CHEA Leang

Brenda HOLLIS

Accused

NUON Chea

Civil Party Lead Co-Lawyers

PICH Ang

Megan HIRST

Co-Lawyers for NUON Chea

SON Arun

Doreen CHEN

LIV Sovanna

THE SUPREME COURT CHAMBER of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Supreme Court Chamber” or “Chamber” and “ECCC” respectively) is seised of the urgent request concerning the impact on appeal proceedings of NUON Chea’s death prior to the appeal judgement (“Urgent Request”).¹

I. PROCEDURAL BACKGROUND

1. On 16 November 2018, the Trial Chamber pronounced the verdict in Case 002/02, convicting NUON Chea and KHIEU Samphân of crimes against humanity, grave breaches of the Geneva Conventions and genocide, and sentenced them to life imprisonment.² Taking into consideration the life sentences imposed on NUON Chea and KHIEU Samphân in Case 002/01, the Trial Chamber in Case 002/02 merged the two sentences into a single term of life imprisonment for both accused.³ The Trial Chamber provided a summary of its reasons and clarified that the time limit for filing notices of appeal would begin following the notification of the fully reasoned judgment.⁴ The Trial Chamber subsequently filed the fully reasoned judgment in Khmer, English and French on 28 March 2019 (“Trial Judgement”).⁵

2. On 19 November 2018, KHIEU Samphân filed an urgent appeal against the pronouncement of the Trial Judgement, requesting that the Supreme Court Chamber annul the summary delivered on 16 November 2018 for lack of form and declare the subsequent Trial Judgement invalid.⁶ On 13 February 2019, the Supreme Court Chamber found the urgent appeal to be inadmissible.⁷

3. On 3 April 2019, KHIEU Samphân and NUON Chea filed requests for extensions of time and page limits for filing their respective notices of appeal against the Trial Judgement.⁸ The Supreme Court Chamber granted the parties a uniform extension of time and page limits on 26 April 2019.⁹

4. On 1 July 2019, NUON Chea and KHIEU Samphân filed their notices of appeal against the Trial Judgement in Case 002/02.¹⁰ In his notice of appeal, NUON Chea outlined 351 alleged errors of fact and/or law he considered to be found in the Trial Judgement.

5. On 18 July 2019, NUON Chea filed a letter of authorisation to the Supreme Court Chamber informing it of his *ante mortem* wish to designate certain members of his family

¹ Urgent Request concerning the Impact on Appeal Proceedings of NUON Chea’s Death prior to the Appeal Judgement, 6 August 2019, F46/2 (“Urgent Request”).

and Defence team to act on his behalf in the event of his death prior to the pronouncement of an appeal judgement.¹¹

6. On 23 July 2019, NUON Chea filed a request for the extension of time and page limits for his appeal brief.¹² He passed away shortly thereafter on 4 August 2019.¹³

7. On 6 August 2019, NUON Chea Defence filed the Urgent Request.

8. On 9 August 2019, NUON Chea Defence team's contracts were terminated.¹⁴ Subsequently, on 13 August 2019, the team filed an urgent request for its re-instatement.¹⁵ On 2 September 2019, the Supreme Court Chamber issued its response finding the request to fall outside its jurisdiction but directing that NUON Chea's Co-Lawyers maintain access to the ECCC email system, Zylab and notifications until further notice.¹⁶

9. On 13 August 2019, the Supreme Court Chamber terminated the appellate proceedings against NUON Chea and pronounced that it remains seised of the Urgent Request concerning *inter alia* the impact of NUON Chea's death on the Trial Judgement and underlying convictions ("Termination Decision").¹⁷

² See Transcript 16 November 2018 (Pronouncement of Judgement in Case 002/02), p. 53 (line 21) to p. 56 (line 17).

³ Case 002/02 Trial Judgement, 16 November 2018, E465 ("Trial Judgement"), paras 4401-4402.

⁴ See Transcript 16 November 2018 (Pronouncement of Judgement in Case 002/02), p. 3 (lines 11-16), p. 57 (lines 18-23).

⁵ The Supreme Court Chamber determined that since it was filed outside the ECCC's official filing hours, the notification was effective from the next working day, i.e. 29 March 2019: Decision on NUON Chea and KHIEU Samphân's Requests for Extensions of Time and Page Limits on Notices of Appeal, 26 April 2019, F43, para. 12.

⁶ KHIEU Samphân's Urgent Appeal against the Judgement Pronounced on 16 November 2018, 19 November 2018, E463/1.

⁷ Decision on KHIEU Samphân's Urgent Appeal against the Summary of Judgement Pronounced on 16 November 2018, 13 February 2019, E463/1/3.

⁸ 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; KHIEU Samphân Defence Request for Extension of Time and Number of Pages to File Notice of Appeal, 3 April 2019, F39/1.1.

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 NUON Chea's Notice of Appeal against the Trial Judgement in Case 002/02, 1 July 2019, E465/3/1; KHIEU Samphân's Notice of Appeal (002/02), 1 July 2019, E465/4/1.

¹¹ NUON Chea's Letter authorising Designated Persons to Act on his Behalf in the Event of his Death prior to the Completion of the Appeal Proceedings, 18 July 2019, F46.

¹² 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.

¹³ NUON Chea Death Certificate, 4 August 2019, F46/1.1.

¹⁴ Expiration of Legal Services Contract, 9 August 2019, F46/4.1.3.

¹⁵ Urgent Request to Re-instate NUON Chea Defence Team, 13 August 2019, F46/4.

¹⁶ Supreme Court Chamber's Response to F46/4, 2 September 2019, F46/5.

¹⁷ Decision to Terminate Proceedings against NUON Chea, 13 August 2019, F46/3 ("Termination Decision"), para. 8.

10. On 26 August 2019, the Civil Party Lead Co-Lawyer responded to the Urgent Request.¹⁸ With leave of the Chamber,¹⁹ the Co-Prosecutors responded in English on 29 August 2019 and in Khmer on 2 September 2019.²⁰ KHIEU Samphân filed a reply to the Co-Prosecutors' response on 9 September 2019.²¹

II. THE URGENT REQUEST

11. In its Urgent Request, NUON Chea Defence requests the Chamber to consider the following:

(a) admissibility:

(i) accept the Urgent Request as validly filed and consider itself properly seised because the Defence has written authorisation from NUON Chea to act on his behalf; or, alternatively

(ii) decide on the Urgent Request *proprio motu* in the interests of justice.

(b) determine that it would either:

(i) terminate the appellate proceedings concerning NUON Chea, in which case the Trial Judgement would be vacated in relation to NUON Chea since he continued to enjoy a presumption of innocence on appeal; or, alternatively

(ii) allow the appellate proceedings concerning NUON Chea to continue in the interests of justice, while ensuring NUON Chea's continued representation after his death by the counsels of his choice.

(c) if necessary or desirable, propose amendments to the Internal Rules to be made by the ECCC plenary to clarify the applicable rules in connection with matters raised within this Urgent Request;

(d) that the Chamber:

¹⁸ Civil Party Lead Co-Lawyer's Response to NUON Chea's Urgent Request Concerning the Impact on Appeal Proceedings of NUON Chea's Death prior to the Appeal Judgement, 26 August 2019, F46/2/1 ("Civil Party Lead Co-Lawyer's Response").

¹⁹ Decision on Co Prosecutors' Urgent Request to File their Response to the NUON Chea Defence Team's Urgent Request in One Language, 29 August 2019, F46/2/3.

²⁰ Co-Prosecutors' Response to the Urgent Request Concerning the Impact on Appeal Proceedings of NUON Chea's Death prior to the Appeal Judgement (F46/2), 29 August 2019, F46/2/4 ("OCP Response").

²¹ KHIEU Samphân's Reply to the Co-Prosecutors concerning the Presumption of Innocence on Appeal (F46/2/4), 9 September 2019, F46/2/4/1 ("KHIEU Samphân Reply").

- (i) render this decision or, at a minimum, a dispositive decision with a reasoned decision to follow as soon as possible on an urgent basis; and
- (ii) issue an interim order prior to any decision on the merits that the NUON Chea Defence team will be retained until a reasonable time to be determined by the Chamber after such a decision is issued.

III. ADMISSIBILITY

12. As a preliminary note, the Supreme Court Chamber observes that the written authorisation relies on Internal Rule 112.²² Internal Rule 112 concerns the revision of a final judgment, not the appeal of a trial judgment.²³ As the appellate jurisdiction of the Supreme Court Chamber is limited under the Internal Rules to appeals against decisions or judgments of the Trial Chamber,²⁴ Internal Rule 112 cannot therefore serve as a basis to ground the admissibility of the Urgent Request. Further, no new material evidence has been presented, nor has any evidence been provided that “decisive evidence was false, forged or falsified”, nor alleged that one of the judges committed a serious misconduct or breach of duty²⁵ on which to base a request for revision. Consequently, there is no basis for the Chamber to accept such a request pursuant to Internal Rule 112.

13. The Urgent Request raises several issues: some have been addressed in previous decisions,²⁶ others – namely whether the proceedings have been terminated and whether they can be continued after NUON Chea’s death; whether his death brought finality to the proceedings; whether the presumption of innocence applies to appeal proceedings and if so

²² Urgent Request, paras 6 and 13

²³ See The Internal Rules of the ECCC, Revision 9, 16 January 2015 (as revised) (“Internal Rules”).

Internal Rule 112, “Revision of Final Judgment”: “1. The convicted person or, after his or her death, the spouse, children, parents, or any person alive at the time of the person’s death who has been given express written instructions from the convicted person to bring such a claim, or the Co-Prosecutors on the person’s behalf, may apply to the Chamber to revise the final judgment on the grounds that: a) new evidence has been discovered that: i) was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making the application; and ii) is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict; b) it has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified; or c) one or more of the judges who participated in a judicial investigation or a conviction, committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under these IRs.

²⁴ See Internal Rules 104-105.

²⁵ See Internal Rule 112, specifically grounds 1) a) to c).

²⁶ See Termination Decision; Chamber’s response to NUON Chea’s Urgent Re-instatement Request, 2 September 2019, F46/5.

whether his death leads to a vacation of the Trial Judgement, and what is the status of reparation awards – remain outstanding.

14. Given that the ECCC's legal compendium does not directly address these issues, the Supreme Court Chamber considers that notwithstanding its Termination Decision it is in the interests of justice²⁷ to exercise its inherent jurisdiction and discretion to consider the merits of part of the Urgent Request.²⁸ The Supreme Court Chamber accordingly admits the Urgent Request.

IV. DISCUSSION

A. Termination of the Appellate Proceedings

15. Following NUON Chea's death, the Supreme Court Chamber terminated (*i.e.* ended *ex nunc*) all further proceedings against NUON Chea in accordance with Article 7(1) of the Code of Criminal Procedure of the Kingdom of Cambodia ("Code of Criminal Procedure"), which explicitly provides for extinguishment of criminal proceedings following the death of an accused.²⁹ As explained in the Termination Decision,³⁰ the death of NUON Chea had the effect of frustrating the Chamber's function to make "final decisions on both issues of law

²⁷ See Decision on Immediate Appeal by NUON Chea against the Trial Chamber's Decision on Fairness of Judicial Investigations, 27 April 2012, E116/1/7, para. 30; Decision on KHIEU Samphan's Urgent Appeal against the Summary of the Judgement Pronounced on 16 November 2018, 13 February 2018, E463/1/3, para. 17.

²⁸ The rules governing procedure before other internationalized tribunals support such an approach as a means of determining issues arising as a direct consequence of the procedures of which they are seised. See "Decision on Appeal of Pre-Trial Judge's Order regarding Jurisdiction and Standing", Special Tribunal for Lebanon ("STL"), Case No. CH/AC/2010/02, Appeals Chamber, 10 November 2010, paras 45-46, 48; *Prosecutor v. Beqaj*, IT-03-66-T-R77, "Judgement on Contempt Allegations", Trial Chamber, 27 May 2005, para. 13; *Nuclear Tests Case, Australia v. France*, International Court of Justice, "Judgement of 20 December 1974", para. 23: "the Court possesses an inherent jurisdiction enabling it to take such action as may be required [...] to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and [...] that its basic judicial functions may be safeguarded"; *Prosecutor v. Blaškić*, IT-95-14, "Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997", Appeals Chamber, 29 October 1997, paras 33, 55 (suggesting that inherent powers are closely related to the mission entrusted to the tribunal and aim to ensure that its fundamental functions are fully discharged); *Barayagwiza v. The Prosecutor*, ICTR-97-19-AR72, "Decision", Appeals Chamber, 3 November 1999, para. 76: "It is generally recognised that courts have supervisory powers that may be utilised in the interests of justice [...] The use of such supervisory powers serves three functions: to provide a remedy for the violation of the accused's rights; to deter future misconduct; and to enhance the integrity of the judicial process". (emphasis added).

²⁹ Termination Decision, para. 5.

³⁰ Termination Decision, para. 6: "Jurisprudence from the International Criminal Tribunal for the former Yugoslavia demonstrates that although appeals chambers have issued decisions after the death of an appellant no appeal judgement can be rendered with respect to an accused who had prior to his or her death duly seised the appeals chamber with a brief containing reasoned grounds of appeal. The position is even clearer in a situation such as the present one in which the appellate chamber has neither been fully briefed on the appeal nor is in a position to commence deliberations on the merits of alleged errors of law or fact which have in summary form been outlined in a notice of appeal".

and fact”³¹ with respect to his prospective appeal.³² The Defence submissions concerning the termination of the appellate proceedings are therefore moot.³³

16. The Chamber clarifies that termination of proceedings does not vitiate that which has previously lawfully transpired. Accordingly, the Termination Decision neither disturbed nor altered the Trial Judgement’s findings; it merely had the effect of foreclosing the possibility of any future proceedings by or against NUON Chea.

B. Finality of the Trial Judgement

Submissions

NUON Chea Defence

17. NUON Chea Defence submits that the consequences of termination of proceedings at the appellate stage are not yet settled under Cambodian law and that it is unclear whether the trial judgement is to be considered final when the appellant dies before the appeal judgment has been rendered.³⁴ It is contended that a combined reading of articles 35 *new*, 36 *new*, and 37 *new* of the ECCC Law as well as of Internal Rule 111(6) leads to the conclusion that once appealed, the Trial Judgement can only become final when the appeal is rejected on the merits.³⁵

18. The Defence argues that the ICTY Appeals Chamber’s decision terminating the appellate proceedings against *Delić* (following his death prior to the delivery of the appeal judgement) and declaring that the trial judgement against him would be considered final, is inapplicable to the ECCC.³⁶

Civil Party Lead Co-Lawyer

19. The Civil Party Lead Co-Lawyer submits that the Trial Judgement is not final as it relates to NUON Chea and that “it is only the legal effect of the [Trial Judgement] as to the

³¹ 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 (“ECCC Law”), Art. 36 *new*.

³² See Internal Rule 105(3); Decision on Defence Motion for Extension of Time and Page Limits on Notices of Appeal and Appeal Briefs, 29 August 2014, F3/3, para. 8. *See also* NUON Chea’s Notice of Appeal against the Trial Judgement in Case 002/02, 1 July 2019, E465/3/1, para. 7 acknowledging that “identification of pinpoint citations for [all] errors [...] may not be comprehensive”.

³³ Urgent Request, para. 1.

³⁴ Urgent Request, para. 22.

³⁵ Urgent Request, para. 45.

³⁶ Urgent Request, paras 35 and 44.

criminal responsibility of NUON Chea that does not exist”.³⁷ The Civil Party Lead Co-Lawyer explains that “the reparations measures endorsed by the Trial Chamber in Case 002/02 were sought through Internal Rule 23 *quinquies* 3(b)” whereby reparation awards are “not dependant on the existence of a final judgment”³⁸ and can be “developed and implemented in parallel with the trial”³⁹ to enable “the realisation of meaningful reparations within a reasonable time”.⁴⁰ Given that collective and moral reparations are recognised and endorsed by the Trial Chamber, rather than dependent on a judgment or directed through an order against the accused, the Civil Party Lead Co-Lawyer concludes that NUON’s Chea’s death therefore “does not impact the portion of the Trial Judgment addressing civil party reparations”.⁴¹

Co-Prosecutors

20. While the Co-Prosecutors acknowledge that Cambodian law provides for the presumption of innocence until the final judgment,⁴² they argue that due to the “innate differences between the ECCC and domestic legal realm”⁴³ and the inconsistency of ECCC law with relevant procedures and practice at the international level,⁴⁴ relevant jurisprudence of the *ad hoc* tribunals should be followed.⁴⁵ The Co-Prosecutors request that the Chamber adopt the position of the ICTY Appeals Chamber to conclude that the Trial Judgement is final and nothing – including the initiation of appeal proceedings – can undermine its finality. According to the Co-Prosecutors, the Internal Rules suggest that the Trial Judgement shall be considered to be the final judgement.⁴⁶ They argue that this interpretation mirrors the practice of the *ad hoc* tribunals.⁴⁷

³⁷ Civil Party Lead Co-Lawyer’s Response, para. 8.

³⁸ Civil Party Lead Co-Lawyer’s Response, para. 9.

³⁹ Civil Party Lead Co-Lawyer’s Response, para. 12.

⁴⁰ Civil Party Lead Co-Lawyer’s Response, para. 12.

⁴¹ Civil Party Lead Co-Lawyer’s Response, para. 13.

⁴² The Constitution of the Kingdom of Cambodia, 1993, (“The Constitution”), Art. 38: “Any accused is presumed innocent up to the final verdict”.

⁴³ OCP Response, para. 3.

⁴⁴ OCP Response, para. 4 in relation to the ECCC Law, Art. 35 *new* and 37 *new*.

⁴⁵ OCP Response, paras 5, 6 and 7.

⁴⁶ OCP Response, para. 13, fn. 36: the Co-Prosecutors raise in particular that ‘Provisional Detention’ is interpreted as being detention before a “Final Judgement” and the Internal Rules clearly distinguish between ‘Provisional Detention’ before the issuance of the Trial Judgement and ‘continued detention’ after the issuance of the Trial Judgement. See definition of ‘Provisional Detention’ provided in the Internal Rules: “detention of the Charged Person ordered by the Co-Investigating Judges or the Pre-Trial Chamber, or the detention of the Accused ordered by the Chambers, pending final judgement”, p. 85. *See also* Internal Rules 21(1)(d) and 99.

⁴⁷ OCP Response, para. 13.

KHIEU Samphân Defence

21. KHIEU Samphân Defence argues that there is no final judgement by relying on Internal Rule 111(6) which provides that “[w]here an appeal is rejected, the trial judgment shall become final”. Given that no appeal can be rejected in the framework of Internal Rule 111(6), KHIEU Samphân Defence concludes that while the Trial Judgement remains a judicial decision, it does not have the force of *res judicata*, which is reserved for final judgments.⁴⁸

Applicable Law

(i) Cambodian and ECCC law

22. The Constitution of the Kingdom of Cambodia (“Constitution”) provides that “Any accused is presumed innocent up to the *final verdict*”.⁴⁹ The Criminal Code of the Kingdom of Cambodia (“Criminal Code”) provides that “[a] decision is considered *final* where it is no longer subject to appeal”.⁵⁰

23. The Code of Criminal Procedure provides that i) after a sentence is pronounced, the “[p]rosecutor may enforce the sentence only after it has become *final*”;⁵¹ ii) “[t]he execution of [a trial] judgment shall be suspended until the time limit for appeal has expired”;⁵² iii) when a “request for cassation [before the Supreme Court] is rejected, the contested decision becomes a *res judicata*”;⁵³ and iv) that *res judicata* applies to final acquittals.⁵⁴ The Code of Criminal Procedure requires definitive decisions to be rendered at every level of the judicial hierarchy where the finality of previous instance decisions can only be impeached following a merits review process by a suitably empowered appellate jurisdiction.⁵⁵

24. The ECCC Law provides that the Supreme Court Chamber “shall serve as both appellate chamber and final instance”,⁵⁶ and shall decide appeals against the decisions of the

⁴⁸ KHIEU Samphân Reply, paras 44-45.

⁴⁹ Constitution, Art. 38.

⁵⁰ Criminal Code of the Kingdom of Cambodia, 2009 (“Criminal Code”), Art. 91.

⁵¹ Code of Criminal Procedure of the Kingdom of Cambodia, 2007 (“Code of Criminal Procedure”), Art. 497.

⁵² Code of Criminal Procedure, Art. 398.

⁵³ Code of Criminal Procedure, Art. 439.

⁵⁴ Code of Criminal Procedure, Art. 12: “In applying the principle of *res judicata*, any person who has been finally acquitted by a court judgment cannot be prosecuted once again for the same act, even if such act is subject to different legal qualification”.

⁵⁵ See e.g. Code of Criminal Procedure, Art. 417 (stating that “final” judgments issued by the Criminal Chamber of the Court of Appeal may be subject to cassation before the Supreme Court).

⁵⁶ ECCC Law, Art. 9 *new*. See also Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodia Law of Crimes Committed During the Period of

Trial Chamber by making “final decisions on both issues of law and fact, and shall not return the case to the [Trial Chamber]”.⁵⁷ The Internal Rules empower the Supreme Court Chamber to conduct appellate review of Trial Chamber decisions and render final judgments.⁵⁸ The Internal Rules also provide that “[w]here an appeal is rejected, the trial judgment shall become final and no further appeal against such decision shall be allowed”⁵⁹ and that “[t]he Co-Prosecutors shall implement the sentence as soon as the decision of the Chambers becomes final [...]”.⁶⁰ In this respect, the Chamber previously held that “in the context of the ECCC, judgments on the merits are not final until [they] hav[e] passed through the appellate stage.”⁶¹

(ii) International Case Law

25. In the cases *Prosecutor v. Delić* and in *Prosecutor v. Popović et al* – where both appellants convicted at trial died during the course of their appeals⁶² – the ICTY Appeals Chamber found that i) the death of the appellant resulted in the termination of the appeal proceedings, ii) the Statute and the Rules were silent on the impact of the termination of the appellate proceedings on the finality of the trial judgement following the death of an appellant and prior to the issuance of an appeal judgement, and iii) given that no appeal judgement could be rendered in their respective cases, nothing could undermine the finality of the trial judgement, which, as a consequence, shall be considered final.⁶³

Democratic Kampuchea, signed 6 June 2003 and entered into force on 29 April 2005, (“The Agreement”), Art. 3(2)(b).

⁵⁷ ECCC Law, Art. 36 *new*.

⁵⁸ Internal Rule 104(3): “Decisions of the [Supreme Court] Chamber are final and shall not be sent back to the Trial Chamber”. See also, Internal Rules 104(3), 112 “Revision of Final Judgment”.

⁵⁹ Internal Rule 111(6).

⁶⁰ Internal Rule 113(2). See also regarding finality, Internal Rules 34(4) (referring to final decisions before the Pre-Trial, Trial and Supreme Court Chambers), 66 *bis* (referring to the finality of orders reducing the scope of judicial investigations), 77*bis*(2) (declaring that decisions by the Pre-Trial Chamber on expedited appeals are to be considered final), 80(1) and 89(1) (referring to the point at which an indictment or closing order becomes final), 89*quater*(2) (referring to the finality of orders reducing the scope of trial).

⁶¹ Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision concerning the Scope of Case 002/01, 8 February 2013, E163/5/1/13, para. 24 *citing* Internal Rules 104, 110-111, 113; Constitution, Art. 38; Code of Criminal Procedure, Art. 398, 405-406 and 497.

⁶² *Prosecutor v. Delić*, IT-04-83-A, “Decision on the Outcome of the Proceedings”, Appeals Chamber, 29 June 2010 (“*Delić Decision*”), para. 5; *Prosecutor v. Popović et al.*, IT-05-88-A, “Decision Terminating Appellate Proceedings in Relation to Milan Gvero”, Appeals Chamber, 7 March 2013 (“*Gvero Decision*”), paras. 2-4.

⁶³ *Delić Decision*, paras 9 and 15; *Gvero Decision*, para. 6: “[T]he Appeals Chamber considers that, having found that the death of an appellant results in the termination of proceedings and given that no appeal judgement can be rendered with respect to Gvero, nothing can undermine the finality of the Trial Judgement as it concerns Gvero. As a consequence, the Trial Judgement shall be considered final in relation to Gvero”.

Considerations

26. While only the word ‘final’ is used in the Internal Rules, both words ‘definitive’ and ‘final’ are found in the Criminal Code, the Code of Criminal Procedure and the ECCC law.⁶⁴ ‘Definitive’ can have a different nuanced meaning in English such as authoritative that does not necessarily equate to final in the sense of conclusive and binding.

27. Despite the interchangeable use of the words “final” and “definitive” found in the Cambodian and ECCC legal frameworks, the cumulative effect of these provisions is that the appeal procedure has a suspensive effect on the decision of a Trial Chamber.⁶⁵ The execution of such decision will be stayed until such time as the statutory period allowed for appeal has expired or, alternatively, until an appeal decision on the merits has been rendered by an appellate court.

28. By duly filing his notice of appeal, NUON Chea took appropriate steps to exercise his legal right to initiate appellate proceedings against the Trial Judgement. In doing so, he recorded his intention to demonstrate that he considered that no fewer than 351 errors of law and/or fact were found in the Trial Judgement.

29. There is no dispute that when a convicted person files an appeal before the ECCC, the decision of the Trial Chamber is not final. As such, the situation is in contrast with the *Delić* and *Popović et al* cases before the ICTY Appeals Chamber.⁶⁶

30. The legal framework applicable at the ECCC commands the finding that, because NUON Chea filed his notice of appeal, the Trial Judgement is not final.

⁶⁴ See Criminal Code, Art. 91; Code of Criminal Procedure, Art. 12, 66, 123, 256, 497. See also Internal Rules 34, 104, 111, 112 and 113. See also, ECCC Law, Art. 35 *new* and 36 *new*.

⁶⁵ See Code of Criminal Procedure, Art. 12, 398 and 497. See Internal Rule 111(6). This excludes reparation awards granted pursuant to Internal Rule 23 *quinquies* (3)(b); See *infra* para. 84.

⁶⁶ See *supra* para. 25.

C. Vacation of the Trial Judgement

Submissions

NUON Chea Defence

31. Relying on a survey of domestic practices of several jurisdictions, the NUON Chea Defence submits that the death of an appellant before an appeal judgement has been rendered triggers the termination of the appeal proceedings and “necessarily includes the vacating of the Trial Judgement”. They posit that this course of action is consistent with international standards.⁶⁷

32. The Defence bases its request for vacation on its interpretation of a joint reading of Article 36 *new* of the ECCC Law⁶⁸ and Internal Rule 111(6)⁶⁹ to conclude that “given that termination of proceedings is not a dismissal of the appeals on the merits, if appeal proceedings are terminated due to the death of an appellant, then the trial judgement must accordingly be vacated”.⁷⁰

Civil Party Lead Co-Lawyer

33. The Civil Party Lead Co-Lawyer submits that, contrary to NUON Chea Defence’s submission, the Trial Judgement is not vacated and the trial record remains intact. The Civil Party Lead Co-Lawyer entreats the Chamber to “not effect a decision that diminishes the symbolic value of the [Trial Judgement] to civil parties, particularly those who testified” and argues that finding the trial record intact is “consistent with [...] Civil Parties right [...] to have the facts established in a judicial decision”.⁷¹

Co-Prosecutors

34. The Co-Prosecutors submit that no ECCC, Cambodian or international authority supports the NUON Chea Defence’s argument that trial judgements should be vacated when appeal proceedings are terminated following the death of an accused. They outline that none

⁶⁷ Urgent Request, paras 20-23, 32-33.

⁶⁸ ECCC Law, Art. 36 *new*: “The Extraordinary Chamber of the Supreme Court shall decide appeals made by the accused, the victims, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the trial court. In this case, the Supreme Court Chamber shall make final decisions on both issues of law and fact, and shall not return the case to the Extraordinary Chamber of the trial court”.

⁶⁹ Internal Rule 111(6): “Pursuant to the ECCC Law, the Chamber shall attempt to achieve unanimity. If this is not possible, a decision shall require the affirmative vote of at least five judges. Where an appeal is rejected, the trial judgment shall become final and no further appeal against such decision shall be allowed”.

⁷⁰ Urgent Request, para. 22.

⁷¹ Civil Party Lead Co Lawyer’s Response, paras 6-8.

of the domestic and statutory provisions cited by the Defence support their claims in this regard.⁷²

Considerations

35. The argument that the Trial Judgement must necessarily be vacated should appellate proceedings be terminated following NUON Chea's death, finds no support in Cambodian law. Nowhere do the Code of Criminal Procedure or Criminal Code allow for the unconditional nullification of previous instance decisions without prior judicial review.

36. The ECCC legal framework similarly does not contain procedural rules authorising vacation of trial judgments in circumstances where appeal proceedings are terminated following the death of an accused.

37. The Chamber is of the view that the vacation of a trial judgement in the event of an appellant's death is a matter of such fundamental importance that were it intended, it would have been expressly provided for in either the ECCC Law, the Internal Rules or Cambodian law, much the same way that the extinguishment of criminal proceedings following the death of an accused was unequivocally provided in Article 7(1) of the Code of Criminal Procedure.⁷³ As such, an order for the vacation of the Trial Judgement would be to take a step impermissible in law and would run against the established standard of appellate review at the ECCC and other international tribunals which do not lightly disturb the Trial Chamber findings.⁷⁴ Moreover, nullifying the entire trial record and findings following the full application of fair trial rights to the accused would also fundamentally disregard the interests of Civil Parties and victims.

38. The Chamber considers that the NUON Chea Defence has hopelessly conflated Article 36 *new* of the ECCC Law and Internal Rule 111(6) to arrive at the erroneous conclusion that "given that termination of proceedings is not a dismissal of the appeals on

⁷² OCP Response, paras 16-18.

⁷³ This finding is fortified by the application of two established Latin maxims of construction and interpretation of statutes and deeds. "Expressio unius est exclusio alterius" – express mention of one thing excludes an alternative or expression provision for one meaning excludes alternative meanings and also "expressum facit cessare tacitum" – what is expressed makes what is implied silent or what is clearly provided excludes implication of other provisions.

⁷⁴ Case 001 Appeal Judgement, 3 February 2012, F28, para. 17; Case 002/01 Appeal Judgement, 23 November 2016, F36, para. 88: "[A]pp[ly] the standard of reasonableness in reviewing an impugned finding of fact, not whether the finding is correct. In determining whether or not a Trial Chamber's finding of fact was one that no reasonable trier of fact could have reached, the Supreme Court Chamber "will not lightly disturb findings of fact by a Trial Chamber.

the merits, if appeal proceedings are terminated due to the death of an appellant, then the Trial Judgement must accordingly be vacated”.⁷⁵

39. As stated in the Termination Decision, NUON Chea’s death triggered the termination of the appellate proceedings, which *de facto* extinguished the Chamber’s opportunity to render an appeal judgment in his case.⁷⁶ Therefore, neither Internal Rule 111(6) nor Article 36 *new* of the ECCC Law can be used to import a vacation remedy against the Trial Judgement. While his death clearly prevents the Chamber from rendering an appeal judgement in relation to NUON Chea it simply does not follow that the termination of the proceedings due to his death triggers the vacation of the Trial Judgement. As such, the NUON Chea Defence request for vacation is entirely unsubstantiated with no relevant basis in either Cambodian law or in the ECCC legal framework and practice.

40. The Supreme Court Chamber recalls that it may seek guidance in procedural rules established at the international level if existing procedures in force “do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard”.⁷⁷ As the Code of Criminal Procedure clearly provides a system of appellate review and does not provide for the vacation of judgments, there is no uncertainty regarding the application of such provisions and as such recourse to “procedural rules established at the international level” is not required.

41. Nevertheless, as the NUON Chea Defence repeatedly asserts that vacating the Trial Judgement when proceedings are terminated is consistent with international standards,⁷⁸ the Supreme Court Chamber has examined the references provided and finds no authority to support this assertion. From a survey of the practices of the various internationalised tribunals, it is evident that appeals chambers pay deference to the triers of fact in the assessment of evidence and to the factual inferences drawn from that evidence and do not disturb those findings lightly.⁷⁹ The Chamber has not identified any case supporting the practice of vacation of a trial judgement following the death of an appellant.

⁷⁵ Urgent Request, para. 22.

⁷⁶ Termination Decision, para. 8.

⁷⁷ ECCC Law, Art. 33 *new* and 37 *new*.

⁷⁸ See e.g. Urgent Request, paras 32-33 (in fn. 37 which refers to the presumption of innocence under French law, and Italian and Bosnian criminal procedures concerning final judgements), 45-47 (referring to the presumption of innocence at the ECCC).

⁷⁹ *Prosecutor v. Karadžić*, MICT-13-55-A, Judgement, Appeals Chamber, 20 March 2019, para. 17; *Prosecutor v. Šešelj*, MICT-16-99-A, Judgement, Appeals Chamber, 11 April 2018, para. 15; *Prosecutor v. Ngirabatware*,

42. Among decisions from the international tribunals, the Chamber found that only *Prosecutor v. Delić* and *Prosecutor v. Popović et al.* are relevant to the circumstances of the present case.⁸⁰ Neither case supports the Defence contention that the Trial Judgement must be vacated. To the contrary, the ICTY Appeals Chamber considered, in both cases, “that the approach followed in certain national jurisdictions, where convictions entered by a court of first instance are vacated following the death of an appellant, is not compatible with the essence of the appellate proceedings” before the ICTY.⁸¹

43. Although the Chamber has found reason to depart from the conclusions reached by the ICTY Appeals Chamber in *Delić* and *Popović et al.* with respect to the final nature of the trial judgement,⁸² parts of the judgement concerning vacation and abatement remain instructive in that the Appeals Chamber in *Delić* examined similar arguments to the one posited by the Defence before this Chamber in the Urgent Request. The Appeals Chamber conducted a full review of the civil and common law approaches to the issue but was unable to “discern any prevalent approach, let alone identify any rules of customary international law, that would be directly applicable” following the death of an appellant.⁸³ The Chamber concurs with this conclusion.

44. Though not clearly reasoned or argued in its Urgent Request,⁸⁴ the only authority which appears to support the Defence position regarding vacation of the Trial Judgement is the common law doctrine of abatement *ab initio*, cited in a footnote concerning the termination of proceedings: “In the United States, most courts, including nearly all federal

MICT-12-29-A, Judgement, Appeals Chamber, 18 December 2014, para. 10. *See also*, *Prosecutor v. Prlić et al.*, IT-04-74-A, Judgement, Appeals Chamber, 29 November 2017, para. 22; *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A, Judgement, Appeals Chamber, 30 June 2016, para. 21; *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Judgement, Appeals Chamber, 14 December 2015, para. 32; *Prosecutor v. Taylor*, SCSL-03-01-A, Judgment, Appeals Chamber, 26 September 2013, para. 26.

⁸⁰ *Gvero* Decision, para. 6: “[T]he Appeals Chamber considers that, having found that the death of an appellant results in the termination of proceedings and given that no appeal judgement can be rendered with respect to Gvero, nothing can undermine the finality of the Trial Judgement as it concerns Gvero. As a consequence the Trial Judgement shall be considered final in relation to Gvero.”; *Delić* Decision, para. 15: “Having found that the death of an appellant results in the termination of proceedings and given that no appeal judgement can be rendered in this case, nothing can undermine the finality of the Trial Judgement. As a consequence, the Trial Judgement shall be considered final”. In each case, the appellant died after filing his submissions on appeal. As mentioned in the finality section, in *Delić* Decision paras 14-15 and *Gvero* Decision para. 6, the International Criminal Tribunal for the Former Yugoslavia Appeals Chamber terminated proceedings against the appellants after their deaths but held that the Trial Judgement was to be considered final in each case.

⁸¹ *Delić* Decision, para. 14; *Gvero* Decision, para. 6 (emphasis added).

⁸² *Delić* Decision, para. 14; *Gvero* Decision, para. 6 (emphasis added).

⁸³ *Delić* Decision, para. 13.

⁸⁴ Urgent Request, para 32. *See also* paras 1(b)(i), 22-23, 29(b), 33-34, 89(b)(i). No correct authority can be found in the Defence’s submissions to support their argument that termination of proceedings on appeal automatically vacates the trial judgement: Preliminary Art., Art. 6 and 327(4) of the French Criminal Procedure Code; Art. 648 of the Italian Criminal Procedure Code, Art. 27(2) of the Constitution of the Italian Republic; Art. 3 and 178(1) of the Bosnian Criminal Procedure Code.

courts, follow the doctrine of abatement *ab initio* of the conviction, which erases all evidence that the conviction ever existed”.⁸⁵ As examined by the Appeals Chamber of the ICTY in *Delić*,⁸⁶ the Supreme Court Chamber observes that this doctrine arose from the exigencies of nineteenth century criminal procedure and its application is not universally applied in all United States jurisdictions.⁸⁷ In any event, the doctrine of abatement *ab initio* is unknown in other common law jurisdictions and in the civil law system upon which Cambodian law is based. There is consequently no reason to follow this doctrine.

45. The Supreme Court Chamber sees no legal reason to vacate the Trial Judgement. The complete record of the Trial Chamber’s findings must therefore stand.

D. Presumption of Innocence

Submissions

NUON Chea Defence

46. The NUON Chea Defence submits that a combined interpretation of Articles 35 *new*, 36 *new*, 37 *new* of the ECCC Law and Internal Rule 111(6) provide that the presumption of innocence continues on appeal after conviction pending a final judgement from the Supreme Court Chamber.⁸⁸ It urges the Chamber to determine that “if appeal proceedings are terminated due to the death of an appellant” then the only course of action at the Chamber’s disposal is the vacation of the Trial Judgement on the basis that the presumption of innocence stands on appeal.⁸⁹

⁸⁵ Urgent Request, fn. 25.

⁸⁶ *Delić* Decision, para. 12 and fn. 35: “In the United States of America, the Federal Courts of Appeal have generally adopted the approach that in such cases, the proceedings terminate *ab initio*, resulting in the judgement of conviction being vacated and the indictment being dismissed”.

⁸⁷ See e.g. for a recent example: Commonwealth vs. Aaron J. Hernandez, Superior Judicial Court Massachusetts, 13 March 2019, p. 29: “As we have been unable to discern a reasoned analysis for the adoption of the abatement *ab initio* doctrine, and in any event, we are presented with substantial reasons it should be changed, we conclude that we will no longer follow the doctrine when a defendant dies during the pendency of a direct appeal as of right challenging a conviction. Instead, upon the death of the defendant, the appeal shall be dismissed as moot and the trial court shall be instructed to place in the record a notation stating that the defendant’s conviction removed the defendant’s presumption of innocence, but that the conviction was appealed and it was neither affirmed nor reversed on appeal because the defendant died while the appeal was pending and the appeal was dismissed”. See also Sabrina M. Bierer, “The Importance of Being Earned: How Abatement after Death Collaterally Harms Insurers, Families, and Society at Large”, 78 Brooklyn Law Review, 2013; Timothy A. Razel, “Dying to Get Away With It: How the Abatement Doctrine Thwarts Justice -- and What Should be Done Instead”, 75(4) Fordham Law Review, 2007.

⁸⁸ Urgent Request, paras 32-47.

⁸⁹ Urgent Request, paras 22-23.

47. The Defence further argues that the ICTY Appeals Chamber in *Delić* erred in finding that “the presumption of innocence d[id] not apply to persons convicted by Trial Chambers pending the resolution of their appeals”,⁹⁰ and that, in any event, the *Delić* decision is inapplicable in light of the provisions of the ECCC legal framework⁹¹ which “leads to the conclusion that presumption of innocence applies on appeal”.⁹²

Co-Prosecutors

48. The Co-Prosecutors submit that while the Constitution “provides for the presumption of innocence until the final judgment”, the ECCC’s structure, mandate, jurisdiction and character distinguish it from other parts of the Cambodian judiciary.⁹³ They argue that these “innate differences”⁹⁴ serve as a basis for “an accused [to be] presumed innocent at the ECCC only until his/or her guilt has been established beyond reasonable doubt by the trier of fact”.⁹⁵ They further argue that Articles 35 and 37 *new* of the ECCC Law are inconsistent with the relevant procedures and practice at the international level and on that basis guidance should be sought in procedural rules established at the international level.⁹⁶

49. The Co-Prosecutors argue that the similarity of appellate structure and standard of appellate review between the ECCC and other international(ised) tribunals renders their practice “uniquely relevant”.⁹⁷ As such, the Co-Prosecutors endorse the ICTY Appeals Chamber’s finding in *Delić* that “the presumption of innocence does not apply to persons convicted by the Trial Chambers pending the resolution of their appeals”.⁹⁸ They further endorse the reasoning according to which both the standard of appellate review and the burden of proof on appeal “is clearly different from the [standard] operative at trial, where the presumption of innocence does apply and the Prosecution has to prove its case beyond reasonable doubt.”⁹⁹

50. According to the Co-Prosecutors, declaring that NUON Chea should continue to be presumed innocent despite his convictions after a trial conducted with all procedural

⁹⁰ Urgent Request, paras 37-43; *Delić* Decision, para. 14.

⁹¹ ECCC Law, Art. 35 *new* and 36 *new*; Internal Rule 111(6).

⁹² Urgent Request, para. 45.

⁹³ OCP Response, para. 3; Constitution, Art. 38; Case 002/01 Appeal Judgement, 23 November 2016, F36, para. 107; Case 001 Appeal Judgement, 3 February 2012, F28, para. 348.

⁹⁴ OCP Response, para. 3.

⁹⁵ OCP Response, para. 3.

⁹⁶ OCP Response, paras 4-5.

⁹⁷ OCP Response, paras 6-7.

⁹⁸ OCP Response, para. 8 *citing Delić* Decision para. 14.

⁹⁹ OCP Response, paras 8-9 *citing Delić* Decision para. 14.

safeguards and in full respect of his rights as an accused, would diminish the purpose for the establishment of the Court and undermine the rights of the victims.¹⁰⁰

Civil Party Lead Co-Lawyer

51. The Civil Party Lead Co-Lawyer submits that the Trial Judgement, which is considered non-final as to NUON Chea, has no legal effect on the deceased. It concludes that such a finding is consistent with the presumption of innocence.¹⁰¹

KHIEU Samphân Defence

52. KHIEU Samphân Defence submits that “Cambodian law and ECCC Law is crystal clear on the fact that the presumption of innocence continues to apply on appeal”.¹⁰² Therefore, when an appellant dies prior to delivery of his appeal judgement, he “died presumed innocent”.¹⁰³

Applicable Law

53. The Constitution provides that “[a]ny accused is presumed innocent up to the final verdict of the court”.¹⁰⁴ Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”), which is directly incorporated into the ECCC framework by the Agreement¹⁰⁵ and ECCC Law¹⁰⁶ provides that “everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to the law”. A similar definition of the presumption of innocence can be found in the Internal Rules.¹⁰⁷

¹⁰⁰ OCP Response, paras 10-15.

¹⁰¹ Civil Party Lead Co-Lawyer’s Response, para. 6.

¹⁰² KHIEU Samphân Reply, paras 6-26, 44.

¹⁰³ KHIEU Samphân Reply, paras 6, 45.

¹⁰⁴ Constitution, Art. 38(7).

¹⁰⁵ The Agreement, Art. 12(2): “The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Art. 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party”. The Agreement, Art.13(1): “the rights of the accused enshrined in Art. 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process. Such rights shall, in particular, include the right: to a fair and public hearing; to be presumed innocent until proved guilty; to engage a counsel of his or her choice; to have adequate time and facilities for the preparation of his or her defence; to have counsel provided if he or she does not have sufficient means to pay for it; and to examine or have examined the witnesses against him or her”.

¹⁰⁶ ECCC Law, Art. 33 *new*: “The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Art. 14 and 15 of the 1966 International Covenant on Civil and Political Rights”.

¹⁰⁷ Internal Rule 21(1)(d): “Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established”.

54. Article 35 *new* of ECCC Law adopts a different definition whereby “[t]he accused shall be presumed innocent as long as the court has not given its definitive judgment”. Article 37 *new* provides that Article 35 *new* applies “*mutatis mutandis* in respect of proceedings before the Extraordinary Chambers of the Supreme Court”.

55. The Internal Rules stipulate that “[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims so as to ensure legal certainty and transparency of proceedings”.¹⁰⁸

Considerations

56. The Chamber rejects NUON Chea Defence’s argument that the effect of the presumption of innocence on appeal results in the vacation of the Trial Judgement. The Defence arrives at its erroneous conclusion by misapplying and conflating provisions of the ECCC Law¹⁰⁹ and the Internal Rules.¹¹⁰

57. The Chamber observes that various provisions in the ECCC legal framework use different terminology to define the point at which the presumption of innocence applies or indeed, ends. While omitted by NUON Chea Defence, the Constitution unequivocally provides that the presumption of innocence shall apply “up to the *final verdict* of the court”.¹¹¹ The Chamber further observes that the ECCC Law provides that the presumption applies “as long as the court has not given its *definitive* judgement”.¹¹² On the other hand, the presumption of innocence stands “until proved guilty” in the Agreement,¹¹³ “as long as [the] guilt has not been established” in the Internal Rules,¹¹⁴ and “until proved guilty according to law” in the ICCPR.¹¹⁵

¹⁰⁸ Internal Rule 21(1).

¹⁰⁹ ECCC Law, Art. 35 *new*, 36 *new* and 37 *new*.

¹¹⁰ Internal Rule 111(6): “Pursuant to the ECCC Law, the Chamber shall attempt to achieve unanimity. If this is not possible, a decision shall require the affirmative vote of at least five judges. Where an appeal is rejected, the trial judgement shall become final and no further appeal against such decision shall be allowed”.

¹¹¹ Constitution, Art. 38(7).

¹¹² ECCC Law, Art. 35 *new*.

¹¹³ The Agreement, Art. 13(1).

¹¹⁴ Internal Rule 21(1)(d).

¹¹⁵ International Covenant on Civil and Political Rights (“ICCPR”) Art. 14(2) reproduced in Art. 12(2) of The Agreement; Art. 33 *new* of the ECCC Law.

58. As demonstrated by the conflicting nature of the Parties' submissions, these different definitions result in uncertainty regarding the interpretation of the scope of application of the presumption of innocence in the situation where an appellant dies prior to delivery of the appeal judgement. In light of this uncertainty coupled by the novel nature of this particular issue at the ECCC, the Chamber deems it helpful to consult guidance in procedural rules established at the international level.¹¹⁶

59. As stated above,¹¹⁷ the ICTY Appeals Chamber has adjudicated on the applicability of the presumption of innocence to appellants convicted at trial and who died prior to the delivery of their appeal judgement.¹¹⁸ In the *Delić* Decision, it found that:

“the presumption of innocence does not apply to persons convicted by Trial Chambers pending the resolution of their appeals. This interpretation [is] consistent with the standard of review applicable in appellate proceedings whereby the appealing party has the burden of showing an error of law or of fact that invalidates the trial judgement, or leads to a miscarriage of justice, rather than attempting to initiate a trial *de novo*. This burden is clearly different from the one operative at trial, where the presumption of innocence does apply and the Prosecution has to prove its case beyond reasonable doubt”.¹¹⁹

60. The Chamber acknowledges the similarities between the ECCC and the ICTY – namely the appellate structure, the standard of appellate review, and the mandate of the tribunals to bring to trial those most responsible for extreme atrocities committed in their respective territory in Democratic Kampuchea and in the former Yugoslavia. However, the Chamber notes that at the ICTY the presumption of innocence is exclusively governed by its Statute which provides that “the accused shall be presumed innocent *until proved guilty* according to the provisions of the present Statute”.¹²⁰ This differs from the legal framework operative at the ECCC where the presumption of innocence is applicable on appeal as a matter of constitutional right in Cambodia which extends “up to the *final verdict* of the court”, and is thus of limited assistance for the Chamber.¹²¹ Therefore, contrary to what the Co-Prosecutors argue, the similarities stated above cannot serve as the basis to adopt the ICTY's position as such a step would disregard the legal framework applicable at the ECCC.

¹¹⁶ The Agreement, Art. 12(1): “The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, guidance may also be sought in procedural rules established at the international level”; ECCC Law, Art. 33 *new*: “If existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, guidance may also be sought in procedural rules established at the international level”.

¹¹⁷ See *supra* para. 25.

¹¹⁸ *Delić* Decision, paras 9, 14-15; *Gvero* Decision, para. 6.

¹¹⁹ *Delić* Decision, para. 14.

¹²⁰ International Criminal Tribunal for the former Yugoslavia (“ICTY”) Statute, Art. 21(3).

¹²¹ Constitution, Art. 38(7).

61. As the Co-Prosecutors correctly recognise, the ICCPR, and in particular its Article 14, ratified by Cambodia and directly incorporated into the ECCC's legal framework¹²² contextualise the right to presumption of innocence to the parameters of trial proceedings whereby the presumption assigns to the prosecution the burden of proving to the trier of fact beyond reasonable doubt every element of the crime(s) with which the accused is charged to secure a guilty verdict. If reasonable doubt remains, the accused must be acquitted.¹²³

62. Given that Article 14 of the ICCPR is of a particularly complex nature combining various guarantees with different scopes of application, the United Nations Human Rights Committee provided comprehensive guidance in the form of a General Comment ("General Comment 32") to assist practitioners of Member States with interpreting Article 14 when implementing fair trial rights.¹²⁴ The Office of the United Nations High Commissioner for Human Rights in Cambodia highlighted the importance of this guidance for all States parties "irrespective of whether they follow civil law or common law principles" and to "all those committed to the implementation of fair trial rights in Cambodia".¹²⁵ The Chamber considers General Comment 32 instructive when applying the array of minimum guarantees comprised within Article 14 to the issues raised in the Urgent Request, especially NUON Chea's arguments that the practical application of the presumption of innocence on appeal warrants the vacation of the Trial Judgement.

63. The provisions in Article 14 of the ICCPR and General Comment 32, which distinguish between the rights inherently applicable to trial and appeal proceedings,¹²⁶ reflect the practical role the presumption of innocence plays before the Trial Chamber where the guilt or innocence of the accused, and the evidence presented to establish or refute it, are at

¹²² Article 13 of The Agreement cites Article 14(2) of the ICCPR, which provides that "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law". Similar wording is reflected at Internal Rule 21(1)(d) "Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established".

¹²³ ICCPR, Art. 14(2); The Universal Declaration of Human Rights, 1948 ("UDHR"), Art. 11(1): "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense".

¹²⁴ General Comment No. 32: ICCPR, Art. 14, Right to equality before courts and tribunals and to fair trial, UN Human Rights Committee, UN Doc. CCPR/C/GC/32, 23 August 2007 ("General Comment 32").

¹²⁵ Office of the United Nations High Commissioner for Human Rights Cambodia, June 2013, pp. 5 and 7: <http://cambodia.ohchr.org/sites/default/files/book/UNITED%20NATIONS%20GENERAL%20COMMENT%20NO%2032%20International%20Covenant%20on%20Civil%20and%20Political%20Rights%20Eng.pdf>.

¹²⁶ General Comment 32 provides a clear distinction between procedural rights applicable at trial and at appeal whilst avoiding the use of confusing vocabulary. Trial rights are carefully examined and explained in Chapter V "Rights of Persons Charged with a Criminal Offence" whereas appeal rights are covered in VII "Review by a Higher Tribunal".

centre stage. This is reflected in the ICCPR's definition of the presumption, which protects the accused "until [he is] proved guilty according to law".¹²⁷

64. While the ICCPR is directly incorporated into the ECCC's legal framework so are the provisions of the Constitution.¹²⁸ The Constitution expressly provides that the presumption of innocence continues until final judgment, which means that it applies on appeal as a matter of a constitutional right to Khmer citizens.

65. As a Supreme Court Chamber applying international standards "within the existing court structure of Cambodia",¹²⁹ the Chamber takes the more expansive approach and finds that the presumption of innocence applies to the standard of review to be conducted by the Judges of the Chamber. This means that such presumption is not intended to be exercised in a legal void, either selectively or individually but in a holistic and contextual manner. While this Chamber cannot fully apply the *Delić* Decision,¹³⁰ it agrees with the ICTY Chamber's observations concerning the distinct nature of "the standard of review applicable in appellate proceedings whereby the appealing party has the burden of showing an error of law or of fact that invalidates the trial judgement, or leads to a miscarriage of justice, rather than attempting to initiate a trial *de novo*".¹³¹ The presumption of innocence in this Chamber imposes on its Judges an absolute requirement to evaluate all submissions made by the Appellant with an open mind from that properly high standard.¹³²

66. Had NUON Chea lived, the Chamber would have conducted its appellate review of his case and rendered "final decision[s] on both issues of law and fact".¹³³ However his death triggered the termination of the proceedings and simultaneously negated the possibility for any appellate review.

67. The Chamber reiterates that it is not a trier of fact determining the guilt or innocence of an accused. That is the sole function of the Trial Chamber. There is a clear distinction

¹²⁷ ICCPR, Art. 14(2); *See also* UDHR, Art. 11 which is also referenced in Art. 31 of the Constitution: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense".

¹²⁸ The Agreement, Art. 12(1) and (2): "the procedure shall be in accordance with Cambodian Law" and "the Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Art. 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party".

¹²⁹ The Agreement, Preamble.

¹³⁰ *Delić* Decision, para. 14: "the presumption of innocence does not apply to persons convicted by Trial Chambers pending the resolution of their appeals".

¹³¹ OCP Response, fn.19 *citing* *Delić* Decision para. 14.

¹³² *Barberà, Messegue and Jabardo v. Spain*, European Court of Human Rights ("ECtHR"), "Judgement", App. No. 10590/83, 6 December 1988, para. 77: "when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged".

¹³³ ECCC Law, Art. 36 *new*.

between a legal rule binding any appeal chamber to apply an open mind to its review of the trial findings¹³⁴ and the presumption of innocence which, with all other Article 14 rights, applies to the trier of fact. Such an approach is reflected in Article 37 *new* of the ECCC Law which provides that “Article[s] 33, 34 and 35 shall apply *mutatis mutandis* in respect of proceedings before the Extraordinary Chambers of the Supreme Court”. *Mutatis mutandis* means that a rule is applied with changes appropriate to the circumstances. Therefore, in light of the distinct differences in jurisdiction, objects and procedures that apply to trial and appellate chambers, trial rights guaranteed by Article 14 require adjustment in their application at the appellate stage. This necessarily includes an adjustment to the method of application of the presumption of innocence.

68. The Chamber finds that the Defence misunderstands the application of the presumption of innocence at the appellate stage and, in equating it to trial proceedings, draws erroneous conclusions. Any argument that the application of the presumption of innocence means that an appellant commences his appeal in the same position as an accused before the Trial Chamber is rejected.

69. The presumption of innocence is a legal rule, which at the ECCC applies up until the final appeal decision upholding or quashing the verdict of conviction. That presumption is not a declaration of a not guilty status. The lodging of an intention to appeal the Trial Chamber's findings of guilt does not negate or abate those findings. As the appeal is not a trial *de novo*, the appellant does not commence his appeal armed in the full panoply of Article 14 rights relevant to proceedings before the Trial Chamber.¹³⁵ The appellant does not undergo a rebirth as an innocent accused. The presumption of innocence applies to the standard of review to be applied by the Supreme Court Chamber. Further, as the presumption of innocence is a personal right which applies to the standard of review on appeal, it follows that if an appellant dies before his appeal can be determined, then his death extinguishes the appeal and his enjoyment of rights applicable to the appeal process. Death on appeal does not convert a guilty finding at trial into a not guilty finding.

¹³⁴ *Barberà, Messegué and Jabardo v. Spain*, ECtHR, “Judgement”, App. No. 10590/83, 6 December 1988, para. 77.

¹³⁵ *See supra* para. 67.

E. Continuation of Appellate Proceedings

Submissions

70. As an alternative to termination of appellate proceedings, the NUON Chea Defence requests the Chamber, in the interests of justice, to allow appellate proceedings to continue while ensuring NUON Chea's continued representation after his death by counsel of his choice.¹³⁶ They refer to jurisdictions which allow the succession of criminal actions, substitution of accused persons following their death¹³⁷ or continuation of appellate proceedings where there is evidence that the deceased appellant is not guilty.¹³⁸ The Defence states that exceptional continuation of appellate proceedings may be warranted in instances where there is a "need to address legal issues of general public importance, or systematic issues related to the administration of justice" which transcend the death of the appellant.¹³⁹ They additionally argue that the personal jurisdiction of the ECCC is not limited to living persons and that Internal Rule 112(1) accordingly allows close relatives of the deceased appellant to petition for review of a final judgment.¹⁴⁰

71. The Co-Prosecutors, Civil Party Lead Co-Lawyer do not make any submissions on this point.

Considerations

(i) Continuation of proceedings

72. The Defence submissions concerning the continuation of proceedings¹⁴¹ are moot in light of the Termination Decision.¹⁴²

(ii) Revision of final judgment

73. Internal Rule 112 permits a request for revision of a final judgment to be brought by a "convicted person or, after his or her death, the spouse, children, parents or any person alive at the time of the person's death who has been given express written instructions from the convicted person to bring such a claim". The circumstances in which a request for review

¹³⁶ Urgent Request, paras 31, 48-56.

¹³⁷ See e.g., Urgent Request, paras 31, 51 (referring to practices in England and Wales, Singapore, various US jurisdictions, Canada, Hong Kong, China, Italy, Azerbaijan, Russia, Sweden and Switzerland).

¹³⁸ See e.g., Urgent Request, paras 51-55 (referring to practices in Italy, Azerbaijan, Russia and China).

¹³⁹ Urgent Request, para. 55.

¹⁴⁰ Urgent Request, paras 5-6, 65.

¹⁴¹ Urgent Request, paras 29(a), 30-34, 48-56, 69-79.

¹⁴² Termination Decision.

may be filed are limited to instances where (i) new evidence is discovered which was not available at trial and would have resulted in a different verdict were it proved at trial; (ii) it is proved that evidence relied upon at trial was false, forged or falsified; or (iii) the judges who participated in a judicial investigation or a conviction committed in that case an act of serious misconduct or serious breach of duty of sufficient gravity to justify their removal under the Internal Rules. This provision presents a high bar to the review of final judgments. Motion for Review of Proceedings pursuant to the Code of Criminal Procedure¹⁴³, imposes even stricter pre-conditions by requiring the motion to be approved by the Supreme Court in a Plenary.

74. The Supreme Court Chamber recalls that, prior to his death, NUON Chea filed a written authorisation pursuant to Internal Rule 112 for certain family members and his Co-Lawyers “to continue the proceedings, make any filing or initiate any procedure at the ECCC on [his] behalf, in the event [of his death]”.¹⁴⁴ However, the Internal Rules explicitly limit such revision to a “final judgment” and to the very specific pre-conditions aforementioned.¹⁴⁵ Given that there is no final judgment with respect to NUON Chea and that no evidence has been presented to consider the request, the Trial Judgement cannot be revised within the meaning of Internal Rule 112.

75. Accordingly, and insofar as they have not already been declared moot, the Supreme Court Chamber rejects the Defence submissions concerning the continuation of proceedings with respect to NUON Chea.

¹⁴³ See Code of Criminal Procedure, Art. 443-455.

¹⁴⁴ NUON Chea’s Letter Authorising Designated Persons to Act on his Behalf in the Event of his Death prior to the Completion of the Appeal Proceedings, 18 July 2019, F46, para. 9.

¹⁴⁵ See Internal Rule 112(3): “If [the Supreme Court Chamber] determines that the application [for review] is meritorious, it shall return jurisdiction over the matter, with a view to [...] arriving at a determination on whether the judgement should be revised.”; Code of Criminal Procedure, Art. 443: “A motion for review is a procedure whereby a party contests against a final judgment which already has the *res judicata* effect”; Code of Criminal Procedure, Art. 450: The Supreme Court shall “decide on the questions of law and fact and render a final judgement” if the Criminal Chamber declares a motion for review to be admissible; Code of Criminal Procedure, Art. 452: “As soon as the Supreme Court considers the case to be ready for a decision, it shall decide on the motion for review by final judgment”.

F. Effect of NUON Chea's Death on Reparations Awarded by the Trial Chamber

Submissions

76. NUON Chea Defence acknowledges that a final verdict is “of great interest for the civil parties” but notes that their “right [to] reparation could be denied if the proceedings stop at this stage”.¹⁴⁶

77. The Civil Party Lead Co-Lawyer submits that this view is misguided given that “the reparation measures endorsed by the Trial Chamber in Case 002/02 were sought through Internal Rule 23 *quinquies* 3(b) whereby reparations are “not linked to a specific accused” nor “dependent on a judgment. This is demonstrated by the fact that reparations programs in the present case [Case 002/02] have been developed and implemented in parallel with the trial” and such approach “is in keeping with the purpose of the rule, which was adopted to enable, with donor assistance and that of external collaborators, the realisation of meaningful reparations within a reasonable time”.¹⁴⁷ The Civil Party Lead Co-Lawyer accordingly submits that NUON Chea's death does not impact the portion of the Trial Judgement concerning Civil Party reparations.¹⁴⁸

78. The Co-Prosecutors did not respond on this point.

Considerations

79. The Supreme Court Chamber recalls that the reparations projects advanced by the Civil Party Lead Co-Lawyers in Case 002/02 were sought through Internal Rule 23 *quinquies* (3)(b).¹⁴⁹ By arguing that reparations are contingent on a final verdict, the Defence disregards the meaning and effect of Internal Rule 23 *quinquies* (3)(b).

¹⁴⁶ Urgent Request, para. 70.

¹⁴⁷ Civil Party Lead Co-Lawyer's Response, para. 12. *See also* Case 002/01 Trial Judgement, 7 August 2014, E313, para. 1120; Trial Judgement, para. 4418: “The Chamber is aware that the majority of these projects have already been partially or fully implemented. In this context, the Chamber recalls the Lead Co-Lawyers' concerns regarding the practical difficulties in securing external funding for the realization of reparations projects under the mode of implementation established in Internal Rule 23 *quinquies* (3)(b). The Chamber addressed these concerns during the course of the proceedings in Case 002/01 by permitting the implementation of projects to begin prior to the verdict in order to ensure the realization of meaningful reparations within a reasonable time. The Chamber reiterates that while a conviction is a precondition for awarding collective and moral reparations pursuant to Internal Rule 23 *quinquies* (1), recognising projects whose implementation has already begun or even concluded is in keeping with the purposes of Internal Rule 23 *quinquies* (3)(b)”.

¹⁴⁸ Civil Party Lead Co-Lawyer's Response, para. 13.

¹⁴⁹ Trial Judgement, para. 4416.

80. Internal Rule 23 *quinqüies* offers the Civil Party Lead Co-Lawyers two distinct and mutually exclusive avenues to seek reparations awards: the first, requiring the convicted person to bear the costs of the award(s); the second, enabling “recogni[tion] that a specific project appropriately gives effect to the award sought by the Lead Co-Lawyers and may be implemented”.¹⁵⁰ The Internal Rules require that awards sought through the second avenue shall “have been designed or identified in cooperation with the Victims Support Section and have secured sufficient external funding”.¹⁵¹

81. Whereas previous versions of the Internal Rules permitted reparations to be awarded exclusively against convicted person(s),¹⁵² Internal Rule 23 *quinqüies* (3)(b) was adopted by the ECCC Plenary to allow meaningful reparations to be implemented within a reasonable time through third-party funding or collaboration with governmental and non-governmental organizations.¹⁵³ This new framework was introduced against the backdrop of the ECCC’s experience in Case 001, which demonstrated “the inherent unlikelihood” that “reparations awards against ECCC Convicted Persons [would] result in meaningful outcomes for civil parties”.¹⁵⁴ The Trial Chamber subsequently clarified that awards sought under “the new and separate reparations avenue created by Internal Rule 23 *quinqüies* (3)(b) [...] do not result in enforceable claims against an accused, and may be developed in parallel with the trial”.¹⁵⁵

82. In recognising the Civil Party’s concerns regarding the practical difficulties in securing external funding for the realisation of reparations projects, the Trial Chamber permitted “the implementation of projects to begin prior to the verdict in order to ensure the realisation of meaningful reparations within a reasonable time”.¹⁵⁶ It reiterate[d] that “while a conviction is a precondition for awarding collective and moral reparations pursuant to Internal Rule 23 *quinqüies* (1), recognising projects whose implementation has already

¹⁵⁰ Internal Rule 23 *quinqüies* (3)(b).

¹⁵¹ Internal Rule 23 *quinqüies* (3)(b).

¹⁵² See e.g., The Internal Rules of the ECCC, Revision 5, 9 February 2010, Former Internal Rule 23 *quinqüies* (1): “[T]he Chambers may award only collective and moral reparations to Civil Parties. These shall be awarded against, and be borne by, convicted persons.” Under subsection (2), the awards could take the form of: “(a) an order to publish the judgement in any form at the convicted person’s expense; (b) an order to fund any non-profit activity or service for the benefit of victims; or (c) other appropriate and comparable forms of reparation”.

¹⁵³ Trial Judgement, paras 4405 and 4418 (referring to: Indication of Priority Projects for Implementation as Reparation; Internal Rule 80bis(4)). See also, ECCC Press Release: “Eight ECCC Plenary Session Concludes”, 17 September 2010, <https://www.eccc.gov.kh/en/Art.s/eight-eccc-plenary-session-concludes>.

¹⁵⁴ Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, E284, para. 158 (fn. 264).

¹⁵⁵ Trial Chamber Decision on Severance following SCC Decision, 26 April 2013, E284, para. 158.

¹⁵⁶ Case 002/01 Trial Judgement, 7 August 2014, E313, para. 1120; Trial Judgement, para 4418.

begun or even concluded is in keeping with the purposes of Internal Rule 23 *quinquies* (3) (b)”.¹⁵⁷

83. The Supreme Court Chamber sees no reason to depart from the Trial Chamber’s findings.

84. The death of an appellant does not reverse or displace the Trial Chamber’s findings. Therefore, NUON Chea’s death does not itself impact the Trial Chamber’s reparation awards to the Civil Parties as appeal proceedings do not have any suspensive effect on an award of reparations. Such would frustrate the objects and purposes of Internal Rule 23 *quinquies* (3) (b) by denying implementation of reparations projects within a meaningful timeframe.

85. The Supreme Court Chamber considers that NUON Chea’s death has no effect on the recognition of harm suffered by the Civil Parties and on the reparations awarded by the Trial Judgement.

G. Summary of legal clarifications

86. The Supreme Court Chamber provides the following legal clarifications:

- i. The termination of proceedings did not vacate the Trial Judgement.
- ii. There is no provision for the proposed appeal to proceed after NUON Chea’s death.
- iii. The presumption of innocence applies at all stages of criminal proceedings.
- iv. The presumption of innocence at appeal is a legal rule and standard applied by the Judges of the Supreme Court Chamber in their review of the grounds of appeal.
- v. A final judgement on the guilt or innocence of NUON Chea cannot be delivered as his death prevented any appellate review.
- vi. Presumption of innocence does not equate to a *post mortem* finding of not guilty.
- vii. NUON Chea’s death does not affect the awards of reparations to the Civil Parties.

¹⁵⁷ Case 002/01 Trial Judgement, 7 August 2014, E313, para. 1120; Trial Judgement, para 4418.

V. DISPOSITION

87. For the foregoing reasons, the Supreme Court Chamber:

FINDS the Urgent Request to be admissible to clarify certain issues;

DISMISSES the Urgent Request.

Phnom Penh, 22 November 2019

President of the Supreme Court Chamber



KONG Srim