

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

**FILING DETAILS**

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

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## **PART 1. INTRODUCTION**

1. Pursuant to Internal Rules 2, 92, and 104bis, and in light of Nuon Chea's death on 4 August 2019,<sup>1</sup> the Co-Lawyers for Nuon Chea (the "Defence") submit this urgent request concerning the impact on the Case 002/02 appeal proceedings of Nuon Chea's death prior to the rendering of an appeal judgement (the "Request"). For the reasons outlined in this Request, the Defence requests:
  - (a) that the Supreme Court Chamber (the "Chamber"):
    - (i) accept this motion as validly filed and the Chamber properly seized because the Defence has written authorisation from Nuon Chea to act on his behalf; or, alternatively
    - (ii) decide on the subject matter of this Request *proprio motu* in the interests of justice.<sup>2</sup>
  - (b) that the Chamber determine that it would either:
    - (i) terminate the appellate proceedings concerning Nuon Chea, in which case the trial judgement in Case 002/02 would be vacated in relation to Nuon Chea since Nuon Chea 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 counsel of his choice.
  - (c) that if necessary or desirable, the judges of the Chamber 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 Request.
  - (d) that the Chamber:

<sup>1</sup> See F46/1.1, Nuon Chea's Death Certificate, ERN 01623650 (KH), 01623651 (EN).

<sup>2</sup> This has been done in other international(ised) tribunals. For instance, the ICTY Appeals Chamber dismissed the defence motion filed on behalf of Delić's son for lack of standing, yet it issued a decision on the same day on the subject matter *proprio motu*: see *infra*, *Prosecutor v. Delić*, IT-04-83-A, 'Decision on the Outcome of the Proceedings', 29 Jun 2010 ("Delić Decision on the Outcome of Proceedings").

- (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 and 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.
2. The Defence has received verbal authorisation from one of the Chamber's greffiers to file this Request in English only, with a Khmer translation to follow.

## **PART 2. BACKGROUND**

### **I. NUON CHEA'S DEATH**

3. After being transferred to the Khmer-Soviet Friendship Hospital for treatment on 2 July 2019, Nuon Chea passed away on 4 August 2019 at 6pm.<sup>3</sup>

### **II. THE ABSENCE OF ECCC JURISPRUDENCE ON THE IMPACT OF DEATH OF AN APPELLANT ON APPEAL**

4. This Chamber and others at the ECCC have already had occasion to consider the impact of the untimely death of accused persons following the incapacitation and death of Nuon Chea's Case 002 co-accused persons Ieng Thirith and Ieng Sary. However, such discussion has thus far been confined to the circumstances of death *during trial*. No ECCC jurisprudence has yet considered the death of an *appellant* against a trial judgement or examined in detail the specific issues raised in this Request, *e.g.*, the impact of such death on the presumption of innocence of the deceased appellant.

### **III. NUON CHEA'S AUTHORISATION TO CONTINUE PROCEEDINGS ON HIS BEHALF AFTER HIS DEATH**

5. What the ECCC Internal Rules do make clear, at Rule 112(1), is that after a convicted person's 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 [...] may apply to the Chamber to revise the final judgment" in certain circumstances. These relate to the discovery of new evidence; falsity, forgery, or falsification of evidence upon which the conviction depends; or

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<sup>3</sup> See F46/1.1, Nuon Chea's Death Certificate, ERN 01623650 (KH), 01623651 (EN).

serious misconduct or breach of duty by a judge who participated in a judicial investigation or conviction.

6. In light of both Internal Rule 112(1) and the circumstances and issues discussed in this Request, on 12 July 2019, Nuon Chea already provided written authorisation for the Defence and certain of his family members to act on his behalf in the event of his death. The Defence filed this authorisation to the Chamber on a strictly confidential basis on 18 July 2019.<sup>4</sup> A public (redacted) version is attached to this Request.<sup>5</sup>

### **PART 3. APPLICABLE LAW**

7. Article 12 (1) of the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (“ECCC Agreement”) provides that:

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, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.

8. Likewise, Article 33 *new* of the ECCC Law stipulates that:

If these existing procedures 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, guidance may be sought in procedural rules established at the international level.

9. Insofar as the presumption of innocence is concerned, Article 35 *new* of the ECCC Law provides that, “[t]he accused shall be presumed innocent as long as the court has not given its **definitive judgment**” (emphasis added).
10. In respect of the two immediately preceding rules, it should also be noted that Article 37 *new* of the ECCC Law provides that “[t]he provision[s] of Article 33, 34 and 35 shall apply *mutatis mutandis*” in proceedings before the Supreme Court Chamber.

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<sup>4</sup> F46, ‘Nuon Chea’s Letter Authorising Designated Persons to Act on His Behalf in the Event of His Untimely Death Prior to the Completion of the Appeal Proceedings’, 18 Jul 2019.

<sup>5</sup> Letter from Nuon Chea, Designated Persons to Act on His Behalf in the Event of His Untimely Death Prior to the Completion of the Appeal Proceedings, 12 Jul 2019 (**Public (Redacted) Attachment 1**).

11. As for the appeals process, ECCC Law Article 36 *new* mandates that the Supreme Court Chamber will decide appeals made by all parties and that the 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” (emphasis added).
12. Finally, Internal Rule 21(1) stipulates 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** and so as **to ensure legal certainty** and transparency of proceedings” (emphases added).

#### **PART 4. ARGUMENTS**

##### **I. THE ECCC AGREEMENT SETS OUT CLEAR RULES OF INTERPRETATION OF THE ECCC'S PROCEDURAL RULES**

13. The ECCC Agreement established that the ECCC was to consist of extraordinary chambers “within the existing court structure of Cambodia”,<sup>6</sup> and that the ECCC’s procedures “shall be in accordance with Cambodian law” to the extent that the Cambodian law is consistent with international standards.<sup>7</sup>
14. To implement the aforesaid agreement, the ECCC Plenary adopted a set of Internal Rules, “to consolidate applicable Cambodian procedure for proceedings before the ECCC” and to ensure the rules’ consistency with international standards.<sup>8</sup>
15. Consequently, and as the Pre-Trial Chamber rightly held:

The Internal Rules therefore form a **self-contained regime of procedural law** related to the unique circumstances of the ECCC, made and agreed upon by the plenary of the ECCC. **They do not stand in opposition to the Cambodian Criminal Procedure Code (“CPC”) but the focus of the ECCC differs substantially enough from the normal operation of Cambodian criminal courts to warrant a specialized system.**<sup>9</sup>

16. In other words, the Internal Rules are special law compared to the Cambodian Code of Criminal Procedure (“CPC”). The Internal Rules are thus the primary source of

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<sup>6</sup> ECCC Agreement, preamble.

<sup>7</sup> ECCC Agreement, Art. 12(1).

<sup>8</sup> Internal Rules, preamble.

<sup>9</sup> D55/1/8, ‘Decision on Nuon Chea’s Appeal against Order Refusing Request for Annulment’, 26 Aug 2008 (“Decision on Appeal against Order Refusing Annulment”), para. 14 (emphases added). This Chamber also adopted a similar approach towards the relationship between the Internal Rules and CPC. See, e.g., E50/3/1/4, ‘Decision on Immediate Appeal by Khieu Samphan on Application for Release’, 6 Jun 2011, para. 28.

reference for ECCC procedure. The CPC, as the general law, is the secondary source of reference when the Internal Rules are silent on a particular matter.

17. When the CPC is so referenced, the interpretation of its provisions must take into account the context of both the CPC and the Internal Rules as well as other ECCC legal documents holistically and should not render any of the documents ineffective (in accordance with the principle of effectiveness). In addition, the relevant CPC rules' consistency with international standards must be examined before ECCC chambers can apply them.<sup>10</sup> Only if the said rules contravene international standards will there be a legitimate basis for the ECCC chambers to depart from them and innovate in reference to international standards.<sup>11</sup>
18. In the situation where neither the Internal Rules nor the CPC sets out relevant rules in relation to a particular matter, the ECCC chambers will have to refer to procedural rules established at the international level for guidance.<sup>12</sup>
19. Based on the foregoing, the Defence in this Request will first examine whether the Internal Rules and CPC contain relevant rules governing the situation of the untimely death of the appellant (Section II); then assess whether the relevant existing rules are consistent with international standards (Section III); and finally, discuss whether the absence of certain rules would warrant innovation by the Chamber (Section IV).

## **II. THE INTERNAL RULES AND CAMBODIAN LAW PROVIDE THAT UNTIMELY DEATH OF THE APPELLANT LEADS TO TERMINATION OF THE PROCEEDINGS AND THE TRIAL JUDGEMENT BEING VACATED**

20. The Internal Rules are silent on the impact of the death of an appellant on proceedings before the ECCC. Article 23bis(6), for example, only provides for the extinguishment of civil actions against an *accused* (*i.e.*, a person facing trial) on that person's death.
21. In accordance with the rules of interpretation set out in Section I, where there is a *lacuna* in the Internal Rules, guidance must first be sought from Cambodian law. Article 7(1) of the CPC provides that "the death of the offender" is one reason "for

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<sup>10</sup> ECCC Agreement, Art. 12(1); ECCC Law, Art. 33 *new*; and Internal Rules, preamble.

<sup>11</sup> Case 001, F28, 'Appeal Judgement', 3 Feb 2012, para. 414. The Defence notes that, as this Chamber previously indicated, "innovation" is to be distinguished from "interpretation"; see E138/1/10/1/5/7, 'Decision on Immediate Appeal against the Trial Chamber's Order to Unconditionally Release the Accused Ieng Thirith', 14 Dec 2012 ("Decision on Appeal against Release of Ieng Thirith"), para. 33. See also *infra*, Part 4 Section IV-E.

<sup>12</sup> ECCC Agreement, Art. 12(1); ECCC Law, Art. 33*new*; and Internal Rules, preamble.

extinguishing a charge in a criminal action”. However, the consequences of termination at the appellate stage are not yet settled under Cambodian law. In particular, it is unclear whether a trial judgement is to be considered final in circumstances where the appellant dies before the appeal judgement has been rendered.

22. As stated above in Section I, the application of Cambodian law to proceedings before the ECCC must be interpreted in the context of the ECCC legal documents. Article 35 *new* of the ECCC Law states that “[t]he accused shall be presumed innocent as long as the court has not given its **definitive judgment**” (emphasis added). Based on Article 37 *new*, this principle applies *mutatis mutandis* to the appellate proceedings. Moreover, Article 36 *new* and Internal Rule 111(6) indicate that once appealed, it is the Supreme Court Chamber which “shall make **final** decisions on both issues of law and fact”, and the trial judgement accordingly only becomes **final** “[w]hen the appeal is **rejected**” (emphases added). 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 and the presumption of innocence maintained.
23. Based on the foregoing, the existing procedural rules at the ECCC require that, following the death of an appellant, **criminal and civil proceedings terminate; the trial judgement be vacated; and the presumption of innocence stands**. This outcome, as will be discussed below, is also consistent with standards and rules established at the international level.

### **III. TERMINATION OF THE PROCEEDINGS WITH THE EFFECT OF VACATING THE TRIAL JUDGEMENT IS CONSISTENT WITH INTERNATIONAL STANDARDS**

- A. PROCEDURAL RULES APPLIED AT THE ECCC MUST BE CONSISTENT WITH INTERNATIONAL STANDARDS**
24. As previously mentioned, the relevant existing rules of the CPC and the Internal Rules must be consistent with international standards in order to be applied at the ECCC. The “international standards” in this context refer to “international standards of criminal justice established in the International Covenant on Civil and Political Rights and other

instruments”,<sup>13</sup> and notably “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” (“ICCPR”).<sup>14</sup> Two such standards enshrined in ICCPR Article 14 are the fundamental principle of the presumption of innocence and the fundamental right to have one’s conviction and sentence reviewed by a higher tribunal.<sup>15</sup>

- 25. International standards set out guiding **principles** rather than specific **rules** of procedure. To determine the specific rules which can be followed in consistency with international standards, ECCC chambers need to refer to domestic practice and rules of other international(ised) tribunals for guidance.<sup>16</sup>
- 26. It is worth noting in this regard that criminal procedure is not a subject matter of international law; rather, it is a matter essentially derived from domestic law. There are no international treaties on this subject. Nor is there customary international law established in this regard: in terms of criminal procedure, domestic courts apply domestic law, which does not constitute state practice or reflect *opinio juris*.
- 27. As rightly held by the International Court of Justice (“ICJ”) in the *Barcelona Traction* Case, whenever legal issues arise on the international plane over which the international law has not established its own rules, it has to refer to domestic law, *i.e.*, rules generally accepted by the relevant domestic legal systems.<sup>17</sup>
- 28. Similarly, in the *Furundžija* Case, the ICTY Trial Chamber looked into national laws for guidance when international law did not have an accurate definition of rape which could satisfy the criminal law principle of specificity.<sup>18</sup> In this context, the ICTY Trial Chamber held that “[w]henever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified”.<sup>19</sup> The same rationale applies to specific rules and notions of criminal procedure.

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<sup>13</sup> UN Doc. A/53/850, S/1999/231, 16 Mar 1999, Annex, ‘Report of the Group of Experts for Cambodia Established pursuant to General Assembly Resolution 52/135’, 18 Feb 1999 (**Attachment 2**), para. 129.

<sup>14</sup> ECCC Law, Art. 33 *new*.

<sup>15</sup> ICCPR, Arts 14(2) and (5).

<sup>16</sup> For instance, when determining the applicable rules for unconditional release, this Chamber conducted an extensive survey of both the practice of various domestic jurisdictions and the rules and practice at other international(ised) tribunals: *see, E138/1/10/1/5/7*, Decision on Appeal against Release of Ieng Thirith.

<sup>17</sup> *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ, ‘Judgement’, 5 Feb 1970 (**Attachment 3**), paras 38 and 50.

<sup>18</sup> *Prosecutor v. Furundžija*, IT-95-17/1-T, ‘Judgement’, 10 Dec 1998 (“*Furundžija* Trial Judgement”), para. 117.

<sup>19</sup> *Furundžija* Trial Judgement, para. 178.

**B. ALTHOUGH NATIONAL LAW OF STATES IS NOT UNIFORM, THE EXISTING ECCC RULES ARE CONSISTENT WITH THE NATIONAL LAW OF STATES FROM SIMILAR LEGAL SYSTEMS**

29. In this context, the Defence conducted a survey of procedural rules and practices in domestic jurisdictions regarding the impact of the death of the appellant prior the rendering of the appeal judgement. Considering the limited time available to the Defence, this survey is by no means comprehensive but is instead meant to provide a fair representation of the main legal systems in place across the world. As will be set out immediately below, the survey shows that:
- (a) First, in principle, the untimely death of the appellant extinguishes the proceedings. In some jurisdictions, termination is the only option. In other jurisdictions, in addition to termination, the courts have the alternative option to continue the proceedings following the death of the appellant in special circumstances.
  - (b) Second, in those jurisdictions which acknowledge the presumption of innocence at the appeal stage until the rendering of the appeal judgement, the termination of the appellate proceedings has the effect of vacating the first-instance judgement.
30. The survey shows that termination of proceedings in the event of the untimely death of the appellant is an option common in all the studied jurisdictions. In some of the jurisdictions, termination is the only option, *e.g.*, France,<sup>20</sup> Belgium,<sup>21</sup> Germany,<sup>22</sup> Bosnia Herzegovina,<sup>23</sup> Australia,<sup>24</sup> and most of the United States' jurisdictions.<sup>25</sup>

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<sup>20</sup> France, *Code de procédure pénale*, Art. 6 [unofficial translation]: “an accused’s death extinguishes the criminal action against him. Further, as an appealed decision is not definitive, any of the causes of extinction of the criminal proceedings listed in Art. 6 vacates the first instance judgement” (**Attachment 4**). See also *Cour de Cassation, Chambre criminelle*, France, No 88-81.542 (8 Apr 1991) (**Attachment 5**).

<sup>21</sup> Belgium, *Code d’Instruction Criminelle*, Art. 20 [unofficial translation]: “death extinguishes criminal actions against the deceased. When an appellant dies pending the outcome of the appeal, the appealed judgement does not produce its effects as no *res judicata* is attached to it” (**Attachment 6**). See also *Cour de Cassation*, Belgium, P951155N (17 Oct 1995) (**Attachment 7**).

<sup>22</sup> Germany, *Code of Criminal Procedure (StPO)*, Art. 206(a) [official translation]: “death is a procedural impediment to criminal proceedings and a formal decision of closure of proceedings needs to be issued” (**Attachment 8**). See also *Decision to Terminate the Appeal Proceedings Pursuant to Art.206(a) StPO following Jonh Damanjuk’s Death*, Germany, Munich Regional Court, LG München II, 1 Ks 115 Js 12496/08 (5 Apr 2012) (**Attachment 9**).

<sup>23</sup> Bosnia and Herzegovina, *Criminal Procedure Code*, Art. 205 [official translation]: the proceedings shall be discontinued in the event of an accused death (**Attachment 10**).

<sup>24</sup> In Australia, criminal proceedings terminate on the death of the defendant, which also means that the right of appeal abates on the death of a convicted person. See *A reference by the Attorney General for the State of New South Wales under s. 77(1)(b) of the Crimes (Appeal and Review) Act 2001 re the conviction of Frederick*

31. In other surveyed jurisdictions, the courts have the alternative of continuing the proceedings following the appellant's death in specific circumstances, namely the United Kingdom,<sup>26</sup> Singapore,<sup>27</sup> some states of the United States,<sup>28</sup> Canada,<sup>29</sup> China

*Lincoln McDermott*, Australia, New South Wales Court of Criminal Appeal, [2013] NSWCCA 102 (6 May 2013) (**Attachment 11**).

<sup>25</sup> In the United States, most courts, including nearly all federal courts, follow the doctrine of abatement *ab initio* of the conviction, which erases all evidence that the conviction ever existed. Some jurisdictions apply looser forms of abatement *ab initio* where only the conviction is abated but the restitution order is not. See Sabrina M. Bierer, *The Importance of Being Earned: How Abatement After Death Collaterally Harms Insurers, Families, and Society at Large*, 78 Brook. L. Rev. (2013) ("Bierer, The Importance of Being Earned"), pp 1739-1740; and Timothy A. Razell, *Dying To Get Away With It: How the Abatement Doctrine Thwarts Justice – And What Should Be Done Instead*, 75 Fordham L. Rev. 2193 (2007), p. 2208. (**Attachments 12, 13**).

<sup>26</sup> England and Wales, *Criminal Appeal Act* 1968, Section 44A(1): "[w]here a person has died, (a) any relevant appeal which might have been begun by him had he remained alive may be begun by a person approved by the Court of Appeal; and (b) where any relevant appeal was begun by him while he was alive or is begun in relation to his case by someone approved by the Court of Appeal or by a reference by the Criminal Cases Review Commission, any further step which might have been taken by him in connection with the appeal if he were alive may be taken by a person so approved" (**Attachment 14**).

<sup>27</sup> Singapore, *Criminal Procedure Code*, Art. 393: "where a person has died (a) any relevant appeal which might have been begun by him if he were alive may be begun by a person approved by the High Court; and (b) where any relevant appeal was begun by him while he was alive or is begun in relation to his case under paragraph (a), any further step which might have been taken by him in connection with the appeal if he were alive may be taken by a person so approved" (**Attachment 15**).

<sup>28</sup> Rule 43 (Substitution of Parties) of the US *Federal Rules of Appellate Procedure* 2016 allows the substitution of the deceased appellant during appeal (**Attachment 16**). This rule has been used in criminal proceedings. See, e.g., *State v. Webb*, United States, Supreme Court of Washington, 219 P.3d 695 (29 Oct 2009) ("US, *State v. Webb*") (**Attachment 17**); *State v. McGettrick*, United States, Supreme Court of Ohio, 31 Ohio St. 3d 138 (24 Jun 1987): "[i]t is in the interest of the defendant, the defendant's estate and society that any challenge initiated by a defendant to the regularity of a criminal proceeding be fully reviewed and decided by the appellate process [footnote omitted]. App. R. 29(A) provides a means by which such interests may be protected. App. R. 29(A) initially provides in part: 'If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative, or by any party, with the clerk of the court of appeals.' (Emphasis added.) [...] Accordingly, we construe this part of App. R. 29(A) as providing that when a criminal defendant-appellant dies while his appeal is pending and, subsequently, within a reasonable time, a personal representative of the decedent is appointed, that representative may be substituted as a party on motion by the decedent's representative or the state under the then existing style of the case and the court of appeals shall proceed to determine the appeal." (**Attachment 18**); *State v. Makaila*, United States, Supreme Court of Hawaii, 897 P.2d 967 (14 Jun 1995) (**Attachment 19**); *State v. McDonald*, United States, Supreme Court of Wisconsin, 144 Wis. 2d 531 (16 Jun 1988) (**Attachment 20**), where the Supreme Court of Wisconsin ruled that "a defendant has a constitutional as well as a statutory right to an appeal [which] is an integral part of a defendant's right to a final determination of the merits of the case. It serves as a safeguard to protect a defendant against errors in the criminal proceedings. A defendant who dies pending appeal, irrespective of the cause of death, is no less entitled to those safeguards. Moreover, because collateral proceedings may be affected by criminal proceedings in which it is alleged that an individual took the life of another, it is in the interest of society to have a complete review of the merits of the criminal proceedings." As a consequence, it considered that a defendant who has "properly initiated the appellate process prior to his death [...] is entitled to a final determination of his appeal". See also Bierer, *The Importance of Being Earned*.

<sup>29</sup> In principle, criminal proceedings terminate on the death of an accused or appellant. However, if a convicted person lodges a notice of appeal prior to their death, judges have the discretion to determine whether or not to proceed. There are two steps to be taken for continuing criminal appeals after an appellant has died: 1) someone must step into the shoes of an appellant by making an application under section 73(1) of the Canadian Supreme Court Act; and 2) the continuation of the appeal must be in the interests of justice. Both limbs must be satisfied if proceedings are to continue on appeal (**Attachment 21**). See *R. v. Jetté*, Canada, Quebec Court of Appeal, [1999] RJQ 2603 (18 Oct 1999) (**Attachment 22**); and *R. v. Smith*, Canada, Supreme Court of Canada, [2004] 1 SCR 385 (4 Mar 2004) ("Canada, *R. v. Smith*", **Attachment 23**).

(Hong Kong),<sup>30</sup> China (mainland),<sup>31</sup> Italy,<sup>32</sup> Azerbaijan,<sup>33</sup> Russia,<sup>34</sup> Sweden,<sup>35</sup> and Switzerland.<sup>36</sup>

32. It is also evident that in the jurisdictions which recognise the presumption of innocence on appeal, the legal effect of termination is always the vacating of the trial judgement, with the deceased appellant remaining presumed innocent.<sup>37</sup>

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<sup>30</sup> In Hong Kong, when an appeal is registered to the Court of Final Appeal during an appellant's lifetime, it lies within the Court's discretion to allow the appeal proceedings to continue notwithstanding the appellant's death through substitution, and it may posthumously overturn a conviction. See *HKSAR v. Cheng Chee-Tock Theodore*, China, Court of Final Appeal of the Hong Kong Special Administrative Region, FACC No. 7/2014 (25 Jun 2015) ("Hong Kong, *HKSAR v. Cheng Chee-Tock Theodore*"), para. 31 (**Attachment 24**).

<sup>31</sup> Article 16(5) of the Chinese Criminal Procedural Law provides that death extinguishes criminal proceedings **against** the deceased. However, article 297 provides that if there is any evidence proving the deceased's innocence, the people's court can conduct a trial *in absentia* (**Attachment 25**). Further, article 241(9) of the Interpretation of the Supreme People's Court Concerning the Implementation of the Criminal Procedure Law provides that [official translation]: "for publicly prosecuted case at the first instance trial", if the defendant is deceased, the court shall render a decision to terminate the adjudication. However, "if the court is confident that the defendant is not guilty based on the ascertained facts and admitted evidence, [it] shall render a judgment and announce the defendant is not guilty" (**Attachment 26**).

<sup>32</sup> Italy, *Criminal Procedure Code*, Art. 69(1) [unofficial translation]: "If the accused person dies, at any stage and instance of the proceedings after the initiation of criminal prosecution, the court, after hearing the Public Prosecutor and the lawyer, shall deliver a judgment under Article 129". Art. 129(2): "The court shall deliver a judgment of either acquittal or no grounds to proceed with the prescribed formula if there is a cause of extinguishment of the offence but it is clearly proven that the criminal act did not occur or the accused did not commit it or the act does not constitute an offence or it is not deemed an offence by law" (**Attachment 27**).

<sup>33</sup> Azerbaijan, *Criminal Procedure Code*, Art. 39.1.5 [official/unofficial translation]: "A criminal prosecution may not start or shall be discontinued (and the criminal case may not be begun or proceedings in the criminal case shall be discontinued) in the following circumstances: [...] 39.1.5. if the person dies after committing the act provided for in criminal law (excluding the circumstances in which it is necessary to acquit the person)" (**Attachment 28**).

<sup>34</sup> Russia, *Criminal Procedural Code*, Art. 24(1)(4) [official/unofficial translation]: "A criminal case cannot be instituted, and or instituted criminal case shall be subject to termination on the following grounds: [...] death of the suspect or of the accused, with the exception of cases when the proceedings on the criminal case are necessary for the rehabilitation of the deceased". Art. 5(34): "rehabilitation - the procedure for the reinstatement of the person, who has been unlawfully or groundlessly subjected to the criminal prosecution, in his rights and freedoms, and for the compensation of the harm done to him" (**Attachment 29**).

<sup>35</sup> Sweden, *Code of Judicial Procedure*, Chapter 21, Section 1 [official/unofficial translation]: "The surviving spouse, direct heir, father, mother, or sibling of a suspect who has died may appeal from a judgment to the extent that the judgment declares that the suspect committed the act" (**Attachment 30**).

<sup>36</sup> Switzerland, *Criminal Procedure Code*, Art. 382(3) [official/unofficial translation]: "In the event of the death of the accused, the person convicted or a private claimant the next-of-kin in terms of Article 110 paragraph 1 SCC158 and in accordance with their ranking under the law of succession may seek an appellate remedy or continue the appellate proceedings provided their legitimate interests are affected" (**Attachment 31**).

<sup>37</sup> In France, the presumption of innocence applies throughout the criminal proceedings, including on appeal. See France, *Code de procédure pénale*, Preliminary Art. (III) and Art. 327(4). In many other countries, both from civil law and common law systems, the presumption of innocence applies during the appeal proceedings. E.g. Italy, *Code of Criminal Procedure*, Art. 648 [official translation]: "judgements are final when all recourses have expired and when the time limit to appeal has expired"; Constitution of the Italian Republic, Art. 27(2) [official translation]: "the accused is not considered guilty until the judgement is final" (**Attachment 32**); Bosnia and Herzegovina, *Criminal Procedure Code*, Art. 3 [unofficial translation]: a person shall be considered innocent "until guilt has been established by a final verdict"; and Art. 178 (1) [unofficial translation]: "a verdict becomes final when it may no longer be contested by appeal or when no appeal is admissible".

33. In sum, despite the lack of uniform rules, it can be concluded from the Defence's survey that termination of proceedings is one of the options available to a court when the appellant dies during appeal. In some jurisdictions, termination is the only option, while in other jurisdictions, a court has an alternative of continuing the appellate proceedings on an exceptional basis. In any event, in those jurisdictions which recognise a continuing presumption of innocence on appeal, the effect of the termination of proceedings necessarily includes the vacating of the trial judgement.
34. The existing ECCC rules, as interpreted in Section II above, indicate that: (a) the ECCC recognises presumption of innocence on appeal; and (b) the untimely death of the appellant on appeal is a reason to terminate the criminal proceedings, leading to the vacating of the trial judgement. This is fully consistent with international standards and the procedural rules established at the international level (as reflected partly in the survey of various domestic jurisdictions).

#### **C. THE RULES ESTABLISHED AT THE ICTY (IN THE *DELIĆ* CASE) PROVIDE NO VALID GUIDANCE FOR THE ECCC**

35. The ICTY was the first international(ised) tribunal which had to deal with the situation where the appellant died before the appeal judgement was delivered. This occurred when the appellant Rasim Delić passed away on appeal in 2010. The Appeals Chamber dismissed the consistent position shared by both Delić's defence counsel<sup>38</sup> and the prosecutor<sup>39</sup> to continue the appellate proceedings after Delić's death.<sup>40</sup> The Appeals Chamber decided to terminate the appellate proceedings with regard to Delić and declared that the trial judgement against Delić shall be considered final.<sup>41</sup>
36. As will be demonstrated below, the rules established by the ICTY Appeals Chamber in the *Delić* Case are both legally incorrect and, in any event, inapplicable to the ECCC.

##### **1. The ICTY Appeals Chamber Erred in Law in Finding that Presumption of Innocence did not Apply on Appeal at the ICTY**

37. The Appeals Chamber's holdings that the appellate proceedings must absolutely be terminated after the death of the appellant and that the termination would render the

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<sup>38</sup> *Prosecutor v. Delić*, IT-04-83-A, 'Formal Notification of Death and Motion for Continuation of the Appeal Proceedings', 21 Apr 2010, para. 7.

<sup>39</sup> *Prosecutor v. Delić*, IT-04-83-A, 'Response to Motion for Continuation of the Appeal Proceedings', 28 Apr 2010, para. 16.

<sup>40</sup> *Delić* Decision on the Outcome of Proceedings.

<sup>41</sup> *Delić* Decision on the Outcome of Proceedings, para. 16.

trial judgement final were both erroneous. For the purpose of this Section, the Defence will only discuss the latter. The former error will be discussed in Part 4 Section IV-B.

38. The Appeals Chamber's determination that the trial judgement shall become final after the termination of the appellate proceedings following the appellant's death was essentially based its holding that at the ICTY, "the presumption of innocence d[id] not apply to persons convicted by Trial Chambers pending the resolution of their appeals".<sup>42</sup>
39. This interpretation finds no support in the ICTY Statute or Rules of Procedure and Evidence. It also breached the basic rules of interpretation, namely the principle of effectiveness. As rightly held by the European Court of Human Rights ("ECtHR"):

The Court also reiterates that the Convention **must be interpreted in such a way as to guarantee rights which are practical and effective** as opposed to theoretical and illusory [...] Accordingly, and in the light of the foregoing, it considers that the **presumption of innocence cannot cease to apply in appeal proceedings simply because the accused was convicted at first instance. To conclude otherwise would contradict the role of appeal proceedings**, where the appellate court is required to re-examine the earlier decision submitted to it as to the facts and the law. It would mean that the presumption of innocence would not be applicable in proceedings brought in order to obtain a review of the case and have the earlier conviction set aside.<sup>43</sup>

40. In an attempt to justify its interpretation that presumption of innocence does not apply to convicted persons on appeal, the ICTY Appeals Chamber held that this interpretation is consistent with the standard of applicable review "whereby the appealing party has the burden of showing an error of law or of fact [...], rather than attempting to initiate a trial *de novo*."<sup>44</sup>
41. This holding further contained a twofold error. First, the appellant does not have the "burden" of proving an error at the ICTY. It had been well established that "**even if the party's arguments are insufficient** to support the contention of an error, the Appeals Chamber may still conclude for other reasons that there is an error of law."<sup>45</sup>

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<sup>42</sup> *Delić Decision on the Outcome of Proceedings*, para. 14.

<sup>43</sup> *Konstas v. Greece*, ECtHR, App. No. 53466/07, 'Judgment (Extracts)', 24 May 2011 (**Attachment 33**), para. 36 (emphasis added).

<sup>44</sup> *Delić Decision on the Outcome of Proceedings*, para. 14.

<sup>45</sup> *Prosecutor v. Krajišnik*, IT-00-39-A, 'Judgement', 17 Mar 2009 ("*Krajišnik Appeal Judgement*"), para. 12 (emphasis added).

42. Second, not conducting a *de novo* trial does not mean the Appeals Chamber could not make findings of fact applying the same standard of proof as would a trial chamber of first instance. It had been the ICTY's jurisprudence that:

[...] the Appeals Chamber not only corrects the legal error, but, when necessary, applies the correct legal standard to the evidence contained in the trial record and **determines whether it is itself convinced beyond reasonable doubt as to the factual finding** challenged by an appellant before the finding is confirmed on appeal. The Appeals Chamber will not review the entire trial record *de novo*.<sup>46</sup>

43. Based on the foregoing, the ICTY Appeals Chamber erred in its holding that the presumption of innocence ceases to apply to the appellant after a conviction at trial.

## **2. In Any Event, the *Delić* Decision is Inapplicable to the ECCC**

44. The correctness of the *Delić* decision aside, the rule established in this decision that the trial judgement becomes final after the appellate proceedings are terminated following the death of the appellant is inapplicable to the ECCC.

45. In contrast to the ICTY Statute which gives no indication as to whether the presumption of innocence applies on appeal, the ECCC legal documents, as previously illustrated, clearly show that it does. A systematic read of Articles 35 *new*, 36 *new*, and 37 *new* of the ECCC Law as well as Internal Rule 111(6) leads to the conclusion that presumption of innocence applies on appeal and that once appealed, the trial judgement only becomes final when the appeal is rejected on merits.

46. Therefore, the *Delić* rule which is based on the premise that presumption of innocence does not apply on appeal is inapplicable to the ECCC. At the ECCC, the presumption of innocence continues to apply on appeal pending a final judgement from the Supreme Court Chamber.

47. In conclusion, based on the Internal Rules and the CPC, the death of the appellant is a reason to terminate the appellate proceedings, in which case the trial judgement against the deceased appellant is vacated. This interpretation of the existing rule is consistent with international standards, in particular, the principle of presumption of innocence.

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<sup>46</sup> *Krajišnik* Appeal Judgement, para. 13.

**IV. IN THE INTERESTS OF JUSTICE, THIS CHAMBER SHOULD HAVE AN ALTERNATIVE OPTION TO CONTINUE THE APPEAL PROCEEDINGS DESPITE THE DEATH OF THE APPELLANT**

- 48. As mentioned above, in addition to termination of the appellate proceedings, many domestic jurisdictions envisage an alternative option of continuation of the appellate proceedings after the appellant's death. The Internal Rules and the CPC are silent on such an alternative.
- 49. The Defence will demonstrate in this section that: (a) having such an alternative is consistent with international standards (in particular, the interests of justice), as reflected partly in the laws of domestic jurisdictions (Sections IV-A and IV-C); (b) the absolute rule of termination established in the *Delić* Case was both based on erroneous legal premises and inapplicable to the ECCC (Section IV-B); and (c) this Chamber has the power to either develop the rules or to request that the rules be amended to introduce such an alternative, which would not create conflicts with existing rules (Section IV-D and Section IV-E).

**A. NATIONAL LAW OF SOME STATES PROVIDE LEGAL BASES FOR EXCEPTIONAL CONTINUATION OF APPEAL PROCEEDINGS AFTER THE DEATH OF THE APPELLANT**

- 50. As demonstrated above in Section III-B, many domestic jurisdictions recognise the need to have, in addition to termination of proceedings, an alternative of continuing the appellate proceedings after the appellant's untimely death.
- 51. Among these jurisdictions, some allow close relatives of a deceased appellant or deceased convicted person to appeal or continue the appeal against a conviction on behalf of the deceased;<sup>47</sup> some allow appellate proceedings to continue through substitution of the deceased appellant, either by their relatives or other approved persons;<sup>48</sup> and some demand that appellate proceedings continue when there is evidence that the deceased appellant is not guilty.<sup>49</sup>

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<sup>47</sup> Sweden, *Code of Judicial Procedure*, Chapter 21, Section 1; Switzerland, *Criminal Procedure Code*, Art. 382(3).

<sup>48</sup> England and Wales, *Criminal Appeal Act* 1968, Section 44A; Singapore, *Criminal Procedure Code*, Art. 393; United States, *Federal Rules of Appellate Procedure* 2016, Rule 43; US, *State v. Webb*; Canada, *R. v. Smith*, para. 10; Hong Kong, *HKSAR v. Cheng Chee-Tock Theodore*, paras 31-34, 39-42.

<sup>49</sup> Italy, *Criminal Procedure Code*, Arts. 69(1) and 129(2); Azerbaijan, *Criminal Procedure Code*, Art. 39.1.5; Russia, *Criminal Procedural Code*, Arts 24(1)(4) and 5(34); China (Mainland), *Criminal Procedure Code* 2018, Art. 297(1) [official/unofficial translation]: "When the accused dies, the People's court shall decide to terminate

52. Despite the variation in details, certain common rationale can be deduced from these domestic laws. For instance, the need to clear the name of a wrongly convicted person persists in spite of that person's death, and the interests of justice require that a wrongful conviction be corrected regardless of whether the person is alive. This is implied in those jurisdictions where the appellate court is required to continue the appellate proceedings when evidence suggests that the convicted is not guilty. Indeed, the Lord Chief Justice of England held in *R v. Whelan* that to clear the name of a deceased relative who was wrongfully convicted was a legitimate objective, and that:

If we were to be persuaded that this conviction was in truth unsafe, then we would in our judgment owe a duty to the cause of truth and justice so to rule. That duty is unaffected by the death of the deceased in a case such as this where only the intervention of death has prevented the defendant himself from pursuing his appeal.<sup>50</sup>

- 53. In line with this, the Supreme Court of Canada held in *R v. Smith* that it is clearly in the interests of justice to continue the appeal after the appellant's death when the grounds of appeal are serious and overwhelming, with evidence suggesting the factual innocence of the appellant. The opportunity to clear the name of the deceased appellant was also considered by the Court to be of major significance to their family.<sup>51</sup>
- 54. The Supreme Court of Washington in the United States similarly reiterated in *State v. Webb* that a termination of appeal leaving the conviction intact would effectively preclude the convicted person from exercising their constitutional right to appeal his or her conviction. This is a violation of that person's fundamental rights, even when that person is deceased.<sup>52</sup>
- 55. Additional rationale for the exceptional continuation of appellate proceedings in the interests of justice after the appellant's death include the need to address legal issues of general public importance, or systematic issues related to the administration of justice. These issues are of great public interest and therefore transcend the death of the appellant.<sup>53</sup>

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the proceedings; however, if the evidence shows that the accused is not guilty, and the People's court is satisfied that the accused is not guilty through a trial *in absentia*, it shall enter a judgement accordingly."

<sup>50</sup> *R. v. Whelan*, England and Wales, Court of Appeal (Criminal Division), [1997] Crim. L.R. 659 (**Attachment 34**).

<sup>51</sup> Canada, *R. v. Smith*, paras 46-47.

<sup>52</sup> US, *State v. Webb*, paras 15-16.

<sup>53</sup> See, e.g., Canada, *R. v. Smith*, para. 50; Hong Kong, *HKSAR v. Cheng Chee-Tock Theodore*, paras 32-33.

56. In sum, the brief survey of domestic jurisdictions set out above demonstrates that the interests of justice, in their various forms, demand that an alternative to the termination of appellate proceedings be available, so that appellate proceedings can continue after the death of the appellant on an exceptional basis to strike a balance between all interests at stake.

**B. THE ABSOLUTE RULE OF TERMINATION ESTABLISHED AT THE ICTY IN THE *DELIĆ* CASE PROVIDE NO VALID GUIDANCE FOR THE ECCC**

57. As stated above in Section III-C, the ICTY was the first international(ised) tribunal which had to deal with the situation where the appellant died before the appeal judgement was delivered. On that occasion, the ICTY Appeals Chamber decided, against the shared position of both the prosecution and the defence (which both requested to continue), to terminate the appellate proceedings with regard to Delić, and declared that the trial judgement against Delić was final.<sup>54</sup>
58. As will be demonstrated immediately below, the rule of an absolute termination of proceedings after the death of the appellant, as established by the ICTY Appeals Chamber in the *Delić* Case, was both legally incorrect and, in any event, inapplicable to the ECCC.

**1. The Appeals Chamber’s Interpretation of Personal Jurisdiction was Erroneous**

59. The ICTY Appeals Chamber determined that it had no choice but to terminate the appellate proceedings because the tribunal lacked jurisdiction *ratione personae* (personal jurisdiction) upon the death of the appellant.<sup>55</sup> However, the Appeals Chamber erred in reaching that interpretation.
60. The Appeals Chamber found that the ICTY’s personal jurisdiction was limited to **living** persons because Article 6 of ICTY Statute stipulated that the tribunal’s personal jurisdiction was over “natural persons”.<sup>56</sup> However, *travaux préparatoires* (preparatory works) leading up to the final Statute unequivocally show that the term “natural

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<sup>54</sup> *Delić* Decision on the Outcome of Proceedings, para. 16.

<sup>55</sup> *Delić* Decision on the Outcome of Proceedings, para. 8.

<sup>56</sup> *Delić* Decision on the Outcome of Proceedings, para. 6.

“person” was not used to limit the jurisdiction to living persons, but to exclude the jurisdiction over *juridical persons* such as associations or organisations.<sup>57</sup>

61. Not only was the Appeals Chamber’s interpretation of the meaning of “natural person” in Article 6 of the ICTY Statute entirely erroneous based on the *travaux préparatoires*, such an interpretation of personal jurisdiction also inevitably led to contradictions with domestic practice common to major jurisdictions around the world.
62. For instance, essentially based on its interpretation of personal jurisdiction, the Appeals Chamber later dismissed Delić’s defence counsel’s motion to revise the trial judgement.<sup>58</sup> However, in most domestic jurisdictions, it is legally possible to request for revision of a final judgement even after the death of the convicted person.<sup>59</sup>
63. Therefore, the Appeals Chamber’s holding that it must terminate the appellate proceedings in the *Delić* Case was based on a completely erroneous interpretation of the law and thus provides no valid guidance to the Chamber in this instance.

## **2. The Absolute Rule of Termination in *Delić* is Inapplicable to the ECCC**

64. The correctness of the *Delić* decision aside, it is in any event inapplicable to the ECCC, for the following reasons.
65. Internal Rule 112(1) explicitly provides that the close relatives of the convicted person or other persons who have express written instructions from the convicted person could request this Chamber to revise a final judgement after the death of the convicted person. This shows that the personal jurisdiction of the ECCC is not limited to living persons. Therefore, the *Delić* rule of absolute termination of proceedings after the death of the appellant, which is based on the premise that the ICTY’s personal jurisdiction was over living persons only, cannot apply to the ECCC in any event.
66. Moreover, the *Delić* holdings further provide no valid guidance to the ECCC because they were seemingly based on budgetary considerations. This Chamber, however, has

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<sup>57</sup> UN Doc. S/25704, ‘Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)’, 3 May 1993 (**Attachment 35**), paras 50-52.

<sup>58</sup> *Prosecutor v. Delić*, IT-04-83-R.1, ‘Decision on Defence Motion for Review’, 17 Dec 2013, p. 1.

<sup>59</sup> See, e.g., Cambodia, CPC, Art. 446 (**Attachment 36**); France, *Code de procédure pénale*, Art. 622-2; Germany, *Code of Criminal Procedure (StPO)*, Art. 361; Bosnia and Herzegovina, *Criminal Procedure Code*, Art. 329; Italy, *Criminal Procedure Code*, Art. 632; Azerbaijan, *Criminal Procedure Code*, Art. 464.5; Russia, *Criminal Procedural Code*, Arts 24(1)(4) and 5(34); China (Mainland), *Criminal Procedure Code 2018*, Arts 252 and 297(2); Australia (NSW), *Crimes (Appeal and Review) Act 2001*, ss 77 and 86 (**Attachment 37**).

unequivocally and rightly held that decisions on matters of law and fact shall not be “unduly influenced by financial considerations”.<sup>60</sup> Indeed, after a meticulous analysis of the *Delić* decision, the most recent ECCC International Co-Investigating Judge Michael Bohlander expressed disapproval of the ICTY’s approach in a 2010 journal article, in which he stated that:

This short note will take a look at the approach taken by the ICTY in handling this issue and conclude that, not for the first time, the judges jumped too short in their interpretation of more intricate issues of procedural law and needlessly laid themselves open to yet another challenge that the preoccupation with the completion strategy and the legacy of the ICTY is too large a factor that influences the determination of procedural outcomes in the wind-up stage of the Tribunal.<sup>61</sup>

- 67. As the Chamber will be well aware, during the negotiations of the establishment of the ECCC, the United Nations insisted on having an international(ised) tribunal and emphasised the need to refer to “international standards” of criminal justice (including impartiality and due process of law) throughout the ECCC legal documents; the revision of the ECCC Law was about precisely this. All of these efforts will be in vain if the integrity of the trial of Case 002 is tainted at the very last stage by inappropriate considerations such as the ECCC’s budget and completion plan.
- 68. In sum, the *Delić* rules of absolute termination of the proceedings are inconsistent with international standards and do not provide valid guidance to the ECCC.

**C. IT IS NOT ALWAYS IN THE INTERESTS OF JUSTICE TO TERMINATE THE PROCEEDINGS AFTER THE DEATH OF AN APPELLANT**

- 69. As demonstrated above in Section III, according to the existing rules of procedure at the ECCC, termination of the proceedings and subsequent vacating of the trial judgement is the only option currently available to the Chamber in the event of the appellant’s untimely death. However, as also set out above in Section III-B and Section IV-A, many domestic jurisdictions equally envisage that termination of proceedings is not always in the interests of justice, and that exceptional continuation of the proceedings is a necessary addition or alternative. The circumstances

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<sup>60</sup> E284/4/8, ‘Decision on Immediate Appeals against Trial Chamber’s Second Decision on Severance of Case 002’, 23 Nov 2013 (“Decision on Appeals against Second Case 002 Severance”), para. 75.

<sup>61</sup> Michael Bohlander, *Death of an Appellant – The Termination of the Appellate Proceedings in the Case of Rasim Delić at the ICTY*, 21 Crim. L. Forum 495 (2010), p. 496 (“Bohlander, Termination of Appellate Proceedings in *Delić*”, Attachment 38).

surrounding this Request call for precisely such an introduction of an alternative option to continue the appellate proceedings in the aftermath of Nuon Chea's death.

70. If the Case 002/02 appellate proceedings were to terminate in accordance with the existing ECCC rules, the outcome would amount to a grave infringement of the interests of justice. Indeed, given that the two co-accused are the last representatives of the DK regime, the outcome of this case is of the utmost importance to the Cambodian nation, and more broadly, to the international community, both of which are entitled to be provided with a final judgement at last ascertaining the truth. A final verdict is also of great interest for the civil parties whose right for reparation could be denied if the proceedings stop at this stage. Finally, the completion of Case 002/02 appellate proceedings has always been crucial to Nuon Chea as they represent his last chance to convey the truth to the Cambodian people. Following the existing rules of procedure, all of these varied interests would be sweepingly denied.
71. In addition to the interests of justice concerns common to domestic criminal trials, international criminal trials by nature have their unique features. Beyond the legal aspect, such trials also involve historical, political and moral dimensions, and are commonly meant to support reconciliation within the society. As such, international criminal trials result in a greater public interest in ascertaining the truth and thus may deserve special rules which suit their specificity.
72. This Chamber already acknowledged the specific nature of the trials under its jurisdiction and the correlative necessity to ensure the completion of the proceedings in the interests of justice:

[t]here exists a strong public interest ("countervailing rights and legal interests affected") to prosecute the Accused. This Court's very existence and its perseverance through the negotiation process as an idea and its subsequent operation as an institution are a testament to the great public interest in the prosecution of the persons and crimes within its jurisdiction and to prevent impunity and foster national reconciliation. Given the advanced stage of proceedings, where charges against the Accused have been confirmed by the Pre-Trial Chamber, there is a compelling public interest to prosecute the Accused. Moreover, as the Accused has pleaded not guilty, there is, at least in abstract, legal interest on the part of the Defence based, *inter alia*, in the presumption of innocence, in appealing against the stay of proceedings. There is also an interest on the part of the victims to have the truth ascertained and to pursue their civil claims.<sup>62</sup>

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<sup>62</sup> E138/1/10/1/5/7, Decision on Appeal against Release of Ieng Thirith, para. 28.

73. Case 002/02 covers 22 charges involving five nationwide policies, eight crime sites, and countless alleged events across the entire DK period. Case 002/02 further represents almost five years of proceedings, including 2.5 years of hearings during which 172 witnesses and civil parties were heard and nearly 11,000 pieces of evidence admitted. Stopping the proceedings with the consequence of vacating the trial judgement at this stage, while the appellant has already lodged his detailed notice of appeal, would also be a pitiful waste of resources and effort.
74. Exceptional continuation of the proceedings concerning Nuon Chea following his death is therefore the only way to fully serve the overall interests of justice. It is in the realm of this Chamber to decide on adding this option to the existing ECCC rules, such as it is contemplated by a great number of domestic jurisdictions around the world.

**D. THE ALTERNATIVE OPTION TO CONTINUE APPEAL PROCEEDINGS WOULD NOT CREATE CONFLICTS WITH EXISTING ECCC RULES**

75. As set out above, while the existing rules applicable before the ECCC demand that criminal proceedings *against* the deceased must be terminated, they do not necessarily prevent proceedings *concerning* the deceased.<sup>63</sup> Furthermore, the Internal Rules<sup>64</sup> and Cambodian law<sup>65</sup> both provide specific protections to prevent the Chamber from aggravating the trial judgement or increasing Civil Parties' reparations when only the accused filed an appeal. In such circumstances, the Chamber may only amend the judgement in favour of the accused.
76. On 1 July 2019, Nuon Chea filed his notice of appeal setting out 543 grounds of appeal seeking to overturn the judgement in its entirety.<sup>66</sup> On 21 June 2019, the Co-Prosecutors filed their notice of appeal setting forth a single ground whereby:

the Trial Chamber erred in law and or fact by finding that male victims of forced marriage who were coerced to have sexual intercourse without their free consent were not victims of the crime against humanity of Other Inhumane Acts.<sup>67</sup>

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<sup>63</sup> Judge Bohlander also discussed the distinction between proceedings *against* a person and proceedings *concerning* a person in this regard. See Bohlander, Termination of Appellate Proceedings in *Delić*, p. 500.

<sup>64</sup> Internal Rule 110(3).

<sup>65</sup> CPC, Art. 399.

<sup>66</sup> E465/3/1, ‘Nuon Chea’s Notice of Appeal against the Trial Judgement in Case 002/02’, 1 Jul 2019. This number includes sub-grounds.

<sup>67</sup> E465/2/1, ‘Co-Prosecutors Notice of Appeal of the Trial Judgement in Case 002/02’, 21 Jun 2019.

77. The Co-Prosecutors' appeal is confined to an issue of legal interpretation which does not lead to invalidate the judgement or any parts of it. In that sense, contrary to the appeals lodged by the accused, the Co-Prosecutors' appeal is not an appeal on merits. Thus, following the applicable rules, the Supreme Court Chamber cannot worsen the trial verdict, meaning that the current appellate proceedings can only lead to a decision benefitting Nuon Chea. As such, the ongoing proceedings before the Chamber cannot be regarded as being *against* Nuon Chea. It follows that the rules preventing the continuation of such proceedings in case of untimely death of the appellant prior the rendering of the judgement are therefore inapplicable to the present situation.
78. Furthermore, the concept of successors taking over the action is not innovative before the ECCC. As set out above,<sup>68</sup> the Internal Rules do contemplate, under specific circumstances, the possibility for persons designated *pre-mortem* by the accused to continue to act on his behalf following his untimely death.<sup>69</sup> Nuon Chea exercised this right prior to his death and provided the Chamber with a written authorisation designating the Defence and certain of his family members to so act.
79. In sum, the existing rules of procedure applicable to the ECCC do not prevent the continuation of the proceedings *concerning* Nuon Chea following his death and already envisage the concept of successors and designated persons acting on his behalf. Based on the foregoing, opening the option of continuation under this contained circumstance, *i.e.*, when the outcome of the proceedings can only benefit Nuon Chea, would not lead to any contradiction with the existing rules of procedure.

**E. THE CHAMBER HAS THE POWER TO DEVELOP THE RULES OF PROCEDURE AND/OR THE PLENARY HAS THE POWER TO AMEND THE INTERNAL RULES**

80. This Chamber has previously acknowledged that Article 12 of the ECCC Agreement empowers ECCC chambers to "innovate" insofar as the content of the ECCC's rules of procedure are concerned.<sup>70</sup> This position is also implicit in the Chamber's previous position, for example, that although the ECCC rules of procedure were silent on the

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<sup>68</sup> See Part 2, Section IV.

<sup>69</sup> Internal Rule 112(1).

<sup>70</sup> E138/1/10/1/5/7, Decision on Appeal against Release of Ieng Thirith, para. 33.

possibility of withdrawing or judicially terminating charges against an accused, doing so was not necessarily “foreclosed”.<sup>71</sup>

81. Two pathways for judicial innovation in relation to procedure at the ECCC are implicitly provided for in Article 12 of the ECCC Agreement:

- (a) *interpretation* of the rules of procedure “where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law”; and
- (b) *development* of the rules of procedure either:
  - (i) “[w]here Cambodian law does not deal with a particular matter”; or
  - (ii) “where there is a question regarding the consistency of [an existing] rule with international standards”.<sup>72</sup>

82. These judicial powers are the logical corollary of the ECCC possessing, as the Pre-Trial Chamber put it, “a self-contained regime of procedural law related to [its] unique circumstances [...] differ[ing] substantially enough from the normal operation of Cambodian criminal courts to warrant a specialized system”.<sup>73</sup> In other words, the ECCC legal regime may be prone to containing inconsistencies or *lacunae*. It stands to reason that it must accordingly be able to be readily (re)interpreted or developed to ensure its proper functioning.

83. In addition, or in the alternative, in the specific circumstance where Cambodian law is silent on a matter, Internal Rules 2 and 3(2) specifically mandate that “a proposal for amendment of these [Internal Rules] *shall* be submitted to the Rules and Procedure Committee as soon as possible”<sup>74</sup> and then to “the Plenary Session for adoption”. By way of illustration, the Trial Chamber dropped all remaining charges against Nuon Chea and Khieu Samphân after the Internal Rules were amended to provide for this possibility via Internal Rule 89 *quater*.<sup>75</sup> That amendment, in January 2015, occurred six months after this Chamber ordered a temporary stay of proceedings in respect of charges outside of Cases 002/01 and 002/02 and directed the Trial Chamber to dispose

<sup>71</sup> See E284/4/8, Decision on Appeals against Second Case 002 Severance, paras 61-62. See also E301/9/1, ‘Decision on Additional Severance of Case 002 and Scope of Case 002/02’, 4 Apr 2014, para. 45.

<sup>72</sup> See also the Trial Chamber’s reasoning, E138/1/10/1/5/7, Decision on Appeal against Release of Ieng Thirith, para. 33.

<sup>73</sup> D55/1/8, Decision on Appeal against Order Refusing Annulment, para. 14.

<sup>74</sup> Emphasis added.

<sup>75</sup> E439/5, ‘Decision on Reduction of the Scope of Case 002’, 27 Feb 2017.

of those remaining charges accordingly. In so doing, the Chamber chastised the Trial Chamber’s “repeated indecision” as to the remaining charges and relevantly noted that the situation could be resolved, *inter alia*, through:

the use of powers under Article 12 of the ECCC Agreement, and/or the convening of a Plenary meeting in the subject of the Co-Prosecutors’ proposal for amendment of the Internal Rules to allow for the withdrawal or reduction of charges at the ECCC.<sup>76</sup>

84. While the Defence does not have standing to submit such a request for amendment, Internal Rule 3(1) does empower ECCC judges to do so, among other actors.

**V. THIS DECISION MUST BE RENDERED URGENTLY AND THE NUON CHEA DEFENCE TEAM RETAINED AT LEAST UNTIL SUCH TIME**

85. It appears that – despite receiving the Case 002/02 Trial Judgement on 29 March 2019 and being on notice of its forthcoming issuance since the delivery of an oral judgement summary on 16 November 2018 – the Supreme Court Chamber is nevertheless currently facing serious resource issues. The Defence has learned, for example, that two international judges are about to resign from its bench, which appears consistent with the appointment of Ms. Maureen Harding Clark has been appointed as an international judge on 2 August 2019. It also appears that the Chamber may be understaffed, with several staff posts within the Chamber recently advertised and likely in the long process of recruitment. Nevertheless, as the Chamber itself has previously emphasised *vis-à-vis* financial considerations, resource issues must not influence the continuity or pace of the proceedings.<sup>77</sup>
86. This Chamber and others, notably the Trial Chamber, have frequently issued at least dispositive decisions urgently where the circumstances so require it. For instance, this Chamber issued a dispositive decision on the Defence’s pending additional evidence requests in Case 002/01 on 21 October 2015, three weeks before the Case 002/01 appeal hearings were due to take place. It did so partly on the basis that:

it is in the interests of justice to dispose of the pending requests for additional evidence in advance of the scheduled hearing, thereby allowing the parties to prepare

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<sup>76</sup> **E301/9/1/1/3**, ‘Decision on Khieu Samphân’s Immediate Appeal against the Trial Chamber’s Decision on Additional Severance of Case 002 and Scope of Case 002/02’, 29 Jul 2014, paras 88 and 90.

<sup>77</sup> **E284/4/8**, Decision on Appeals against Second Case 002 Severance, para. 75.

their pleadings having a complete and definitive picture of the evidentiary basis on which this Chamber will ground its determination of the appeals.<sup>78</sup>

87. Nuon Chea passed away on 4 August 2019. The circumstances surrounding this Request underscore that it is in the interests of justice for at least a dispositive decision to be rendered in its regard on an urgent basis. Likewise, it is in the interests of justice for the Chamber to issue an interim order prior to any decision on the merits to retain the Nuon Chea Defence Team at least until a reasonable time after a fully reasoned decision is issued in relation to this Request. This, on the one hand, allows the team to continue working on Nuon Chea's appeal brief in the meantime, given that, if granted, one outcome of this Request is that appellate proceedings concerning Nuon Chea would continue after his death. On the other hand, retaining the Nuon Chea Defence Team to a reasonable time after the issuance of a fully reasoned decision on the Request guarantees all parties an opportunity to request for reconsideration of the decision or to respond to such requests.
88. Moreover, retaining the Nuon Chea Defence Team would be the most efficient approach in a circumstance where time is most acutely of the essence. Significant time and focus would be lost if the team were to be dismissed, check out, reappointed, check back in, with several internationally based team members having to be flown in and out of the duty station to complete such steps.

## **PART 5. RELIEF**

89. For the above reasons, the Defence requests:
  - (a) that the Chamber:
    - (i) accept this motion as validly filed and the Chamber properly seized because the Defence has written authorisation from Nuon Chea to act on his behalf; or, alternatively
    - (ii) decide on the subject matter of this Request *proprio motu* in the interests of justice.
  - (b) that the Chamber determine that it would:

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<sup>78</sup> F2/9, 'Decision on Pending Requests for Additional Evidence on Appeal and Related Matters – Disposition', 21 Oct 2015, p. 6.

- (i) either terminate the appellate proceedings concerning Nuon Chea, in which case the trial judgement in Case 002/02 would be vacated in relation to Nuon Chea since Nuon Chea continued to enjoy a presumption of innocence on appeal;
  - (ii) or, alternatively, 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 counsel of his choice.
- (c) that if necessary or desirable, the judges of the Supreme Court Chamber 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 Request.
- (d) that the Chamber:
- (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.

CO-LAWYERS FOR NUON CHEA



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