



**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.ស.ជ/អ.ជ.ត.ក**

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

<b>ឯកសារដើម</b>
<b>ORIGINAL/ORIGINAL</b>
ថ្ងៃ ខែ ឆ្នាំ (Date): 13-Feb-2019, 14:53
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 Phillip RAPOZA**
- Judge YA Narin**

**Date:**

**13 February 2019**

**Language(s):**

**Khmer/English**

**Classification:**

**PUBLIC**

**DECISION ON KHIEU SAMPHÂN’S URGENT APPEAL AGAINST THE SUMMARY OF JUDGEMENT PRONOUNCED ON 16 NOVEMBER 2018**

**Co-Prosecutors**

CHEA Leang  
Nicholas KOUMJIAN

**Co-Lawyers for NUON Chea**

SON Arun  
Victor KOPPE

**Accused**

KHIEU Samphân  
NUON Chea

**Co-Lawyers for KHIEU Samphân**

KONG Sam Onn  
Anta GUISSÉ

**Civil Party Lead Co-Lawyers**

PICH Ang  
Marie GUIRAUD

**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 seized of the “KHIEU Samphân’s Urgent Appeal against the Judgement Pronounced on 16 November 2018”, filed on 19 November 2018 (“Appeal”).<sup>1</sup>

### **I. Procedural Background**

1. On 16 November 2018, the Trial Chamber pronounced a summary of its judgement and findings regarding the culpability and sentences of NUON Chea and KHIEU Samphân in Case 002/02 and informed the parties and general public that full written reasons for its judgement would be notified in due course.<sup>2</sup> The Chamber also stated that “in accordance with Internal Rule 107 (4) and Article 8.5 of the Practice Direction on the Filing of Documents before the ECCC, the time limit for filing a notice of appeal, if any, will commence on the first calendar day following the day of service of the notification of the fully reasoned, written Judgement in Khmer and on of the other official languages of the ECCC as selected by each Party pursuant to Article 2.2 of the Practice Direction.”<sup>3</sup>
2. On 19 November 2018, the Defence for KHIEU Samphân (“Defence”) filed, in French and Khmer, the Appeal, which was notified on 20 November 2018.
3. The Co-Prosecutors filed their Response in English on 30 November 2018 (“Response”),<sup>4</sup> pursuant to the Supreme Court Chamber’s instructions.<sup>5</sup> The Khmer translation of the Response was filed on 4 December 2018 and notified on 19 December 2018.
4. The Defence filed a reply on 15 January 2019 (“Reply”).<sup>6</sup>

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<sup>1</sup> KHIEU Samphân’s Urgent Appeal against the Judgement Pronounced on 16 November 2018, E463/1, 20 November 2018.

<sup>2</sup> Transcript of Hearing on the Substance in Case 002/2, E1/529.1, 16 November 2018.

<sup>3</sup> Trial Chamber, Summary of Judgement in Case 002/02, para. 79

<sup>4</sup> Co-Prosecutors’ Response to KHIEU Samphan’s Appeal against the Judgment Pronounced on 16 November 2018, E463/1/2, 30 November 2018.

<sup>5</sup> Decision on Co-Prosecutors’ Request to File Response in One Language, E463/1/1/1, 30 November 2018. *See also* Co-Prosecutors’ Request to File Their Response to KHIEU Samphan’s Appeal Dated 19 November 2018 in One Language, E463/1/1, 27 November 2018.

<sup>6</sup> KHIEU Samphân’s Reply to the Co-Prosecutors’ Response to KHIEU Samphan’s Appeal against the Judgment Pronounced on 16 November 2018, E463/1/2/1, 15 January 2019.

## II. ADMISSIBILITY

### A. Submissions

5. The Defence submits that the Appeal is admissible under Internal Rule 105(1)(b), under Internal Rules 105(2) and 104(4)(a), or pursuant to the inherent jurisdiction of the Supreme Court Chamber.<sup>7</sup>
6. In the first ground of admissibility, the Defence asserts that the Trial Chamber's pronouncement of a summary of its judgement and findings on 16 November 2018 constituted "the disposition of the Chamber" under Internal Rule 101(1)(b)<sup>8</sup> and *ipso facto* the "Trial Chamber judgement" within the meaning of Internal Rule 105(1). Consequently, the Defence contends, the Appeal should be considered admissible as the Accused is empowered to file "[a]n appeal against the Trial Chamber judgement pursuant to Internal Rule 105(1)(b)."<sup>9</sup> In its second ground of admissibility, however, the Defence concedes that the Trial Chamber's pronouncement of a summary of its judgement and findings "is not *stricto sensu* a judgement within the meaning of the rules governing appeals against a judgement before the ECCC."<sup>10</sup> In its view, the decision delivered on 16 November 2018 should thus at least be deemed as "hav[ing] the effect of terminating the proceedings" and therefore be subject to immediate appeal under Internal Rules 105(2) and 104(4)(a).<sup>11</sup> Finally, should the Appeal not be deemed admissible on either of the cited grounds, the Defence requests the Supreme Court Chamber, in the absence of specific legal provisions governing the situation created by the Trial Chamber, to exercise its inherent jurisdiction and intervene in the interests of justice.<sup>12</sup>
7. The Co-Prosecutors respond that the Appeal is untimely, as the Defence elected not to challenge the scheduling order notifying the decision to pronounce a summary of the judgement with full written reasons to follow.<sup>13</sup> They further aver that the Appeal is not admissible, at this stage of the proceedings, on any of the three proffered grounds.<sup>14</sup>

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<sup>7</sup> Appeal, para. 9.

<sup>8</sup> Appeal, paras 10-12.

<sup>9</sup> Appeal, paras 15-20.

<sup>10</sup> Appeal, paras 21-23.

<sup>11</sup> Appeal, paras 24-27.

<sup>12</sup> Appeal, paras 28-33.

<sup>13</sup> Response, para. 6 referring to Scheduling Order for Pronouncement of the Judgement in Case 002/02, E462, 26 September 2018.

<sup>14</sup> Response, paras 1, 7.

8. First, the Co-Prosecutors assert that the Appeal challenging the Trial Chamber's procedural choice to pronounce a summary of its judgement and findings is premature,<sup>15</sup> contending that under Internal Rule 105(1)(b) challenges to decisions of a procedural nature are admissible only in the course of appealing a final written judgement on the merits, which has not yet issued. Second, recalling the Chamber's limited jurisdiction under Internal Rule 104(4), the Co-Prosecutors submit that the procedural decision to pronounce a summary of its judgement and findings with a fully reasoned, written judgement to follow simply concluded the trial phase but did not have the effect of terminating the proceedings without there being an appealable judgement.<sup>16</sup> Third, the Co-Prosecutors assert that the Defence has not established that the intervention of the Supreme Court Chamber pursuant to its inherent jurisdiction (which is incidental to a matter of which it **is seized**) would be justified where the pronouncement of a summary of judgement and findings is to be followed by a fully reasoned written judgement along with anticipated appellate proceedings, of which the Chamber **is not yet seized**.<sup>17</sup>
9. The Defence reiterates in Reply that the Appeal is admissible under the three grounds raised.<sup>18</sup> With regards to timeliness, the Defence avers that it could not have challenged the scheduling order<sup>19</sup> since no application can be submitted to during deliberations<sup>20</sup> and since the order was not subject to immediate appeal,<sup>21</sup> contrary to the "disposition" delivered by the Trial Chamber on 16 November 2016.<sup>22</sup>

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<sup>15</sup> Response, para. 11.

<sup>16</sup> Response, paras 8-10.

<sup>17</sup> Response, paras 12-13.

<sup>18</sup> Reply, para. 23.

<sup>19</sup> Reply, paras 15-17.

<sup>20</sup> Reply, para. 16 referring to Internal Rule 96(2).

<sup>21</sup> Reply, para. 17 referring to Internal Rule 104(4).

<sup>22</sup> Reply, paras 18-23 referring to Internal Rule 101(1)(b).

## **B. Determination by the Supreme Court Chamber**

### **1. Admissibility Under Internal Rule 105(1)(b)**

10. Concerning the first ground of admissibility, the Supreme Court Chamber recalls that, pursuant to Internal Rule 105(1)(b), the accused may file an “appeal against the Trial Chamber judgment”. In accordance with Internal Rule 107(4), notices of appeal shall be filed “within [30 days] of the date of pronouncement of the judgment or its notification, as appropriate”.
11. The Supreme Court Chamber considers that the procedural challenge raised by the Defence does not constitute an “appeal against the Trial Chamber judgment” in the sense of Internal Rule 105(1)(b). The Chamber notes that the Trial Chamber pronounced a summary of the judgement on 16 November 2018 and made it abundantly clear that “[t]he only authoritative account of the findings is contained in the full written Judgment which will be made available [...] in due course.”<sup>23</sup> The Trial Chamber further clarified that “the time limit for filing a notice of appeal, if any, will commence on the first calendar day following the day of service of the notification of the fully reasoned, written Judgment [...]”<sup>24</sup>
12. In light of the foregoing, the Supreme Court Chamber concludes that the procedural challenge regarding the timing of the pronouncement of the summary of the judgement and findings before notification of the fully reasoned, written judgement is premature and cannot be raised on the basis of Internal Rule 105(1)(b), which applies to appeals against trial judgements on the merits *stricto sensu*.

### **2. Admissibility Under Internal Rules 105(2) and 104(4)(a)**

13. Turning to the second ground of admissibility, the Supreme Court Chamber considers that the Appeal falls beyond the scope of Internal Rule 104(4)(a), which limits immediate appeals to appeals from “decisions which have the effect of terminating the proceedings”.
14. The right of immediate appeal ensures that an avenue for appellate recourse exists where the proceedings are terminated without arriving at a final judgement and therefore without

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<sup>23</sup> Transcript of Hearing on the Substance in Case 002/02, E1/529.1, 16 November 2018, p. 3.

<sup>24</sup> Transcript of Hearing on the Substance in Case 002/02, E1/529.1, 16 November 2018, p. 57.

the opportunity to bring an appeal<sup>25</sup> at the same time as an appeal against the judgement on the merits. In the present case, for the same reasons as above, the Supreme Court Chamber concludes that the pronouncement of the disposition on 16 November 2018 simply concluded the trial phase but did not have with effect of terminating the proceedings, in the sense of Internal Rule 104(4)(a), or to deprive the Accused of his right to have examined the merits of the conviction and sentence.<sup>26</sup> The Trial Chamber made it clear that the fully reasoned, final written judgement would be made available in due course<sup>27</sup> and that its notification would trigger the pertinent time limits for filing notices of appeal.<sup>28</sup>

15. Accordingly, the Supreme Court Chamber concludes that the Defence has not demonstrated any compelling circumstances that would bar the Chamber from issuing a fully reasoned, final written judgement on the merits or otherwise deprive KHIEU Samphân of his right to appeal.

### **3. Admissibility pursuant to the Chamber's Inherent Jurisdiction**

16. Finally, the Supreme Court Chamber is not persuaded by the Defence's argument that it should resort to its inherent jurisdiction to rule on the matter. The Defence has not established that the intervention of the Chamber, pursuant to its inherent jurisdiction incidental to a matter of which it is seized, would be justified in the present circumstances. Where a fully reasoned, final written judgement and any anticipated appellate proceedings are still pending, the Chamber is not yet seized of a matter to which its inherent jurisdiction applies.
17. The Chamber also recalls that its inherent jurisdiction is implicated in circumstances in which there is an imperative need to ensure a good and fair administration of justice, and then only when it is incidental to its primary jurisdiction.<sup>29</sup> The Pre-Trial Chamber, in particular, has used its inherent jurisdiction to review matters relating to upcoming

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<sup>25</sup> Decision on IENG Sary's Appeal Against Trial Chamber's Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, E95/8/1/4, 19 March 2012, para. 9; Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber Decision Concerning the Scope of Case 002/01, E163/5/1/13, 8 February 2013, para. 22.

<sup>26</sup> Appeal, para. 26.

<sup>27</sup> Transcript of Hearing on the Substance in Case 002/02, E1/529.1, 16 November 2018, p. 3.

<sup>28</sup> Transcript of Hearing on the Substance in Case 002/02, E1/529.1, 16 November 2018, p. 57.

<sup>29</sup> See, e.g., Decision on Co-Prosecutors' Request for Clarification, E284/2/1/2, 26 June 2013, para. 12.

appeals, where a statutory appellate right existed and might have become ineffective due to infringement of specific fundamental rights.<sup>30</sup> No such risk exists in the present matter.

18. The Supreme Court Chamber concludes that the Defence has not demonstrated that the pronouncement of the summary of judgement and findings before notification of the fully reasoned, final written judgement deprives KHIEU Samphân of his right to appeal or render it ineffective. The Chamber further concludes that the alleged violation of the Accused's procedural rights<sup>31</sup> remains purely hypothetical and that its intervention is not warranted, at this stage, to safeguard the fairness of the proceedings.

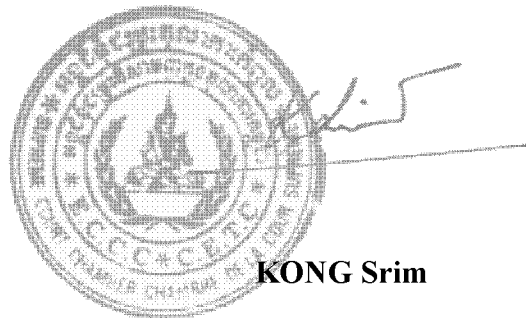
### 19. DISPOSITION

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

**FINDS** that the Appeal is not admissible.

**Phnom Penh, 13 February 2019**

**President of the Supreme Court Chamber**



**KONG Srim**

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<sup>30</sup> See, e.g., Decision on [redacted] Request for the Pre-Trial Chamber to take a Broad Interpretation of the Permissible Scope of Appeals Against the Closing Order & to Clarify the Procedure for Annulling the Closing Order, or Portions Thereof, If Necessary, D158/1, 28 April 2016, para. 12.

<sup>31</sup> Appeal, para. 35.