BEFORE THE SUPREME COURT

OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/SC

Filing Party: KHIEU Samphân

Filed To: Supreme Court

Original Language: French

Date of Document: 19 November 2018

CLASSIFICATION

Classification suggested by the Filing Party: Public

Classification of the Chamber: Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

KHIEU Samphân's Urgent Appeal against the Judgement Pronounced on 16 November 2018

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MAY IT PLEASE THE SUPREME COURT CHAMBER

1. On 26 September 2018, the Trial Chamber (the "Chamber") issued an Order scheduling the pronouncement of the judgement in Case 002/02 on Friday, 16 November 2018. "Pursuant to Internal Rule 98", the Chamber notified the parties and the public that "pursuant to Internal Rule 102(1), it "w[ould] announce a summary of the findings and the disposition of the Judgement [for Case 002/02] concerning the Accused, NUON Chea and KHIEU Samphân." It also stated that "the full written reasons for its Judgement [would] be notified in due course".[1]

2. At a public hearing held on 16 November 2018, the Chamber convicted KHIEU Samphân of genocide (of the Vietnamese), crimes against humanity, grave violations of the Geneva Conventions, and sentenced him to life imprisonment.[2] Again, it stated that the full written Judgement would be made available "in due course".[3]

3. By this Brief, the KHIEU Samphân Defence (the "Defence") is appealing against the Judgement delivered on 16 November 2018, and requests the Supreme Court Chamber (the "Supreme Court") to annul it for procedural defect and lack of reasoning.[4]

4. By failing to provide the full written reasons on 16 November 2018, the Chamber violated the Internal Rules (I), created procedural confusion and legal uncertainty (II), committed an error of law which invalidates its decision (III), and infringed KHIEU Samphân's procedural and fundamental rights, thereby causing him serious prejudice (IV).

I. VIOLATION OF THE INTERNAL RULES

5. It was impermissible for the Chamber to, first, deliver a summary of the reasons and disposition of its Judgement, and then provide the full written reasons at a later date (past that on which the Judgement was announced).

6. Internal Rules 101 and 102 unequivocally provide as follows:

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[1] Scheduling Order for Pronouncement of the Judgement in [Case 002/02], 26 September 2018, **E462**, p. 2.
[2] Transcript of the proceedings of ("T.") of 16 November 2018, around 11.34.48.
[3] T., 16 November 2018, between 09.34.35 and 09.36.02.
[4] For the grounds for this Appeal, see *infra*, Part "II.1. Admissibility of this Appeal", paras 9-35.

Rule 101. Form of the Judgement
(Amended on 17 September 2010)

1. **The judgment shall be divided into two parts**:
   a) **the findings**, setting out the factual and legal reasons supporting the Chamber's decision; and
   b) **the disposition** by the Chamber.
2. Where there is no unanimity, a judge may write a separate or dissenting opinion, in which case, it shall be attached to the judgment.
3. The Chamber shall examine all counts in the Indictment and consider all arguments raised during the trial.
4. The findings in the judgment shall respond to the written submissions filed by all of the parties.
5. The disposition by the Chamber shall set out each crime committed by an Accused, the applicable law, the sentence and any reparations.
6. **The judgment shall be signed by all the judges of Chamber, as well as the Greffier.** A dissenting judge shall, however, only sign his or her dissenting opinion. The judgment shall include:
   a) the date of the hearing(s);
   b) the date of issuance of the judgment;
   c) the full name of the judges who conducted the trial;
   d) the full name of the Co-Prosecutors;
   e) the full name of the Greffiers;
   f) the full name, place of residence, birth date, birthplace, and occupation of the Accused;
   g) the full names of the Civil Parties and, where requested by the Civil Party Lead Co-Lawyers, their place of residence, birth date, birthplace and occupation;
   h) the full names of the lawyers; and
   i) the appellate rights of the parties and the conditions and time limits for appeals.
7. **The original judgment shall be signed**, as set out above, **on the day the judgment is issued, at the latest**. (emphasis added)

Rule 102. Announcement of the Judgment at a Public Hearing
(Amended on 1 February 2008)

1. All judgments shall be issued and announced during a public hearing. A summary of the findings and the disposition shall be read aloud by the President or any other judge of the Chamber. Any dissenting judge may also read aloud a summary of their dissenting opinion. **The Greffier shall provide a copy of the judgment to the parties** and ensure that the judgment is published by the Office of Administration by appropriate means.
2. If the Accused is absent when the judgment is announced, the Accused will be notified through his or her lawyer or through the lawyer appointed by the Chamber. **The period of appeal will start with notification**. (emphasis added)

7. The Chamber was therefore under the obligation to issue its Judgement in writing on the day of its announcement. The Judgement should have been reasoned, and should have been signed by all the judges of the Chamber, as well as the Greffier "at the latest" on 16 November 2018, and a copy of the Judgement should have been provided to the parties and the Judgement should have

been published on 16 November 2016. The Chamber should have prepared and signed its Judgement before announcing it, and not the other way around.

II. PROCEDURAL CONFUSION AND LEGAL UNCERTAINTY

8. The failure to deliver the Judgement in the form prescribed by the Internal Rules creates procedural confusion and legal uncertainty both as to the admissibility of the present appeal (1) and the full written reasons to follow (2).

1. ADMISSIBILITY OF THIS APPEAL

9. The Defence cannot be fully certain about the procedural impact of the decision that the Chamber delivered orally on 16 November 2018. For this reason, it proposes several grounds for admissibility of the present appeal: Internal Rule 105(1)(b) (A), Internal Rules 105(2) and 104(4)(a) (B), or the inherent jurisdiction of the Supreme Court (C).

A. Internal Rule 105(1)(b)

10. The Chamber presents the decision of 16 November 2018 as its Judgement in Case 002/02. In its 26 September 2018 order "scheduling" the "pronouncement of the Judgement" on 16 September 2018, it cites Internal Rules 98 and 102(1) (entitled "The Judgement" and "Announcement of the Judgement", respectively). It stated that it would announce "a summary of the findings and the disposition of the Judgement", which it did on 16 November by pronouncing upon the guilt of the Accused and sentencing them.[5]

11. Given that the Chamber announced the disposition of its Judgement and that it constitutes "the disposition of the Chamber" under Internal Rule 101(1)(b),[6] the Chamber therefore delivered its Judgement in Case 002/02 on 16 November 2018.

12. Under the circumstances, this appeal should be deemed admissible under Internal Rule 105(1)(b), which empowers the Accused to file "an appeal against the Trial Chamber judgement".

13. On 16 November 2018, after announcing the disposition of its Judgement, the Chamber provided a "clarification" concerning the commencement of the time limit for appeal:

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[5] See *supra*, paras 1 and 2.
[6] See *supra*, para. 6.

> The Chamber clarifies 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 one of the other official languages of the ECCC as selected by each Party pursuant to Article 2.2 of the Practice Direction.[7]

14. A careful reading of the Internal Rules (a) and the Practice Direction (b) demonstrates that the "clarification" is entirely inaccurate.

a. <u>Commencement of the time limit for filing an appeal under the Internal Rules</u>

15. The time limit for filing an appeal commences on the day of pronouncement of the judgement. Indeed, pursuant to Internal Rule 107(4), "[n]otice of appeal against a judgment of the Trial Chamber [...] shall be filed within 30 (thirty) days of the date of pronouncement of the judgment or its notification, as appropriate." According to Internal Rule 102(2), the period of appeal starts with notification of the judgement "if the Accused is absent when the judgment is announced".[8] In other words, if the Accused is present when the judgment is announced, the period of appeal commences on the day of its pronouncement.

16. The Cambodian Code of Criminal Procedure is even more explicit regarding the commencement of the period of appeal. According to Article 381, in the case of the prosecutor, the time period for appeal "is calculated from the date the judgement was pronounced". According to Article 382, in the case of the accused, the appeal "shall be made within one month. Where the judgement is non-default, the time period for an appeal shall be calculated from the day the judgement was pronounced. Where the judgement is deemed to be non-default, the time period for an appeal shall be calculated from the day the writ of notification was made regardless of the means." Also, according to the Code, a judgement is non-default "if the accused appears at trial" (Article 360, paragraph 1). A judgement is deemed to be a non-default judgement "if the accused does not appear for trial, but had knowledge of his citation or summons" (Article 361, paragraph 1).

17. In this case, KHIEU Samphân was present when the Judgement was announced on Friday, 16 November 2018, and this Appeal is filed on the Monday thereafter, i.e. 3 (three) days after.

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[7] T., 16 November 2018, around 11.37.57.
[8] See *supra*, para. 6.

b. Commencement of the time limits for appeal under the Practice Direction

18. Article 8.5 of the Practice Direction referred to by the Chamber provides:

> Except as otherwise directed by the Co-Investigating Judges or a Chamber of the ECCC, time limits commence on the first calendar day following the day of service of the Notification of the document in Khmer and one other official language of the ECCC. Exceptionally, the Co-Investigating Judges and a Chamber may decide that the time limits commence on the first calendar day following the day of filing in all three official languages.

19. Therefore, contrary to the Chamber's assertion, the time limit commences on the day of service of the notification of the document in Khmer and in one of the other two official languages of the ECCC, even if it is not the one chosen by the party under Article 2.2 of the Practice Direction. In other words, if the written judgement is issued in Khmer and English on the day of its pronouncement, the time limit commences on the next calendar day, and it is for the Defence, which chose French, to request the Supreme Court to defer the commencement of the time limit for filing its notice of appeal to the day of service of the notification of the Judgement in all three official languages of the ECCC.

20. In this case, that question does not arise since the Chamber did not deliver its Judgement in writing on 16 November 2018, which was when the time limit for filing an appeal commenced.

B. Internal Rules 105(2) and 104(4)(a)

21. In the absence of a written judgement, it is not possible to strictly adhere to the procedure for appealing against a judgement prescribed by the Internal Rules.

22. Pursuant to Internal Rule 108(1), where an appeal is filed against a judgement of the Trial Chamber, "the Greffier of the Trial Chamber shall forward the case file to the Greffier of the [Supreme Court] Chamber together with [a] certified cop[y] of the judgment", which is not feasible in this instance.

23. As such, while the Chamber announced the disposition of its Judgement, and hence its Judgement, the Supreme Court could consider that it is not *stricto sensu* a judgement within the meaning of the rules governing appeals against a judgement before the ECCC.

24. Under the circumstances, the decision delivered on 16 November 2018 should, at the very least, be deemed as "hav[ing] the effect of terminating the proceedings", and thus subject to immediate appeal under Internal Rules 105(2) and 104(4)(a).

25. According to the jurisprudence of the Supreme Court, the right to file an immediate appeal under Internal Rule 104(4)(a) "ensures that an avenue of immediate appeal exists where the proceedings are terminated without arriving at a judgement and therefore without the opportunity to appeal against it".[9]

26. In this case, the Supreme Court could consider that the Chamber's decision concerning the guilt of the Accused and their sentence in Case 002/02 terminated the proceedings without arriving at a judgement that is subject to appeal. Indeed, as discussed *infra*, the right to appeal a judgement entails the right to have examined the merits of the conviction and the sentence. However, KHIEU Samphân cannot exercise that right in this case.[10]

27. Moreover, this appeal concerning the form of the Judgement has been filed within the prescribed time limit for filing an immediate appeal under Internal Rule 104(4)(a), i.e. "within 30 (thirty) days of the date of the decision or its notification", as prescribed by Internal Rule 107(1).

C. Inherent jurisdiction of the Supreme Court

28. Should this appeal be deemed inadmissible pursuant to the provisions cited *supra*, the Supreme Court should exercise its inherent jurisdiction.

29. As the Supreme Court has recalled in reference to a decision of the Special Tribunal for Lebanon (STL), "international or internationalized tribunals have found that, in instances where their statutory provisions do not expressly or by necessary implication contemplate their power to pronounce on a matter, they possess an inherent jurisdiction 'to determine incidental issues which arise as a direct consequence of the procedures of which [they are] seized by reason of the matter falling under [their] primary jurisdiction".[11]

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[9] Decision on KHIEU Samphan's Immediate Appeal Against the Trial Chamber's Decision on Additional Severance of Case 002 and Scope of Case 002/02, 29 July 2014, **E301/9/1/1/3**, para. 17.
[10] See *infra*, Part "III. Error of law invalidating the decision", paras 58-63.
[11] Decision on Co-Prosecutors' Request for Clarification, 26 June 2013, **E284/2/1/2**, para. 12, referring to *El Sayed*, No. CH/AC/2010/02, STL, Decision on Appeal of Pre-Trial Judge's Order regarding Jurisdiction and Standing, 10

30. According to this STL decision, the inherent jurisdiction "is rendered necessary by the imperative need to ensure a good and fair administration of justice, including full respect for human rights".[12] "The practice of international bodies shows that the rule endowing international tribunals with inherent jurisdiction has the general goal of remedying possible gaps in the legal regulation of the proceedings. More specifically, it serves one or more of the following purposes: (i) to ensure the fair administration of justice, (ii) to control the process and the proper conduct of the proceedings (...)".[13]

31. This approach has already been enshrined in the jurisprudence of the ECCC, and in particular that of the Pre-Trial Chamber, for example in regard to staying the enforcement of a decision pending final determination of an appeal, requests for reconsideration or procedural errors committed by the Co-Investigating Judges.[14]

32. In this case, in the absence of specific statutory provisions governing the situation created by the Chamber – one that is not only not contemplated by the Internal Rules but also contrary thereto – as appellate body at the trial stage, the Supreme Court must intervene in the interests of justice.

33. The Supreme Court ought to intervene immediately, to the extent that, as discussed below, the Chamber has committed an error of law which invalidates its decision and violates KHIEU Samphân's rights.

Clarification concerning the form of this appeal

34. The mere fact that the Defence has to engage in speculation in order to exercise this fundamental right of appeal is in itself a breach of fair trial rights. Owing to the uncertainty about the grounds for admissibility of this appeal and the need to address the matter urgently, the Defence has filed this appeal in the form of a brief, having regard to two of the three options available (immediate appeal and inherent jurisdiction).

November 2010. paras 45, 46 and 48.

[12] *El Sayed*, No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order regarding Jurisdiction and Standing, 10 November 2010. para. 45.

[13] *El Sayed*, No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order regarding Jurisdiction and Standing, 10 November 2010. para. 48.

[14] Order Suspending Enforcement of the "Order on International Co-Prosecutor's Public Statement Regarding Case File 003", 13 June 2011, **003-D14/1/2**, and references in footnotes 11 and 12.

35. Should the Supreme Court find this appeal admissible under Internal Rule 105(1)(b), it should, by way of exception, consider it as both a notice of appeal and an appeal brief.[15] The purpose of distinguishing between the two types of filings under this rule is to enable an appellant to put forward the legal grounds and factual basis of his or her appeal. In this case, in the absence of full written reasons for the Judgement, only the issue of compliance with the rules of procedure is addressed.

2. FULL WRITTEN REASONS TO FOLLOW

36. The procedural confusion and legal uncertainty created by the Chamber also concern the full written reasons for the Judgement, which are to be announced "in due course", and ought already to be considered invalid (A). The two-step decision-making process before the ECCC (B) is strictly prohibited in the case of a judgement.

A. The Chamber is *functus officio* and the full written reasons to follow are invalid

37. To the extent that the Chamber delivered the disposition of its Judgement on 16 November 2018, and therefore, its Judgement, it became *functus officio* as concerns Case 002/02 as of that date. By resolving the main matter before it, the Chamber has exhausted its adjudicative authority. The effect of loss of jurisdiction by the judges involved in the judgement is encapsulated in the Latin phrase: *lata sentantia, judex desinit esse judex*, meaning, once a judge has rendered his judgement, he ceases to be a judge. Accordingly, the Chamber is no longer empowered to deliver the full written reasons for the Judgement, and the ongoing drafting thereof is *ultra vires*.

38. The Chamber perhaps thought – but mistakenly – that its course of action was permissible because of the practice of rendering decisions in two steps, which is quite common at the ECCC.

B. The ECCC's two-step decision-making process

39. Each of the ECCC's Chambers has issued the disposition of some of its decisions first (with or without a summary thereof) and then the reasons at a later date.

[15] According to Internal Rule 105(3), "[a] party wishing to appeal a judgment shall file a notice of appeal setting forth the grounds" and "shall subsequently file an appeal brief setting out the arguments and authorities in support of each of the grounds."

40. Only the Supreme Court is expressly empowered to do so when deciding an immediate appeal.[16] In particular, it did so when it ruled on the appeals against the Severance Decision in Case 002/01, on the same day as the conclusion of the substantive hearings.[17] It also did so on other occasions, for example when ruling on objections to lists of documents to be used for questioning witnesses prior to their testimony.[18] Or when ruling on pending requests for admission of additional evidence ahead of pleadings.[19]

41. The Pre-Trial Chamber first issued the disposition of its decisions on the appeals against the Closing Order in Case 002 (confirming the continued detention of the Accused pending their appearance before the Chamber),[20] which then triggered the Chamber's authority to hear the case,[21] and then issued the reasons at a later date.[22]

42. The Chamber has proceeded likewise very (too) many times in the course of the trial in Case 002/02, for example concerning requests for admission of documents relevant to testimony[23] or closed sessions,[24] ahead of testimony.

43. In all of the above instances, the decisions in question had an immediate effect and a direct impact on the proceedings that were ongoing at the time. Moreover, decisions of the Supreme

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[16] Internal Rule 108(4) *bis* (amended for this purpose on 3 August 2011).
[17] Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002 – Summary of Reasons, 23 July 2013, **E284/4/7**; Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, **E284/4/8**.
[18] Decision on Objections to Document Lists – Summary, 1 July 2015, **F26/11**; Decision on Objections to Document Lists – Full Reasons, 31 December 2015, **F26/12**.
[19] Decision on Pending Requests for Additional Evidence and Related Matters – Disposition, 21 October 2015, **F2/9**; Decision on NUON Chea's Request for Reconsideration of the Decision of 21 October 2015 on Requests for Additional Evidence, 11 February 2016, **F2/10/3**, pp. 3-4 (where the Supreme Court announced that it would provide the reasons in its judgement on the pending appeals).
[20] Decision on IENG Sary's Appeal against the Closing Order, 13 January 2011, **D427/1/26**; Decision the IENG Thirith's and NUON Chea's Appeals against the Closing Order, 13 January 2011, **D427/2/12**; Decision on KHIEU Samphan's Appeal against the Closing Order, 13 January 2011, **D427/4/14**.
[21] Order to File Material in Preparation for Trial, 17 January 2011, **E9**, p. 2 and footnote 1; Internal Rule 79(1): "The Trial Chamber shall be seised by an Indictment from the Co-Investigating Judges or the Pre-Trial Chamber".
[22] Decision on KHIEU Samphan's Appeal against the Closing Order, 21 January 2011, **D427/4/15**; Decision on Appeals by NUON Chea and IENG Thirith against the Closing Order, 15 February 2011, **D427/2/15** and **D427/3/15**. Decision on IENG Sary's Appeal against the Closing Order, **D427/1/30**.
[23] Decision on NUON Chea's Request for Admission of Documents Relevant to the Testimony of 2-TCE-95, **E367/7**; Decision on NUON Chea's Rule 87(4) Requests for Admission of 29 Documents Relevant to the Testimony of 2-TCE-95, **E367/8**.
[24] T., 4 January 2016, **E1/376.1**, 13.33-13.36; Ruling on Closed Session for Witnesses 2-TCW-894 and 2-TCW-938, 23 February 2016, **E319/35/5**.

Court and the Pre-Trial Chamber are not subject to appeal.[25] Decisions rendered by the Chamber in the course of the proceedings are not subject to immediate appeal; they may be appealed only at the same time as an appeal against the judgement on the merits.[26] In other words, the decisions in question had an impact on the proceedings without any procedural action to be undertaken being legally dependent on the immediate availability of the reasons.[27]

44. However, in Case 004/01 (IM Cheam), where the Co-Investigating Judges issued the disposition of their Closing Order first, and the reasons at a later date,[28] this concerned the decision terminating a procedural phase (conclusion of the judicial investigation) that was subject to immediate appeal.

45. In that case, the Pre-Trial Chamber held *proprio motu* that delivering reasons at a later date is an approach which "cannot apply to [a] closing order[…]", a "procedural act, which officially concludes the judicial investigation", and recalled that Co-Investigating Judges are immediately *functus officio* with respect to the case after having signed the disposition of their closing order.[29]

46. For some odd reason, the Pre-Trial Chamber did not draw the consequences, and neither did it say anything about the invalidity of the reasons due to the Co-Investigating Judges' lack of jurisdiction. Perhaps the situation would have been otherwise had the case against IM Cheam not been dismissed for lack of personal jurisdiction, and had been sent for trial.

47. Be that as it may, it is strictly forbidden to deliver the full reasons for a judgement subsequently to the announcement of the disposition, and the consequences of that prohibition must be drawn.

C. The two-step decision-making process is strictly forbidden in the case of judgements

48. Like a closing order, a judgement has the effect of terminating a procedural phase (conclusion of the trial phase), and is immediately subject to appeal. Unlike a closing order, a judgement deals

[25] Internal Rules 77(13) and 104(3).
[26] Internal Rule 104(4).
[27] See, for example, Decision **F2/10/3**, p. 3, last Considering.
[28] Closing Order (Disposition), 22 February 2017, **004/1-D308**; Closing Order (Reasons), 10 July 2017, **004/1-D308/3** (the French versions of those documents have not been made public).
[29] Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2017, **004/1-D508/3/1/20**.

with whether or not the accused are guilty of the charges against them, as well as with their sentence, and must be pronounced at a public hearing at the conclusion of a public trial.

49. At the ECCC, the Internal Rules are crystal clear regarding the form of the judgement: it must be signed "at the latest" on the day it is issued at a public hearing, which is when the period of appeal by the Prosecutor and/or the convicted accused, if the latter is present, starts to run.[30]

50. The reason why the Chamber is not afforded any discretion in this regard is because of all the effects attaching to a judgement, a document of a very particular character, notably the fact that it renders the trial judges *functus officio* and immediately triggers the commencement of the appeal period.

51. In this instance, if indeed the Chamber is unaware that drafting the reasons after announcing the judgement is *ultra vires*, how could it, at the very least, have failed to realise the problem posed by the departure of one of its two international judges? Indeed, according to a document from the ECCC Administration, one of the international judges of the Chamber is required to return to his domestic jurisdiction to take up new duties effective 1 December 2018.[31]

52. Unless that means that the Chamber was fully aware that it would become *functus officio* on announcing the judgement while hoping that no one would notice that it no longer had jurisdiction and the invalidity of the written reasons prepared during the appeal period.

53. Whatever the case, the Defence cannot wait for the full written reasons to be delivered before raising the matter. The Internal Rules provide no mechanism for appealing against such a document, even though the appeal period started to run on the day it was delivered.

54. Consequently, given this most confusing situation, it is at least clear that KHIEU Samphân must immediately denounce this error of law which invalidates the Chamber's decision.

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[30] See *supra*, paras 6 and 15-16.
[31] Completion Plan, Revision 18, para. 34 (posted on the ECCC website on 23 October 2018).

III. ERROR OF LAW INVALIDATING THE DECISION

55. As discussed *supra*,[32] according to the law applicable before the ECCC, the judgement announced must be written and reasoned. As the Supreme Court has recalled, failure to fulfil this obligation is a ground for nullity.

56. While considering the legality and effects of an oral decision against which NUON Chea had filed an immediate appeal, the Supreme Court held as follows: "[u]nder the ECCC legal framework the lack of the written form for the decision other than the judgement does not result in nullity". In other words, failure to render a judgement in written form is a ground for nullity.[33]

57. The Supreme Court then recalled that "it is established ECCC practice for decisions open to appeal to be released in written form", especially considering the complexity of issues handled by the ECCC:

> This practice, although not required by law, serves legal certainty and transparency of proceedings as required by Rule 21 and enables an effective review process. Further, as held by the Trial Chamber on a different occasion, all judicial decisions – whether oral or written – must comply with a court's obligation to provide adequate reasons as a corollary of the accused's fundamental fair trial rights. Indeed, the right to receive a reasoned decision forms part of the right to be heard.[34]

58. This obligation in relation to a judgement is clearly and explicitly set out in the Internal Rules in compliance with Article 14(5) of the International Covenant on Civil and Political Rights,[35] which mandates that: "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".

59. This includes the duty "substantially to review conviction and sentence, both as to sufficiency of the evidence and of the law".[36] A review that is "limited to the formal or legal aspects of the conviction[…] means that the guarantees provided for in article 14, paragraph 5, of the Covenant

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[32] See *supra*, "I. Violation of the Internal Rules", paras 5-7.
[33] Decision on NUON Chea's Appeal against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012, **E176/2/1/4**, footnote 78 (at para. 25).
[34] *Ibid.*, para. 25 and footnote 78.
[35] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the ECCC, Article 13(1): "The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process."
[36] *Bandajevsky v. Belarus,* Communication No. 1100/2002, adopted by the Human Rights Committee on 28 March 2006, para. 10.13.

have not been met".[37] "To ensure the effective use of this right, the convicted person is entitled to have access to duly reasoned, written judgments in the trial court."[38]

60. In this case, on 16 November 2018, the Chamber only announced the disposition of its Judgement and read out a summary of the reasons, and did not release the full written reasons. Under the circumstances, it is plain that KHIEU Samphân cannot appeal his conviction and sentence on the merits.

61. Not only does the summary not enable a review as to the sufficiency of the evidence considered and the law applied, and therefore to identify any errors of law and fact, it is not even authoritative.[39]

62. Also, the full written reasons – being the only account of the findings that would be authoritative – that are to be made available "in due course" after the commencement of the time limit for appealing against the judgement, will have no legal basis nor legal value given that the Trial Chamber judges would have since become *functus officio* with respect to Case 002/02. No legal remedy is available in such a circumstance.

63. That means that KHEIU Samphân cannot appeal his conviction and sentence on the merits at this time or at a later stage. By extension, not being able to appeal against the judgement also means not being able to appeal against decisions rendered during the trial as they may be appealed only at the same time as an appeal against the judgement.[40]

64. Accordingly, the error of law committed by the Chamber invalidates its decision, in that it unduly deprives the Defence of its ability to appeal against the Judgement and any decisions that may be appealed at the same time as the appeal against the Judgement.

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[37] *Gómez Vázquez v. Spain,* Communication No. 701/1996, adopted by the Human Rights Committee on 20 June 2000, para. 11.1.
[38] *Van Hulst v. Netherlands,* Communication No. 903/1999, adopted by the Human Rights Committee on 1 November 2004, para. 6.4.
[39] T., 16 November 2018, around 9.35: "The following is a summary of the Trial Chamber's Judgement in Case 002/02. The only authoritative account of the findings is contained in the full written Judgement, which will be made available in Khmer, English, and French in due course". (This quote in English is from the summary posted on the ECCC's website). While announcing the Judgement in Case 002/01, the President of the Chamber had stated: "The only authoritative account of the findings is contained in the full written Judgement which will be made available in Khmer, English, and French immediately after this hearing". T., 7 August 2014, E1/241.1, p. 2, after 09.07.13.
[40] Internal Rule 104(4).

IV. INFRINGEMENT OF KHIEU SAMPHÂN'S RIGHTS AND PREJUDICE CAUSED TO HIM

65. By violating the Internal Rules, the Chamber infringed KHIEU Samphân's procedural rights, his right to transparency of the proceedings, his right to legal certainty, his right to appeal and his right to be heard, and has thereby caused him serious prejudice.

66. On 16 November 2018, KHIEU Samphân was convicted of the most serious crimes in the world, and was sentenced to life imprisonment at a public hearing attended, amongst others, by officials and diplomats (including the UN Under-Secretary General for Legal Affairs and Legal Counsel), before an internationalised Tribunal under the aegis of the UN where all the walkways leading to the courtroom had been given a fresh coat of paint in preparation for the landmark judgement.

67. Given that KHIEU Samphân's conviction was covered both by the international and national media, he was exposed to worldwide opprobrium, as a result of the Judgement pronounced by the Chamber against which he is not even in a position to appeal on the merits.

68. This appeal only concerns the formal aspects of the decision and in no way mitigates the prejudice suffered, given that it does not comply with the safeguards under the International Covenant on Civil and Political Rights and the Internal Rules.

CONCLUSION

69. In view of the prejudice caused, as well as the significance and impact of the issues raised, the Supreme Court must intervene forthwith, if practicable, before notification of the full written reasons.

70. Should the Supreme Court nevertheless decide to validate the Trial Chamber's violation of the Internal Rules and decide not to annul the Judgement delivered on 16 November 2018 as being procedurally defective and for lack of reasoning, it should postpone the commencement of the time limit for appeal against the Judgement on merits. It should, indeed, consider that this appeal concerning the form of the Judgement has been filed as an interim measure, in that it leaves open the possibility of lodging an appeal against the Judgement on the merits when it will be properly reasoned.

71. Should the Supreme Court render such a decision before the notification of the full written reasons (or following notification thereof in two languages), it should defer the start of the period of appeal until notification thereof in the three official languages of the ECCC in order to allow each party to effectively exercise its right of appeal. As a matter of fact, the Chamber was so well aware of the need for each party to receive the judgement in both of its working languages for the appeal that it caused its confusion concerning Article 8.5 of the Practice Direction.[41]

72. Conversely, should the Supreme Court issue such a decision after the notification by the trial judges of the full written reasons in all three official languages of the ECCC, it should defer the commencement of the time limit for appeal until notification of its own decision on this appeal.

73. **FOR THESE REASONS**, the Defence requests the Supreme Court:

- to RULE on this Appeal on an urgent basis,
- to FIND that this Appeal is admissible,
- to ANNUL the Judgement delivered on 16 November 2018,
- to DECLARE that the full written reasons to follow are invalid;

Alternatively,

- to DEFER the commencement of the time limit for appeal until notification of the full written reasons for the Trial Chamber's Judgement in all three official languages of the ECCC, or until notification of its own decision should it be rendered at a later date.

KONG Sam Onn	Phnom Penh	[signed]
Anta GUISSÉ	Phnom Penh	[signed]

[41] See *supra*, paras 13-14 and 18-19.