

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

FILING DETAILS

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**KHIEU Samphân's Reply to the Co-Prosecutors concerning the Presumption of Innocence
on Appeal (F46/2/4)**

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Before:

The Supreme Court Chamber
Judge KONG Srim
Judge Chandra Nihal JAYASINGHE
Judge SOM Sereyvuth
Judge Florence Ndepele MWACHANDE-
MUMBA
Judge MONG Monichariya
Judge Maureen HARDING CLARK
Judge YA Narin

The Co-Prosecutors
CHEA Leang
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All Civil Party Lawyers

MAY IT PLEASE THE SUPREME COURT CHAMBER

1. On 6 August 2019, the Lawyers for late NUON Chea, who had appealed his sentence in Case 002/02 before his death on 4 August 2019, filed a request concerning the impact on appeal proceedings of NUON Chea's death prior to the appeal judgment.¹
2. On 13 August 2019, the Supreme Court ordered the termination of proceedings against NUON Chea and declared that it would remain seized of the request by his Lawyers.²
3. On 26 August 2019, the last day of the time-limit for response,³ the Civil Party Lead Co-Lawyer (the "Civil Parties") responded that the trial judgment was still valid, although it was not final as concerns NUON Chea and did not have any legal effect on him, in view of the presumption of innocence and the rights of Civil Parties.⁴
4. On 29 August 2019, that is, three days after the expiry of the time-limit for response, the Co-Prosecutors argued that the presumption of innocence did not extend to appeal proceedings before the ECCC and that in any event the findings of guilt against NUON Chea should not be overturned.⁵
5. By these written submissions which KHIEU Samphân's Defence (the "Defence") did not think it would have to make, it responds to the Co-Prosecutors' Request in view of their astonishing stand on the presumption of innocence on appeal. As an accused in the appeal case, KHIEU Samphân is

¹ Urgent Request Concerning the Impact on Appeal Proceedings of NUON Chea's Death prior to the Appeal Judgment, 6 August 2019, **F46/2**, notified on 6 August 2019 in English and on 16 August 2019 in Khmer.

² Decision to Terminate Proceedings against NUON Chea, 13 August 2019, **F46/3** ("F46/3 Decision").

³ Pursuant to Articles 8.3 and 8.5 of the Practice Direction on the Filing of Documents before the ECCC (the "Practice Direction"), the parties were given 10 to respond as from the notification of the Khmer version of the request on 16 August 2019, i.e., up to 26 August 2019.

⁴ Civil Party Lead Co-Lawyer's Response to the Urgent Request by NUON Chea's Defence Concerning the Impact on Appeal Proceedings of NUON Chea's Death prior to the Appeal Judgment, 26 August 2019, **F46/2/1** (the "Civil Parties' Response").

⁵ Co-Prosecutors' Response to the Urgent Request Concerning the Impact on Appeal Proceedings of NUON Chea's Death prior to the Appeal Judgment, 6 August 2019 (F46/2), 29 August 2019, **F46/2/4** (the "Co-Prosecutors' Response"), notified on 29 August 2019 in English and on 2 September 2019 in Khmer (and in French), extending the time limit for reply to 9 September 2019. On 28 August 2019, two days after the expiry of the time limit for response, the Co-Prosecutors sought leave to first file in English, which was granted by the Supreme Court the following day, without noting the late filing of the Request and the Response (Decision on Co-Prosecutors' Urgent Request to File Their Response to the NUON Chea Defence Team's Urgent Request in One Language, 29 August 2019, **F46/2/3**).

forced to intervene in this debate, which should not have arisen since the legal framework is so indisputable.

6. Indeed, Cambodian law and ECCC law is crystal clear on the fact that the presumption of innocence continues to apply on appeal (I). The Co-Prosecutors' stand, taken supposedly for fear of the reactions it anticipates from international public opinion, is regrettably indicative of the lack of courage. It is absurd given that even those accused of the most serious crimes are supposed to continue to enjoy the so-called “fundamental” rights on appeal (II). Lastly, the impact of the death of an accused who appealed his or her conviction before a judgment was rendered is obvious: the appellant died presumed innocent and the judgment under appeal is not a final judgment (III).

I. CLARITY OF CAMBODIAN AND ECCC LAW: THE PRESUMPTION OF INNOCENCE CONTINUES TO APPLY ON APPEAL

7. According to the Co-Prosecutors (both national and international), the fact that the ECCC was established to deal with mass atrocities would justify trying these atrocities in violation of the Constitution of the Kingdom of Cambodia and international human rights norms.⁶ It is quite the opposite.

1. The ECCC was established in accordance with the Constitution of the Kingdom of Cambodia

8. Since 1993, the Constitution of the Kingdom of Cambodia provides in its Article 38, paragraph 7:

“Any accused shall be presumed to be innocent until they are finally convicted by the court.”

9. In 2003, 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, (the “Agreement”) was signed. Articles 12 and 13 provide that:

“Article 12 Procedure

1. The procedure shall be in accordance with Cambodian law. Where **Cambodian law does not deal with a particular matter**, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the

⁶ -Prosecutors’ Response, paras. 1, 3-14.

consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.

2. The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party. (...)

Article 13 Rights of the accused

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**. Such rights shall, in particular, include the right: to a fair and public hearing; to be presumed innocent until proved guilty; to engage a counsel of his or her choice; to have adequate time and facilities for the preparation of his or her defence; to have counsel provided if he or she does not have sufficient means to pay for it; and to examine or have examined the witnesses against him or her.” (emphasis added).⁷

10. In 2004, the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (the "Law on the Establishment of the ECCC") was promulgated by the late King NORODOM Sihanouk, with the (first) visa of the Constitution of the Kingdom of Cambodia,⁸ after the Constitutional Council declared it in conformity with the Constitution.⁹

11. The law provides, *inter alia*, that the ECCC “shall automatically dissolve following the definitive conclusion of these proceedings”,¹⁰ and that the Agreement shall apply as law within the Kingdom of Cambodia,¹¹ as the law itself. Furthermore, it incorporates the provisions of Article 12 of the aforementioned Agreement.¹² Moreover, in line with Article 13 of the abovementioned Agreement, it expressly states, as does the Constitution of the Kingdom, that:

“The accused shall be presumed innocent as long as the court has not given its definitive judgment.”¹³

⁷ The Co-Prosecutors fail to mention the fact that these rights, including the right to the presumption of innocence, are respected "throughout the trial process" when they partially cite Article 13(1) of the Agreement: Co-Prosecutors' Response, para. 13.

⁸ Law on the Establishment of the ECCC, p. 1: "We, Preah Bat Samdech Preah Norodom Sihanouk, King of Cambodia, having taken into account the constitution of the Kingdom of Cambodia, hereby promulgate"

⁹ Law on the Establishment of the ECCC, p. 1-2.

¹⁰ Law on the Establishment of the ECCC, Article 47 (emphasis added).

¹¹ Law on the Establishment of the ECCC, Article 47 *bis* ; Co-Prosecutors' Response, para. 10 and footnote (“fn”) 25.

¹² Law on the Establishment of the ECCC, Article 33 paras. 1 and 2 and Article 37.

¹³ Law on the Establishment of the ECCC, Articles 35 and 37. It is noteworthy that Article 35 concerns "the court" in

12. Accordingly, despite the fact that the Agreement and the Law on the Establishment of ECCC Law established a single appeal court (the Supreme Court Chamber) instead of the two provided for in Cambodian criminal procedure (the Criminal Chamber of the Court of Appeal and the Supreme Court),¹⁴ these founding texts and the legislators of the Law on the Establishment of the ECCC at the same time prescribed respect for the presumption of innocence until a final judgment is handed down, as required also by the Constitution of the Kingdom of Cambodia and Cambodian criminal procedure.

2. In Cambodia and before the ECCC, the constitutional right to the presumption of innocence undoubtedly applies to all criminal proceedings

13. Beyond the Constitution, the Agreement and the Law on the Establishment of the ECCC, the ECCC Internal Rules (“IR”), “the purpose of which is to consolidate applicable Cambodian procedure for proceedings before the ECCC”,¹⁵ also acknowledge very clearly that the presumption of innocence applies to the entire criminal proceedings.

14. The Co-Prosecutors dare to argue that the wording of Rule 21((1)(d) of the IR supports their argument that the presumption of innocence ceases to exist once guilt has been established at first instance.¹⁶ However, this Rule provides that:

“Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent.”

15. It is clearly worth recalling that a person who has appealed the judgement convicting him or her remains a “prosecuted” person so long as the judgement has not become final. He/she is still on trial. Similarly, as everyone knows, the right to remain silent and not to incriminate oneself is

general, and not the Chamber or the Supreme Court in particular, unlike Articles 33 and 36. In any event, under the terms of Article 37, “The provision of Article 33, 34 and 35 shall apply *mutatis mutandis* in respect of proceedings before the Extraordinary Chamber of the Supreme Court.”

¹⁴ Agreement, Article 3; Law on the Establishment of the ECCC, Article 9; Co-Prosecutors’ Response, para. 6.

¹⁵ IR, Preamble, last consideration.

¹⁶ Co-Prosecutors’ Response, para. 13. *See also* para. 3 and fn 6.

“closely linked” to the presumption of innocence.¹⁷ This right is also present “at every stage of the proceedings” and therefore until the judgment becomes final.¹⁸

16. The wording of other provisions of the IR, and their counterpart in the Cambodian Code of Criminal Procedure (“CCP”), unequivocally supports the evidence that guilt is not established until it is definitively established on appeal. According to Rule 104, the Supreme Court, whose decisions “are final, and shall not be sent back to the Trial Chamber and decides in the last instance” (104 (3)), “shall decide an appeal against a judgment or decision of the Trial Chamber” and may “examine evidence and call new evidence” (104 (1)). It may “either confirm, annul or amend decisions in whole or in part, as provided in Rule 110” (104 (2)).¹⁹
17. Pursuant to Rule 111(6), “[w]here an appeal is rejected, the trial judgment shall become final and no further appeal against such decision shall be allowed”.²⁰
18. It is therefore only after that and once “a decision of the Chambers becomes final” that the Co-Prosecutors shall execute the sentence (Rule 113(2))²¹ and the “accused” becomes “the convicted person” (Rule 112 (1)).²²

¹⁷ European Court of Human Rights (“ECHR”), *Saunders v. United Kingdom* (Application no. 19187/91), AJ, 17 December 1996, para. 68; ECHR, *Heaney and McGuinness v. Ireland* (Application no. 34720/97), AJ, 21 December 2000 (final on 21 March 2001), para. 40. *See also Prosecutor v. Lubanga*, ICC-01/04-01/06 OA 11, AJ, relating to Thomas Lubanga Dyilo’s appeal of the Trial Chamber’s Oral Decision dated 18 January 2008, 11 January 2008, with Partly Dissenting Opinion by Judge Georgios M. Pikis, para. 14.

¹⁸ *See also* Articles 35 (2) (g) and 37 of Law on the Establishment of the ECCC.

¹⁹ *See also* Articles 405 and 406 of the Cambodian Code of Criminal Procedure (CCP), according to which the Court of Appeal may overturn the judgement and acquit the accused as well as raise any issues in dispute and decide on the merits. *See also* Article 439(1), according to which the Supreme Court may dismiss the appeal in whole or in part and set aside the contested judgment of the Court of Appeal in whole or in part..

²⁰ *See also* Article 439 (2) of the Cambodian CCP: “If the request for cassation is rejected, the contested decision becomes a *res judicata*.”

²¹ Confirming the interpretation of the last paragraph of Article 104 (which specifies that an immediate appeal has no suspensive effect) that, on the contrary, an appeal against a judgment has a suspensive effect. *See also* Articles 398 (“The execution of the judgment shall be suspended until the time for appeal has expired.”) and Article 435 the Cambodian CCP (“As long as the time limit for a request for cassation has not yet expired, the execution of the judgment of the Court of Appeal shall be suspended. A request for cassation has the effect of suspending [the execution of judgment]. The execution of a contested decision shall be suspended while the Supreme Court has not yet made a decision.”) *See also* Article 497 (final decision): (“The prosecutor may enforce the sentence only after it has become final.”)

²² According to the IR, the accused person is referred to as “the accused” at first instance (Rules 79 to 102) as on appeal (Rules 104 to 111). The same applies to the Cambodian CCP, according to which the “accused” at first instance, on appeal and cassation only becomes “the convicted person” upon the delivery of the “final judgment which already has the *res judicata* effect.” (Articles 443 (1) and 446 (2) In this regard, the Defence notes that the Co-Prosecutors continues to refer to KHIEU Samphân as an “accused” since the appeal proceedings, including on the cover page of their

19. Accordingly, it is indisputable that according to the ECCC IR and its Rule 21 (1)(d), guilt “has not been established” until it has been **definitively** established by a final judgment and the presumption of innocence continues to apply until then, as prescribed by the Constitution of the Kingdom of Cambodia, the Agreement and the Law on the Establishment of the ECCC and the Cambodian CCP.
20. The case law of the ECCC, whether or not it is put forward by the Co-Prosecutors, only confirms this. Indeed, the Chamber's two case laws, which the Co-Prosecutors argue are in line with its opportunely minimalist interpretation of Rule 21(1) (d) of the IR,²³ actually do quite the opposite. In the first,²⁴ the Chamber notes that the presumption of innocence "is an essential component of the right of every accused person to a fair trial. It is set out in Rule 21(d) of the [IR] and enshrined in Article 38 of the Constitution of the Kingdom of Cambodia, Article 14(2) of the [ICCPR], Article 6 (2) of the European Convention of Human Rights ["ECHR"] (...)". In the second,²⁵ the Chamber refers not only to Rule 21 (1) (d) of the RP, but also to Article 13 of the Agreement, Article 35 of the Law on the Establishment of the ECCC, as well as Article 14 (2) of the ICCPR and Article 6(2) of the ECHR.²⁶
21. Furthermore, as mentioned by the Civil Parties,²⁷ the Supreme Court has had occasion to note that “in the context of the ECCC judgments on the merits are not final until having passed through the appellate stage.” It then referred to Rules 104, 110, 111 and 113 of the IR, Article 38 of the Constitution of the Kingdom of Cambodia and some Articles of the Cambodian CCP.²⁸ In addition, the Defence recalls that on another occasion, the Supreme Court stated:

“The international human rights standards on the presumption of innocence are applicable to the ECCC pursuant to Articles 12(2) and 13(1) of the Agreement, and Articles 33(new) and 35(new) of the ECCC Law, which make direct reference to Articles 14 and 15 of the International Covenant on Civil and Political Rights ("ICCPR").”²⁹

submissions, including this Response.

²³Co-Prosecutors’ Response, para. 14

²⁴ Co-Prosecutors’ Response, para.14 and fn 37 (referring to para. 16 of **E176/2** Decision).

²⁵ Co-Prosecutors’ Response, para.14 and fn 38 (referring to para. 44 of the *Duch* Judgment).

²⁶ See fn 62 of para.44 of the *Duch* Judgment to which the Co-Prosecutors are referring.

²⁷ Civil Parties’ Response, para. 6 and fn 11 (referring to para 24 of **E163/5/1/13** Decision

²⁸ In particular Articles 398, 405, 406 and 497 of the CCP fn of 67 **E163/5/1/13** Decision).

²⁹ 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**, para. 52. The Defence notes that the Supreme Court then considered the question of State

22. It is therefore particularly distressing to read in the Co-Prosecutors' Response that "Articles 35 and 37 of the ECCC Law are inconsistent with the relevant procedures and practice at the international level,"³⁰ whereas it is the complete opposite that is true.

3. Cambodian standards applicable at the ECCC as regards the presumption of innocence are perfectly compatible with international standards

23. As noted by the Supreme Court and the Chamber, international standards in this area include Articles 14(2) of the ICCPR and Article 6(2) of the ECHR, which similarly provide that:

"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."³¹

24. Although these articles do not expressly specify that guilt is legally established only when it is definitively established (as in Rule 21-1-d of the IR), this is obvious given that both state that "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."³² It also stipulates that "no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."³³

25. This evidence is very clearly noted in the jurisprudence. According to the ECHR, Article 6 (2) "governs criminal proceedings in their entirety",³⁴ "in the absence of a final conviction", guilt is not "proved before the law".³⁵ The ECHR also noted that before it, the European Commission of

interference in ongoing criminal proceedings in the case law of human rights courts above all, in the absence of relevant national case law or practice.

³⁰ Co-Prosecutors' Response, para. 4.

³¹ The only difference between the two texts lies in the fact that the ICCPR refers to a "criminal offence" while the ECHR simply refers to an "offence".

³² Article 14 (5) of the ICCPR and Article 2 (1) of Protocol No. 4 to the ECHR.

³³ Article 14 (7) of the ICCPR and Article 4 (1) du Protocol No, 4 to the ECHR.

³⁴ ECHR, *Minelli v. Switzerland* (Application no. 8660/79), AJ, 25 March 1983, para. 30; *Matijašević v. Serbia* (Application no. 23037/04), AJ, 19 September 2006 (final on 19 December 2006) ("AJ, *Matijašević v. Serbia*"), paras. 46 and 49; *Nešťák v. Slovakia* (Application no. 65559/01), AJ, 27 February 2007 (final on 27 May 2007) ("AJ, *Nešťák v. Slovakia*"), para. 88; *Poncelet v. Belgium* (Application no. 44418/07), AJ, 30 March 2010 (final on 4 October 2010), paras. 49-50.

³⁵ AJ, *Matijašević v. Serbia*, paras. 48-49; AJ, *Nešťák v. Slovakia*, para. 89; *Ismoilov et al v. Russia* (Application no. 2947/06), AJ, 24 April 2008 (final on 1 December 2008), para.166.

Human Rights had admitted that “[the presumption of innocence cannot cease until the accused is convicted by law]”,³⁶ before stating:

“[The Court also considers it useful to recall that the Convention must be interpreted in such a way as to guarantee concrete and effective rights and not theoretical and illusory ones. Consequently, and in the light of the foregoing, it considers that **the presumption of innocence cannot cease to apply on appeal solely because the proceedings at first instance resulted in the conviction of the person concerned. Such a conclusion would contradict the role of the appeal proceedings**, during which the competent judge is required to retry the accused, in fact and in law, the decision assigned to him. The presumption of innocence would thus be inapplicable in proceedings in which the person concerned seeks a new judgment in his case and seeks to reverse his prior conviction.]”³⁷

26. It is precisely because of the reforming role of appeal proceedings that even those accused of the most serious crimes who have a right of appeal continue to enjoy fundamental rights in general and the presumption of innocence in particular after their conviction at first instance and until a final judgment is rendered.

II. ABSURDITY OF THE CO-PROSECUTORS' OUTRAGEOUS STAND AND THEIR LACK OF COURAGE: EVEN THOSE ACCUSED OF THE MOST SERIOUS CRIMES ARE EXPECTED TO CONTINUE ENJOYING THE SO-CALLED "FUNDAMENTAL" RIGHTS ON APPEAL

27. The Co-Prosecutors are basically requesting the Supreme Court to flout the Constitution of the Kingdom of Cambodia, the Agreement, the Law on the Establishment of the ECCC, the IR, the Cambodian CCP, its jurisprudence, international human rights norms and the very essence of the right of appeal in order to be able to be guided by the “practice adopted by other international criminal courts” because of “their similar mandate, structure and goals” relevant to the ECCC.³⁸ Since the ECCC and ICTY try serious crimes and have a single level of appellate review and certain appellate review criteria in common,³⁹ the ECCC should adopt “this approach”⁴⁰ followed in a

³⁶ *Konstas v. Greece* (Application No. 53466/07), AJ, 24 May 2011 (final on 28 November 2011) (“AJ, *Konstas v. Greece*”), para. 35, references omitted.

³⁷ AJ, *Konstas v. Greece*, para. 36, references omitted. Translator’s note : This appeal judgement is only available in French and Ukrainian.

³⁸ Co-Prosecutors’ Response, paras. 7 and 4.

³⁹ Co-Prosecutors’ Response, paras. 1, 6, 7.

⁴⁰ Co-Prosecutors’ Response, para. 10.

single decision of the ICTY Appeals Chamber and repeated hesitantly in only one other decision by the same court.⁴¹

28. However, to follow this unconscionable and heretical decision would be contrary not only to the law applicable at the ECCC, but also to the established case law of the ICT, which in reality also recognises the right to the presumption of innocence on appeal. Indeed, regardless of the fact that the ECCC and ICT have only one level of appellate jurisdiction, regardless of the fact that they have certain appellate review criteria, even the accused before them can be acquitted on appeal

1. Even accused before the ECCC and ICT may be acquitted on appeal

29. Although accused persons before the ECCC and the ICT have only one level of appellate jurisdiction, the appellate court reviews the trial judgment in fact and in law.⁴² Although it considers that it should show some deference to the factual findings of the Trial Chamber,⁴³ this idea should be approached “with extreme caution”, as the appellate court may disagree with these findings “whenever the failure to interfere may occasion a miscarriage of justice”.⁴⁴

30. In any event, the review in fact and in law of the first instance judgment by a single appellate court may lead to a partial or total reversal of that judgment. That is indeed why accused before the ECCC continue to enjoy all the rights to which they are entitled until a final judgment is rendered,⁴⁵ including the presumption of innocence, which extends even further in the event of final acquittal.⁴⁶

⁴¹ Co-Prosecutors’ Response, paras. 8-9.

⁴² Co-Prosecutors’ Response, para. 6. The Defence notes that despite the fact that the Supreme Court has been guided by the ICT’s appellate review criteria (Co-Prosecutors’ Response, para. 5), it has done so by ensuring that the procedure “retains features of appellate review by a Criminal Chamber of the Court of Appeal” of Cambodia and the possible grounds of appeal “encompass the grounds for a request for cassation to the Supreme Court of Cambodia”: AJ, *Duch*, 3 February 2012, **001-F28** (“AJ, *Duch*”), para. 13.

⁴³ Co-Prosecutors’ Response, para. 6 and fn 15.

⁴⁴ Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s, “Judgment pursuant to Article 74 of the Statute”, ICC-01/05-01/08 A, 8 June 2018 (“AJ, *Bemba*”), paras. 38-40.

⁴⁵ See for example, Articles 12 (2) and 13 (1) of the Agreement and Articles 33, 35 and 37 of the Law on the Establishment of the ECCC.

⁴⁶ According to the ECHR, the expression of suspicions about the innocence of an accused after an acquittal that has become final is incompatible with the presumption of innocence: *Sekanina v. Austria* (Application no.13126/87), AJ, 25 August 1993, para. 30; *Rushiti v. Austria* (Application no. 28389/95), AJ, 21 March 2000 (final on 21 June 2000), para. 31; *O. v. Norway* (Application no. 29327/95), AJ, 11 February 2003 (final on 11 May 2003), para. 39; *Geerings v. The Netherlands* (Application no. 30810/03), AJ, 1 March 2007, final on 1 June 2007), paras. 49-50; *Vassilios Stavropoulos v. Greece* (Application no. 35522/04), AJ, 27 September 2007 (final on 27 December 2007) (“AJ, *Vassilios Stavropoulos v. Greece*”), para. 38; *Paraponiaris v. Greece* (Application no. 42132/06), AJ, 25 September 2008 (final on 6 April 2009), para. 32.

31. As the Co-Prosecutors are aware, the reformist role of appeal proceedings has already led to the acquittal on appeal of accused before the ICT (including ICTY) who had nevertheless been convicted and sentenced at first instance.⁴⁷
32. As the Co-Prosecutors know even better, since they were present at the 002/01 trial and the Supreme Court noted this last 13 August in its decision to terminate the trial of NUON Chea,⁴⁸ the Supreme Court overturned several of the findings of guilt reached by the Chamber against KHIEU Samphân and NUON Chea.⁴⁹ The Supreme Court held that the latter had committed many errors not only in law but also in fact, finding its approach to evidence very often unreasonable.⁵⁰
33. It was the same Chamber that rendered the judgment at first instance in 002/02, and found KHIEU Samphân and NUON Chea guilty, inter alia, of extermination in Phnom Kraol, a crime which it nevertheless found not to have been established...⁵¹ To follow the Co-Prosecutors' position would be to consider that NUON Chea died guilty of a crime that has not been established and in respect of which KHIEU Samphân is no longer presumed innocent, whereas the conviction must necessarily be reversed on appeal.
34. Accordingly, whatever the Co-Prosecutors may say,⁵² the appellate review criteria applied at the ICT and ECCC by a single appellate court can in no way justify the termination of the application of the presumption of innocence on appeal, especially since it is clear that any doubt continues to benefit the accused on appeal before these courts

2. Even accused before the ECCC and the ICT are entitled to the benefit of the doubt on appeal

⁴⁷ For example: 1) at ICTY: *Prosecutor v. Orić*, IT-03-68-A, AJ, 3 July 2008; 2) at ICTR: *Zigiranyirazo v. Prosecutor*, ICTR-01-73-A, AJ, 16 November 2009; 3) at the ICC: AJ, *Bemba*.

⁴⁸ F46/3 Decision, para. 2.

⁴⁹ AJ, Case 002/01, 23 November 2016, F36 (“AJ, Case 002/01”).

⁵⁰ See for example, paras. 454, 631 (“On such a weak evidentiary basis, no reasonable trier of fact could have entered that finding”), 633, 637, 970 of AJ, Case 002/01.

⁵¹ KHIEU Samphân’s Notice of Appeal (Case 002/02), 1 July 2019, E465/4/1, errors 18.279 and 19.1; NUON Chea’s Notice of Appeal Against the Trial Judgement in Case 002/02, 1 July 2019, E465/3/1, Ground 251.

⁵² Co-Prosecutors’ Response, paras. 6-8.

35. Anyone who takes the trouble to think a little bit about what the presumption of innocence is cannot decently support the Co-Prosecutors' argument premised on the isolated decision of the ICTY Appeals Chamber that it puts forward.
36. The principle of the presumption of innocence "requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused."⁵³
37. However, even on appeal before the ECCC and the ICT, the burden of proof is not reversed and doubt always benefits the accused. Indeed, based on the jurisprudence of the ICT, the Supreme Court has clearly and correctly stated that:

"Considering that the guilt of an accused must be established at trial beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice must be evaluated in the context of what the appellant seeks to demonstrate. This is somewhat different for an appeal by the Co-Prosecutors against acquittal than with an appeal by the Defence against conviction. An appeal against a conviction must show that the Trial Chamber's factual errors create a reasonable doubt as to an accused's guilt. An appeal against an acquittal must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated."⁵⁴

38. Furthermore, the Appeals Chamber of the ICC recently held that:

"The accused does not have to prove that the trial chamber made a factual error. It suffices for him or her to identify sources of doubt about the accuracy of the trial chamber's findings to oblige the Appeals Chamber to independently review the trial chamber's reasoning on the basis of the evidence that was available to it. (...) It is also important that, in all cases before the Court, the duty to substantiate errors in the conviction decision should not lead to a reversal of the burden of proof."⁵⁵

39. Accordingly, it is obvious that the principle that doubt benefits the accused (*in dubio pro reo*), enshrined in the Constitution of the Kingdom of Cambodia with the presumption of innocence until

⁵³ ECHR, *Barberà, Messegué and Jabardo v. Spain* (Application no. 10590/83), AJ, 6 December 1988, para. 77 ; *Telfner v. Austria* (Application No. 33501/96), AJ, 20 March 2001 (final on 20 June 2001), para. 15. *See also* para. 30 of General Observation No. 32 of the HRC mentioned by the Co-Prosecutors in fn 35 of their Response.

⁵⁴ AJ, *Duch*, para. 18. *See also*, for a recent example of the jurisprudence of the Appeals Chamber of MICT (referred to in fn 15 of the Co-Prosecutors' Response) : *Prosecutor v. Karadžić*, MICT-13-55-A, J, 20 March 2009, para. 18.

⁵⁵ AJ, *Bemba*, para. 66.

a final judgment,⁵⁶ "a particular expression of the presumption of innocence",⁵⁷ applies at all stages of the proceedings.⁵⁸ Therefore, and a fortiori, the presumption of innocence applies at all stages of the proceedings, including on appeal before the ECCC and the ICT.

40. Similarly, the right to silence and not to contribute to one's incrimination, which is "closely linked" to the presumption of innocence, also still applies on appeal⁵⁹ even according to the ICTY Appeals Chamber,⁶⁰ which nevertheless rendered the unfair decision that is so pleasing to the Prosecution.

41. Consequently, the Co-Prosecutors' position is indefensible, both legally and ethically.

3. According to the Co-Prosecutors, the ECCC's mission is to endorse a presumption of guilt and to render a travesty of justice.

42. The Prosecution shamefully requests the judges to flout Cambodian law that respects human rights under the guise of... the interests of the Cambodian people and the rights of victims "to justice".⁶¹ The Defence is almost speechless. Fortunately, the Civil Parties spoke for them (within the prescribed time limit) and unlike the Co-Prosecutors, had the courage to acknowledge that the accused's presumption of innocence extended to appeals.⁶²

⁵⁶ Article 38 para. 6 of the Constitution of the Royal Government of Cambodia.

⁵⁷ ECHR, *AJ Vassilios Stavropoulos v. Greece*, para. 39; *Tsalkitzis v. Greece (N° 2)* (Application N° 72624/10), 19 October 2017 (final on 19 January 2018), para. 60; See also: Appeal against the Decision on Mr KHIEU Samphan's Application for Immediate Release on Bail, 6 June 2011, **E50/3/1/4**, para. 31 ("The Supreme Court Chamber must stress that the in dubio pro reo rule, which results from the presumption of innocence, is guaranteed by the Constitution of Cambodia.")

⁵⁸ See also: Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the prosecutor against Jean- Pierre Bemba Gombo, ICC-01/05-01/08, 15 juin 2009, §31 (« Lastly, in making this determination the Chamber wishes to underline that it is guided by the principle *in dubio pro reo* as a component of the presumption of innocence, which as a general principle in criminal procedure applies, *mutatis mutandis*, to all stages of the proceedings, including the pre-trial stage. »).

⁵⁹ See *supra*, para.15 fn 17 and 18.

⁶⁰ *Prosecutor v. Karadžić*, IT-95-5/18-AR73.11, Decision on Appeal against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir, 13 November 2013, para. 50: "an accused **or appellant** is not compellable in his own case, whether at the request of his co-accused or the Prosecution, as this may violate his right under Article 21(4)(g)" (which provides that «In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: [...] g) not to be compelled to testify against himself or to confess guilt").

⁶¹ Co-Prosecutors' Response, paras. 10-12.

⁶² Civil Parties' Response, para. 6.

43. Indeed, it is in the interest of the Cambodian people and in the interest of the victims to see fair justice applied, in accordance with the Constitution of the Kingdom of Cambodia and international human rights norms, not trumped-up or discounted justice.

III. EVIDENCE OF THE IMPACT OF THE DEATH OF AN ACCUSED WHO APPEALED HIS CONVICTION BEFORE A JUDGMENT WAS RENDERED: THE APPELLANT DIED PRESUMED INNOCENT AND THE JUDGMENT APPEALED IS NOT FINAL

44. The presumption of innocence applies until a final judgment is rendered. A trial judgement under appeal does not have the force of *res judicata* reserved for a final judgment until the appeal has been decided.

45. As a result, an accused who has appealed his or her conviction and dies before a judgment is rendered dies presumed innocent. The sentencing judgment remains a judicial decision but without the final judgment's *res judicata* effect. That is all.

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

- DISMISS the submissions of the Co-Prosecutors;
- FIND that the presumption of innocence continues to apply on appeal and that consequently a convicting trial judgment against which an appeal has been filed, does not have the effect of *res judicata* which is reserved for a final judgment against the accused irrespective of whether he/she is alive or deceased.

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| KONG Sam Onn | Phnom Penh | |
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