

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

**FILING DETAILS**

**Case No:** 002/19-09-2007-ECCC/SC **Party Filing:** Co-Prosecutors  
**Filed to:** Supreme Court Chamber **Original Language:** English  
**Date of document:** 29 August 2019

**CLASSIFICATION**

**Classification of the document  
suggested by the filing party:** PUBLIC



**Classification by Supreme Court Chamber:** សាធារណៈ/Public

**Classification Status:**

**Review of Interim Classification:**

**Records Officer Name:**

**Signature:**

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**CO-PROSECUTORS' RESPONSE TO THE URGENT REQUEST CONCERNING  
THE IMPACT ON APPEAL PROCEEDINGS OF NUON CHEA'S DEATH  
PRIOR TO THE APPEAL JUDGEMENT (F46/2)**

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## I. INTRODUCTION

1. The Nuon Chea Defence's contentions that, as a result of Nuon Chea's death during the pendency of his appeal of the Case 002/02 Trial Judgment, (i) the presumption of innocence continues to apply to him and (ii) his convictions should be vacated<sup>1</sup> are both without merit. While the continuation of the presumption of innocence on appeal is consistent with Cambodian practice, it is inconsistent with the practice and jurisprudence of the international and internationalised criminal tribunals that are most similar to the ECCC in terms of structure and mandate and which therefore offer the best guide to the proper approach at the ECCC. In any event, the Defence assertion that termination vacates the convictions against Nuon Chea has no legal basis in international or Cambodian practice.
2. The Co-Prosecutors file this Response in English first, with the Khmer translation to follow by Monday, 2 September 2019.<sup>2</sup>

## II. THE PRESUMPTION OF INNOCENCE AT THE ECCC DOES NOT EXTEND TO APPELLATE PROCEEDINGS

### *(1) The scope of the presumption of innocence advocated by the Defence is inconsistent with international practice*

3. Although Cambodian law provides for the presumption of innocence until the final judgment,<sup>3</sup> the "structure of the ECCC differs from other parts of the Cambodian judiciary",<sup>4</sup> given the "unique purposes of the ECCC under its mandate, jurisdiction [and] character".<sup>5</sup> As such, an accused is presumed innocent at the ECCC only until his/her guilt has been

<sup>1</sup> **F46/2** Urgent Request Concerning the Impact on Appeal Proceedings of Nuon Chea's Death Prior to the Appeal Judgment, 6 August 2019 ("Request"), paras 1(b)(i), 22-23, 29(b), 32-34, 89(b)(i) and Part 4, Heading II. The OCP has responded to the Defence's request for continued retention (**F46/2** Request, paras 1(d)(ii), 87-88, 89(d)(ii)) in **F46/4/1** Co-Prosecutors' Response to the Urgent Request to Reinstate the Nuon Chea Defence Team, 22 August 2019. In relation to the Defence proposal regarding Internal Rules amendments, the OCP observes that under the Internal Rules, the SCC must first decide the matter before the need to propose amendments is triggered. See Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9) as revised on 16 January 2015 ("Internal Rules"), Rule 2.

<sup>2</sup> See **F46/2/2** Co-Prosecutors' Urgent Request to File their Response to the Nuon Chea Defence Team's Urgent Request in English First, 28 August 2019; **F46/2/3** 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, para. 9.

<sup>3</sup> The Constitution of the Kingdom of Cambodia, adopted 21 September 1993, art. 38 ("The accused shall be considered innocent until the court has judged finally on the case.").

<sup>4</sup> **F36** Appeal Judgement, 23 November 2016 ("Case 002/01 AJ"), para. 107.

<sup>5</sup> Case 001-**F28** Appeal Judgement, 3 February 2012 ("*Duch* AJ"), para. 348.

established beyond reasonable doubt by the trier of fact.<sup>6</sup> This approach does not undermine the primary position of the Constitution in Cambodian law, nor affect its interpretation. Rather, it recognises the innate differences between the ECCC and the domestic legal realm.

4. Contrary to the Nuon Chea Defence's argument,<sup>7</sup> Articles 35 and 37 of the ECCC Law are inconsistent with the relevant procedures and practice at the international level. As provided in Article 12 of the Agreement and Article 33 of the ECCC Law, when there is a question regarding the consistency of a rule with international standards, "guidance may be sought in procedural rules established at the international level."<sup>8</sup>
5. The Supreme Court Chamber recognised this when it held that it was "authorised by the UN-RGC Agreement and ECCC Law to seek guidance [...] in procedural rules established at the international level, including their interpretation by relevant international judicial bodies".<sup>9</sup> On this basis, the SCC concluded that the "ICTY and ICTR jurisprudence is a source of guidance in the interpretation of Internal Rule 104(1) [Jurisdiction of the SCC]".<sup>10</sup>
6. The ECCC, like the ICTY and ICTR as well as other international or internationalised tribunals, was specifically established to deal with mass atrocities resulting in the commission of international crimes that could not, due to their gravity and magnitude, be prosecuted within domestic jurisdictions. Tellingly, the ECCC appellate structure<sup>11</sup> mirrors that of the ICTY, ICTR, ICC, and SCSL, with only one layer of appellate review from a trial

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<sup>6</sup> See 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, Phnom Penh, 6 June 2003 ("Agreement"), art. 13(1); Internal Rules, Rule 21(1)(d).

<sup>7</sup> F46/2 Request, para. 22.

<sup>8</sup> 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, as promulgated on 27 October 2004 ("ECCC Law") (NS/RKM/1004/06), art. 33 *new*.

<sup>9</sup> Case 001-F28 *Duch* AJ, para. 13.

<sup>10</sup> Case 001-F28 *Duch* AJ, para. 13.

<sup>11</sup> See the SCC's explanation of the limited appellate review at the ECCC compared to systems which allow for *de novo* review on appeal, F36 Case 002/01 AJ, paras 93-94.

judgment.<sup>12</sup> The standard of review at these courts, except the ICC,<sup>13</sup> is also the same as at the ECCC, reviewing only procedural errors, errors of law invalidating the decision, or errors of fact which occasion a miscarriage of justice,<sup>14</sup> with Appeals Chambers paying deference to the trier of fact in relation to its assessment of evidence and factual findings.<sup>15</sup>

7. Because of their similar mandate, structure, and goals, the practice adopted by other international criminal courts in relation to the scope of the presumption of innocence on appeal is uniquely relevant to the ECCC.<sup>16</sup>
8. Jurisprudence from the courts most similar to the ECCC in structure and purpose suggests that the presumption of innocence should end with the trial judgment.<sup>17</sup> In 2010, the ICTY

<sup>12</sup> **ICTY**: Statute of the International Criminal Tribunal for the Former Yugoslavia, 25 May 1993 as updated September 2009 (“ICTY Statute”), art. 11(a); **ICTR**: Statute of the International Criminal Tribunal for Rwanda, 8 November 1994 as amended 26 March 2004 (“ICTR Statute”), art. 10(a); **ICC**: Rome Statute of the International Criminal Court, 17 July 1998 (“Rome Statute”), 2187 UNTS 90, art. 34(b); **SCSL**: Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the establishment of the Special Court for Sierra Leone, Freetown, 16 January 2002 (“SCSL Statute”), 2178 UNTS 137, art. 11(a).

<sup>13</sup> **ICC**: Rome Statute, art. 81(1)(a)-(b).

<sup>14</sup> **ICTY**: ICTY Statute, art. 25(1)(a)-(b); **ICTR**: ICTR Statute, art. 24(1)(a)-(b); **SCSL**: SCSL Statute, art. 20(1).

<sup>15</sup> **ICTY**: *Prosecutor v. Karadžić*, MICT-13-55-A, Appeals Chamber, Judgement, 20 March 2019, para. 17 (“In determining whether a trial chamber’s finding was reasonable, the Appeals Chamber will not lightly overturn findings of fact made by a trial chamber”), *see also* paras 18, 321, 323, 363; **ICTR**: *The Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Appeals Chamber, Judgement, 14 December 2015, para. 32 (“Regarding errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by a trial chamber”); **SCSL**: *Prosecutor v. Taylor*, SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, para. 26 (“A Trial Chamber’s findings of fact will not be lightly overturned, as the Trial Chamber is best placed to assess the evidence received at trial”).

<sup>16</sup> *Contra* **F46/2** Request, paras 35-47. At the national level, the duration of the presumption of innocence is mixed. Some civil law jurisdictions continue the presumption until the final appeal judgment (*see, e.g. Delić* Decision, para. 11), while in several common law countries, the presumption ends with a conviction at the trial phase. For example, in **Canada**, a convicted criminal must prove error requiring the conviction to be vacated, as the presumption of innocence does not survive a conviction (*see R. v. Smith* [2004] 1 S.C.R. 385, 2004 SCC 14, para. 16); in **India**, when a lower Court convicts an accused and sentences him, the presumption of innocence comes to an end (*see B.R. Kapur v. State of Tamil Nadu and Ors* (2001) 7 SCC 231, para. 40; *Shamsher Singh alias Shera v. State of Haryana* (2002) 7 SCC 536, para. 7); in **Kenya**, a challenge to a trial court judgment does not restore the presumption of innocence and the conviction stands unless it is overturned on appeal (*see Kigoro Machoro v. Republic* [2019], eKLR, para. 17; *Bernard Simiyu Wawire v. Republic* [2016] eKLR, para. 11). Other countries abate appellate proceedings and leave the conviction intact upon the death of an appellant, indicating that the presumption of innocence does not apply post-conviction. *See, e.g. Australia*: *R. v. Rimon* [2003] VSCA 136, 6 VR 553, 142 A Crim R 226, paras 1, 4-6; *Quartermaine v. The Queen* [2002] WASCA 345, paras 3-5; *Sen v. The Queen* [1991] 55 A Crim R 349, paras 11, 14-15; **United Kingdom**: *R. v. Kearley* (No. 2) [1994] 2 AC 414, 420-423; *R. v. Jefferies* [1969] 1 Q.B. 120, 123-125.

<sup>17</sup> Only the ICTY has dealt with the specific situation of a person convicted at trial dying while their appeal is pending. Nevertheless, decisions by the ICTR, ICC and SCSL provide support for the principle that the presumption ceases to apply when a Trial Chamber enters a conviction. *See, e.g. ICC*: *The Prosecutor v. Lubanga*, ICC-01/04-01/06, Trial Chamber, Judgment pursuant to article 74 of the Statute, 14 March 2012,

Appeals Chamber found “that the presumption of innocence does not apply to persons convicted by Trial Chambers pending the resolution of their appeals.”<sup>18</sup> This was “consistent with the standard of review applicable in appellate proceedings whereby the appealing party has the burden of showing an error of law or of fact that invalidates the trial judgement, or leads to a miscarriage of justice, rather than attempting to initiate a trial *de novo*.”<sup>19</sup> The Chamber emphasised that “[t]his burden is clearly different from the one operative at trial, where the presumption of innocence does apply and the Prosecution has to prove its case beyond reasonable doubt.”<sup>20</sup>

9. In 2013, the ICTY Appeals Chamber affirmed the principle that the presumption of innocence does not continue on appeal of a conviction.<sup>21</sup> The Appeals Chamber held that “having found that the death of an appellant results in the termination of proceedings and given that no appeal judgement can be rendered with respect to Gvero, nothing can undermine the finality of the Trial Judgement as it concerns Gvero”.<sup>22</sup> Both Delić and Gvero had already filed their respective appeal briefs when they died.<sup>23</sup> Nonetheless, the ICTY

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para. 92 (“Under article 66 of the [Rome] Statute, the accused is presumed to be innocent until the Prosecutor has proven his guilt. For a conviction, each element of the particular offence charged must be established ‘beyond reasonable doubt’”); *The Prosecutor v. Ngudjolo*, ICC-01/04-02/12, Trial Chamber, Judgment pursuant to article 74 of the Statute, 18 December 2012, para. 34; *The Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-A, Appeals Chamber, Judgment (Reasons), 1 June 2001, para. 107 (“in conformity with the principle of presumption of innocence [...] it is the duty of the Prosecution to prove the guilt of the accused beyond reasonable doubt”); **ICTR**: *Rutaganda v. The Prosecutor*, ICTR-96-3-A, Appeals Chamber, Judgment, 26 May 2003, para. 172 (“the standard of proof to be applied is that of proof beyond a reasonable doubt, and [...] the burden of proof lies on the Prosecution [...] as the Accused enjoys the benefit of the presumption of innocence”); **SCSL**: *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Chamber, Judgment, 2 March 2009, para. 475 (“Article 17(3) of the [SCSL] Statute enshrines the principle that an Accused person is presumed innocent until proven guilty. The Prosecution alone bears the burden of establishing the guilt of the Accused. Each fact on which a conviction is based must be proven beyond reasonable doubt”).

<sup>18</sup> *Prosecutor v. Delić*, IT-04-83-A, Appeals Chamber, Decision on the Outcome of the Proceedings, 29 June 2010 (“*Delić Decision*”), para. 14. See also *Prosecutor v. Milutinović et al.*, IT-05-87-A, Appeals Chamber, Public Redacted Version of the “Decision on Vladimir Lazarević’s Second Motion for Temporary Provisional Release on the Grounds of Compassion” Issued on 21 May 2009, 22 May 2009, para. 9; *Prosecutor v. Popović et al.*, IT-05-88-AR65.8, Appeals Chamber, Decision on Prosecution’s Appeal Against Decision on Gvero’s Motion for Provisional Release, 20 July 2009, para. 11 (the Appeals Chamber explained the difference between provisional release during trial and appeal by comparing a decision “in relation to a person who has already been convicted by the Trial Chamber and whose case is now on appeal” and “an accused on trial who still benefits from the presumption of innocence.”).

<sup>19</sup> *Delić Decision*, para. 14.

<sup>20</sup> *Delić Decision*, para. 14.

<sup>21</sup> *Prosecutor v. Popović et al.*, IT-05-88-A, Appeals Chamber, Decision Terminating Appellate Proceedings in relation to Milan Gvero, 7 March 2013 (“*Popović Termination Decision*”), paras 5-7.

<sup>22</sup> *Popović Termination Decision*, para. 6.

<sup>23</sup> *Delić Decision*, para. 1; *Popović Termination Decision*, para. 1.

Appeals Chamber terminated the appeal proceedings, declared that the presumption of innocence was no longer applicable because there had been a conviction at trial, and pronounced that the trial judgment was final.<sup>24</sup>

10. Applying this approach at the ECCC is supported by the object and purpose of the ECCC Agreement and achieves a more equitable resolution of the issue. The purpose of the Agreement, which is an international treaty that forms part of Cambodian law,<sup>25</sup> is to bring the senior leaders of the DK and those most responsible for the crimes of the Khmer Rouge to account in accordance with law.<sup>26</sup> It also explicitly recognises the “legitimate concern of [...] the people of Cambodia in the pursuit of justice”.<sup>27</sup>
11. This recognition of the Cambodian people’s interest in justice reflects the fact that victims have a right to justice that is enshrined in international law.<sup>28</sup> The United Nations’ Basic Principles and Guidelines of victims’ rights<sup>29</sup> encompasses, *inter alia*: that gross violations of human rights are investigated, prosecuted, and punished;<sup>30</sup> acknowledgement of the victimisation and public disclosure about the harm suffered;<sup>31</sup> and knowing the full and complete truth as to the events that occurred, who participated in them, and why they happened.<sup>32</sup>

<sup>24</sup> *Delić* Decision, paras 14-16; *Popović* Termination Decision, paras 5-6.

<sup>25</sup> See Agreement, art. 31 (“The present Agreement shall apply as law within the Kingdom of Cambodia following its ratification [...]”). See also ECCC Law, art. 47 *bis new*.

<sup>26</sup> See Agreement, art. 1.

<sup>27</sup> Agreement, preamble.

<sup>28</sup> See International Covenant on Civil and Political Rights, New York, 16 December 1966 (“ICCPR”), 999 UNTS 171, art. 2(3)(a) (requiring State Parties to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy”); Universal Declaration of Human Rights, 10 December 1948, GA res. 217A (III), UN Doc. A/810, art. 8 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, entered into force 26 June 1987, 1465 UNTS 113, art. 14(1).

<sup>29</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147 (2005) (“UN Basic Principles”).

<sup>30</sup> UN Basic Principles, para. 4.

<sup>31</sup> UN Basic Principles, para. 24. See also Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (2011), p. 102.

<sup>32</sup> UN Basic Principles, paras 3(b), 4, 22(e), 24. See also Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. E/CN.4/2006/91 (2006), para. 59.

12. A holding that Nuon Chea continues to be presumed innocent, despite convictions beyond reasonable doubt at a trial conducted with all procedural safeguards and full respect for the rights of the accused, would undo the work of the ECCC in securing these rights to the victims. No longer would the full and complete truth regarding their victimisation, its causes, or Nuon Chea's participation in their suffering be acknowledged. This failure to recognise their experience as criminal victimisation could lead to secondary victimisation.<sup>33</sup> It would certainly defeat the Agreement's object and purpose of bringing justice to Cambodia regarding the events of the DK period and holding to account those most responsible for the crimes that occurred.
13. The wording of instruments governing the ECCC also supports the position that the presumption of innocence ends once guilt has been proven and a conviction has been entered at trial. The ordinary meaning of the language of the Agreement<sup>34</sup> supports this approach, as the Agreement states that an accused shall "be presumed innocent until proved guilty".<sup>35</sup> Similarly, Internal Rule 21, governing "Fundamental Principles", states that "[e]very person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established".<sup>36</sup>
14. Jurisprudence further supports this. The Trial Chamber in Case 002/01 stated it "is a fundamental principle of criminal proceedings that accused persons are presumed innocent until proven guilty".<sup>37</sup> In Case 001, the Trial Chamber held that "Internal Rule 21(d) enshrines the right of an accused to be presumed innocent as long as his or her guilt has not

<sup>33</sup> UN Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims*, 1999, p. 9.

<sup>34</sup> Agreement, art. 2 (providing that it is to be interpreted according to the Vienna Convention on the Law of Treaties). *See particularly* Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, art. 31 (governing treaty interpretation).

<sup>35</sup> Agreement, art. 13(1). *See also* ICCPR, arts 14(2) ("Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."), 14(5) ("Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."); UN Human Rights Committee, General Comment No. 32 on Article 14 of the ICCPR, 23 August 2007, UN Doc. CCPR/C/GC/32, para. 30.

<sup>36</sup> Internal Rules, Rule 21(1)(d). Additionally, the ECCC Rules interpret "Provisional Detention" as detention before the "final judgment" and make a clear distinction between "Provisional Detention" before the issuance of the trial judgment and "continued detention" after. This suggests that the Internal Rules considers the trial judgment to be the "final judgment" and mirrors the practice of the *ad hoc* tribunals. *See* Internal Rules, Rule 99, and the definition of "Provisional Detention", p. 85.

<sup>37</sup> E176/2 Decision on Rule 35 Applications for Summary Action, 11 May 2012, para. 16.

been established. This presumption places the burden of establishing the guilt of an accused before the ECCC on the Co-Prosecutors.”<sup>38</sup>

15. Indeed, the Nuon Chea Defence has previously submitted that “only after [...] the Trial Chamber has found in a well-reasoned and written decision that grave crimes were committed, will it then be appropriate to accept as a fact that such unfortunate events occurred. [...] This [...] is the essence of the presumption of innocence.”<sup>39</sup> Nuon Chea’s lawyers also declared during the Case 002/01 trial that it is “our client’s right to be presumed innocent until found guilty by a court. It’s not up to [others] to decide whether [Nuon Chea] is guilty; it’s up to you, the Judges in this [Trial Chamber]”.<sup>40</sup>

### III. NUON CHEA’S CONVICTIONS SHOULD NOT BE VACATED

16. Even were the presumption of innocence to apply on appeal, vacation of the Judgment would be an inappropriate remedy unsupported by any relevant authority. While the Defence state that the termination of proceedings on appeal automatically vacates a trial judgment,<sup>41</sup> they have not identified any support for this claim in statutory law, jurisprudence, or practice of the ECCC, Cambodia, other international criminal tribunals, regional human rights courts, France, or other civil law systems.<sup>42</sup> To the contrary, neither the ECCC nor Cambodian law authorise vacation of trial judgments in these circumstances<sup>43</sup> nor are there international procedural rules authorising vacation in this context.<sup>44</sup> In fact, far from supporting vacation,

<sup>38</sup> E188 Case 001-Judgment, 26 July 2010, para. 44. *See* Internal Rules, Rule 21(1)(d).

<sup>39</sup> C11 Appeal Hearing before the PTC, T. 7 February 2008, EN 00219554, lines 7-14.

<sup>40</sup> E1/24.1 T. 10 January 2012, 09.09.13-09.11.30. *See also* F16 Nuon Chea’s Appeal Against the Judgment in Case 002/01, 29 December 2014, para. 41 (“Article 35 *new* provides that the ‘accused shall be presumed innocent as long as the court has not given its definitive judgment’ [...] The presumption of innocence entails the right to be tried by an impartial tribunal, which is given independent effect under Cambodian law and applicable international instruments. The essence of this right is that the trier of fact must ‘bring an impartial mind’ to its assessment of the evidence.”).

<sup>41</sup> F46/2 Request, para. 32. *See also* paras 1(b)(i), 22-23, 29(b), 33-34, 89(b)(i) and Part 4, Heading II.

<sup>42</sup> In fact, in their Request, the Defence identify only *one* jurisdiction, domestic or otherwise, that vacates trial judgments in this context: the United States, a common law jurisdiction. *See* F46/2 Request, fn. 25. Other common law jurisdictions such as Australia, the UK, and Canada not only do not vacate upon the death of an appellant, they expressly leave the conviction intact. *See Delić* Decision, fns 34-35.

<sup>43</sup> *Contra, e.g.*, F46/2 Request, paras 22-23. Contrary to the Defence’s claim (F46/2 Request, para. 21), this does not evidence a “lacuna” in the law, but rather reflects that judgments are not vacated in such circumstances. This is consistent with other civil law jurisdictions such as France, which has a presumption of innocence on appeal but no statutory provision authorising the vacation of trial judgments in response to an appellant’s death – because death on appeal does not lead to vacation. *See* fn. 52, *infra*.

<sup>44</sup> *See* Agreement, art. 12(1); ECCC Law, art. 33 *new*.



the only international criminal tribunal cases on point hold the opposite: where a convicted person dies during appeal proceedings, the trial judgment becomes final.<sup>45</sup>

17. Lacking any relevant support for vacation, the Defence instead inaccurately state the content of domestic law. First, they ‘quote’ Article 6 of France’s criminal procedure code: “Further, as an appeal is not definitive, any of the causes of extinction of the criminal proceedings listed in Art. 6 vacates the first instance judgment”.<sup>46</sup> No such quote can be found in this Article.<sup>47</sup> Second, the Defence claim that in “the jurisdictions which recognise the presumption of innocence on appeal, the legal effect of termination is *always* the vacating of the trial judgment”.<sup>48</sup> They cite six statutory provisions from three civil law jurisdictions.<sup>49</sup> None support vacation. Finally, the Defence repeatedly insist that in jurisdictions with a presumption of innocence on appeal, the termination of appellate proceedings itself vacates the first-instance judgment.<sup>50</sup> They cite no support for these claims.
18. Contrary to the Defence’s claims, the consistent practice of domestic civil law jurisdictions which maintain a presumption of innocence on appeal – like France, upon which Cambodian law is based<sup>51</sup> – is that when a convicted person dies on appeal, the criminal proceedings are terminated, with no vacation or any other further action.<sup>52</sup> The same approach is appropriate here.

<sup>45</sup> *Delić* Decision, paras 14-16; *Popović* Termination Decision, para. 6.

<sup>46</sup> **F46/2** Request, fn. 20. Similarly, **F46/2.1.5** Cass. Crim., 8 April 1991, No. 88-81.542 does not support vacation but rather demonstrates that the death of an accused leads to termination of proceedings and nothing more. *See* fn. 52, *infra*.

<sup>47</sup> *See* Code de procédure pénale, art. 6 (“The public prosecution for the imposition of a penalty is extinguished by the death of the defendant, by limitation, amnesty, the repeal of the criminal law and res judicata. However, if a prosecution resulting in conviction has revealed the falsity of the judgment or decision which declared the public prosecution extinguished, the prosecution may be resumed. [...]”).

<sup>48</sup> **F46/2** Request, para. 32 (emphasis added).

<sup>49</sup> **F46/2** Request, fn. 37 (*see* underlying statutory provisions *or* Defence’s own summaries thereof).

<sup>50</sup> **F46/2** Request, paras 29(b), 33-34.



<sup>51</sup> *See e.g.* **E138/1/10/1/5/7** Decision on Immediate Appeal Against the Trial Chamber’s Order to Unconditionally Release the Accused Ieng Thirith, 14 December 2012, fn. 201; Case 001-**D99/3/42** Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias “Duch”, 5 December 2008, fn. 39.

<sup>52</sup> *French Cour de cassation*: Cass. Crim., 9 February 1987, No. 86-92.864 (the death of an appellant in cassation extinguished the criminal proceedings (the “*action publique*”) and rendered the appeal in cassation moot); Cass. Crim., 26 October 2016, No. 15-82.742 (criminal proceedings terminated after the death of the appellant in cassation); Cass. Crim., 29 June 2016, No. 14-84.037 (criminal proceedings terminated by death of appellant in cassation); **F46/2.1.5** Cass. Crim., 8 April 1991, No. 88-81.542 *cited* at **F46/2** Request, fn. 20 (criminal proceedings extinguished but the *Cour de cassation* still considered competent to decide on the deceased’s civil action). *See also* *French Cour d’appel*: Cour d’appel, Rouen, 21 February 2011, No. 09/00268; Cour

#### IV. RELIEF REQUESTED

19. For the reasons outlined above, the Co-Prosecutors request this Chamber to dismiss the Nuon Chea Defence Request.

Respectfully submitted,

Date	Name	Place	Signature
29 August 2019	CHEA Leang National Co-Prosecutor	Phnom Penh	
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d'appel, Rouen, 21 February 2011, No. 11/00086; Cour d'appel, Douai, 28 June 2007, No. 05/02859; Cour d'appel, Lyon, 21 October 2009, No. 2449/08. None of these decisions vacate the lower court judgment.