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Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

In the name of the Cambodian people and the United Nations and pursuant to 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

Case File N° 002/31-10-2019-ECCC/SC (03)

Before: Judge PRAK Kimsan, President
Judge Olivier BEAUVALLET
Judge NEY Thol
Judge Kang Jin BAIK
Judge HUOT Vuthy
Judge SIN Rith
Judge Steven BWANA

Date: 14 July 2020

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PUBLIC

DECISION ON KHIEU SAMPHÂN'S APPLICATION FOR DISQUALIFICATION OF SIX APPEAL JUDGES WHO ADJUDICATED IN CASE 002/01

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THE SPECIAL PANEL of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), formed by the Judicial Administrative Committee (“JAC”) pursuant to Internal Rule 34(6),¹ is seised of “KHIEU Samphân’s Application for Disqualification of the Six Appeal Judges Who Adjudicated in Case 002/01”, dated 31 October 2019 (“Application for Disqualification”).²

I. PROCEDURAL HISTORY

1. On 15 September 2010, the Co-Investigating Judges issued a Closing Order in Case 002, indicting NUON Chea, IENG Sary, IENG Thirith and KHIEU Samphân with crimes against humanity, genocide and grave breaches of the Geneva Conventions of 1949 and violations of the 1956 Cambodian Penal Code.³ IENG Thirith was later found unfit to stand trial and IENG Sary passed away on 14 March 2013,⁴ leaving only NUON Chea and KHIEU Samphân.

2. On 22 September 2011, the Trial Chamber issued an Order separating the Case 002 proceedings,⁵ which was annulled by the Supreme Court Chamber on 8 February 2013.⁶ On 26 April 2013, the Trial Chamber severed Case 002 creating Cases 002/1 and 002/2, which concerned two distinct series of alleged criminal activities of NUON Chea and KHIEU Samphân.⁷ Case 002/1 was limited to the allegations of crimes against humanity relating to the two phases of forced movement of population and to executions of former Khmer Republic personnel committed at

¹ Case 002/31-10-2019-ECCC/SC (03), Appointment of Replacement Judges to Hear KHIEU Samphân’s Disqualification Motion, 4 December 2019, 7; Case 002/31-10-2019-ECCC/SC (03), [Corrected 1] Appointment of Replacement Judges to Hear KHIEU Samphân’s Disqualification Motion, 17 December 2019, 9.

² Case 002/31-10-2019-ECCC/SC (03), KHIEU Samphân’s Application for Disqualification of the Six Appeal Judges Who Adjudicated Case 002/01, 31 October 2019, 1 (“KHIEU Samphân’s Application for Disqualification (1)”).

³ Case 002/19-09-2007-ECCC/OCIJ (“Case 002”), Closing Order, 15 September 2010, D427 (“Case 002 Closing Order (D427)”), para. 1613.

⁴ Case 002, Decision on IENG Thirith’s Fitness to Stand Trial, 17 November 2011, E138, para. 82; Case 002, Termination of the Proceedings against the Accused IENG Sary, 14 March 2013, E270/1, p. 3.

⁵ Case 002, Severance Order pursuant to Internal Rule 89ter, 22 September 2011, E124.

⁶ Case 002, Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision concerning the Scope of Case 002/01, 8 February 2013, E163/5/1/13 (“Case 002 First Severance Appeal Decision (E163/5/1/13)”), para. 52.

⁷ Case 002, Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, E284 (“Case 002 First Severance Decision (E284)”).



Tuol Po Chrey soon after the evacuation of Phnom Penh.⁸ On 23 July 2013, the Supreme Court Chamber confirmed this severance.⁹ On 4 April 2014, the Trial Chamber issued a further decision, defining the scope of Case 002/2,¹⁰ which was subsequently upheld by the Supreme Court Chamber on 29 July 2014.¹¹ Case 002/2 was confined to the genocide against the Vietnamese and Cham; the crimes that occurred at S-21, Kraing Ta Chan, Au Kansang, and Phnom Kraol Security Centres; the crimes that occurred at the worksites of 1st January and Trapeang Thma Dams, Tram Kak Cooperatives, Kampong Chhnang Airport; the forced marriage and the rape within the context of forced marriage; and the internal purges.¹²

3. On 7 August 2014, in Case 002/1, the Trial Chamber convicted NUON Chea and KHIEU Samphân of crimes against humanity of extermination, persecution on political grounds and other inhumane acts, including forced transfer, enforced disappearances and attacks against human dignity.¹³ They were sentenced to life imprisonment.¹⁴ Following the issuance of the Case 002/1 Trial Judgment, NUON Chea and KHIEU Samphân filed the applications requesting the disqualification of the Trial Chamber Judges who were to hear Case 002/2 (“Case 002 Disqualification Applications”).¹⁵ The Case 002 Disqualification Applications alleged, *inter alia*, that findings in the Case 002/1 Trial Judgment reveal actual bias on the part of the challenged judges and/or raise a reasonable appearance of bias in relation to future

⁸ Case 002 First Severance Decision (E284), Disposition, p. 70.

⁹ Case 002, Decision on Immediate Appeals against Trial Chamber’s Second Decision on Severance of Case 002 (Summary of Reasons), 23 July 2013, E284/4/7, paras 6-7, 13; Case 002, Decision on Immediate Appeals against Trial Chamber’s Second Decision on Severance of Case 002, 25 November 2013, E284/4/8 (“Case 002 Second Severance Appeal Decision (E284/4/8)”), para. 76.

¹⁰ Case 002, Decision on Additional Severance of Case 002 and Scope of Case 002/02, 4 April 2014, E301/9/1 (“Case 002 Decision on Additional Severance (E301/9/1)”).

¹¹ Case 002, Decision on KHIEU Samphân’s Immediate Appeal against the Trial Chamber’s Decision on Additional Severance of Case 002 and Scope of Case 002/02, 29 July 2014, E301/9/1/1/3 (“Case 002 Third Severance Appeal Decision (E301/9/1/1/3)”), para. 91.

¹² Case 002 Decision on Additional Severance (E301/9/1), para. 21.

¹³ Case 002/1, Case 002/01 Judgement, 7 August 2014, E313 (“Case 002/1 Trial Judgment (E313)”), Disposition, p. 622.

¹⁴ Case 002/1 Trial Judgment (E313), Disposition, p. 622.

¹⁵ Case 002, Mr KHIEU Samphân’s Request for Reconsideration of the Need to Await Final Judgement in Case 002/01 Before Commencing Case 002/02 and the Appointment of a New Panel of Trial Judges, 25 August 2014, E314/1 (“Case 002 KHIEU Samphân’s Request (E314/1)”); Case 002, NUON Chea Application for Disqualification of Judges NIL Nonn, YA Sokhan, Jean-Marc LAVERGNE and YOU Ottara, 29 September 2014, E314/6 (“Case 002 NUON Chea Application for Disqualification (E314/6)”); Case 002, Renewed Application for Disqualification of the Current Judges of the Trial Chamber Who Are to Hear Case 002/02, 10 October 2014, E314/8 (“Case 002 Renewed Application for Disqualification (E314/8)”).



proceedings in Case 002/2.¹⁶ The majority of the Special Panel, formed to consider the Case 002 Disqualification Applications, dismissed NUON Chea's and KHIEU Samphân's allegations, with Judge DOWNING partly dissenting.¹⁷ On 23 November 2016, the Supreme Court Chamber affirmed, in part, the convictions and upheld the sentence of life imprisonment for NUON Chea and KHIEU Samphân.¹⁸

4. On 16 November 2018, in Case 002/2, the Trial Chamber, by providing an oral summary of the findings and dispositions, convicted and sentenced NUON Chea and KHIEU Samphân to life imprisonment.¹⁹

5. On 19 November 2018, KHIEU Samphân appealed against the judgement pronounced on 16 November 2018 on grounds of procedural defect and lack of reasoning.²⁰ On 13 February 2019, the Supreme Court Chamber dismissed this appeal as inadmissible.²¹ On 20 March 2019, KHIEU Samphân filed a request for annulment of this Supreme Court Chamber's Decision, on the grounds that Reserve Judge RAPOZA was not properly designated as sitting judge at the time of the Decision's

¹⁶ Case 002 KHIEU Samphân's Request (E314/1), paras 42, 48; Case 002 NUON Chea Application for Disqualification (E314/6), paras 61-114, 122-133.

¹⁷ Case 002, Reasons for Decision on Applications for Disqualification, 30 January 2015, E314/12/1 ("Case 002 Reasons for Disqualification Decision (E314/12/1)").

¹⁸ Case 002/1, Appeal Judgement, 23 November 2016, F36 ("Case 002/1 Appeal Judgment (F36)"). The Supreme Court Chamber reversed NUON Chea's and KHIEU Samphân's convictions for the crime against humanity of extermination, while affirming the convictions for the crimes against humanity of murder, persecution on political grounds and other inhumane acts, which occurred during the Phase 1 of the Population Movement. With respect to the facts carried out in the course of the Phase 2 of the Population Movement, the Supreme Court Chamber reversed the convictions for the crimes against humanity of extermination and persecution on political grounds, while affirming the convictions for the crime against humanity of other inhumane acts and entering a conviction for the crime against humanity of murder by re-characterising the facts. Concerning the facts in Tuol Po Chrey, the Supreme Court Chamber reversed NUON Chea's and KHIEU Samphân's convictions for the crimes against humanity of extermination, murder and persecution on political grounds.

¹⁹ Case 002/2 Transcript of 16 November 2018 (Pronouncement of Judgment in Case 002/02), E1/529.1. ERN (EN) 01595987-01595990 ("Case 002/2 Transcript of 16 November 2018 (E1/529.1)"), pp. 53:21 to 56:17.

²⁰ Case 002/2, KHIEU Samphân's Urgent Appeal against the Judgement Pronounced on 16 November 2018, 19 November 2018, E463/1 ("Case 002/2 KHIEU Samphân's Urgent Appeal (E463/1)").

²¹ Case 002/2, Decision on KHIEU Samphân's Urgent Appeal against the Summary of Judgement Pronounced on 16 November 2018, 13 February 2019, E463/1/3 ("Case 002/2 Decision on KHIEU Samphân's Urgent Appeal (E463/1/3)").



issuance.²² On 16 August 2019, the Supreme Court Chamber dismissed the annulment request, outlining the details of Reserve Judge RAPOZA's appointment.²³

6. On 28 March 2019, the Trial Chamber notified the parties of the full reasoned Judgment in Case 002/2.²⁴ On 21 June 2019, the Co-Prosecutors filed their Notice of Appeal,²⁵ to which KHIEU Samphân responded.²⁶ On 1 July 2019, KHIEU Samphân filed his Notice of Appeal for Case 002/2 before the Supreme Court Chamber, alleging a multitude of errors.²⁷ On 4 August 2019, NUON Chea passed away.

7. On 31 October 2019, KHIEU Samphân filed the Application for Disqualification.²⁸ On 25 November 2019, the Co-Prosecutors as well as the Civil Party Lead Co-Lawyers each filed their respective Responses to the Application for Disqualification.²⁹

8. On 4 December 2019, the JAC notified the forming of a Special Panel under Internal Rule 34(6) to hear KHIEU Samphân's Application for Disqualification.³⁰ The JAC unanimously selected Judges PRAK Kimsan (Presiding), HUOT Vuthy, NEY Thol, SIN Rith, Olivier BEAUVALLET, Maureen CLARK and Kang Jin BAIK.

²² Case 002/2, KHIEU Samphân's Request for Annulment of Decision E463/1/3 on his Urgent Appeal against the Judgement of 16 November 2018, 20 March 2019, E463/1/4 ("Case 002/2 KHIEU Samphân's Request for Annulment (E463/1/4)").

²³ Case 002/2, Decision on KHIEU Samphân's Request for Annulment of Decision E463/1/3 on his Urgent Appeal against the Judgement of 16 November 2018, 16 August 2019, E463/1/5 ("Case 002/2 Decision on Annulment Request (E463/1/5)").

²⁴ Case 002/2, Case 002/02 Judgement, 16 November 2018 (filed on 27 March 2019), E465 ("Case 002/2 Trial Judgment (E465)").

²⁵ Case 002/2, Co-Prosecutors' Notice of Appeal of the Trial Judgement in Case 002/02, 21 June 2019, E465/2/1 ("Case 002/2 Co-Prosecutors' Notice of Appeal (E465/2/1)").

²⁶ Case 002/2, KHIEU Samphân's Defence Response to the Prosecution's Appeal in Case 002/02, 23 September 2019, F50/1.

²⁷ Case 002/2, KHIEU Samphân's Notice of Appeal (002/02), 1 July 2019, E465/4/1.

²⁸ KHIEU Samphân's Application for Disqualification (1).

²⁹ Case 002/31-10-2019-ECCC/SC (03), Co-Prosecutors' Response to KHIEU Samphân's Application for Disqualification of the Six Appeal Judges Who Adjudicated Case 002/01, 25 November 2019, 5 ("Co-Prosecutors' Response (5)"); Case 002/31-10-2019-ECCC/SC(03), Civil Party Lead Co-Lawyers' Response to KHIEU Samphân's Application for Disqualification of Six Appeal Judges, 25 November 2019, 6 ("Civil Party Lead Co-Lawyers' Response (6)"). The Co-Prosecutors and the Civil Party Lead Co-Lawyers required additional time to respond. *See* Case 002/31-10-2019-ECCC/SC(03), Co-Prosecutors' Urgent Request for an Extension of Time to Respond to KHIEU Samphân's Recusal Request, 4 November 2019, 2; Case 002/31-10-2019-ECCC/SC(03), Civil Party Lead Co-Lawyers' Urgent Request for Extension of Time to Respond to F53, 7 November 2019, 3. On 15 November 2019, the Supreme Court Chamber extended the deadline to 25 November 2019. Case 002/31-10-2019-ECCC/SC (03), Decision on the Co-Prosecutors and Civil Party Urgent Requests for Extension of Time to Respond to KHIEU Samphân's Disqualification Request, 15 November 2019, 4.

³⁰ Case 002/31-10-2019-ECCC/SC (03), Appointment of Replacement Judges to Hear KHIEU Samphân's Disqualification Motion, 4 December 2019, 7.



9. On 13 December 2019, Judge CLARK notified the JAC of her recusal given that she formed a part of the Supreme Court Chamber when it issued the impugned Decision on KHIEU Samphân. On 17 December 2019, the JAC unanimously selected Judge Steven BWANA to replace Judge CLARK on the Special Panel.³¹

10. On 20 January 2020, a separate case file for the documents related to the Application for Disqualification has been created and notified to the parties and the Special Panel.

11. On 22 January 2020, the Special Panel issued an invitation³² to the Challenged Judges pursuant to Internal Rule 34(7) to which Judge JAYASINGHE³³ and Judge MWACHANDE-MUMBA³⁴ each responded on 31 January 2020.

II. SUBMISSIONS

12. The Co-Lawyers for KHIEU Samphân (“Co-Lawyers”) request the Supreme Court Chamber to disqualify the Six Appeal Judges who adjudicated in Case 002/1 pursuant to Internal Rule 34.³⁵ The Co-Lawyers submit that to guarantee the right to be tried by an impartial tribunal,³⁶ the Challenged Judges should be disqualified on the grounds of: (i) bias based on the Case 002/1 Appeal Judgment’s prejudgment of the appeal in Case 002/2; (ii) bias based on the erroneous findings in the Case 002/1 Appeal Judgment; and (iii) procedural irregularities since the pronouncement of the Case 002/2 Trial Judgment.³⁷ The Co-Lawyers, relying on Internal Rule 34(2), base their argument on the legal test for disqualification of judges—unacceptable actual

³¹ Case 002/31-10-2019-ECCC/SC (03), [Corrected 1] Appointment of Replacement Judges to Hear KHIEU Samphân’s Disqualification Motion, 17 December 2019, 9.

³² Case 002/31-10-2019-ECCC/SC (03), Invitation to the Six Judges of the Supreme Court Chamber Who Adjudicated Case 002/1, 22 January 2020, 10.

³³ Case 002/31-10-2019-ECCC/SC (03), Response to Invitation to the Six Judges of the Supreme Court Chamber Who Adjudicated Case 002/1, 31 January 2020, 10/1 (“Response to Invitation to the Six Judges (10/1)”).

³⁴ Case 002/31-10-2019-ECCC/SC (03), Response to Invitation to the Six Judges of the Supreme Court Chamber Who Adjudicated Case 002/1, 31 January 2020, 10/2 (“Response to Invitation to the Six Judges (10/2)”).

³⁵ KHIEU Samphân’s Application for Disqualification (1), paras 8, 116.

³⁶ KHIEU Samphân’s Application for Disqualification (1), paras 12-18.

³⁷ KHIEU Samphân’s Application for Disqualification (1), para. 19.



bias and/or appearance of bias—that was adopted and applied by the ECCC.³⁸ They request a public adversarial hearing.³⁹

13. In the Response, the Co-Prosecutors request the Supreme Court Chamber to deny the Application for Disqualification, as it does not meet the high threshold necessary to overcome the presumption of judicial impartiality afforded to judges at the ECCC.⁴⁰

14. The Civil Party Lead Co-Lawyers do not respond on the merits of the Application for Disqualification.

15. Judge JAYASINGHE, in his written submission,⁴¹ recalls Internal Rule 34(2), which provides that a judge may be disqualified if it is demonstrated that “the Judge has a personal or financial interest or concerning which the Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias”,⁴² and contends that he neither has, nor has had such interest or bias. Judge JAYASINGHE further states that he is aware and mindful of his obligation as a professional Judge to exercise his judicial functions according to the rule of law, to ensure the observance of the fair trial rights of the accused and to act independently, impartially and rigorously in the fair adjudication of the cases.⁴³ Judge JAYASINGHE concludes that in ensuring the professional integrity of his position as a Judge, decisions on which he adjudicates are based on a genuine and objective assessment of the law and facts.⁴⁴ Judge MWACHANDE-MUMBA concurred with Judge JAYASINGHE’s submissions.⁴⁵

³⁸ KHIEU Samphân’s Application for Disqualification (1), paras 19-23 and footnote 36 *referring to* Case 002/1 Appeal Judgment (F36), para. 112; Case 002 (PTC01), Decision on the Co-Lawyers’ Urgent Application for Disqualification of Judge NEY Thol Pending the Appeal against the Provisional Detention Order in the Case of NUON Chea, 4 February 2008, (C11/29) (“Case 002 Decision on the Co-Lawyers’ Urgent Application (C11/29)”), para. 20 *referring to* International Criminal Tribunal for the Former Yugoslavia (“ICTY”), *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, Appeals Chamber, 21 July 2000 (“*Furundžija* Appeal Judgment (ICTY)”).

³⁹ KHIEU Samphân’s Application for Disqualification (1), para. 116.

⁴⁰ Co-Prosecutors’ Response (5), paras 1, 73.

⁴¹ Response to Invitation to the Six Judges (10/1).

⁴² Response to Invitation to the Six Judges (10/1) *referring to* Internal Rule 34(2).

⁴³ Response to Invitation to the Six Judges (10/1).

⁴⁴ Response to Invitation to the Six Judges (10/1).

⁴⁵ Response to Invitation to the Six Judges (10/2).



III. ADMISSIBILITY

A. SUBMISSIONS

16. The Co-Lawyers submit that the Application for Disqualification is admissible pursuant to Internal Rule 34 because it is (i) filed while an appeal is pending since the filing of the notice of appeal on 1 July 2019; (ii) based on the scope of the appeal against the Case 002/2 Trial Judgment and limited to the errors raised by the parties; and (iii) based on recent procedural irregularities.⁴⁶ The Co-Lawyers assert that the Application for Disqualification provides “written reasons and evidence in support of the allegations of bias”, noting the link between the findings in the Case 002/2 Trial Judgment, the Case 002/1 Appeal Judgment and their alleged impact on the appeal in Case 002/2.⁴⁷ The Co-Lawyers further contend that Annexes 1 to 16, describing the alleged errors in the Case 002/2 Trial Judgment, demonstrate the extent of the issues that were already adjudicated by the Challenged Judges.⁴⁸

17. The Co-Prosecutors do not challenge the admissibility of the Application for Disqualification.⁴⁹

18. The Civil Party Lead Co-Lawyers submit that the Application for Disqualification is inadmissible because (i) it was filed significantly out of time; and (ii) the interests of justice favour its dismissal.⁵⁰

19. Concerning the alleged delay of the Application for Disqualification, the Civil Party Lead Co-Lawyers contend that (i) the Co-Lawyers have known of the alleged ground for disqualification for three years;⁵¹ (ii) the Co-Lawyers knew of their intention to appeal from 16 November 2018;⁵² and that (iii) the appellate proceedings began on 19 November 2018.⁵³

⁴⁶ KHIEU Samphân’s Application for Disqualification (1), para. 11.

⁴⁷ KHIEU Samphân’s Application for Disqualification (1), para. 11.

⁴⁸ KHIEU Samphân’s Application for Disqualification (1), para. 11.

⁴⁹ Co-Prosecutors’ Response (5).

⁵⁰ Civil Party Lead Co-Lawyers’ Response (6), paras 5-56.

⁵¹ Civil Party Lead Co-Lawyers’ Response (6), paras 17-27.

⁵² Civil Party Lead Co-Lawyers’ Response (6), paras 28-30.

⁵³ Civil Party Lead Co-Lawyers’ Response (6), paras 31-35.



20. First, the Civil Party Lead Co-Lawyers argue that the Co-Lawyers have been aware that the Judges who sat on the appeal in Case 002/1 are allegedly biased because of their role in convicting KHIEU Samphân in Case 002/1 at least in November 2016, when the Case 002/1 Appeal Judgment was handed down.⁵⁴ Second, the Civil Party Lead Co-Lawyers argue that the Co-Lawyers knew of their intention to appeal from 16 November 2018, when a summary judgement providing its key conclusions, including adverse findings as to the individual criminal responsibility of KHIEU Samphân, was delivered by the Trial Chamber and the statements confirming their intention to appeal were made to the press.⁵⁵ The question of alleged bias of the Supreme Court Chamber Judges was no longer hypothetical since then.⁵⁶ Third, the Civil Party Lead Co-Lawyers assert that appellate proceedings began on 19 November 2018 with the filing of KHIEU Samphân's Urgent Appeal against the Judgement Pronounced on 16 November 2018 and that the Co-Lawyers could and should have filed their disqualification request immediately once the appellate proceedings were initiated, in compliance with Internal Rule 34(4).⁵⁷

21. With respect to the interests of justice, the Civil Party Lead Co-Lawyers assert that the interests of justice favour the dismissal of the Application for Disqualification because (i) the delay and the Co-Lawyers' conduct are particularly egregious since it is marked by a substantial delay with less justification and the taking of a number of positive steps to engage with the Challenged Judges;⁵⁸ (ii) considering the request despite the delay would prejudice civil party rights and interests of the legal certainty and expeditious proceedings, which are stronger in the present case because of the advanced age of most of the civil parties;⁵⁹ (iii) the Application for Disqualification does not raise any novel or serious questions as the issue at hand is materially identical to that which has already been determined in the Special Panel's Disqualification Decision of 30 January 2015;⁶⁰ and (iv) the interests of justice favour

⁵⁴ Civil Party Lead Co-Lawyers' Response (6), paras 17, 22 *referring to* Case 002 Reasons for Disqualification Decision (E314/12/1)", paras 6, 9.

⁵⁵ Civil Party Lead Co-Lawyers' Response (6), paras 28-29.

⁵⁶ Civil Party Lead Co-Lawyers' Response (6), paras 28-30.

⁵⁷ Civil Party Lead Co-Lawyers' Response (6), paras 31-35.

⁵⁸ Civil Party Lead Co-Lawyers' Response (6), paras 41-45.

⁵⁹ Civil Party Lead Co-Lawyers' Response (6), paras 46-50.

⁶⁰ Civil Party Lead Co-Lawyers' Response (6), paras 51-53.



the enforcement of applicable procedural rules.⁶¹ The Civil Party Lead Co-Lawyers argue that rejecting untimely defence motions as inadmissible ensures the fair and expeditious conduct of proceedings.⁶²

B. DISCUSSION

22. The Special Panel first sets out the legal foundations governing the admissibility of an application for disqualification of a judge. Then, in turn, the Special Panel addresses the admissibility of each ground of the Application for Disqualification.

23. Internal Rule 34 outlines the procedure and the grounds for disqualification of judges at the ECCC.⁶³ Relevant to the admissibility of an application for disqualification of a Supreme Court Chamber Judge are Internal Rules 34(3) and (4)(d), which provide that the application (i) “shall clearly indicate the grounds and shall provide supporting evidence”; (ii) “shall be filed as soon as the party becomes aware of the grounds in question” and (iii) “must be submitted [...] concerning matters arising before the appeal, at the beginning of the appellate proceedings; or concerning matters [...] of which the parties were unaware before the start of the appeal, before the final decision on the appeal.”⁶⁴ As numerous Chambers of the ECCC have held, these conditions are cumulative and must be satisfied.⁶⁵

24. In deciding on admissibility of the application for disqualification, the Pre-Trial Chamber has ruled that “[t]o satisfy the clarity requirement for admissibility purposes, an application need only identify a ground(s) for disqualification with

⁶¹ Civil Party Lead Co-Lawyers’ Response (6), paras 54-56.

⁶² Civil Party Lead Co-Lawyers’ Response (6), paras 54-55.

⁶³ *Internal Rules of the Extraordinary Chambers in the Courts of Cambodia* (Rev.9), as revised 16 January 2015 (“Internal Rules”), Internal Rule 34.

⁶⁴ Internal Rules 34(3), (4).

⁶⁵ Case 002/19-09-2007-ECCC/SC (1), Decision on IENG Thirith’s Application to Disqualify Judge SOM Sereyvuth for Lack of Independence, 3 June 2011, Doc. No. 1/4 (“Case 002/19-09-2007-ECCC/SC (1), Decision on IENG Thirith’s Application (Doc. No. 1/4)”), para. 4; Case 002/17-06-2010-ECCC-PTC (09), Decision on Application for Disqualification of Judge YOU Bunleng, 10 September 2010, Doc. No. 8 (“Case 002/17-06-2010-ECCC-PTC (09), Decision on Application for Disqualification of Judge YOU Bunleng (Doc. No. 8)”), para. 12.



sufficient clarity to enable the relevant Chamber to conduct a proper review of the merits of the ground(s).”⁶⁶

25. Concerning the timeliness of an application, the Special Panel notes the cumulative character of the conditions under Internal Rules 34(3) and (4)(d),⁶⁷ and considers that both function as a time limit for the filing of the application for disqualification against a Supreme Court Chamber Judge. The Pre-Trial Chamber has held that to meet the requirement under Internal Rule 34(3), a party should file the application “as soon as the context becomes apparent to them as founding or supporting a ground which they advance.”⁶⁸ Further delineating the timeliness condition, the Supreme Court Chamber has ruled that “the applicant must have an appeal pending before the Chamber at the time of the filing of the application for disqualification.”⁶⁹ The Special Panel observes that pursuant to Internal Rules 105(2) and (3), the appellate proceedings begin with the filing of immediate appeal or a notice of appeal.⁷⁰

26. In the instant case, the Special Panel will consider whether three grounds of the Application for Disqualification comply with the conditions under Internal Rules 34(3) and (4)(d).

⁶⁶ Case 002/17-06-2010-ECCC-PTC (09), Decision on Application for Disqualification of Judge YOU Bunleng (Doc. No. 8), para. 26.

⁶⁷ Case 002/19-09-2007-ECCC/SC (1), Decision on IENG Thirith’s Application (Doc. No. 1/4), para. 4.

⁶⁸ Case 002/13-10-2009-ECCC/PTC (02), Decision on KHIEU Samphân’s Application to Disqualify Co-Investigating Judge Marcel LEMONDE, 14 December 2009, Doc. No. 7 (“Case 002/13-10-2009-ECCC/PTC (02), Decision on KHIEU Samphân’s Application to Disqualify (Doc. No. 7)”), para. 20. *See also* Case 002/17-06-2010-ECCC-PTC (09), Decision on Application for Disqualification of Judge YOU Bunleng (Doc. No. 8), para. 19; Case 002 Decision on the Co-Lawyers’ Urgent Application (C11/29), para. 4.

⁶⁹ Case 002/19-09-2007-ECCC/SC (1), Decision on IENG Thirith’s Application (Doc. No. 1/4), para. 4.

⁷⁰ Internal Rules 105(2), (3). *See also* Case 002/19-09-2007-ECCC/SC (1), Decision on IENG Thirith’s Application (Doc. No. 1/4), para. 1 (“the Accused initiated appellate proceedings before the Supreme Court Chamber by filing an immediate appeal against the Trial Chamber’s decision”); International Residual Mechanism for Criminal Tribunals (“IRMCT”), *Prosecutor v. Mladić*, MICT-13-56-A, Decision on a Further Motion for an Extension of Time to File a Notice of Appeal, Appeals Chamber, 9 March 2018, p. 2 (“the filing of a notice of appeal marks the commencement of the appeal proceedings in a case”); International Criminal Tribunal for Rwanda (“ICTR”), *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Decision on Motions for Extension or Time for the Filing of Appeal Submissions, Appeals Chamber, 25 July 2011, para. 5.



1. Grounds 1 and 2 are Admissible

27. As a preliminary matter, the Special Panel notes that Ground 1 implicates the existence of bias prejudging the appeal in Case 002/2 and that Ground 2 addresses multiple “erroneous findings reached in the Case 002/1 Appeal Judgment”, which constitute bias or an appearance of bias.⁷¹ Recalling that the clarity condition under Internal Rule 34(3) is met as long as a party identifies a ground to enable its review on the merits,⁷² the Special Panel considers that Grounds 1 and 2 satisfy this requirement.

28. With respect to the timeliness requirement, the Special Panel finds that the Application for Disqualification was filed more than four months after the appellate proceedings began and that the Co-Lawyers became aware of the matters in Grounds 1 and 2 before the appeal.

29. First, concerning the “as soon as” requirement under Internal Rule 34(3), the Special Panel deems it necessary to recall when the Co-Lawyers “became aware” of the relevant findings in the Case 002/1 Appeal Judgment and in the Case 002/2 Trial Judgment on which the arguments in Grounds 1 and 2 primarily rely. The Special Panel observes that the Case 002/1 Appeal Judgment was delivered on 23 November 2016,⁷³ while the full reasons for the Case 002/2 Trial Judgment were notified to the parties on 28 March 2019.⁷⁴ The Special Panel notes that on 3 April 2019, in their Request for Extension for Notice of Appeal, the Co-Lawyers cited the “preparation of an application for disqualification” in support of the request.⁷⁵

30. The Special Panel is not convinced by the Civil Party Lead Co-Lawyers’ arguments⁷⁶ that in the context of Internal Rule 34(3), the Co-Lawyers have been aware of Grounds 1 and 2 for three years since November 2016 when the Case 002/1 Appeal Judgment was delivered, or from November 2018 when the Case 002/2 summary judgment was issued by the Trial Chamber. While “a party may become

⁷¹ KHIEU Samphân’s Application for Disqualification (1), para. 19.

⁷² Case 002/17-06-2010-ECCC-PTC (09), Decision on Application for Disqualification of Judge YOU Bunleng (Doc. No. 8), para. 26.

⁷³ Case 002/1 Appeal Judgment (F36).

⁷⁴ Case 002/2 Trial Judgment (E465).

⁷⁵ Case 002/2, KHIEU Samphân [*sic*] Defence Request for Extension of Time and Number of Pages to File Notice of Appeal, 3 April 2019, F39/1.1, para. 36.

⁷⁶ Civil Party Lead Co-Lawyers’ Response (6), paras 17, 28.



aware of some of the ‘supporting evidence’ before s/he ‘becomes aware’ of the ground(s) for disqualification”,⁷⁷ the alleged prejudging or erroneous findings in Case 002/1 Appeal Judgment could become clear to the Co-Lawyers only after the full reasons of the Case 002/2 Trial Judgment were published and overlapping issues with the Case 002/1 Appeal Judgment were identified.⁷⁸ The Special Panel, accordingly, finds that for the purposes of Internal Rule 34(3), the Co-Lawyers became aware of the grounds for the bias alleged in Grounds 1 and 2 on 28 March 2019 or at the latest on 3 April 2019.

31. Second, regarding the “at the beginning of the appellate proceedings” requirement under Internal Rule 34(4)(d), the Special Panel recalls that the appellate proceedings commence with the filing of immediate appeal or a notice of appeal.⁷⁹ Contrary to the Civil Party Lead Co-Lawyers’ assertion,⁸⁰ the Special Panel considers that the appellate proceedings in the present case did not commence on 19 November 2018 with the filing of KHIEU Samphân’s Urgent Appeal against the Judgement Pronounced on 16 November 2018.⁸¹ The Special Panel observes that the Urgent Appeal is not an immediate appeal in the sense of Internal Rule 104(4)(b),⁸² but rather a motion against the summary of the findings and disposition for its formal irregularities including “lack of reasoning”,⁸³ which was found inadmissible⁸⁴ and could not initiate the appellate proceedings. The Special Panel, thus, finds that the beginning of the appellate proceedings in the instant case is the Co-Prosecutors’ filing of the Notice of Appeal on 21 June 2019.⁸⁵

32. The Special Panel observes that in the meaning of Internal Rules 34 and 39(1), 21 June 2019 was the earliest date when the Co-Lawyers could file the Application

⁷⁷ Case 002/17-06-2010-ECCC-PTC (09), Decision on Application for Disqualification of Judge YOU Bunleng (Doc. No. 8), para. 19.

⁷⁸ See also Case 002 Reasons for Disqualification Decision (E314/12/1), para. 32 (where the Special Panel of the Trial Chamber noted that despite the party’s knowledge of “the facts purportedly showing an appearance of bias” and delay with filing the disqualification application in that regard, “many of the grounds [...] rely on specific findings made in the Case 002/01 Judgement and Final Witness Decision, which obviously could only be known once published on 7 August 2014”).

⁷⁹ See *supra* para. 25.

⁸⁰ Civil Party Lead Co-Lawyers’ Response (6), para. 31.

⁸¹ Case 002/2 Decision on KHIEU Samphân’s Urgent Appeal (E463/1/3).

⁸² Internal Rule 104(4).

⁸³ Case 002/2 KHIEU Samphân’s Urgent Appeal (E463/1).

⁸⁴ See Case 002/2 Decision on KHIEU Samphân’s Urgent Appeal (E463/1/3).

⁸⁵ Case 002/2 Co-Prosecutors’ Notice of Appeal (E465/2/1).



for Disqualification, which was submitted later on 31 October 2019,⁸⁶ more than four months after the appellate proceedings began and six months after the Co-Lawyers became aware of Grounds 1 and 2.

33. Nonetheless, the Special Panel notes that it has discretion to admit an application for disqualification and consider it on the merits, even if the time limit for filing is not met.⁸⁷ Specifically, when the application for disqualification raises a matter of substantial importance to the fairness of the proceedings, it may be found admissible on a case-by-case basis.⁸⁸ In relation to the fairness, the Pre-Trial Chamber has held that “in light of Article 33 (new) of the ECCC Law, which provides that ‘trials are fair’ and conducted ‘with full respect for the rights of the accused’, and of Article 14 of the ICCPR, which is ‘applicable to all stages of proceedings before the ECCC, [...] [t]he overriding consideration in all proceedings before the ECCC is the fairness of the proceedings, as provided in Internal Rule 21(1)(a).’”⁸⁹

⁸⁶ KHIEU Samphân’s Application for Disqualification (1).

⁸⁷ Internal Rule 39(4) (“the Chambers may [...] on their own motion: [...] recognise the validity of any action executed after the expiration of a time limit prescribed in these IRs on such terms, if any, as they see fit”).

⁸⁸ See Case 002 Reasons for Disqualification Decision (E314/12/1), para. 32 (“[d]espite misgivings [...], overall it is in the interests of justice to admit the Disqualification Applications in their entirety and address the various submissions advanced”); Case 002, Decision on the Charged Person’s Application for Disqualification of Drs. Stephen HEDER and David BOYLE, 22 September 2009, Doc. No. 3, para. 12. See also International Criminal Court, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judges of Pre-Trial Chamber I, ICC-01/12-01/18-458-AnxI-Red, 12 September 2019, para. 30 (where a majority of the Plenary Judges permitted an “exceptional assessment” of the merits of the request, though the request was found untimely); Special Tribunal for Lebanon, *Prosecutor v. El Sayed*, CH/PRES/2010/08, Decision on Mr El Sayed’s Motion for the Disqualification of Judge RIACHY from the Appeals Chamber Pursuant to Rule 25, 5 November 2010, para. 36 (“[t]he interests of justice require that in any proceeding all the persons involved should have a right to challenge the impartiality or independence of a Judge, and the court must grant satisfaction to such challenges”); Case 002, Decision on IENG Sary’s Request for Investigation under Internal Rule 35 into the Actions of Dr. Craig ETCHESON of the Office of the Co-Prosecutors relating to *Ex-Parte* Communication with the International Component of the OCIJ, 27 April 2010, Doc. No. 3, para. 12 (“[t]he Pre-Trial Chamber considers that to cover such an exceptional situation as the one raised by the Application, it is in the interest of justice to rule the Application as appropriately filed before the Pre-Trial Chamber. By so doing there can be no perception of conflict, possible bias or embarrassment”).

⁸⁹ Case 002 (PTC75), Decision on IENG Sary’s Appeal against the Closing Order, 11 April 2011, D427/1/30 (“Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30)”), para. 49 quoting Case 002 (PTC42), Decision on IENG Thirith’s Appeal against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1), 10 August 2010, D264/2/6, paras 13-14.



34. Contrary to the Civil Party Lead Co-Lawyers' argument,⁹⁰ the Application for Disqualification raises a serious issue of fairness – the alleged bias of the Judges of the Supreme Court Chamber who are to hear the Case 002/2 Appeal.⁹¹ The Special Panel observes that the Case 002/2 Appeal Judgment will mark the end of 10 years of proceedings against KHIEU Samphân and the Supreme Court Chamber is the final stage where the conviction and sentence can be appealed.⁹²

35. The Special Panel notes that there is a legitimate concern of whether the Application of Disqualification meets the requirements set out in Internal Rules 34(3) and (4)(d), which do not specifically define the time limit of filing the application, warranting the case-by-case approach.

36. In this regard, the Special Panel recalls the unique nature of the Severance Order at hand in which a single indictment was split into two cases involving the same accused with overlapping factual background. The Supreme Court Chamber once expressed concerns on the fairness of proceedings after the severance, including impartiality of judges,⁹³ but ultimately confirmed it with its own clarification.⁹⁴ The compelling interest to ensure meaningful justice through obtaining a verdict within the lifespan of the Accused was given due consideration.⁹⁵

37. The severance was already challenged by the Co-Lawyers before the Special Panel of the Trial Chamber,⁹⁶ but the challenge in the instant case is based on the Case 002/1 Appeal Judgment, which was announced after the decision of the Special Panel of the Trial Chamber,⁹⁷ and made in a different context of the appellate

⁹⁰ Civil Party Lead Co-Lawyers' Response (6), paras 51-53.

⁹¹ KHIEU Samphân's Application for Disqualification (1), paras 41-109.

⁹² *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*, 6 June 2003, entered into force 29 April 2005 ("ECCC Agreement"), Art. 3(2)(b); *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, 10 August 2001, NS/RKM/1004/006, as amended 27 October 2004 ("ECCC Law"), Art. 36; Internal Rule 104.

⁹³ Case 002 Second Severance Appeal Decision (E284/4/8), para. 39.

⁹⁴ Case 002 Third Severance Appeal Decision (E301/9/1/1/3), para. 88.

⁹⁵ Case 002 Third Severance Appeal Decision (E301/9/1/1/3), para. 54. *See also* Case 002 Second Severance Appeal Decision (E284/4/8), paras 50-51; Case 002 First Severance Appeal Decision (E163/5/1/13), para. 51.

⁹⁶ Case 002 KHIEU Samphan's Request (E314/1); Case 002 NUON Chea Application for Disqualification (E314/6); Case 002 Renewed Application for Disqualification (E314/8).

⁹⁷ Case 002 Reasons for Disqualification Decision (E314/12/1).



proceedings. Therefore, it is not materially identical to that which has already been determined by the Special Panel of the Trial Chamber as alleged by the Civil Party Lead Co-Lawyers.⁹⁸

38. The Special Panel considers that a fair balance must be struck between the legitimate interest of Civil Parties and the effective exercise by the Accused of the right to appeal available to him, particularly in view of what is at stake in the proceedings for the Accused. The Special Panel observes that if the Application is found inadmissible on formality grounds and a question relating to the alleged bias of the Judges of the Supreme Court Chamber who are to hear the Case 002/2 Appeal⁹⁹ remains unaddressed, the overall fairness of the proceedings against KHIEU Samphân could be undermined. The Special Panel is convinced that considering the entirety of the legitimate interests is equally important matter for all parties to the proceedings and for the legacy of the ECCC.

39. In light of the foregoing, the Special Panel finds it appropriate to admit Grounds 1 and 2 and address the merits of them.

2. Ground 3 is Admissible

40. The Special Panel finds that Grounds 3—arguing for the confirmation of bias since the pronouncement of the Case 002/2 Trial Judgment¹⁰⁰—is admissible because it satisfies the conditions pursuant Internal Rules 34(3) and 34(4)(d).

41. Ground 3 implicates the procedural irregularities committed since the pronouncement of the Case 002/2 Trial Judgment summary, in particular the decisions of the Supreme Court Chamber of 13 February 2019 and 16 August 2019.¹⁰¹

42. The Special Panel observes the contextually interrelated nature of the two decisions of the Supreme Court Chamber¹⁰² and considers it proper to regard the date

⁹⁸ Civil Party Lead Co-Lawyers' Response (6), paras 51-53.

⁹⁹ KHIEU Samphân's Application for Disqualification (1), paras 41-109.

¹⁰⁰ KHIEU Samphân's Application for Disqualification (1), para. 110.

¹⁰¹ Case 002/2 Decision on KHIEU Samphân's Urgent Appeal (E463/1/3); Case 002/2 Decision on Annulment Request (E463/1/5).

¹⁰² Case 002/13-10-2009-ECCC/PTC (02), Decision on KHIEU Samphân's Application to Disqualify (Doc. No. 7), para. 20 ("a party may present past apparently disparate evidence which is seen as contextually relevant for the first time as a result of more recent events.").



of the Supreme Court Chamber’s Decision on the Request for Annulment—16 August 2019—to be the date when the Co-Lawyers “became aware” of the alleged disqualification ground.

43. The Special Panel further notes that since the appellate proceedings began on 21 June 2019 and the Co-Lawyers were notified of the Supreme Court Chamber’s Decision on the Request for Annulment on 16 August 2019, Ground 3 constitutes a matter “of which the parties were *unaware before* the start of the appeal”.¹⁰³ The Special Panel observes that a period of two months transpired between 16 August 2019 and KHIEU Samphân’s filing of the Application for Disqualification on 31 October 2019, and considers that there was no unreasonable delay in filing of the Application for the Co-Lawyers to prepare and file a Disqualification request for Ground 3, in light of the relatively short period of the time and the overall fairness of the proceedings. Accordingly, Ground 3 is admissible.

IV. MERITS

A. GROUND 1: THE EXISTENCE OF BIAS BASED ON THE CASE 002/1 APPEAL JUDGMENT PREJUDGING THE APPEAL IN CASE 002/2

1. Submissions

44. The Co-Lawyers submit that the Case 002/1 Appeal Judgment “unacceptably prejudices the appeal in Case 002/2”, citing the “relevant jurisprudence” of the ECCC, international criminal tribunals and the European Court of Human Rights (“ECtHR”).¹⁰⁴ The Co-Lawyers further rely on the “relevant jurisprudence” to establish bias based on the prejudgment of the guilt of an accused¹⁰⁵ and refer to the “compelling reasons” that make, in their view, the disqualification necessary.¹⁰⁶

(i) Relevant Jurisprudence

45. The Co-Lawyers challenge the Special Panel of the Trial Chamber’s previous dismissal of the application for disqualification of the Trial Chamber Judges in Case

¹⁰³ Internal Rule 34(4)(d) (emphasis added).

¹⁰⁴ KHIEU Samphân’s Application for Disqualification (1), para. 24.

¹⁰⁵ KHIEU Samphân’s Application for Disqualification (1), paras 25-40.

¹⁰⁶ KHIEU Samphân’s Application for Disqualification (1), paras 24, 41-75.



002/2, arguing that the test adopted and applied by the majority, “whether findings in an earlier case evince attributing criminal responsibility in relation to the charges to be adjudicated in subsequent cases” is “wrong” in light of Judge DOWNING’s partly dissenting opinion and recent jurisprudence of the international criminal tribunals.¹⁰⁷

46. First, the Co-Lawyers note that Judge DOWNING, in his partly dissenting opinion, considered that the Trial Chamber “made findings in the Case 002/1 Judgement on a number of [...] significant issues [...], the effect of which is to evince the attribution of individual criminal responsibility” to KHIEU Samphân, which constitute grounds for the appearance of “bias on the part of the challenged judges in Case 002/2.”¹⁰⁸

47. Second, the Co-Lawyers assert that the unique circumstances of Case 002/2 justify taking even greater precautions than those before the other international tribunals, which have ruled in favour of the strict respect for the principle of judicial impartiality.¹⁰⁹ According to the Co-Lawyers, the *Mladić* Disqualification Decision in which a single Judge ANTONETTI of the International Residual Mechanism for Criminal Tribunals (“IRMCT”) granted the motions to disqualify the judges challenged by the accused, is the one that “approximates most closely to the present situation”.¹¹⁰ The Co-Lawyers further aver that Judge ANTONETTI ruled that while the incriminating references regarding the accused in separate appeal judgments do not directly constitute findings of the Appeals Chamber, their accumulation could constitute “an impression of bias”.¹¹¹ The Co-Lawyers argue that this decision

¹⁰⁷ KHIEU Samphân’s Application for Disqualification (1), paras 25-28 referring to Case 002 Reasons for Disqualification Decision (E314/12/1), paras 62, 70.

¹⁰⁸ KHIEU Samphân’s Application for Disqualification (1), para. 26 referring to Case 002 Reasons for Disqualification Decision (E314/12/1), Judge DOWNING’s Partly Dissenting Opinion, 30 January 2015 (“Case 002 Reasons for Disqualification Decision (E314/12/1), Dissenting Opinion of Judge DOWNING”), para. 1.

¹⁰⁹ KHIEU Samphân’s Application for Disqualification (1), para. 29.

¹¹⁰ KHIEU Samphân’s Application for Disqualification (1), para. 30 referring to IRMCT, *Prosecutor v. Mladić*, Decision on Defence Motions for Disqualification of Judges Theodor MERON, Carmel AGIUS and Liu DAQUN, MICT-13-56-A, 3 September 2018 (“*Mladić* Disqualification Decision (IRMCT)”).

¹¹¹ KHIEU Samphân’s Application for Disqualification (1), para. 34 referring to *Mladić* Disqualification Decision (IRMCT), para. 49.



“explicitly recogni[s]es the pitfalls of judges hearing several related trials and marks the end of a risky practice in the matter of impartiality.”¹¹²

48. Third, the Co-Lawyers contend that the ECtHR jurisprudence,¹¹³ which has at times been interpreted “as requiring that the impugned judge has ruled on all ‘the relevant criteria necessary to constitute a criminal offence’ in order to be disqualified”, is merely “illustrative and do[es] not establish a dispositive test for prejudgement” as correctly stated by Judges DOWNING and ANTONETTI.¹¹⁴ Relying on another case of the ECtHR,¹¹⁵ the Co-Lawyers allege that the ECtHR “sets out a fundamental criterion for deciding this case”,¹¹⁶ *i.e.*, “whether the issues that the Judges have to consider in the second appeal are similar to those they adjudicated in the first appeal”, thereby leaving no doubt as to the bias of the Challenged Judges in the case at hand.¹¹⁷

49. In the Response, the Co-Prosecutors submit that the Co-Lawyers overstate the strength of the jurisprudence upon which they rely and fail to demonstrate that the application of the law requires the disqualification of the Challenged Judges.¹¹⁸ First, the Co-Prosecutors aver that the Co-Lawyers misplace reliance on Judge DOWNING’s partial dissent from the supermajority decision of the Special Panel of the Trial Chamber to dismiss applications to disqualify the Case 002/2 Trial Judges and that, other than contrasting Judge DOWNING’s view with that of the

¹¹² KHIEU Samphân’s Application for Disqualification (1), para.35 referring to *Mladić Disqualification Decision (IRMCT)*, paras 82-83.

¹¹³ KHIEU Samphân’s Application for Disqualification (1), para. 37 referring to European Court of Human Rights (“ECtHR”), *Poppe v. The Netherlands*, Application No. 32271/04, Judgement, 24 June 2009 (“*Poppe v. The Netherlands (ECtHR)*”), para. 26.

¹¹⁴ KHIEU Samphân’s Application for Disqualification (1), para. 37 referring to *Poppe v. The Netherlands (ECtHR)*, para. 28; Case 002 Reasons for Disqualification Decision (E314/12/1), Dissenting Opinion of Judge DOWNING, paras 15-16; *Mladić Disqualification Decision (IRMCT)*, para. 25.

¹¹⁵ ECtHR, *Mancel and Branquart v. France*, Application No. 22349/06, Judgement, 24 June 2010 (“*Mancel and Branquart v. France (ECtHR)*”), para. 36 (“the apprehension of bias was due to the fact that seven of the nine judges sitting in the Criminal Division [of the Court of Cassation], which, on 30 November 2005, had ruled on the appeal lodged by the applicants against the sentencing judgement, had previously sat in the chamber that had ruled on 27 November 2002 on the appeal lodged by the Prosecutor General of the Amiens Court of Appeal against the decision to acquit”) (unofficial translation).

¹¹⁶ KHIEU Samphân’s Application for Disqualification (1), paras 38-39 referring to ECCC Law, Art. 36; Internal Rule 104; *Mladić Disqualification Decision (IRMCT)*, paras 37, 82.

¹¹⁷ KHIEU Samphân’s Application for Disqualification (1), paras 39-40 referring to *Mancel and Branquart v. France (ECtHR)*, para. 37.

¹¹⁸ Co-Prosecutors’ Response (5), paras 13, 21.



supermajority Judges, the Co-Lawyers merely allege that the Special Panel was wrong to dismiss given the recent jurisprudence.¹¹⁹

50. Second, the Co-Prosecutors argue that the *Mladić* Disqualification Decision referenced by the Co-Lawyers substantially departs from the well-settled standards, which afford a strong presumption of impartiality to judges at international criminal tribunals, thus requiring an extremely high threshold of proof to establish that there is actual bias or appearance of bias on the part of the judge.¹²⁰ The Co-Prosecutors further assert that the *Mladić* Disqualification Decision was subsequently counterbalanced by the directly opposing view of another judge¹²¹ and, thus, by no means constitutes strong jurisprudence.¹²²

51. Third, with reference to the ECtHR jurisprudence, the Co-Prosecutors contend that contrary to the Co-Lawyers' attempt to circumvent the plain language of *Poppe v. The Netherlands* by asserting that Judges ANTONETTI and DOWNING correctly stated that the "all the elements of a criminal offence" test was merely illustrative, the

¹¹⁹ Co-Prosecutors' Response (5), para. 14 referring to Case 002 Reasons for Disqualification Decision (E314/12/1), para. 5.

¹²⁰ Co-Prosecutors' Response (5), paras 15-16 referring to Case 002 Decision on the Co-Lawyers' Urgent Application (C11/29), para. 19; Case 002, Decision on IENG Thirith, NUON Chea and IENG Sary's Applications for Disqualification of Judges NIL Nonn, Silvia CARTWRIGHT, YA Sokhan, Jean-Marc LAVERGNE and THOU Mony, 23 March 2011, E55/4 ("Case 002 Trial Chamber Decision on Applications for Disqualification (E55/4)"), paras 12, 15; ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001 ("*Delalić et al.* Appeal Judgment (ICTY)"), para. 707; ICTY, *Prosecutor v. Šainović et al.*, IT-05-87-A, Judgement, Appeals Chamber, 23 January 2014, para. 181; ICTY, *Prosecutor v. Galić*, IT-98-29-A, Judgement, Appeals Chamber, 30 November 2006 ("*Galić* Appeal Judgment (ICTY)"), paras 41, 44; ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Decision on Defence Motion Seeking to Disqualify the Honourable Judge Alphons ORIE and the Honourable Judge Christoph FLÜGGE, President of the Tribunal, 26 August 2016 ("*Mladić* Decision on Judges ORIE and FLÜGGE (ICTY)"), p. 3, footnote 14 citing ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A, Judgement, Appeals Chamber, 30 June 2016, para. 44; ICTY, *Prosecutor v. Šešelj*, IT-03-67-R77.3, Decision on Motion by Professor Vojislav Šešelj for the Disqualification of Judges O-Gon KWON and Kevin PARKER, Special Chamber, 19 November 2010 ("*Šešelj* Decision on Motion for Disqualification (ICTY)"), para. 28 citing ICTY, *Prosecutor v. Brđanin and Talić*, IT-99-36-T, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, Trial Chamber, 18 May 2000 ("*Brđanin and Talić* Decision (ICTY)"), para. 18; ICTR, *Prosecutor v. Ntawukulilyayo*, ICTR-05-82-A, Decision on Motion for Disqualification of Judges, Appeals Chamber, 8 February 2011 ("*Ntawukulilyayo* Decision on Motion for Disqualification (ICTR)"), paras 7, 12, 13; ICTR, *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement, Appeals Chamber, 28 November 2007 ("*Nahimana et al.* Appeal Judgment (ICTR)"), paras 48-50, 78; ICTR, *Prosecutor v. Renzaho*, ICTR-97-31-A, Judgement, Appeals Chamber, 1 April 2011 ("*Renzaho* Appeal Judgment (ICTR)"), paras 22-23; ICTR, *Prosecutor v. Karera*, ICTR-01-74-A, Judgement, Appeals Chamber, 2 February 2009 ("*Karera* Appeal Judgment (ICTR)"), para. 378; ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-A, Judgement, Appeals Chamber, 1 June 2001 ("*Akayesu* Appeal Judgment (ICTR)"), para. 269.

¹²¹ Co-Prosecutors' Response (5), para. 17 referring to IRMCT, *Prosecutor v. Karadžić*, MICT-13-55-A, Decision, Appeals Chamber, 27 September 2018.

¹²² Co-Prosecutors' Response (5), para. 17.



test in fact has been treated as dispositive on numerous occasions.¹²³ The Co-Prosecutors add that the alleged strong jurisprudence, *Mancel and Branquart v. France*, which concerned the same issue for the same offence in the same case, is distinguishable because the Challenged Judges in the instant case must assess new findings of fact and law made by the Case 002/2 Trial Chamber, which relate to different crimes, different crime sites and a large body of new evidence—all of which were not considered in Case 002/1.¹²⁴

(ii) Reasons for Disqualification

52. The Co-Lawyers submit that disqualification is necessary given that: (i) the overlapping of Cases 002/1 and 002/2 violates the right to be tried by an impartial tribunal; (ii) the hearing of Case 002/2 by the Challenged Judges infringes the right to appeal; and that (iii) the findings in the Case 002/1 Appeal Judgment prejudice KHIEU Samphân's criminal responsibility in the appeal in Case 002/2.¹²⁵

53. First, the Co-Lawyers allege that while the severance has been ordered to separate the trials of individual persons in multi-accused indictments, the severance of Case 002 in which an indictment had been split into successive trials emanating from the same case involving the same accused was done in an unprecedented and problematic manner, and resulted in the violation of the right to be tried by an impartial tribunal.¹²⁶ The Co-Lawyers assert that the severance of Case 002 “poses a permanent threat to the right to a fair trial” and that the heavy litigation that punctuated Case 002/1 and Case 002/2 reveals a breach of legal certainty.¹²⁷ The Co-

¹²³ Co-Prosecutors' Response (5), para. 18 referring to ECtHR, *Schwarzenberger v. Germany*, Application No. 75737/01, Judgment, 10 August 2006 (“*Schwarzenberger v. Germany* (ECtHR)”), para. 43; ECtHR, *Miminoshvili v. Russia*, Application No. 20197/03, Judgment, 28 June 2011 (“*Miminoshvili v. Russia* (ECtHR)”), para. 118; Case 002 Trial Chamber Decision on Applications for Disqualification (E55/4), para. 21; Case 002 Reasons for Disqualification Decision (E314/12/1), paras 38-44, 94; Case 002 Reasons for Disqualification Decision (E314/12/1), paras 38-44, 94; *Mladić* Decision on Judges ORIE and FLÜGGE (ICTY), Annex B: Internal Memorandum from Presiding Judge Alphonse ORIE to President Theodor MERON entitled “Report pursuant to Rule 15(B)”, 14 May 2012, paras 29-30, 36-37; *Mladić* Decision on Judges ORIE and FLÜGGE (ICTY), Annex A: Internal Memorandum from Judge Christoph FLÜGGE to Presiding Judge Alphonse ORIE entitled “Conferring on Disqualification Motion pursuant to Rule 15(B)”, 17 January 2014, paras 18-19, 36-38.

¹²⁴ Co-Prosecutors' Response (5), para. 20 referring to *Mancel and Branquart v. France* (ECtHR), paras 21-22, 27-28, 39.

¹²⁵ KHIEU Samphân's Application for Disqualification (1), para. 41.

¹²⁶ KHIEU Samphân's Application for Disqualification (1), paras 42-44.

¹²⁷ KHIEU Samphân's Application for Disqualification (1), para. 46 and footnote 69.



Lawyers contend that the Supreme Court Chamber itself, acknowledging the exceptional nature of the severance, explicitly recommended the establishment of another panel of judges to “safeguard against any potential concerns about actual or appearance of bias of judges” and then raised issue of impartiality in the Second and Third Decisions on Severance, “rejected nonetheless by the [Trial] Chamber”.¹²⁸ The Co-Lawyers further assert that “significant overlap of factual and legal issues” justifies the disqualification of the Challenged Judges, who should have recused themselves voluntarily pursuant to the principles that they laid down and Internal Rule 34(1).¹²⁹

54. Second, the Co-Lawyers allege that ensuring the impartiality of the Judges who will sit in Case 002/2 Appeal Judgment is crucial as the Supreme Court Chamber makes final decisions on both issues of law and fact and the judgment “will mark the end of proceedings against KHIEU Samphân”.¹³⁰ In their view, the Challenged Judges cannot hear the appeal without infringing the fundamental right to be tried by an impartial tribunal, the right to appeal and to the presumption of innocence, since the manner in which the Judges adjudicated in the Case 002/1 Appeal Judgment does not allow the Appellant to effectively exercise his right to appeal in Case 002/2, should the said Judges not be disqualified.¹³¹

55. Third, referring to the annexes, which detail the alleged scope of overlapping, the Co-Lawyers argue that the Case 002/1 Appeal Judgment prejudices KHIEU Samphân’s criminal responsibility in the Case 002/2 appeal in that this involves both factual and legal findings, which were determining factors in KHIEU Samphân’s criminal responsibility in Case 002/2.¹³² The Co-Lawyers aver that the Supreme Court Chamber in Case 002/1 made factual findings on: (i) the existence and purpose of a population movement policy, thereby prejudging the issue of the existence of a policy

¹²⁸ KHIEU Samphân’s Application for Disqualification (1), paras 45, 48-50 referring to Case 002 First Severance Appeal Decision (E163/5/1/13), paras 33, 51; Case 002 Second Severance Appeal Decision (E284/4/8), paras 39-40, 46; Case 002 Third Severance Appeal Decision (E301/9/1/1/3), para. 51.

¹²⁹ KHIEU Samphân’s Application for Disqualification (1), paras 51-55 referring to Case 002 Case 002 Reasons for Disqualification Decision (E314/12/1), Dissenting Opinion of Judge DOWNING, para. 3; Case 002 Third Severance Appeal Decision (E301/9/1/1/3), para. 45.

¹³⁰ KHIEU Samphân’s Application for Disqualification (1), paras 56-58.

¹³¹ KHIEU Samphân’s Application for Disqualification (1), paras 58-59.

¹³² KHIEU Samphân’s Application for Disqualification (1), paras 60-61, 71, 75.



to establish worksites;¹³³ (ii) the alleged policy targeting the former Khmer Republic soldiers and officials for the period relevant to Case 002/2;¹³⁴ (iii) the existence of an alleged policy to kill enemies;¹³⁵ (iv) the alleged significant participation of KHIEU Samphân in a joint criminal enterprise (“JCE”);¹³⁶ and (v) the alleged prior knowledge of the crimes committed and on his intent.¹³⁷ The Co-Lawyers add that the *obiter dictum* on cooperatives and worksites “in the absence of a footnote or explicit reference to a finding by the Chamber” shows “actual bias and or at least is likely to establish a reasonable apprehension of bias by the Judges.”¹³⁸

56. Regarding the legal findings, the Co-Lawyers allege that they concern the issues “at the heart of the appeal in Case 002/2 and [which] have a decisive impact on its outcome”,¹³⁹ which include the findings “on the contextual elements of crimes against humanity, temporal jurisdiction, the foreseeability and the principle of legality, the *mens rea* of murder as crimes against humanity and [JCE].”¹⁴⁰ The Co-Lawyers assert that the Challenged Judges made “numerous, detailed and unorthodox findings by taking the liberty to depart from the law” and that KHIEU Samphân’s right to appeal would be “*de facto* reduced to nothing” if the disqualification is not granted.¹⁴¹ The Co-Lawyers conclude that the Application is to safeguard “the actual effectiveness of KHIEU Samphân’s right to appeal”.¹⁴²

57. In the Response, the Co-Prosecutors submit that the Co-Lawyers’ challenges relating to severance, the right to appeal and overlapping findings fail to overcome the presumption of judicial impartiality.¹⁴³

58. With respect to the severance of Case 002, the Co-Prosecutors assert that the Co-Lawyers’ argument regarding the violation of the judicial certainty and fair trial rights caused by unprecedented nature of the severance of Case 002 has been

¹³³ KHIEU Samphân’s Application for Disqualification (1), paras 62-64.

¹³⁴ KHIEU Samphân’s Application for Disqualification (1), paras 65-66.

¹³⁵ KHIEU Samphân’s Application for Disqualification (1), para. 67.

¹³⁶ KHIEU Samphân’s Application for Disqualification (1), para. 68.

¹³⁷ KHIEU Samphân’s Application for Disqualification (1), para. 69.

¹³⁸ KHIEU Samphân’s Application for Disqualification (1), paras 62-63 *referring to* Case 002/1 Appeal Judgment (F36), para. 828.

¹³⁹ KHIEU Samphân’s Application for Disqualification (1), paras 70-71.

¹⁴⁰ KHIEU Samphân’s Application for Disqualification (1), para. 72 and footnotes 110-115.

¹⁴¹ KHIEU Samphân’s Application for Disqualification (1), para. 73.

¹⁴² KHIEU Samphân’s Application for Disqualification (1), para. 74.

¹⁴³ Co-Prosecutors’ Response (5), paras 22-36.



repeatedly raised and explicitly answered.¹⁴⁴ They recall that the Supreme Court Chamber considered a variety of legitimate interests, including potential prejudice to the rights of the Accused, before deciding the severance and concluded that ensuring meaningful justice through obtaining a verdict within the lifespan of the Accused was a pressing interest prevailing over other concerns.¹⁴⁵ Contrary to the Co-Lawyers' contention, it is confirmed by the Special Panel of the Trial Chamber that any overlap between the cases is not sufficient to establish that the Judges might be unable to bring an impartial mind to Case 002/2 merely due to their findings on the evidence in Case 002/1.¹⁴⁶

59. Concerning the alleged violation of the right to appeal, the Co-Prosecutors argue that the Co-Lawyers provide only suspicions of bias that are insufficient to rebut the impartiality presumption.¹⁴⁷

60. Regarding the alleged prejudgment by overlapping factual findings, particularly on the issues developed within the Application for Disqualification,¹⁴⁸ the Co-Prosecutors argue that the Case 002/1 Appeal Judgment's findings "clearly demonstrate" the genuine application of the law and the assessment of the facts without prejudgment of issues in the Case 002/2 Appeal.¹⁴⁹ The Co-Prosecutors contend that the Co-Lawyers' reference to the Supreme Court Chamber's *obiter dictum* fails to demonstrate prejudgment, as it does not rule on the existence of a criminal offence nor does it find the Applicant guilty of the offence beyond a reasonable doubt.¹⁵⁰ They further submit that the Co-Lawyers' references to the impugned factual findings in the Case 002/1 Appeal Judgment regarding cooperatives and worksites, policy targeting the former Khmer Republic soldiers and officials, enemies policy, JCE participation and awareness of the crimes are non-existent,

¹⁴⁴ Co-Prosecutors' Response (5), para. 22 referring to, *inter alia*, Case 002 Third Severance Appeal Decision (E301/9/1/1/3), paras 39, 63-86.

¹⁴⁵ Co-Prosecutors' Response (5), paras 22-23 referring to Case 002 Second Severance Appeal Decision (E284/4/8), paras 37-38, 43, 50-52; Case 002 Third Severance Appeal Decision (E301/9/1/1/3), paras 53-55.

¹⁴⁶ Co-Prosecutors' Response (5), paras 24-25 referring to Case 002 Reasons for Disqualification Decision (E314/12/1), paras 11, 50-70, 91-105, 106.

¹⁴⁷ Co-Prosecutors' Response (5), para. 26 and footnote 71.

¹⁴⁸ Co-Prosecutors' Response (5), para. 27.

¹⁴⁹ Co-Prosecutors' Response (5), paras 28-29.

¹⁵⁰ Co-Prosecutors' Response (5), para. 30 referring to *Poppe v. The Netherlands* (ECtHR), para. 28.



irrelevant or not considered in proper context and in their entirety.¹⁵¹ The Co-Prosecutors finally argue that even in case of possible prejudicial findings on common matters due to overlapping factual findings, the Challenged Judges should be considered impartial, since they are well aware that common factual elements must be established anew in all cases.¹⁵²

61. With respect to the Case 002/1 Appeal Judgment's legal findings, the Co-Prosecutors argue that judges are not prohibited from presiding over two separate criminal prosecutions arising from the same set of facts with overlapping questions of fact or law as long as they can bring impartial minds to the evidence in the new case,¹⁵³ and that the prejudgment would have existed only if the Challenged Judges ruled in Case 002/1 on all the elements of a Case 002/2 offence and found KHIEU Samphân guilty beyond a reasonable doubt of committing that offence, which has not happened.¹⁵⁴

2. Discussion

62. The Special Panel first sets out the applicable legal standard for disqualification of a judge. Then, the Special Panel addresses the submissions of the Co-Lawyers and the Co-Prosecutors concerning the relevant jurisprudence. The Special Panel further assesses the parties' legal arguments on the severance of Case 002 and KHIEU Samphân's right to appeal, and will proceed to examine the Case 002/1 Appeal Judgment's alleged prejudgment of the factual and legal findings in Case 002/2.

¹⁵¹ Co-Prosecutors' Response (5), paras 30-33.

¹⁵² Co-Prosecutors' Response (5), para. 34 referring to Case 002 Reasons for Disqualification Decision (E314/12/1), para. 96 citing Case 002 Third Severance Appeal Decision (E301/9/1/1/3), paras 83, 85.

¹⁵³ Co-Prosecutors' Response (5), para. 35.

¹⁵⁴ Co-Prosecutors' Response (5), para. 35 referring to *Poppe v. The Netherlands* (ECtHR), para. 28; Case 002 Reasons for Disqualification Decision (E314/12/1), paras 41-44; Case 002 Trial Chamber Decision on Applications for Disqualification (E55/4), paras 17-18; ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Decision on Defence Motion for a Fair Trial and the Presumption of Innocence or, in the Alternative, a Mistrial, Trial Chamber, 4 July 2016, paras 11-12.



63. It is well-settled—and the parties do not dispute¹⁵⁵—that the requirement of impartiality is violated when there is bias or an appearance of bias on the part of a judge.¹⁵⁶ The Special Panel recalls that the appearance of bias is demonstrated if:

(a) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of the case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved; or (b) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.

The reasonable observer in this test must be 'an informed person, with knowledge of all of the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality is one of the duties that Judges swear to uphold'.¹⁵⁷

64. The Special Panel upholds, as numerous ECCC Chambers and other international tribunals have held, that judges are afforded a presumption of impartiality, which imposes a high threshold of proof on the moving party to displace that presumption.¹⁵⁸ To disqualify a judge, the existence of a reasonable appearance of bias must be "firmly established".¹⁵⁹ The Special Panel recalls that a high threshold is required because it is as much of a threat to the interests of the impartial and fair administration of justice for judges to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias, as the real appearance of bias itself.¹⁶⁰ The presumption of judicial impartiality has been interpreted to assume that, by virtue

¹⁵⁵ KHIEU Samphân's Application for Disqualification (1), paras 19-22; Co-Prosecutors' Response (5), para. 9.

¹⁵⁶ Internal Rule 34(2); Case 002/19-09-2007-ECCC/SC (1), Decision on IENG Thirith's Application (Doc. No. 1/4), para. 10; Case 002 Trial Chamber Decision on Applications for Disqualification (E55/4), paras 11-12; Case 002 Reasons for Disqualification Decision (E314/12/1), para. 33.

¹⁵⁷ Case 002 Trial Chamber Decision on Applications for Disqualification (E55/4), paras 11-12 (footnotes omitted) referring to *Furundžija* Appeal Judgment (ICTY), paras 189-190. See also Case 002 Reasons for Disqualification Decision (E314/12/1), para. 33.

¹⁵⁸ Case 002 Reasons for Disqualification Decision (E314/12/1), para. 33; Case 002 Trial Chamber Decision on Applications for Disqualification (E55/4), para. 12 referring to ECCC Agreement, Art. 3(3); ECCC Law, Art. 10 new; Case 002 Decision on the Co-Lawyers' Urgent Application (C11/29), paras 15-17; *Furundžija* Appeal Judgment (ICTY), paras 196-197; *Delalić et al.* Appeal Judgment (ICTY), para. 707; *Nahimana et al.* Appeal Judgment (ICTR), paras 48-50.

¹⁵⁹ *Furundžija* Appeal Judgment (ICTY), para. 197; ICTY, *Prosecutor v. Blagojević*, IT-02-60-R, Decision on Motion for Disqualification, 2 July 2008 ("*Blagojević* Decision on Disqualification Motion (ICTY)"), para. 3; *Brđanin and Talić* Decision (ICTY), para. 18.

¹⁶⁰ Case 002 Reasons for Disqualification Decision (E314/12/1), para. 35 referring to ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Motion to Disqualify Judge PICARD and Report to the Vice-President pursuant to Rule 15(B)(ii), Chamber Convened by Order of the Vice-President, 22 July 2009 ("*Karadžić* Decision (ICTY)"), para. 17; *Blagojević* Decision on Disqualification Motion (ICTY), para. 3; *Delalić et al.* Appeal Judgment (ICTY), para. 707.



of their training and experience, the judges “can disabuse their minds of any irrelevant personal beliefs or predispositions”, unless proven otherwise.¹⁶¹

65. Turning to the alleged bias based on prejudice of the appeal in Case 002/2, the Special Panel observes that the Co-Lawyers reference the jurisprudence of the ECCC, the IRMCT and the ECtHR in support of their position.¹⁶² The Special Panel considers the Co-Lawyers’ arguments regarding the ECCC jurisprudence—that the Special Panel of the Trial Chamber was wrong to dismiss the application for disqualification in light of Judge DOWNING’s partly dissenting opinion¹⁶³—to be unsubstantiated. The Special Panel remarks, as the Co-Lawyers concede,¹⁶⁴ that the partly dissenting opinion of Judge DOWNING constitutes a contrasting view from the position of the supermajority of the Special Panel of the Trial Chamber. In support of their position, the Co-Lawyers refer to the jurisprudence of the international criminal tribunals, specifically the decision of a single Judge ANTONETTI in the *Mladić* case,¹⁶⁵ which the Special Panel will address below. Otherwise, the Co-Lawyers do not provide any concrete arguments or meaningful examples to support their allegation that the supermajority of the Special Panel of the Trial Chamber was wrong to dismiss the application for disqualification.

66. Regarding the Co-Lawyers’ reliance on the decision of the single Judge ANTONETTI in the *Mladić* case,¹⁶⁶ the Special Panel notes that the jurisprudence of other international criminal tribunals is non-binding at the ECCC.¹⁶⁷ The Special Panel further observes that the *Mladić* Disqualification Decision departs from the prior standing jurisprudence of the ECtHR and the international criminal tribunals concerning the impartiality presumption.¹⁶⁸ Specifically, while acknowledging Judge

¹⁶¹ *Furundžija* Appeal Judgment (ICTY), para. 197; *Nahimana et al.* Appeal Judgment (ICTR), paras 48, 78 (“[i]t is assumed, in the absence of evidence to the contrary, that, by virtue of their training and experience, the Judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case”); *Akayesu* Appeal Judgment (ICTR), para. 269; *Renzaho* Appeal Judgment (ICTR), para. 22.

¹⁶² KHIEU Samphân’s Application for Disqualification (1), paras 25-40.

¹⁶³ KHIEU Samphân’s Application for Disqualification (1), paras 25-28.

¹⁶⁴ KHIEU Samphân’s Application for Disqualification (1), paras 25-27.

¹⁶⁵ KHIEU Samphân’s Application for Disqualification (1), paras 28, 30-35.

¹⁶⁶ KHIEU Samphân’s Application for Disqualification (1), paras 30-36.

¹⁶⁷ Case 001, Appeal Judgment, 3 February 2012, F28 (“Case 001 Appeal Judgment (F28)”), para. 97 referring to *Statute of the International Court of Justice*, 26 June 1945, 33 U. N. T. S. 933, Art. 38.

¹⁶⁸ See, e.g., *Šešelj* Decision on Motion for Disqualification (ICTY), para. 28 citing *Brđanin and Talić* Decision (ICTY), para. 18; *Ntawukulilyayo* Decision on Motion for Disqualification (ICTR), paras 7,



DOWNING's dissenting opinion, Judge ANTONETTI rejects the "all the relevant criteria necessary to constitute a criminal offence" test and considers instead the existence of prejudgment as "illustrative" and "not determining".¹⁶⁹ According to Judge ANTONETTI's interpretation, the bias exists if the challenged judges ruled on the role of the applicant in the commission of crimes, even without addressing "all the relevant criteria" of a criminal offence.¹⁷⁰ The Special Panel considers that this interpretation does not encompass the subsequent clarification on the matter by the ECtHR and, therefore, diverges from the settled jurisprudence.¹⁷¹

67. The Special Panel recalls that, contrary to Judge ANTONETTI's finding,¹⁷² mere exposure to evidence cannot justify the existence of the appearance of bias and, by virtue of their training and experience, judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case, unless proven otherwise.¹⁷³ The Special Panel emphasises that in determining the appearance of bias, an allegation must be "firmly established", meaning that a high threshold must be reached to rebut the presumption of impartiality.¹⁷⁴ Further, judges

12, 13; *Nahimana et al.* Appeal Judgment (ICTR), paras 48, 78; *Renzaho* Appeal Judgment (ICTR), paras 22-23; *Poppe v. The Netherlands* (ECtHR), para. 26; *Miminozhvili v. Russia* (ECtHR), paras 115-116; ECtHR, *Khodorkovskiy and Lebedev v. Russia*, Application Nos 11082/06 and 13772/05, Judgment, 25 July 2013 ("*Khodorkovskiy and Lebedev v. Russia* (ECtHR)"), para. 544.

¹⁶⁹ *Mladić* Disqualification Decision (IRMCT), para. 25.

¹⁷⁰ *Mladić* Disqualification Decision (IRMCT), para. 25 referring to ECtHR, *Rojas Morales v. Italy*, Application No. 39676/98, Judgment, 16 November 2000 ("*Rojas Morales v. Italy* (ECtHR)"), paras 29, 33-34; ECtHR, *Ferrantelli and Santangelo v. Italy*, Application No. 19874/92, Judgment, 7 August 1996 ("*Ferrantelli and Santangelo v. Italy* (ECtHR)"), para. 59.

¹⁷¹ See, e.g., *Miminozhvili v. Russia* (ECtHR), paras 115-116; *Khodorkovskiy and Lebedev v. Russia* (ECtHR), para. 544; *Poppe v. The Netherlands* (ECtHR), para. 26; ECtHR, *OOO 'Vesti' and Ukhov v. Russia*, Application No. 21724/03, Judgment (Merits), 30 May 2013 ("*OOO 'Vesti' and Ukhov v. Russia* (ECtHR)"), paras 76-77. For details, see *infra* para. 68.

¹⁷² *Mladić* Disqualification Decision (IRMCT), paras 49, 52 ("[t]he Appeals Chamber judges, including Judge MERON, were **confronted intensively by the evidence** admitted by and the findings of the Trial Chamber [...] Consequently, it is difficult to imagine how Judge MERON could apprehend the appeal filed by the Accused Ratko Mladić **without being influenced by the incriminating evidence** that he analysed against him and by his own previous findings.[...] Considering the preceding, an analysis of the incriminating references against Ratko Mladić, **taken cumulatively**, tends to show that there is a reasonable apprehension of bias") (emphasis added).

¹⁷³ *Furundžija* Appeal Judgment (ICTY), para. 197; *Nahimana et al.* Appeal Judgment (ICTR), paras 48, 78 ("[i]t is assumed, in the absence of evidence to the contrary, that, by virtue of their training and experience, the Judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case"); *Akayesu* Appeal Judgment (ICTR), para. 269; *Renzaho* Appeal Judgment (ICTR), paras 22-23.

¹⁷⁴ *Akayesu* Appeal Judgment (ICTR), para. 91 citing *Furundžija* Appeal Judgment (ICTY), para. 197; *Blagojević* Decision on Disqualification Motion (ICTY), para. 3; *Delalić et al.* Appeal Judgment (ICTY), para. 707; Case 002 Reasons for Disqualification Decision (E314/12/1), para. 35; Case 002



may be involved in trials which, by their very nature, cover overlapping issues or address similar questions of fact and law.¹⁷⁵ The Special Panel, thus, considers that the reasoning of the single Judge ANTONETTI departs from the prevailing jurisprudence on the presumption of the judicial impartiality. Therefore, the Special Panel is not convinced that the decision of the single Judge ANTONETTI, combined with Judge DOWNING's partly dissenting opinion, can constitute a turning point in lowering the standard to rebut the presumption of judicial impartiality.¹⁷⁶

68. With respect to the ECtHR jurisprudence, the Special Panel observes that the Co-Lawyers support their arguments on the existence of bias by referring¹⁷⁷ to Judges DOWNING's and ANTONETTI's interpretation of *Poppe v. The Netherlands*—that “all the relevant criteria necessary to constitute a criminal offence is illustrative and does not establish a dispositive test for prejudgment.”¹⁷⁸ The Special Panel notes that the test for the existence of prejudgment established in *Poppe v. The Netherlands*¹⁷⁹ has been applied as dispositive in the ECtHR jurisprudence.¹⁸⁰ The Special Panel

Trial Chamber Decision on Applications for Disqualification (E55/4), para. 12 referring to Case 002 Decision on the Co-Lawyers' Urgent Application (C11/29), para. 15.

¹⁷⁵ Case 002 Trial Chamber Decision on Applications for Disqualification (E55/4), para. 15; *Karera* Appeal Judgment (ICTR), para. 378; *Nahimana et al.* Appeal Judgment (ICTR), para. 78; Special Court of Sierra Leon (“SCSL”), *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole THOMPSON from the RUF Case, Trial Chamber I, 6 December 2007 (“*Sesay et al.* Decision (SCSL)”), para. 55; ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-PT, Decision on Application Requesting Disqualification of Judges JORDA and RIAD, Bureau, 4 May 1998 (“*Kordić and Čerkez* Decision (ICTY)”).

¹⁷⁶ See also Joseph POWDERLY, *Judges and the Making of International Criminal Law*, (Brill, 2020), pp.173-183, including, *inter alia*, the observation on pp. 179-180 that Judge ANTONETTI's reasoning “does not appear to attach any weight whatsoever to the established case law of the *ad hoc* Tribunals on the matter (despite prior allusions), and in particular the oft-professed faith in the capacity of the judicial mind to disabuse itself of opinions expressed or determinations made in related cases. The test is far removed from the reasonable observer test [...]”

¹⁷⁷ KHIEU Samphân's Application for Disqualification (I), para. 37.

¹⁷⁸ Case 002 Reasons for Disqualification Decision (E314/12/1), Dissenting Opinion of Judge DOWNING, para. 16; *Mladić* Disqualification Decision (IRMCT), para. 25.

¹⁷⁹ *Poppe v. The Netherlands* (ECtHR), para. 28 (“whether the applicant's involvement [...] fulfilled all the relevant criteria necessary to constitute a criminal offence and, if so, whether the applicant was guilty, beyond reasonable doubt, of having committed such an offence was [...] addressed, determined or assessed by the [...] judges whose impartiality the applicant wishes to challenge”).

¹⁸⁰ *Miminoshvili v. Russia* (ECtHR), paras 116, 118; *Khodorkovskiy and Lebedev v. Russia* (ECtHR), paras 547-549, 556 (“[t]he judgment did not analyse [the applicants'] involvement in the crime imputed [...] and did not establish the constituent elements of the applicants' criminal liability. [...] The Court concludes that the judgment [...] did not contain findings that prejudged the question of the applicants' guilt in subsequent proceedings”); ECtHR, *Lindon, Otchakovskiy-Laurens and July v. France*, Application Nos 21279/02 and 36448/02, Judgment, 22 October 2007, para. 78 (“[i]t is moreover clear that the judgments delivered in the case of the first two applicants did not contain any presupposition as to the guilt of the third applicant”); *Schwarzenberger v. Germany* (ECtHR), para. 43; *OOO 'Vesti' and Ukhov v. Russia* (ECtHR), paras 79-80, 82 (“[the judge] did not make any findings as to the liability of



further considers that the Co-Lawyers' reference to the ECtHR cases of *Ferrantelli and Santangelo v. Italy* and *Rojas Morales v. Italy* in support of their position¹⁸¹ is unconvincing because those cases included prejudgment on "co-perpetration of crime"¹⁸² or "planning or instigating of crime".¹⁸³ Therefore, those cases are distinguishable from *Poppe v. The Netherlands*¹⁸⁴ and the ECtHR jurisprudence on judicial impartiality.¹⁸⁵

69. In respect of the Co-Lawyers' reference to *Mancel and Blanquart v. France*, the Special Panel observes that the ECtHR found the violation of the right to an impartial tribunal in that case because seven of the nine judges of the Court of Cassation, having characterised "the material and the moral elements of the offence" in their decision on the first appeal, were later appointed to hear the second appeal in the same case concerning the aforementioned offence.¹⁸⁶ The Special Panel considers that the situation in *Mancel and Blanquart v. France* is distinguishable from the

[...]. Nor did he use any expressions which might create the impression that he had formed any opinion as to the liability").

¹⁸¹ KHIEU Samphân's Application for Disqualification (1), para. 37 and footnote 61.

¹⁸² The Special Panel observes that in *Ferrantelli and Santangelo v. Italy*, the ECtHR found the lack of impartiality on the part of the judge because in the earlier judgment, the challenged judge referred to the applicants as the "co-perpetrators of the double crime" and mentioned of "the precise statement by G.V. that G.G. together with Santangelo [the applicant] had been responsible for physically carrying out the murders", as well as held that "Ferrantelli [the applicant] had helped to search the barracks and to transport material". See *Ferrantelli and Santangelo v. Italy* (ECtHR), paras 59-60.

¹⁸³ The Special Panel notes that in *Rojas Morales v. Italy*, the ECtHR found the violation of the right to an impartial tribunal because the challenged judges issued a judgment against the applicant's co-accused that mentioned the applicant's role within the criminal organisation and referred to the applicant as the "planner or instigator" of the alleged crime of which the co-accused was convicted. See *Rojas Morales v. Italy* (ECtHR), paras 33-34.

¹⁸⁴ *Poppe v. The Netherlands* (ECtHR), para. 28 ("[t]here is no specific qualification of the involvement of the applicant or of acts committed by him, criminal or otherwise. In this the facts of the applicant's case differ from those of *Ferrantelli and Santangelo* and *Rojas Morales*"). The Special Panel observes that in other cases concerning the prejudgment, the ECtHR also distinguished the situation in *Ferrantelli and Santangelo* and *Rojas Morales*. See *Schwarzenberger v. Germany* (ECtHR), paras 44-45; *Miminoshvili v. Russia* (ECtHR), paras 115-116. See also Case 002 Trial Chamber Decision on Applications for Disqualification (E55/4), para. 21 and footnote 45; Case 002 Reasons for Disqualification Decision (E314/12/1), para. 44.

¹⁸⁵ *Khodorkovskiy and Lebedev v. Russia* (ECtHR), para. 544 ("[i]n more recent cases the Court has clarified its position and held that the mere fact that a judge had already tried a co-accused was not, in itself, sufficient to cast doubt on that judge's impartiality in that applicant's case. [...] An examination is needed, however, to determine whether the earlier judgments contained findings that actually prejudged the question of the applicant's guilt"); *Miminoshvili v. Russia* (ECtHR), paras 115-116 ("the Court gave a more detailed reasoning [...], finding it **decisive** that [...] the trial judges had not addressed, determined or assessed whether the applicant's involvement fulfilled all the relevant criteria necessary to constitute a criminal offence and, if so, whether the applicant was guilty of having committed such an offence") (emphasis added); *Poppe v. The Netherlands* (ECtHR), para. 26; *OOO 'Vesti' and Ukhov v. Russia* (ECtHR), paras 76-77.

¹⁸⁶ *Mancel and Branquart v. France* (ECtHR), para. 39.



present case because Case 002/2 relates to crimes, crime sites and a body of evidence different from Case 002/1.¹⁸⁷ Accordingly, the Special Panel finds the Co-Lawyers' arguments regarding the relevant jurisprudence unpersuasive.

70. The Special Panel reaffirms the test for prejudgment applied by the Special Panel of the Trial Chamber, namely whether "findings in an earlier case evince attributing criminal responsibility in relation to the charges to be adjudicated in subsequent cases",¹⁸⁸ and will examine the Co-Lawyers' arguments for disqualification.

71. First, in respect of the alleged violation of the right to be tried by an impartial tribunal due to overlapping of Cases 002/1 and 002/2 as a result of the severance of Case 002,¹⁸⁹ the Special Panel notes that the context of exceptional circumstances of the severance of Case 002 has been recurrently addressed and clarified by the ECCC Chambers.¹⁹⁰ In light of this, the Special Panel recalls that despite some overlapping issues, Cases 002/1 and 002/2 concern substantially different events.¹⁹¹ Specifically, Case 002/1 is limited to allegations of crimes against humanity relating to the two phases of forced movement of population and to executions of former Khmer Republic personnel committed at Tuol Po Chrey soon after the evacuation of Phnom Penh;¹⁹² in contrast, Case 002/2 is confined to the following: the genocide against the Vietnamese and Cham; the crimes that occurred at S-21, Kraing Ta Chan, Au Kansang, and Phnom Kraol Security Centres; the crimes that occurred at the worksites of 1st January and Trapeang Thma Dams, Tram Kak Cooperatives, Kampong Chhnang Airport; the forced marriage and the rape within the context of forced marriage; and the internal purges.¹⁹³ The Special Panel recalls that at the time of the Case 002 severance, the Supreme Court Chamber provided clarification

¹⁸⁷ See *infra* para. 71.

¹⁸⁸ Case 002 Reasons for Disqualification Decision (E314/12/1), paras 70, 91 referring to Case 002 Third Severance Appeal Decision (E301/9/1/1/3), para. 85.

¹⁸⁹ KHIEU Samphân's Application for Disqualification (1), paras 42-59.

¹⁹⁰ *Contra* KHIEU Samphân's Application for Disqualification (1), paras 43-46. See Case 002/2 Decision on Applications for Disqualification (E314/12/1), paras 49-54, 93, 95-96; Case 002 Third Severance Appeal Decision (E301/9/1/1/3), paras 63-86; Case 002, Decision on KHIEU Samphân Request to Postpone Commencement of Case 002/02 Until a Final Judgement is Handed Down in Case 002/01, E301/5/5/1, 21 March 2014, para. 12.

¹⁹¹ See Case 002/2 Decision on Applications for Disqualification (E314/12/1), para. 93.

¹⁹² Case 002 First Severance Decision (E284), Disposition, p. 70.

¹⁹³ Case 002 Decision on Additional Severance (E301/9/1), para. 21.



concerning the procedural consequences of severance, specifying that although the evidence may be common to Cases 002/1 and 002/2, the factual elements in both cases must be established anew.¹⁹⁴ That said, the Special Panel further observes that there will be substantial differences between the evidence in each case, including numerous lists of documents and witnesses, Civil Parties and experts, not previously put forward, in relation to Case 002/2.¹⁹⁵

72. Moreover, the Special Panel notes that the primary reason for the Supreme Court Chamber's recommendation to establish a second panel of judges was to ensure meaningful justice by obtaining a verdict within the lifetime of the Accused, the Civil Parties and the victims in Case 002.¹⁹⁶ The potential prejudice¹⁹⁷ to the rights of the Accused caused by judicial bias was one of the multiple factors to be considered to ensure the interests of justice, especially in the context of judicial management and efficiency.¹⁹⁸ The Supreme Court Chamber finally affirmed that obtaining a verdict

¹⁹⁴ Case 002 Third Severance Appeal Decision (E301/9/1/1/3), paras 83, 85, 86. *See also* ICTY, *Prosecutor v. Milošević*, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, Appeals Chamber, 18 April 2002, para. 29 (“[i]f evidence were to be admitted in the Kosovo trial which would be prejudicial to the accused in the Croatia and Bosnia trial, the members of the Trial Chamber as professional Judges would be able to exclude that prejudicial evidence from their minds when they came to determine the issues in the Croatia and Bosnia trial”).

¹⁹⁵ *See, e.g.*, Case 002/2, Documents proposed by the KHIEU Samphân Defence for the Trial in Case 002/02, 13 June 2014, E305/12; Case 002/2, Co-Prosecutors' Rule 80(3) Trial Document List, E305/13, 13 June 2014; Case 002/2, Civil Party Lead Co-Lawyers' Updated Rule 80 Lists of Documents & Exhibits for Case 002/02, E305/14, 13 June 2014; Case 002/2, Civil Party Lead Co-Lawyers' Rule 87(4) Request to Admit into Evidence Oral Testimony and Documents and Exhibits Related to Witnesses, Experts and Civil Parties Proposed to Testify in Case 002/02, E307/6, 29 July 2014; Case 002/2, Co-Prosecutors' Proposed Witness, Civil Party and Expert List and Summaries for the Trial in Case File 002/02 (with 5 Confidential Annexes I, II, IIA, III and IIIA), E305/6, 9 May 2014; Case 002/2, Co-Prosecutors' Rule 87(4) Motion Regarding Proposed Trial Witnesses for Case 002/02, E307/3/2, 28 July 2014; Civil Party Lead Co-Lawyers' Rule 80 Witness, Expert and Civil Party Lists for Case 002/02 with Confidential Annexes, E305/7, 9 May 2014; Case 002/2, Decision on Witnesses Civil Parties and Experts Proposed to be Heard during Case 002/02, E459, 18 July 2017; Case 002/2, Decision on KHIEU Samphân's Request for Admission of Additional Evidence, F51/3, 6 January 2020.

¹⁹⁶ *Contra* KHIEU Samphân's Application for Disqualification (1), paras 47-50. *See* Case 002 First Severance Appeal Decision (E163/5/1/1/3), para. 51; Case 002 Third Severance Appeal Decision (E301/9/1/1/3), paras 53-55, 61-62.

¹⁹⁷ The Supreme Court Chamber explicitly stated that at that time “the question of overlap [...] does not yet arise as a concrete prejudice.” *See* Case 002 Third Severance Appeal Decision (E301/9/1/1/3), para. 85.

¹⁹⁸ Case 002 Second Severance Appeal Decision (E284/4/8), paras 44-46.



within the lifespan of the Accused may prevail over other concerns in future trials of Cases 002/1 and 002/2.¹⁹⁹

73. Concerning the alleged significant overlap of factual and legal issues, the Co-Lawyers rely on the partly dissenting opinion of Judge DOWNING and assert that the Special Panel of the Trial Chamber failed to adopt an approach guaranteeing the right to be tried by an impartial tribunal and protecting the integrity of the proceedings.²⁰⁰ This argument is contradicted by the established standard, which the Special Panel adopted, as discussed above.²⁰¹ The Special Panel recalls that it is assumed that based on their training and experience, the judges can disabuse their minds of any irrelevant personal beliefs or predispositions²⁰² and reiterates that the mere existence of overlapping issues without attributing criminal responsibility cannot suffice to rebut the presumption of judicial impartiality.²⁰³ These unfounded and unsupported allegations of the apparent bias by the Co-Lawyers cannot justify the disqualification or voluntary recusal of the Challenged Judges.²⁰⁴

74. The Special Panel, thus, finds that the Co-Lawyers fail to demonstrate that a reasonable observer would consider that the Challenged Judges will not be impartial in adjudicating the appeal in Case 002/2 in the context of overlapping issues of Case 002/1 and Case 002/2.

75. Second, concerning the alleged violation of the right to appeal, the Special Panel recalls that judges are sometimes involved in several trials which, by their very nature, cover issues that overlap.²⁰⁵ Moreover, the Special Panel reaffirms that “a judge is not disqualified from hearing two or more criminal trials arising out of the same series of events, where he is exposed to evidence relating to these events in both

¹⁹⁹ Case 002 Third Severance Appeal Decision (E301/9/1/1/3), paras 53-55, 90.

²⁰⁰ KHIEU Samphân's Application for Disqualification (1), paras 51-52 referring to Case 002/2 Decision on Applications for Disqualification (E314/12/1); Case 002/2 Decision on Applications for Disqualification (E314/12/1), Partly Dissenting Opinion of Judge DOWNING, para. 3.

²⁰¹ See *supra* paras 63-64.

²⁰² *Furundžija* Appeal Judgment (ICTY), para. 197; *Nahimana et al.* Appeal Judgment (ICTR), paras 48, 78; *Akayesu* Appeal Judgment (ICTR), para. 269; *Renzaho* Appeal Judgment (ICTR), para. 23.

²⁰³ See *supra* para. 70.

²⁰⁴ *Contra* KHIEU Samphân's Application for Disqualification (1), paras 53-55.

²⁰⁵ Case 002 Trial Chamber Decision on Applications for Disqualification (E55/4), para. 15; *Karera* Appeal Judgment (ICTR), para. 378; *Nahimana et al.* Appeal Judgment (ICTR), para. 78; *Sesay et al.* Decision (SCSL), para. 55; *Kordić and Čerkez* Decision (ICTY).



cases”.²⁰⁶ In the instant case, while the Special Panel agrees with the Co-Lawyers that the appellate proceedings in Case 002/2 before the Supreme Court Chamber constitute the final instance for KHIEU Samphân,²⁰⁷ the mere fact that the Challenged Judges adjudicated in Case 002/1 does not impugn their impartiality.²⁰⁸

76. The Co-Lawyers cite Judge ANTONETTI’s *Mladić* Disqualification Decision²⁰⁹ and argue that it is impossible for the Challenged Judges to hear the appeal in Case 002/2 without being influenced by the incriminating evidence they assessed against KHIEU Samphân and by the findings that they reached in Case 002/1. The Special Panel observes that the exposure to evidence in Case 002/1 cannot, by itself, provide a basis for any reasonable appearance of bias by the Challenged Judges.²¹⁰ It is assumed, in the absence of evidence to the contrary, that based on their training and experience, the judges can disabuse their minds of any irrelevant personal beliefs or predispositions.²¹¹ The Co-Lawyers do not provide any concrete evidence to support the purported statement that the Supreme Court Chamber “almost certain[ly]” will rule against KHIEU Samphân rendering his right to appeal ineffective.²¹² The Special Panel is not convinced by the Co-Lawyers’ contention that KHIEU Samphân will not be able to effectively exercise his right to appeal in Case 002/2, should the Challenged Judges not be disqualified.²¹³ The Special Panel, therefore, finds that the Co-Lawyers fail to establish that a reasonable observer would perceive that the Challenged Judges are unable to bring an impartial mind to Case 002/2.

²⁰⁶ *Nahimana et al.* Appeal Judgment (ICTR), para. 78 referring to *Kordić and Čerkez* Decision (ICTY).

²⁰⁷ KHIEU Samphân’s Application for Disqualification (1), para. 56.

²⁰⁸ See ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A, Decision on Motion Requesting Recusal, 3 December 2013 (“*Stanišić and Župljanin* Decision (ICTY)”), para. 23 (“on numerous occasions, the Tribunal has observed that a reasonable apprehension of bias of a Judge in a case will not arise merely because he or she previously dealt with evidence related to the same facts in other cases”) referring to *Galić* Appeal Judgment (ICTY), para. 44; *Karadžić* Decision (ICTY), para. 24; ICTY, *Prosecutor v. Brđanin*, IT-99-36-R77, Decision on Application for Disqualification, Trial Chamber, 11 June 2004, para. 13; *Karera* Appeal Judgment (ICTR), para. 378.

²⁰⁹ KHIEU Samphân’s Application for Disqualification (1), para. 57 referring to *Mladić* Disqualification Decision, paras 49, 67.

²¹⁰ See ICTY, *Prosecutor v. Sešelj*, IT-03-67-T, Order on the Prosecution Motion for the Disqualification of Judge Frederik HARHOFF, President, 14 January 2008, paras 24-25; *Stanišić and Župljanin* Decision (ICTY), para. 23; *Nahimana et al.* Appeal Judgment (ICTR), paras 78-79, 84-85; *Akayesu* Appeal Judgment (ICTR), para. 269.

²¹¹ *Furundžija* Appeal Judgment (ICTY), para. 197; *Nahimana et al.* Appeal Judgment (ICTR), paras 48, 78; *Akayesu* Appeal Judgment (ICTR), para. 269; *Renzaho* Appeal Judgment (ICTR), para. 23.

²¹² KHIEU Samphân’s Application for Disqualification (1), para. 59.

²¹³ KHIEU Samphân’s Application for Disqualification (1), para. 59.



77. Finally, the Special Panel turns to the Co-Lawyers' challenges to the Case 002/1 Appeal Judgment's overlapping factual and legal findings and to the issue of prejudgment. The Co-Lawyers submit that the Challenged Judges made factual and legal findings concerning the criminal responsibility of KHIEU Samphân.²¹⁴ The Special Panel will apply the appropriate standard for the disqualification of judges²¹⁵ in assessing the Co-Lawyers' submissions below.

78. The Co-Lawyers challenge the factual findings of the Case 002/1 Appeal Judgment pertaining to: the alleged criminal policies of establishing cooperatives and work sites; targeting the specific group of former Khmer Republic soldiers and officials; killing enemies; KHIEU Samphân's alleged participation in a JCE; and his purported knowledge of the crimes committed and his intent.²¹⁶

79. Concerning the alleged policy of establishing cooperatives and worksites, KHIEU Samphân identifies several findings in the Case 002/1 Appeal Judgment which allegedly prejudge the issue in Case 002/2. First, the Special Panel observes that the finding allegedly prejudging the issue of the existence of a policy to establish worksites²¹⁷ does not constitute a finding made by the Supreme Court Chamber, but a reference to the Closing Order.²¹⁸ Second, the Special Panel finds the Co-Lawyers' reference to the Supreme Court Chamber's *obiter dictum*²¹⁹ to be a statement made in passing, which establishes neither the elements of the crime against humanity of enslavement, nor KHIEU Samphân's criminal responsibility *via* JCE.²²⁰ Third, contrary to the Co-Lawyers' contention, the Supreme Court Chamber did not rule on the alleged visits to worksites by KHIEU Samphân relating to Case 002/2.²²¹ Instead,

²¹⁴ KHIEU Samphân's Application for Disqualification (1), paras 60-75.

²¹⁵ See Case 002/2 Decision on Applications for Disqualification (E314/12/1), paras 70 (delineates the standard as: "whether findings in an earlier case evince attributing criminal responsibility in relation to the charges to be adjudicated in a subsequent case"), 91 referring to Case 002 Third Severance Appeal Decision (E301/9/1/1/3), para. 85.

²¹⁶ KHIEU Samphân's Application for Disqualification (1), para. 61.

²¹⁷ KHIEU Samphân's Application for Disqualification (1), para. 62 and footnote 87.

²¹⁸ Case 002/1 Appeal Judgment (F36), para. 227 ("according to the Closing Order (D427), one of the objectives of moving the population was 'to fulfil the labour requirements of the cooperatives and worksites'").

²¹⁹ KHIEU Samphân's Application for Disqualification (1), paras 62-63 ("it would appear that the enslavement of population was one of the principal objectives of the Khmer Rouge regime, of which the population transfer was but a first step").

²²⁰ See *Poppe v. The Netherlands* (ECtHR), para. 28.

²²¹ KHIEU Samphân's Application for Disqualification (1), para. 64 and footnote 89.



the Supreme Court Chamber acknowledged that the evidence regarding the alleged worksites visits was only relevant to the Phase 2 of the Population Movement, which is within the scope of Case 002/1.²²² Fourth, concerning the statements on KHIEU Samphân's alleged involvement in making economic policy,²²³ the Special Panel observes that the paragraphs referred to by the Co-Lawyers contain no findings of fact on the matter. Instead, the Supreme Court Chamber addressed whether the Trial Chamber's assessment of the September 1975 document and the 1977 economic plan was unreasonable, without forming a judgement of guilt against KHIEU Samphân.²²⁴ Accordingly, the Special Panel finds that the Co-Lawyers' challenges relating to the statements on the alleged policy of establishing cooperatives and worksites do not demonstrate a reasonable appearance of bias.

80. In respect of the findings on the alleged policy of targeting the specific group of former Khmer Republic soldiers and officials, the Special Panel notes that the Co-Lawyers identify three paragraphs which purportedly constitute a prejudgment of KHIEU Samphân's guilt.²²⁵ In this regard, the Special Panel observes the Co-Lawyers misrepresent the Supreme Court Chamber's findings on the matter. First, a review of paragraph 227 of the Case 002/1 Appeal Judgment demonstrates that the Supreme Court Chamber discussed an overlapping issue of five CPK policies in the Closing Order, without making a finding of fact on the purported policy of targeting the specific group of former Khmer Republic soldiers and officials.²²⁶ Second, the Special Panel observes that the paragraphs referenced by the Co-Lawyers concern the examination of the Trial Chamber's findings, including, *inter alia*, the existence of the

²²² Case 002/1 Appeal Judgment (F36), para. 1028 (“[t]he Supreme Court Chamber notes that the evidence is relevant insofar as some of those who were transferred as part of the Phase 2 of the Population Movement indeed had been transferred to worksites”) referring to Case 002/1 Trial Judgment (E313), para. 601.

²²³ KHIEU Samphân's Application for Disqualification (1), para. 64 and footnotes 90-91.

²²⁴ Case 002/1 Appeal Judgment (F36), paras 838, 840-843.

²²⁵ KHIEU Samphân's Application for Disqualification (1), paras 65-66 referring to Case 002/1 Appeal Judgment (F36), paras 227, 960 and 970.

²²⁶ Case 002/1 Appeal Judgment (F36), para. 227. The Special Panel notes that the Supreme Court Chamber explicitly stated that despite the overlap of policies, “the question material for the appellate review is about the sufficiency of notice related to the charges of ‘forced movement phases one and two, executions committed at Tuol Po Chrey in the aftermath of the evacuation of Phnom Penh and associated crimes against humanity’ and, eventually, the sufficiency of factual findings underpinning the conviction, and not about subordinating the evidentiary basis of the case to certain policies.” This statement shows that the Supreme Court Chamber focused its review strictly on the matters relevant to Case 002/1.



alleged policy of targeting former Khmer Republic soldiers and officials during the period before or shortly after the events at Tuol Po Chrey and whether it was established that a policy contemplating the execution of former Khmer Republic soldiers and officials existed at the time of the events at Tuol Po Chrey.²²⁷ While the Supreme Court Chamber made several references to “the evidence post-dating the events at Tuol Po Chrey”,²²⁸ it is clear that the Supreme Court Chamber relied on such evidence insofar as it was relevant to the factual allegations underlying the charges in Case 002/1.²²⁹ Contrary to the Co-Lawyers’ assertion that the Supreme Court Chamber ruled on the alleged policy during the period relevant to Case 002/2,²³⁰ the Special Panel considers that the quoted statements do not prejudice KHIEU Samphân’s guilt in relation to the matters in Case 002/2.

81. Concerning the findings on the alleged policy of killing enemies, the Special Panel observes that taking into account the general context of this section of the Judgment,²³¹ the finding challenged by the Co-Lawyers²³² explicitly concerns the policy, which “continued throughout the time period relevant to Case 002/01”²³³ and, therefore, is incapable of substantiating allegations of a reasonable appearance of bias. The Special Panel further notes that another finding alleged by the Co-Lawyers²³⁴ strictly refers to “the period before or shortly after the events at Tuol Po Chrey”,

²²⁷ KHIEU Samphân’s Application for Disqualification (1), para. 66 *referring to* Case 002/1 Appeal Judgment (F36), paras 860, 883-884, 891, 900, 902, 903, 908, 930, 933, 947, 951-952, 958, 960, 962, 965, 967, 968, 970, 971.

²²⁸ Case 002/1 Appeal Judgment (F36), paras 960, 968, 970.

²²⁹ Case 002/1 Appeal Judgment (F36), paras 908, 956 (“it does not follow that the Trial Chamber was not entitled to rely on evidence post-dating the events to draw inferences on a pre-existing policy, as long as it provided adequate reasons as to why such evidence demonstrated a continuing policy, as opposed to a newly instituted or amended policy”), 971 (“the analysis is inevitably affected by [the] temporal limitation, which caused a large proportion of the evidence to be temporally irrelevant due to the Trial Chamber’s inability to demonstrate why instructions issued in 1976 and later imply that a policy had existed in April 1975”).

²³⁰ KHIEU Samphân’s Application for Disqualification (1), para. 66.

²³¹ *See* ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Decision on Motion for Disqualification of Judge Fausto POCAR, Appeals Chamber, 2 October 2012, para. 16 (“where allegations of bias are raised in relation to a Judge’s statements, it is necessary to situate the Judge’s remarks in their proper context. [...] [T]he consideration of impugned remarks in their proper context ‘is the approach to be expected of a reasonable observer’”).

²³² KHIEU Samphân’s Application for Disqualification (1), para. 67 and footnote 95 *referring to* Case 002/1 Appeal Judgment (F36), para. 933.

²³³ Case 002/1 Appeal Judgment (F36), para. 923. *See also* paras 924-933.

²³⁴ KHIEU Samphân’s Application for Disqualification (1), para. 67 and footnote 95 *referring to* Case 002/1 Appeal Judgment (F36), para. 967.

which is within the scope of Case 002/1,²³⁵ and does not refer to any criminal liability.²³⁶ Therefore, the Special Panel considers that these statements could not reasonably be perceived to reflect a judgment of guilt against KHIEU Samphân in Case 002/2.

82. Regarding the findings on KHIEU Samphân's alleged participation in a JCE, the Special Panel notes that the Co-Lawyers identify a number of general and specific factual findings, which purportedly prejudge his criminal responsibility in Case 002/2.²³⁷ The Special Panel recalls that even if there are "possibly prejudicial findings on matters commonly relevant" in Cases 002/1 and 002/2, such as contribution to JCE, common factual elements in both cases must be established anew.²³⁸ In assessing whether the purported findings demonstrate the appearance of bias, the Special Panel recalls that the prejudgment of issues exists if the findings in an earlier case evince attributing criminal responsibility in relation to the charges to be adjudicated in subsequent cases.²³⁹ Establishing elements of JCE, which is a mode of liability, does not amount to attributing criminal responsibility for all the potential crimes that would be committed under the JCE.

83. The Special Panel first observes that in the contested paragraphs of the Case 002/1 Appeal Judgment relating to KHIEU Samphân's alleged capacity as member of Office 870 and oversight of the Commerce Committee,²⁴⁰ the Supreme Court Chamber discusses the reasonableness of the Trial Chamber's assessment of evidence on the matter, without any basis of a judgment of guilt against KHIEU Samphân. Second, concerning the findings on KHIEU Samphân's alleged contribution by participating in policy and education meetings and by making public statements,²⁴¹

²³⁵ Case 002/1 Appeal Judgment (F36), paras 961-972.

²³⁶ Case 002/1 Appeal Judgment (F36), para 967 (while the Supreme Court Chamber "has found it plausible that the cited Party statements could be regarded as paving the way for a policy contemplating the execution of enemies", it nevertheless held that the Trial Chamber did not explain how abstract and general statements about communism and class struggle allowed it to reasonably infer that there was a policy to kill all Khmer Republic soldiers and officials).

²³⁷ KHIEU Samphân's Application for Disqualification (1), para. 68 referring to Case 002/1 Appeal Judgment (F36), paras 1006, 1011, 1015, 1017, 1018, 1022, 1024, 1027-1030, 1047, 1050, 1086.

²³⁸ Case 002 Third Severance Appeal Decision (E301/9/1/1/3), paras 83, 85.

²³⁹ Case 002/2 Decision on Applications for Disqualification (E314/12/1), paras 70, 91 referring to Case 002 Third Severance Appeal Decision (E301/9/1/1/3), para. 85. See also *Poppe v. The Netherlands* (ECtHR), para. 28.

²⁴⁰ KHIEU Samphân's Application for Disqualification (1), para. 68 and footnotes 96-97.

²⁴¹ KHIEU Samphân's Application for Disqualification (1), para. 68 and footnotes 98-100.



the Special Panel notes that the findings challenged by the Co-Lawyers concern KHIEU Samphân's conduct, which was only relevant to Case 002/1²⁴² and, therefore, cannot reasonably be perceived to reflect a judgment of guilt against KHIEU Samphân in Case 002/2. Third, as for the findings relating to KHIEU Samphân's alleged public statements, role as a diplomat, authority and influence and his contribution to the common purpose,²⁴³ the Special Panel observes that although these findings make reference to KHIEU Samphân's conduct, they do not assess or establish the *actus reus* or *mens rea* in relation to the Case 002/2 crimes.²⁴⁴ Similarly, the challenged findings on the "role of Central Committee"²⁴⁵ do not establish KHIEU Samphân's guilt in relation to crimes within the scope of Case 002/2.²⁴⁶ Accordingly, the Special Panel considers that the findings challenged by the Co-Lawyers do not substantiate the existence of a reasonable appearance of bias.

84. In relation to the findings on KHIEU Samphân's alleged knowledge of the crimes committed and his intent, the Co-Lawyers identify several findings which purportedly amount to a predetermination of issues bearing on KHIEU Samphân's guilt.²⁴⁷ The Special Panel observes that a review of the paragraphs challenged by the Co-Lawyers²⁴⁸ demonstrates that KHIEU Samphân's criminal intent in relation to the Case 002/2 crimes is not addressed therein. The Special Panel, thus, finds that the Co-Lawyers fail to establish bias or a reasonable appearance of bias.

85. Turning to the legal findings alleged by the Co-Lawyers, the Special Panel first notes that the Co-Lawyers base their assessment of the partiality of the Challenged Judges on the reasoning of the ECtHR in *Mancel and Branquart v. France*, namely "whether the issues that the Judges have to consider in the second

²⁴² Case 002/1 Appeal Judgment (F36), paras 1006 (concerns the existence of a policy of population movement), 1011 (discusses the meeting on the forcible transfer of the population of Phnom Penh), 1015 (addresses the issue of population movement, specifically the evacuation of cities), 1024 (where the Supreme Court Chamber explicitly noted that "the Trial Chamber's reliance on this speech and the use it made thereof squarely fell in the scope of Case 002/01"), 1086 (discusses killings that occurred in the course of the evacuation of Phnom Penh).

²⁴³ KHIEU Samphân's Application for Disqualification (1), para. 68 and footnotes 100-103.

²⁴⁴ Case 002/1 Appeal Judgment (F36), paras 1022, 1027-1030.

²⁴⁵ KHIEU Samphân's Application for Disqualification (1), para. 68 and footnotes 104-105.

²⁴⁶ Case 002/1 Appeal Judgment (F36), paras 1047, 1050.

²⁴⁷ KHIEU Samphân's Application for Disqualification (1), para. 69 and footnote 107.

²⁴⁸ Case 002/1 Appeal Judgment (F36), paras 837, 839-842, 1005-1006, 1054-1055, 1071-1077, 1079, 1081-1082, 1084, 1085-1090.



appeal are similar to those they adjudicated in the first appeal”.²⁴⁹ This has been held inapplicable by the Special Panel.²⁵⁰ Instead, the Special Panel reaffirms that the test for prejudgment is whether “findings in an earlier case evince attributing criminal responsibility in relation to the charges to be adjudicated in subsequent cases”.²⁵¹ The Co-Lawyers challenge the legal findings of the Case 002/1 Appeal Judgment relating to the contextual elements of crimes against humanity,²⁵² the *mens rea* of murder as crimes against humanity,²⁵³ temporal jurisdiction,²⁵⁴ the foreseeability and the principle of legality²⁵⁵ and JCE.²⁵⁶ The Special Panel observes that the contested legal findings constitute legal interpretation of general principles of law, elements of crimes or a mode of liability which do not touch upon specific crimes charged within the scope of Case 002/2. Therefore, the Special Panel finds that the Co-Lawyers fail to establish bias or a reasonable appearance of bias.

86. For the foregoing reasons, the Special Panel considers that the Co-Lawyers fail to adduce sufficient evidence to demonstrate that a reasonable observer, properly informed, would be of the view that the Challenged Judges would not bring an impartial and unprejudiced mind to the issues of fact and law raised in determining the issues in Case 002/2.

87. Accordingly, the Special Panel finds that the Co-Lawyers fail to rebut the strong presumption of impartiality attached to the Judges and dismisses Ground 1.

²⁴⁹ KHIEU Samphân’s Application for Disqualification (1), para. 70 referring to *Mancel and Branquart v. France* (ECtHR), para. 37.

²⁵⁰ See *supra* para. 69.

²⁵¹ Case 002/2 Decision on Applications for Disqualification (E314/12/1), paras 70, 91 referring to Case 002 Third Severance Appeal Decision (E301/9/1/1/3), para. 85.

²⁵² KHIEU Samphân’s Application for Disqualification (1), para. 72 referring to Case 002/1 Appeal Judgment (F36), paras 711-732, 738-740, 744-749, 753-754.

²⁵³ KHIEU Samphân’s Application for Disqualification (1), para. 72 referring to Case 002/1 Appeal Judgment (F36), paras 390-410, 516, 765.

²⁵⁴ KHIEU Samphân’s Application for Disqualification (1), para. 72 referring to Case 002/1 Appeal Judgment (F36), paras 213-221, 229, 741.

²⁵⁵ KHIEU Samphân’s Application for Disqualification (1), para. 72 referring to Case 002/1 Appeal Judgment (F36), paras 576, 589, 761-762, 765, 1093, 1095.

²⁵⁶ KHIEU Samphân’s Application for Disqualification (1), para. 72 referring to Case 002/1 Appeal Judgment (F36), paras 773-789, 807-810, 814-817, 857, 860, 980-984, 1053-1055.



B. GROUND 2: THE EXISTENCE OF BIAS BASED ON ERRONEOUS FINDINGS IN THE CASE 002/1 APPEAL JUDGMENT

1. Submissions

88. The Co-Lawyers submit that the erroneous findings that the Challenged Judges reached in the Case 002/1 Appeal Judgment demonstrate the existence of bias and/or the appearance of bias.²⁵⁷ The Co-Lawyers assert that the Challenged Judges “made many errors which are not the result of a true application of the law of which there may be more than one interpretation”, evidenced by findings on such issues as: (i) the principle of legality; (ii) the *mens rea* of the crime against humanity of murder; (iii) JCE; and (iv) the legal re-characterisation of the crimes, which was to secure the conviction of KHIEU Samphân.²⁵⁸

89. First, the Co-Lawyers allege that the Challenged Judges “gutted the principle of legality to make it a mere formality” by taking “a punitive legislative approach”.²⁵⁹ Departing from the ECtHR and the ECCC jurisprudence,²⁶⁰ the Supreme Court Chamber considered that it was sufficient that “the crimes or modes of liability existed under customary international law at the time of the events and that the Accused held senior positions” and that the foreseeability requirement was met “if the Accused had been able to appreciate that his conduct was criminal ‘in the sense generally understood, without reference to any specific provision’, which is the case for ‘the gravest [crimes] known’.”²⁶¹

²⁵⁷ KHIEU Samphân’s Application for Disqualification (1), para. 76.

²⁵⁸ KHIEU Samphân’s Application for Disqualification (1), para. 79.

²⁵⁹ KHIEU Samphân’s Application for Disqualification (1), para. 80.

²⁶⁰ KHIEU Samphân’s Application for Disqualification (1), para. 80 referring to Case 001 Appeal Judgment (F28), para. 97; Case 002/2, KHIEU Samphân’s Closing Brief (002/02), 2 May 2017, amended 2 October 2017, E457/6/4/1 (“Case 002/2 KHIEU Samphân’s Closing Brief (E457/6/4/1)”), paras 300-330 referring to ECtHR, *Kokkinakis v. Greece*, Application No. 14307/88, Judgment, 25 May 1993, paras 40, 52; ECtHR, *Vasiliauskas v. Lithuania*, Application No. 35343/05, Judgment, 20 October 2015, paras 153-154, 166-168, 178, 181, 185-186, 191; ECtHR, *Jamil v. France*, Application No. 15917/89, Judgment, 08 June 1995, paras 34-36; ECtHR, *Korbely v. Hungary*, Application No. 9174/02, Judgment, 19 September 2008, paras 74-75; ECtHR, *Kononov v. Latvia*, Application No. 36376/04, Judgment, 17 May 2010, paras 235-239, 244; ECtHR, *Kafkaris v. Cyprus*, Application No. 21906/04, Judgment, 12 February 2008, paras 140, 143-148, 150.

²⁶¹ KHIEU Samphân’s Application for Disqualification (1), para. 80 (emphasis omitted) referring to Case 002/1 Appeal Judgment (F36), paras 762, 765.



90. Second, the Co-Lawyers allege that the Supreme Court Chamber adopted the *largo sensu* definition of the *mens rea* of the crime against humanity, which encompasses *dolus eventualis*.²⁶² The Co-Lawyers aver that this lowered requisite *mens rea* violates the principle of legality and is based on “[unlawful] and [selective]” reliance on the “subsequent case law of the international criminal tribunals, as well as on a misinterpretation of the *Medical Case* and cited post-1975 domestic laws.”²⁶³ The Co-Lawyers assert that in the absence of evidence of a direct intent to kill, the Challenged Judges introduced *dolus eventualis* in the definition of the mode of liability to ensure conviction.²⁶⁴

91. Third, the Co-Lawyers allege that the Supreme Court Chamber erred in law and showed bias by “creat[ing] a hybrid JCE combining *actus reus* elements of JCE I with *mens rea* elements of JCE III, which is not applicable before the ECCC.”²⁶⁵ The Co-Lawyers contend that the Trial Chamber in Case 002/2 correctly rejected this reasoning, and claim that it is problematic that the same Supreme Court Chamber Judges have to adjudicate JCE on appeal.²⁶⁶ The Co-Lawyers further assert that the broad interpretation of JCE I was to “criminali[se] the common purpose” and leverage “their elastic JCE to bring the crimes charged”, such as the crime against humanity of murder, “within the scope of the common purpose.”²⁶⁷ They contend that the Challenged Judges “were motivated by actual bias or [...] an appearance of bias” when stretching the liability to the maximum to establish the individual criminal responsibility and that the “dangerous and unprecedented lowering of the threshold of criminal intent is precisely proof of the development of a tailor made law to convict KHIEU Samphân.”²⁶⁸

²⁶² KHIEU Samphân’s Application for Disqualification (1), para. 82.

²⁶³ KHIEU Samphân’s Application for Disqualification (1), para. 83 referring to Case 002/2 KHIEU Samphân’s Closing Brief (E457/6/4/1), paras 394-429 referring to *USA v. Karl Brandt et al.* (*Medical Case*), Judgment of 19 August 1947, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. II (“*Medical Case Judgment*”), pp. 174-180, 186, 194, 198, 200-201, 207, 217, 222, 228, 234-237, 241, 248, 255-256, 271, 281-282, 285, 290, 295, 297.

²⁶⁴ KHIEU Samphân’s Application for Disqualification (1), para. 84.

²⁶⁵ KHIEU Samphân’s Application for Disqualification (1), paras 85-86.

²⁶⁶ KHIEU Samphân’s Application for Disqualification (1), paras 87-88 referring to Case 002/2 Trial Judgment (E465), paras 3714, 3715, 3921.

²⁶⁷ KHIEU Samphân’s Application for Disqualification (1), paras 89-90.

²⁶⁸ KHIEU Samphân’s Application for Disqualification (1), paras 91-92.



92. Fourth, the Co-Lawyers allege that the Supreme Court Chamber erred in law by wrongfully re-characterising the facts to “add as many crimes as possible, including those that resulted in deaths as part of the JCE.”²⁶⁹ The Co-Lawyers recall that, despite their unambiguous objection, contending that such re-characterisation into a hybrid JCE violated: (i) Internal Rule 110(2) by introducing new constitutive elements; (ii) the principle of *non reformatio in peius* by elevating the forms of indirect liability to a form of direct liability; and (iii) the right to appeal by ruling for the first time on appeal on KHIEU Samphân’s responsibility²⁷⁰ (elaborating that the Supreme Court Chamber re-characterised the crime of extermination as murder with *dolus eventualis* during the Phase 2 of the Population Movement).²⁷¹ This was “unlawful” since it was carried out without the Co-Lawyers having been informed of or having had the opportunity to hold an adversarial debate,²⁷² and this re-characterisation was allegedly “opportunistic” because the crime of murder during the Phase 2 of the Population Movement was not charged and only became punishable after the re-characterisation.²⁷³

93. The Co-Lawyers further assert that the Supreme Court Chamber indirectly carried out another “prohibited change of characterisation” regarding the crime of enforced disappearances only by a simple indication in a footnote to its Judgment.²⁷⁴ They contend that the Supreme Court Chamber could not reach a finding of guilt under JCE without going through a change of the characterisation of the mode of liability, which it did not do, and that the Chamber brought, “by obscure, devious and patently erroneous means”, all the crimes under JCE for which it decided to uphold the conviction and to ensure the life imprisonment sentence.²⁷⁵ The Co-Lawyers finally aver that since the Trial Chamber in Case 002/2 adopted the Supreme Court Chamber’s definition of murder and likewise changed the characterisation of the crime of extermination to murder with *dolus eventualis*, KHIEU Samphân “has no

²⁶⁹ KHIEU Samphân’s Application for Disqualification (1), para. 93.

²⁷⁰ KHIEU Samphân’s Application for Disqualification (1), paras 94-96.

²⁷¹ KHIEU Samphân’s Application for Disqualification (1), paras 96-97.

²⁷² KHIEU Samphân’s Application for Disqualification (1), para. 98.

²⁷³ KHIEU Samphân’s Application for Disqualification (1), paras 99-101.

²⁷⁴ KHIEU Samphân’s Application for Disqualification (1), para. 102.

²⁷⁵ KHIEU Samphân’s Application for Disqualification (1), paras 104-107.



chance on appeal in Case 002/02” before the Challenged Judges in this case, who were biased on the same issues.²⁷⁶

94. In the Response, the Co-Prosecutors submit that the Application for Disqualification is “in effect a procedurally barred appeal disguised as a disqualification application”²⁷⁷ in which the Co-Lawyers misrepresent purported legal errors as bias, and fail to meet the standard of proof for bias and/or appearance of bias.²⁷⁸ They argue that as acknowledged by the Co-Lawyers, alleged errors of law, in themselves, are insufficient to demonstrate bias and that a party must not use disqualification applications as a platform for disputing the substance of previous decisions with which it disagrees.²⁷⁹

95. Moreover, concerning the Co-Lawyers’ assertions that the four alleged errors demonstrate bias²⁸⁰ or represent the only way for the Supreme Court Chamber to secure a conviction in Case 002/1, the Co-Prosecutors argue that this is unsupported by evidence and is belied by other findings in the Case 002/1 Appeal Judgment, leading to a partial reversal of the Trial Chamber’s findings and the acquittal of charges.²⁸¹

96. Regarding the principle of legality, the Co-Prosecutors contend that contrary to the Co-Lawyers’ argument, the Supreme Court Chamber held in both Cases 001 and 002/1 that the crimes or modes of liability must have existed under national or international law and were accessible and foreseeable to the Accused at the time of the alleged criminal conduct.²⁸² The Co-Prosecutors emphasise that the Supreme Court Chamber’s Case 002/1 findings regarding the tests for “accessibility” and “foreseeability” are consistent with Case 001 Appeal Judgment, the jurisprudence of

²⁷⁶ KHIEU Samphân’s Application for Disqualification (1), paras 108-109.

²⁷⁷ Co-Prosecutors’ Response (5), para. 45.

²⁷⁸ Co-Prosecutors’ Response (5), paras 37, 45.

²⁷⁹ Co-Prosecutors’ Response (5), paras 38-40.

²⁸⁰ Co-Prosecutors’ Response (5), para. 37.

²⁸¹ Co-Prosecutors’ Response (5), paras 41-42.

²⁸² Co-Prosecutors’ Response (5), para. 47.



the Pre-Trial Chamber as well as the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and align with the principle of legality.²⁸³

97. With respect to the *mens rea* of murder as a crime against humanity, the Co-Prosecutors contend that contrary to the Co-Lawyers’ allegation, the finding on the *mens rea* of murder to include *dolus eventualis* neither establishes an error, nor meets the high standard of proof to show bias or an appearance of bias.²⁸⁴ Further, the Co-Prosecutors assert that the Case 002/1 Appeal Judgment’s finding that “a direct intent to kill was *not* required under customary international law for the crime against humanity of murder”, is consistent with the jurisprudence, including that of: the ECCC Chambers in Case 001, the *ad hoc* tribunals²⁸⁵ and the Supreme Court Chamber, which properly observed that in the *Medical Case*, in the post-World War II period, murder as a crime against humanity included the notion of *dolus eventualis*.²⁸⁶ Finally, concerning the Co-Lawyers’ challenges to the Supreme Court Chamber’s purported reliance on domestic laws postdating 1975 as supporting *dolus eventualis*, the Co-Prosecutors submit that the authorities on which the Supreme Court Chamber relied mostly predated 1975.²⁸⁷

98. Regarding JCE, the Co-Prosecutors argue that the Co-Lawyers fail to meet the standard of demonstrating actual bias and/or an appearance of bias in the Challenged

²⁸³ Co-Prosecutors’ Response (5), paras 48-50 referring to Case 002 (PTC145&146), Decision on Appeals by NUON Chea and IENG Thirith against the Closing Order, 15 February 2011, D427/2/15 (“Case 002 Decision on Appeals of NUON Chea and IENG Thirith against the Closing Order (D427/2/15)”), para. 106; Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 235; Case 002 (PTC35), Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15 (“Case 002 JCE Decision (D97/14/15)”), para. 45; ICTY, *Prosecutor v. Hadžihasanović et al*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Appeals Chamber, 16 July 2003 (“*Hadžihasanović and Kubura* Decision (ICTY)”), para. 34.

²⁸⁴ Co-Prosecutors’ Response (5), para. 51.

²⁸⁵ Co-Prosecutors’ Response (5), para. 53 referring to Case 001 Appeal Judgment (F28), paras 332-334 citing Case 001, Judgement, Trial Chamber, 26 July 2010, E188 (“Case 001 Trial Judgment (E188)”), para. 333; ICTY, *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, Judgement, Appeals Chamber, 17 December 2004, para. 113; ICTY, *Prosecutor v. Milošević*, IT-98-29/1-A, Judgement, Appeals Chamber, 12 November 2009, para. 108; ICTY, *Prosecutor v. Stakić*, IT-97-24-T, Judgement, Trial Chamber, 31 July 2003 (“*Stakić* Trial Judgment (ICTY)”), paras 587, 642; ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement, Trial Chamber, 2 September 1998 (“*Akayesu* Trial Judgment (ICTR)”), para. 589; SCSL, *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, Trial Chamber, 18 May 2012, para. 412; ICTR, *Prosecutor v. Bikindi*, ICTR-01-72-T, Judgement, Trial Chamber, 2 December 2008, para. 429.

²⁸⁶ Co-Prosecutors’ Response (5), paras 54-55 referring to Case 002/1 Appeal Judgment (F36), para. 395 citing *Medical Case* Judgment, pp. 189-207, 235-241, 253-263, 271, 290.

²⁸⁷ Co-Prosecutors’ Response (5), para. 56.



Judges' finding on the scope of a JCE's common criminal plan or that the finding does not represent a genuine application of the law.²⁸⁸ They further assert that the Supreme Court Chamber was consistent with the well-established jurisprudence of the ECCC and the *ad hoc* tribunals on the relevant *mens rea* for JCE I.²⁸⁹

99. With respect to the legal re-characterisation of the facts in Case 002/1, the Co-Prosecutors assert that the Co-Lawyers' allegations do not meet the high burden of showing actual bias and/or appearance of bias on the part of the Challenged Judges.²⁹⁰ The Co-Prosecutors argue that, pursuant to Internal Rule 110(2), the Supreme Court Chamber legitimately re-characterised the facts from the crime of extermination to murder²⁹¹ (committed with *dolus eventualis* during the Phase 2 of the Population Movement) as this re-characterisation did not add any new constitutive elements.²⁹² The Co-Prosecutors continue that the Supreme Court Chamber's findings on the crimes—including other inhumane acts during the Phase 2 of the Population Movement under the JCE responsibility—were appropriate as the Trial Chamber was seised of those facts and, thus, KHIEU Samphân conducted his defence accordingly and his rights were fully protected.²⁹³ Finally, the Co-Prosecutors contend that the Co-Lawyers fail to demonstrate that any error in entering convictions for these crimes pursuant to JCE was instrumental in upholding the life sentence, given that a sentence is based upon the totality of the Accused's conduct and there is no inherent hierarchy of gravity for modes of responsibility.²⁹⁴

2. Discussion

100. The Special Panel observes that the Co-Lawyers challenge the Case 002/1 Appeal Judgment's findings pertaining to: (i) the principle of legality;²⁹⁵ (ii) the *mens rea* of the crime against humanity of murder;²⁹⁶ (iii) JCE;²⁹⁷ and (iv) the legal re-

²⁸⁸ Co-Prosecutors' Response (5), paras 57-59.

²⁸⁹ Co-Prosecutors' Response (5), para. 60.

²⁹⁰ Co-Prosecutors' Response (5), para. 61.

²⁹¹ Co-Prosecutors' Response (5), para. 62.

²⁹² Co-Prosecutors' Response (5), para. 62.

²⁹³ Co-Prosecutors' Response (5), paras 62-65.

²⁹⁴ Co-Prosecutors' Response (5), para. 66.

²⁹⁵ KHIEU Samphân's Application for Disqualification (1), paras 80-81.

²⁹⁶ KHIEU Samphân's Application for Disqualification (1), paras 82-84.

²⁹⁷ KHIEU Samphân's Application for Disqualification (1), paras 85-92.



characterisation of the facts.²⁹⁸ The Co-Lawyers submit that the purported errors are not the result of a true application of the law and demonstrate bias on the part of the Challenged Judges.²⁹⁹ The Special Panel will assess, in turn, the merits of each of these challenges.

101. As a preliminary matter, the Special Panel recalls—and the parties agree³⁰⁰—that where allegations of bias are made on the basis of judicial decisions, it has the duty to examine the content of the judicial decisions cited as evidence of bias.³⁰¹ The purpose of that review is not to detect errors, but to determine whether such errors, if any, demonstrate that the judges are actually biased, or that there is an appearance of bias based on the objective test discussed above.³⁰² The Special Panel observes that it is insufficient for a party to merely allege error, if any, on a point of law.³⁰³ Instead, the party must demonstrate that “the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant, and not genuinely related to the application of law (on which there may be more than one possible interpretation) or to the assessment of the relevant facts”.³⁰⁴ In this respect, the party’s disagreement with the substance of a decision does not, by itself, constitute a proper basis for an application for disqualification but, rather, should be addressed on appeal.³⁰⁵ The

²⁹⁸ KHIEU Samphân’s Application for Disqualification (1), paras 93-109.

²⁹⁹ KHIEU Samphân’s Application for Disqualification (1), paras 76, 79.

³⁰⁰ KHIEU Samphân’s Application for Disqualification (1), paras 77-78; Co-Prosecutors’ Response (5), para. 38.

³⁰¹ Case 002 Reasons for Disqualification Decision (E314/12/1), para. 36; Case 002/13-10-2009-ECCC/PTC (02), Decision on KHIEU Samphân’s Application to Disqualify (Doc. No. 7), para. 34; ICTR, *Prosecutor v. Ntahobali*, ICTR-97-21-T, Decision on Motion for Disqualification of Judges, The Bureau, 7 March 2006 (“*Ntahobali Decision (ICTR)*”), para. 12; *Sesay et al. Decision (SCSL)*, para. 62; ICTR, *Prosecutor v. Seromba*, ICTR-2001-66-T, Decision on Motion for Disqualification of Judges, The Bureau, 25 April 2006 (“*Seromba Decision (ICTR)*”), para. 12.

³⁰² Case 002 Reasons for Disqualification Decision (E314/12/1), para. 36 referring to *Seromba Decision (ICTR)*, para. 12; Case 002/13-10-2009-ECCC/PTC (02), Decision on KHIEU Samphân’s Application to Disqualify (Doc. No. 7), para. 34 referring to *Ntahobali Decision (ICTR)*, para. 12. See also *supra* paras 63-64.

³⁰³ Case 002/13-10-2009-ECCC/PTC (02), Decision on KHIEU Samphân’s Application to Disqualify (Doc. No. 7), para. 34 referring to *Ntahobali Decision (ICTR)*, para. 12; *Seromba Decision (ICTR)*, para. 12; Case 002 Trial Chamber Decision on Applications for Disqualification (E55/4), para. 13; Case 002 Reasons for Disqualification Decision (E314/12/1), para. 36; ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Motion by Karemera for Disqualification of Trial Judges, The Bureau, 17 May 2004 (“*Karemera et al. Decision (ICTR)*”), para. 13.

³⁰⁴ Case 002/13-10-2009-ECCC/PTC (02), Decision on KHIEU Samphân’s Application to Disqualify (Doc. No. 7), para. 34 referring to *Ntahobali Decision (ICTR)*, para. 12; *Seromba Decision (ICTR)*, para. 12; *Karemera et al. Decision (ICTR)*, para. 13; *Sesay et al. Decision (SCSL)*, para. 62.

³⁰⁵ Case 002/13-10-2009-ECCC/PTC (02), Decision on KHIEU Samphân’s Application to Disqualify (Doc. No. 7), para. 35 referring to *Ntahobali Decision (ICTR)*, para. 11; ICTY, *Blagojević et al.*, IT-02-60, Decision on Blagojević’s Application Pursuant to Rule 15(B), The Bureau, 19 March 2003

Special Panel reaffirms that although it would not entirely rule out the possibility that decisions rendered by a judge could suffice by themselves to establish actual bias, it would only serve to do so in the truly exceptional cases.³⁰⁶

102. The Special Panel upholds this test for the review of allegations of bias based on judicial decisions, which has been adopted by multiple ECCC Chambers and international criminal tribunals. Accordingly, turning to the Case 002/1 Appeal Judgment’s allegedly erroneous findings, the Special Panel will determine, not if the findings made by the Challenged Judges are or could constitute an error of law, but rather if these findings could reasonably be perceived as creating an appearance of bias with regard to KHIEU Samphân.

103. First, concerning the findings on the principle of legality, the Special Panel observes that the Co-Lawyers’ contention—that the Challenged Judges took “a punitive legislative approach” and “gutted the principle of legality to make it a mere formality” by departing from the prior ECCC jurisprudence³⁰⁷—is unpersuasive. The Special Panel notes that contrary to the Co-Lawyers’ allegation, the Supreme Court Chamber did not find that “it was sufficient that the crimes or modes of liability existed under customary international law at the time of the events and that the Accused held senior positions.”³⁰⁸ Instead, the Chamber adopted the Case 001 Appeal Judgment’s reasoning that offences and modes of responsibility charged before the ECCC must have existed either under national law or international law at the time of the alleged criminal conduct and been accessible and foreseeable to the Accused.³⁰⁹ While agreeing with KHIEU Samphân that “the requirements of foreseeability and accessibility must be determined through an objective analysis, namely that the crimes and modes of liability must be foreseeable and accessible in general,” the Supreme Court Chamber held that it was not unreasonable for the Trial Chamber to consider

(“*Blagojević et al.* Decision on Rule 15(B) Application (ICTY)”), para. 14; Case 002 Trial Chamber Decision on Applications for Disqualification (E55/4), para. 13; Case 002 Reasons for Disqualification Decision (E314/12/1), para. 36.

³⁰⁶ *Ntahobali* Decision (ICTR), para. 11 referring to *Blagojević et al.* Decision on Rule 15(B) Application (ICTY), para. 14; *Karemera et al.* Decision (ICTR), para. 12 citing *Liteky v. United States*, 510 US 540, 555 (1994).

³⁰⁷ KHIEU Samphân’s Application for Disqualification (1), para. 80.

³⁰⁸ KHIEU Samphân’s Application for Disqualification (1), para. 80 referring to Case 002/1 Appeal Judgment (F36), paras 761-762, 764.

³⁰⁹ Case 002/1 Appeal Judgment (F36), paras 761-762 citing Case 001 Appeal Judgment (F28), paras 91, 96.



the senior positions occupied by KHIEU Samphân in assessing compliance with the principle of legality.³¹⁰ The Special Panel observes that this approach is consistent with the one adopted in the Case 001 Appeal Judgment.³¹¹ The Special Panel further notes that the Case 002/1 Appeal Judgment's reasoning relating to the foreseeability requirement is a direct citation of the Case 001 Appeal Judgment³¹² and reflects the approach taken by the Chambers of the ECCC and the ICTY on the matter.³¹³ The Special Panel, therefore, is not convinced that the Supreme Court Chamber's findings on the principle of legality were based on incorrect legal reasoning or influenced by improper considerations demonstrating bias against KHIEU Samphân.

104. Second, in respect of the findings on the *mens rea* of the crimes against humanity of murder, the Special Panel notes that the Co-Lawyers allege bias arising from the adoption of a broad definition of the *mens rea* of the crime against humanity of murder which encompasses *dolus eventualis*.³¹⁴ The Special Panel recalls that to demonstrate bias, it must be established that the findings are "not genuinely related to the application of law, on which there may be more than one possible interpretation".³¹⁵ The Special Panel observes that in making a finding that the *mens rea* of murder as a crime against humanity must be understood to include both direct intent and *dolus eventualis*, the Supreme Court Chamber provided a detailed analysis of the international criminal tribunals' jurisprudence and domestic criminal legislation on the matter.³¹⁶

³¹⁰ Case 002/1 Appeal Judgment (F36), para. 761.

³¹¹ Case 001 Appeal Judgment (F28), para. 280 ("it was sufficiently foreseeable to the Accused, as a member of Cambodia's governing authority, that he could be prosecuted for his persecutory acts or omissions from 1975-1979").

³¹² *Contra* KHIEU Samphân's Application for Disqualification (1), para. 80 referring to Case 002/1 Appeal Judgment (F36), paras 762, 765. See Case 002/1 Appeal Judgment (F36), para. 762 citing Case 001 Appeal Judgment (F28), para. 96 quoting *Hadžihasanović and Kubura* Decision (ICTY), para. 34.

³¹³ *Contra* KHIEU Samphân's Application for Disqualification (1), para. 81 and footnote 122. See, e.g., Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 235 referring to Case 002 JCE Decision (D97/14/15), para. 45; Case 002 Decision on Appeals of NUON Chea and IENG Thirith against the Closing Order (D427/2/15), para. 106; *Hadžihasanović and Kubura* Decision (ICTY), para. 34; ICTY, *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, Appeals Chamber, 21 May 2003, para. 42.

³¹⁴ KHIEU Samphân's Application for Disqualification (1), para. 82.

³¹⁵ Case 002/13-10-2009-ECCC/PTC (02), Decision on KHIEU Samphân's Application to Disqualify (Doc. No. 7), para. 34 referring to *Ntahobali* Decision (ICTR), para. 12; *Seromba* Decision (ICTR), para. 12; *Karemura et al.* Decision (ICTR), para. 13.

³¹⁶ Case 002/1 Appeal Judgment (F36), paras 387-410.



105. Contrary to the Co-Lawyers' contention,³¹⁷ a review of the jurisprudence of the ECCC and the international criminal tribunals reveals that defining the *mens rea* of murder as a crime against humanity in 1975, so as to encompass *dolus eventualis*, is one of the possible interpretations of the relevant jurisprudence and genuinely related to the application of law.³¹⁸ The Supreme Court Chamber provided a comprehensive analysis of the applicability of the notion of *dolus eventualis* in the post-World War II period and the definition of *mens rea* in the national laws predating 1975.³¹⁹ The Special Panel reaffirms that "disagreement with the substance of a decision is a matter for appeal, not an application for disqualification."³²⁰ Given the insufficiency of arguments on the purported "misinterpretation" and the "unlawful" reliance on the jurisprudence of the international criminal tribunals,³²¹ the Special Panel considers that the Co-Lawyers fail to establish a reasonable appearance of bias on the part of the Challenged Judges.

³¹⁷ KHIEU Samphân's Application for Disqualification (1), para. 83 referring to Case 002/2 KHIEU Samphân's Closing Brief (E457/6/4/1), paras 394-429.

³¹⁸ See, e.g., Case 001 Appeal Judgment (F28), para. 333 citing Case 001 Trial Judgment (E188), para. 333 referring to ICTY, *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Judgement, Trial Chamber, 17 January 2005, para. 556; *Stakić* Trial Judgment (ICTY), para. 587 ("[t]urning to the *mens rea* element of the crime, the Trial Chamber finds that both a *dolus directus* and a *dolus eventualis* are sufficient to establish the crime of murder under Article 3"); ICTY, *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, Trial Chamber, 15 March 2002, para. 324; ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, Appeals Chamber, 28 February 2005, para. 261; *Akayesu* Trial Judgment (ICTR), para. 589; ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, paras 420-439 (having examined the Geneva Conventions of 1949, the Additional Protocol I to the Geneva Conventions and its Commentary and domestic case law, the Trial Chamber held that "the necessary intent, meaning *mens rea*, required to establish the crimes of wilful killing and murder, as recognised in the Geneva Conventions, is present where there is demonstrated an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life"). In this regard, the Special Panel recalls that "the elements of the offence of wilful killing under Article 6 of the ECCC Law are the same as those of murder under Article 5 of the ECCC Law (crimes against humanity)". See Case 001 Trial Judgment (E188), para. 431. See also Antonio CASSESE, *International Criminal Law* (Oxford University Press, 2nd Edition, 2008), pp. 67-69 (discussing the post-World War II jurisprudence of German courts administered under Control Council Law No. 10 on the notion of *dolus eventualis* or recklessness in *mens rea* of a crime against humanity).

³¹⁹ See Case 002/1 Appeal Judgment (F36), paras 393-409 referring to, *inter alia*, Medical Case Judgment, pp. 189-207, 235-241, 248, 253-263, 271, 290; *Penal Code of the Kingdom of Cambodia (Code Pénal et Lois Pénales)*, 1956, Arts 503-505.

³²⁰ Case 002 Trial Chamber Decision on Applications for Disqualification (E55/4), para. 13; Case 002 Reasons for Disqualification Decision (E314/12/1), para. 36.

³²¹ KHIEU Samphân's Application for Disqualification (1), para. 83. See Case 002, Decision on Appeals against Co-Investigating Judges' Combined Order D250/3/3 Dated 13 January 2010 and Order D250/3/2 Dated 13 January 2010 on Admissibility of Civil Party Applications, 27 April 2010, D250/3/2/1/5, para. 22 referring to ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004, para. 13; ICTR, *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgement, Appeals Chamber, 26 May 2003, para. 18 (where the Pre-Trial Chamber held that it "will not give detailed consideration to submissions which are obscure, contradictory, or vague, or if they suffer from other formal and obvious insufficiencies").



106. Third, turning to the purportedly erroneous findings on JCE, the Special Panel notes that the Co-Lawyers allege bias stemming from ruling on the applicability of *dolus eventualis* in relation to the *mens rea* of JCE I.³²² The Special Panel observes that the Co-Lawyers misrepresent the Supreme Court Chamber's findings on the issue. Contrary to the Co-Lawyers' assertion,³²³ in making the finding on *dolus eventualis* forming a part of JCE I, the Supreme Court Chamber provided a thorough analysis of the international jurisprudence.³²⁴ The Special Panel is not convinced by the Co-Lawyers' allegation that the Supreme Court Chamber "created a hybrid JCE combining *actus reus* elements of JCE I with *mens rea* elements of JCE III. [...] contrary to the case law of the international criminal tribunals".³²⁵ Rather, the Chamber reaffirmed that the notion of JCE III did not exist at the time of the charges, either under customary international law or as a general principle of law.³²⁶ Having analysed the post-World War II and the international criminal tribunals' jurisprudence on JCE,³²⁷ the Supreme Court Chamber made a distinction between: the case where the crime was not encompassed by the common purpose, while its commission was an autonomous decision of the direct perpetrator (JCE III); and the case where "the members of the JCE must accept the commission of the crime either as a goal, as an inevitable consequence of the primary purpose or as an eventuality treated with

³²² KHIEU Samphân's Application for Disqualification (1), paras 85-92.

³²³ KHIEU Samphân's Application for Disqualification (1), para. 86.

³²⁴ See Case 002/1 Appeal Judgment (F36), paras 767-810.

³²⁵ KHIEU Samphân's Application for Disqualification (1), para. 86.

³²⁶ Case 002/1 Appeal Judgment (F36), paras 790-791 referring to, *inter alia*, Case 002 (PTC38), Decision on the Appeals against the Co Investigative Judges [*sic*] Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, paras 79-81, 83; Case 002, Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, E100/6, paras 30-31. See also Case 002/1 Appeal Judgment (F36), paras 792-807 (where the Supreme Court Chamber found that "criminal liability based on making a contribution to the implementation of a common criminal purpose was, at the time relevant to the charges in the case at hand, limited to crimes that were actually encompassed by the common purpose").

³²⁷ Case 002/1 Appeal Judgment (F36), paras 779-789 referring to, *inter alia*, ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Judgement, Appeals Chamber, 15 July 1999, as amended by Corrigendum to Judgement of the Appeals Chamber of 15 July 1999, 19 November 1999, para. 227 (finding that to establish the *actus reus* of JCE, it is required to have "a common plan, design or purpose which amounts to or involves the commission of a crime"); SCSL, *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Judgment, Appeals Chamber, 22 February 2008, para. 76 ("the criminal purpose underlying the JCE can derive not only from its ultimate objective, but also from the means contemplated to achieve that objective. The objective and the means to achieve the objective constitute the common design or plan").



indifference” (JCE I encompassing *dolus eventualis*).³²⁸ The Supreme Court Chamber considered that only the latter was applicable.³²⁹

107. In light of the foregoing, the Special Panel observes that this finding should be regarded as the Supreme Court Chamber’s choice between several possible interpretations in the course of a genuine application of law, rather than as “the centrepiece of its system for convicting the accused” or “proof of the development of a tailor-made law to convict KHIEU Samphân”, as alleged by the Co-Lawyers.³³⁰ Therefore, the Special Panel is not persuaded that the findings on JCE demonstrate a reasonable appearance of bias.

108. Fourth, concerning the findings on the legal re-characterisation of the facts, the Special Panel notes that the Co-Lawyers allege bias arising from (i) the re-characterisation of the crime against humanity of extermination to murder in relation to the Phase 2 of the Population Movement;³³¹ and (ii) the conviction of KHIEU Samphân for the crimes during the Phase 2 of the Population Movement under JCE, instead of other modes of liability.³³²

109. The Special Panel preliminary notes, and the parties do not dispute,³³³ the fact that prior to the re-characterisation, the Supreme Court Chamber informed the parties of its intention and provided an opportunity to make submissions on the matter, to ensure the rights of the Accused.³³⁴

110. First, the Special Panel considers the Co-Lawyers’ contention—that *dolus eventualis* of the crime against humanity of murder has been introduced as a new constitutive element during the re-characterisation in violation of Internal Rule 110(2)³³⁵—to be unpersuasive. The Co-Lawyers’ argument that “*dolus eventualis* is

³²⁸ Case 002/1 Appeal Judgment (F36), para. 809.

³²⁹ Case 002/1 Appeal Judgment (F36), para. 809.

³³⁰ KHIEU Samphân’s Application for Disqualification (1), paras 91-92.

³³¹ KHIEU Samphân’s Application for Disqualification (1), paras 93-99.

³³² KHIEU Samphân’s Application for Disqualification (1), paras 100-106.

³³³ KHIEU Samphân’s Application for Disqualification (1), paras 95-96; Co-Prosecutors’ Response (5), para. 65.

³³⁴ Case 002, Order Scheduling the Appeal Hearing, 9 October 2015, F30 (“Case 002 Order Scheduling the Appeal Hearing (F30)”), p. 4 and footnote 11.

³³⁵ KHIEU Samphân’s Application for Disqualification (1), paras 97-99; Internal Rule 110(2) (“[i]n all cases, the Chamber may change the legal characterisation of the crime adopted by the Trial Chamber.



not one of the constitutive elements of extermination and was thus not an intrinsic element of the initial charge³³⁶ is misplaced because what is relevant here is not the initial legal characterisation, but the factual findings made by the Trial Chamber in light of the facts set out in the Indictment.³³⁷ In changing the characterisation of the crime of extermination to murder, the Supreme Court Chamber explained that the findings made by the Trial Chamber are sufficient to establish the elements of the crime against humanity of murder, including the *mens rea* of *dolus eventualis* in causing the deaths due to the conditions of the Phase 2 of the Population Movement.³³⁸ The Special Panel further notes that the factual allegations of killings in regard to the Phase 2 of the Population Movement were set out in the Closing Order.³³⁹ Accordingly, the Special Panel considers that this re-characterisation of extermination to murder is insufficient to demonstrate an appearance of bias.

111. Second, in relation to the conviction for the crimes of murder and other inhumane acts of enforced disappearances during the Phase 2 of the Population Movement *via* JCE,³⁴⁰ the Special Panel notes that the Co-Lawyers' assertion in this regard is erroneous. In its Order Scheduling the Appeal Hearing, the Supreme Court Chamber considered that neither the Closing Order nor the Trial Judgment contained any explanation as to why liability based on JCE did not extend to all the crimes for which KHIEU Samphân was charged and convicted.³⁴¹ While inviting the parties' observation on the matter, the Supreme Court Chamber notified that it may consider the change of the legal characterisation of the crimes, including the potential for JCE liability for all the crimes for which KHIEU Samphân's conviction may be confirmed.³⁴² Accordingly, the Supreme Court Chamber found that KHIEU Samphân was responsible for the crimes against humanity of murder and other inhumane acts

However, it shall not introduce new constitutive elements that were not submitted to the Trial Chamber").

³³⁶ KHIEU Samphân's Application for Disqualification (1), para. 98.

³³⁷ Internal Rules 98(2), 110(2).

³³⁸ Case 002/1 Appeal Judgment (F36), paras 558, 561 *referring to, inter alia*, Case 002/1 Trial Judgment (E313), para. 648 ("the Trial Chamber found that the 'Party leadership ignored the lessons of phase one [of the Population Movement] and took no measures to ensure that people were provided with adequate assistance or accommodation during phase two'. This implies that the perpetrators acted with *dolus eventualis*") (footnotes omitted).

³³⁹ Case 002/1 Appeal Judgment (F36), para. 562 *referring to* Case 002 Closing Order (D427), paras 1373, 1381; Internal Rule 98(2).

³⁴⁰ KHIEU Samphân's Application for Disqualification (1), paras 100-105.

³⁴¹ Case 002 Order Scheduling the Appeal Hearing (F30), p. 3.

³⁴² Case 002 Order Scheduling the Appeal Hearing (F30), pp. 3-5.



under JCE.³⁴³ The Special Panel recalls that for disqualification, a party must demonstrate that “the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant, and not genuinely related to the application of law, on which there may be more than one possible interpretation, or to the assessment of the relevant facts”; further, any disagreement with the substance of a decision should be a matter for appeal.³⁴⁴ In light of the foregoing, the Special Panel is not convinced by the Co-Lawyers’ argument that the re-characterisation of modes of liability into JCE as to the crimes against humanity of murder and other inhumane acts was an “obscure, devious and patently erroneous” means used by the Supreme Court Chamber to uphold the conviction, to secure a conviction for the killings or to ensure a sentence of life imprisonment.³⁴⁵ The Special Panel, thus, considers that the Co-Lawyers fail to substantiate that a reasonable observer would apprehend bias in the findings on the legal re-characterisation of the facts.

112. Therefore, the Special Panel finds that the Co-Lawyers fail to meet the burden of proof in demonstrating bias or a reasonable appearance of bias in the Case 002/1 Appeal Judgment’s findings and dismisses Ground 2.

C. GROUND 3: CONFIRMATION OF THE BIAS SINCE THE PRONOUNCEMENT OF THE CASE 002/2 TRIAL JUDGMENT

1. Submissions

113. The Co-Lawyers submit that the way the decisions of the Supreme Court Chamber have been made since the pronouncement of the Case 002/2 Trial Judgment on 16 November 2018, as detailed below, reinforces the suspicions that KHIEU Samphân has no chance on appeal.³⁴⁶

114. The Supreme Court Chamber rejected KHIEU Samphân’s Urgent Appeal challenging the form of the Trial Judgment on 16 November 2018 as inadmissible through misrepresentation of its purpose, by acting as if the Co-Lawyers were

³⁴³ Case 002/1 Appeal Judgment (F36), paras 1096-1099.

³⁴⁴ Case 002/13-10-2009-ECCC/PTC (02), Decision on KHIEU Samphân’s Application to Disqualify (Doc. No. 7), paras 34-35; Case 002 Trial Chamber Decision on Applications for Disqualification (E55/4), para. 13; Case 002 Reasons for Disqualification Decision (E314/12/1), para. 36.

³⁴⁵ KHIEU Samphân’s Application for Disqualification (1), para. 105.

³⁴⁶ KHIEU Samphân’s Application for Disqualification (1), para. 110.



appealing against the “summary”, instead of against the “disposition of the judgement”.³⁴⁷

115. Subsequently, the Co-Lawyers requested the annulment of that decision on the grounds that the Reserve Judge had not been officially designated as a sitting judge at the time of the decision.³⁴⁸ The Supreme Court Chamber did not notify the request for more than three months, despite the Co-Lawyers’ subsequent submissions.³⁴⁹ The Supreme Court Chamber found this request without merit, being of the view that “[d]efence had mischaracterised the chronology”, even though the Co-Lawyers had provided exactly the same chronology and supported the fact that deliberations were held with the Reserve Judge before his appointment was confirmed.³⁵⁰ The Co-Lawyers allege that this “frequent and questionable lack of transparency” of the Supreme Court Chamber constitutes an appearance of bias.³⁵¹

116. In the Response, the Co-Prosecutors submit that the Co-Lawyers fail to meet the considerably higher standard of proof for establishing bias and/or an appearance of bias with regard to either of the two Supreme Court Chamber decisions issued since the public pronouncement of the Case 002/2 Trial Judgment on 16 November 2018.³⁵²

117. First, the Co-Prosecutors argue that, contrary to the Co-Lawyers’ contention, the Supreme Court Chamber did not act in its Decision on KHIEU Samphân’s Urgent Appeal as if he was appealing against the summary rather than the disposition of the Trial Judgment pronounced orally on 16 November 2018.³⁵³ They underline that the

³⁴⁷ KHIEU Samphân’s Application for Disqualification (1), para. 111 *referring to* Case 002/2 KHIEU Samphân’s Urgent Appeal (E463/1); Case 002/2 Decision on KHIEU Samphân’s Urgent Appeal (E463/1/3); Case 002/2, KHIEU Samphân’s Reply to the Co-Prosecutors’ Response to his Urgent Appeal against the Summary of Judgement pronounced on 16 November 2018, 20 December 2018, E463/1/2/1.

³⁴⁸ KHIEU Samphân’s Application for Disqualification (1), para. 112 *referring to* Case 002/2 KHIEU Samphân’s Request for Annulment (E463/1/4).

³⁴⁹ KHIEU Samphân’s Application for Disqualification (1), para. 112.

³⁵⁰ KHIEU Samphân’s Application for Disqualification (1), para. 113 *referring to* Case 002/2 Decision on KHIEU Samphân’s Request for Annulment (E465/1/5).

³⁵¹ KHIEU Samphân’s Application for Disqualification (1), para. 113.

³⁵² Co-Prosecutors’ Response (5), paras 67-72.

³⁵³ Co-Prosecutors’ Response (5), para. 68.



Supreme Court Chamber's reasons for declaring the Urgent Appeal inadmissible apply to an appeal of the disposition alone.³⁵⁴

118. Second, the Co-Prosecutors argue that the Co-Lawyers fail to demonstrate any prejudice resulting from a three-month delay in the notification of the Request, particularly when the Supreme Court Chamber issued its Decision on the Annulment Request one month after the notification.³⁵⁵ Recalling that the Co-Lawyers confused "the receipt of the Decision on the Urgent Appeal by the Case File Officer with the electronic notification of the Designation Order", the Co-Prosecutors aver that the Co-Lawyers misapprehend the Supreme Court Chamber's finding regarding the timing of the Designation Order.³⁵⁶ They conclude that, in any event, any procedural irregularity had no effect on the substance of the Decision on the Urgent Appeal and the decision, which caused KHIEU Samphân no prejudice, does not establish any bias against him.³⁵⁷

2. Discussion

119. At the outset, the Special Panel reiterates that "the starting point for any determination of a claim [of bias] is that 'there is a presumption of impartiality which attaches to a Judge'", which places a high threshold on the moving party to displace that presumption.³⁵⁸ The Special Panel reaffirms, as numerous ECCC Chambers have found, that when alleging bias based on judicial decisions, a party must demonstrate that "the decisions are, or would reasonably be perceived to be, a result of a predisposition against the application rather than the genuine application of the law on which there may be more than one possible interpretation, or to the judges' assessment of facts."³⁵⁹ In this regard, the review of the judicial decisions cited as

³⁵⁴ Co-Prosecutors' Response (5), para. 69 referring to Case 002/2 Decision on KHIEU Samphân's Urgent Appeal (E463/1/3), paras 16-17.

³⁵⁵ Co-Prosecutors' Response (5), para. 70.

³⁵⁶ Co-Prosecutors' Response (5), para. 71.

³⁵⁷ Co-Prosecutors' Response (5), para. 72.

³⁵⁸ Case 002 Decision on the Co-Lawyers' Urgent Application (C11/29), para. 15 referring to *Furundžija* Appeal Judgment (ICTY), para. 196; SCSL, *Prosecutor v. Norman*, SCSL-2004-14-PT, Decision on the Motion to Recuse Judge WINTER from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, Appeals Chamber, 28 May 2004, para. 25; *Kamera et al.* Decision (ICTR), para. 10; Case 002 Trial Chamber Decision on Applications for Disqualification (E55/4), para. 12.

³⁵⁹ Case 002 Reasons for Disqualification Decision (E314/12/1), para. 36; Case 002 Trial Chamber Decision on Applications for Disqualification (E55/4), para. 13 referring to Case 002/13-10-2009-



evidence of bias is conducted “not to detect errors, but to determine whether errors, if any, demonstrate that the judges are actually biased, or that a reasonable observer with knowledge of the relevant circumstances would reasonably apprehend bias.”³⁶⁰

120. The Special Panel now turns to address the alleged bias in the decisions of the Supreme Court Chamber delivered since the pronouncement of the Case 002/2 Trial Judgment. Concerning the Supreme Court Chamber’s Decision on KHIEU Samphân’s Urgent Appeal, the Special Panel observes that the alleged error stems from “a misrepresentation of [the appeal’s] purpose” by the Supreme Court Chamber in rendering the appeal inadmissible.³⁶¹ The Special Panel considers that contrary to the Co-Lawyers’ argument,³⁶² the Decision on the Urgent Appeal refers to “the pronouncement of the disposition” of the judgement, rather than “the summary”.³⁶³ Since the alleged “misrepresentation” by the Supreme Court Chamber is not substantiated, the Special Panel is not convinced that the Supreme Court Chamber’s Decision on KHIEU Samphân’s Urgent Appeal demonstrates bias on the part of the Challenged Judges.

121. With respect to the alleged bias based on the Decision on Annulment Request, the Special Panel notes that the Annulment Request was filed by the Co-Lawyers on 20 March 2019 and notified on 3 July 2019.³⁶⁴ The Supreme Court Chamber dismissed the request, finding that, among others, the Co-Lawyers “conflate[] receipt of the Impugned Decision by the Case File Officer with the electronic notification of

ECCC/PTC (02), Decision on KHIEU Samphân’s Application to Disqualify (Doc. No. 7), para. 34; *Blagojević et al.* Decision on Rule 15(B) Application (ICTY), para. 14.

³⁶⁰ Case 002 Reasons for Disqualification Decision (E314/12/1), para. 36 referring to *Seromba* Decision (ICTR), para. 12.

³⁶¹ KHIEU Samphân’s Application for Disqualification (1), para. 111.

³⁶² KHIEU Samphân’s Application for Disqualification (1), para. 111.

³⁶³ Case 002/2 Decision on KHIEU Samphân’s Urgent Appeal (E463/1/3), paras 6 (“pronouncement of summary of its judgement and findings on 16 November 2018 constituted ‘the disposition of the Chamber’”), 9 (“contrary to the ‘disposition’ delivered by the Trial Chamber on 16 November 2016”), 14 (“the Supreme Court Chamber concludes that the pronouncement of the disposition on 16 November 2018 simply concluded the trial phase”). The Special Panel notes that on several occasions the Decision on KHIEU Samphân’s Urgent Appeal references the “pronouncement of the summary of the judgement and findings”. See Case 002/2 Decision on KHIEU Samphân’s Urgent Appeal (E463/1/3), paras 6, 12, 18. Nevertheless, the simultaneous use of the terms “summary” and “disposition” by the Supreme Court Chamber does not show a predisposition against the applicant, since the pronouncement of a judgement implies the announcement of a summary of the findings and the disposition according to Internal Rule 102(1). See Internal Rule 102(1); Case 002/2 Transcript of 16 November 2018 (E1/529.1), p. 53:12-13 (“[t]his completes the summary of the Chamber’s findings. I will now read out the disposition”).

³⁶⁴ Case 002/2 Decision on Annulment Request (E463/1/5), para. 3.



the Designation Order,” and the Co-Lawyers’ “speculative suggestions about the nature, timing and substance of judicial deliberations surrounding the Impugned Decision are [...] moot.”³⁶⁵

122. The Special Panel finds that the Co-Lawyers’ argument in this Ground expresses their disagreement with the reasoning of the decision without demonstrating any potential bias of the Challenged Judges. Moreover, the alleged delay in the notification of the request, which is the duty of the Greffier of the Chamber,³⁶⁶ is not sufficient to displace the presumption of impartiality of the Challenged Judges.

123. The Special Panel considers that the Co-Lawyers’ argument on the “frequent and questionable lack of transparency” of the Supreme Court Chamber is without basis. Even assuming that there exists a procedural uncertainty regarding the Supreme Court Chamber decisions since the pronouncement of the Case 002/2 Trial Judgment on 16 November 2018, mere suspicions on the transparency of the procedures cannot suffice to support the existence of the alleged bias or appearance of bias of the Challenged Judges.

124. The Special Panel, therefore, dismisses this ground.

³⁶⁵ Case 002/2 Decision on Annulment Request (E463/1/5), paras 5-6 (footnotes omitted).

³⁶⁶ Case 002/2 Decision on Annulment Request (E463/1/5), para. 5.



V. DISPOSITION

FOR THESE REASONS, THE SPECIAL PANEL UNANIMOUSLY HEREBY:

- **DISMISSES** the Co-Lawyers' request to hold a hearing on the Application.³⁶⁷
- **DISMISSES** the Application for Disqualification in its entirety.



Phnom Penh, 14 July 2020

President

Special Panel

PRAK Kimsan Olivier BEAUVALLET NEY Thol Kang Jin BAIK HUOT Vuthy

SIN Rith

Steven BWANA

³⁶⁷ The Special Panel considers that the information before the Special Panel is sufficient to reach an informed decision and it is in the interests of justice to proceed expeditiously.

