**BEFORE THE TRIAL CHAMBER**
**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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# CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN'S REQUEST FOR STAY OF PROCEEDINGS OR DISQUALIFICATION OF JUDGES

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## I. INTRODUCTION

1. On 25 August 2014, the Defence for the Accused Khieu Samphan ("Khieu Samphan Defence requested reconsideration of the denial of the Accused's request for a stay of proceedings in Case 002/02 pending final judgment of appeal in Case 002/01.[1] In the event a stay is not granted, the Khieu Samphan Defence threatens that it will seek "récusation"[2] (i.e. disqualification) of all sitting judges of the Trial Chamber ("Chamber") and composition of a new bench of judges to hear further proceedings in Case 002 ("Request").[3]

2. The Co-Prosecutors submit that: (1) a stay of proceedings is not warranted in the circumstances and the request for primary relief should not be granted by the Chamber (**Part II(a)**, below); (2) a request to disqualify judges conditional upon a primary motion not being granted does not comply with Internal Rule 34; (**Part II(b)**, below); and (3) as there is no basis to disqualify the sitting judges of the Chamber from further proceedings in Case 002, the conditional request for secondary relief is without basis and should not be allowed to delay the proceedings (**Part II(c)**, below).

## II. APPLICABLE LAW AND ARGUMENT

### a. There is no basis to grant a stay of proceedings

3. The Khieu Samphan Defence suggests that reconsideration of the Chamber's decision **E301/5/1/1** – by which the Chamber declined to grant a stay of proceedings pending disposal of final appeals in Case 002/01 – is warranted on two grounds: (a) that the Chamber exceeded the scope of trial in its findings in Case 002/01; and (b) that the Supreme Court Chamber has "invalidated" the legal reasoning of this Chamber in dismissing the Khieu Samphan Defence's prior request for a stay of proceedings.[4]

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1 **E301/5/5/1** Decision on Khieu Samphan Request to Postpone Commencement of Case 002/02 until a Final Judgment is Handed Down in Case 002/01, 21 March 2014.

2 **E314/1** Demande de réexamen de M. Khieu Samphân sur la nécessité d'attendre un jugement définitif dans le procès 002/01 avant de commencer le procès 002/02 et sur la nomination d'un nouveau collège de juges, 25 August 2014 at para. 48. ("Defence Request").

3 *Ibid.* at paras. 46-48.

4 *Ibid.* at paras. 6-7.

4. The Khieu Samphan Defence suggests that the Chamber's prior decision should be reconsidered because a subjective risk of prejudice that the Defence sought to avoid in its initial request has, in the view of that party, actually materialised.[5] The Defence argues that the Chamber has decided in advance on facts with which it was not yet seised, thus violating the presumption of innocence and Khieu Samphan's right to be tried by an impartial tribunal.[6] At the outset, this argument in favour of reconsideration is tautological, and if admitted would subject the validity of judicial decisions to endless reconsideration based only on the subjective perceptions of parties to proceedings.

5. The Khieu Samphan motion relies on holdings in the Supreme Court Chamber decision that: (a) Cases 002/01 and 002/02 are "separate and distinct trials", not part of one continuing trial proceeding;[7] and (b) that there is a risk of "concrete prejudice" to the Accused if findings in Case 002/01 "attributing criminal responsibility" to the Accused were to overlap with findings to be made in Case 002/02,[8] with the potential of rebutting the presumption of impartiality attaching to the professional judges hearing Case 002/02.[9]

6. These holdings have no tangible impact on this Chamber's prior decision rejecting a stay of proceedings in Case 002/02 pending final appeals in Case 002/01. As such, the requested stay should be denied. This position is supported on two inter-related grounds. First, the issue of whether the Chamber may commence Case 002/02 before final appeals in Case 002/01 has already been definitively settled by the Supreme Court Chamber and cannot be reargued by the Khieu Samphan Defence before this Chamber. The most recent Severance Appeal Decision clearly envisages the start of trial in Case 002/02 before the pronouncement of any final judgment on appeal in Case 002/01.[10] Second, the Supreme Court Chamber has directed

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5 *Ibid*. at para. 10.

6 *Ibid*. at para. 42.

7 **E301/9/1/1/3** Decision on Khieu Samphan's Immediate Appeal against the Trial Chamber's Decision on Additional Severance of Case 002 and Scope Of Case 002/02, 29 July 2014 at para. 70 ("Decision on Khieu Samphan's Immediate Appeal").

8 *Ibid*. at para. 85.

9 *Ibid*. at para. 83.

10 **E284/4/7** Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002: Summary of Reasons, 23 July 2013 at para. 35 ["The prospect of Case 002/02 going to trial and reaching judgment is now more proximate than it previously was."]; para. 71 ["Case 002/02 must commence as soon as possible after the end of closing submissions in Case 002/01"].

that proceedings in Case 002/02 should begin "as soon as possible", a direction inconsistent with a protracted stay of proceedings.[11]

7. The claim that the Case 002/01 Judgment attributes criminal responsibility to Khieu Samphan on facts outside the scope of Case 002/01 but within the scope of Case 002/02 is factually incorrect. This is further discussed below in addressing the Defence conditional request for disqualification.

### b. The conditional request for disqualification does not comply with the Internal Rules

8. Internal Rule 34(2) provides that any party may file an application for disqualification of a judge "in any case […] 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."[12] Pursuant to Internal Rule 34(3), such applications "shall clearly indicate the grounds and shall provide supporting evidence".[13] This Chamber has affirmed that Internal Rule 34 "mandates the filing of disqualification applications as soon as the moving party becomes aware of the grounds in question".[14]

9. Nowhere in the applicable law is disqualification an appropriate *alternate* remedy, as pleaded by the Khieu Samphan Request, particularly in the form of a threat to seek disqualification if the Chamber does not grant a stay of proceedings projected to extend over one year – until the pronouncement of final judgment in Case 002/01. The scheme of the Internal Rule 34(2), cited above, envisages that where grounds for disqualification of the sitting judges of the Chamber exist, the moving Party with subjective knowledge of the grounds for disqualification must raise the matter with the Chamber immediately. If grounds for disqualification – however spurious – are not raised squarely by the moving Party and "determined expeditiously",[15] that is, conclusively affirmed or dismissed, a shadow of doubt is cast on the integrity of intervening proceedings that is detrimental to the sound

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11 *Ibid*. at para. 72 ["Case 002/02 must commence as soon as possible after the end of closing submissions in Case 002/01"]; **E301/9/1/1/3** Decision on Khieu Samphan's Immediate Appeal, *supra* note 7 at para. 6.

12 Internal Rule 34(2).

13 Internal Rule 34(3).

14 **E5/3** Decision on Ieng Sary's Application to Disqualify Judge Nil Nonn and Related requests, 28 January 2011 at para. 2 [emphasis added].

15 *Ibid*. at para. 2.

administration of justice. If the Khieu Samphan Defence truly believed that there was a valid basis for Request, they are mandated by Internal Rule 34(2) to make that submission now, not to threaten to do so if their request to delay the trial for over a year is not granted. The Co-Prosecutors understand from the terms of the referral from the President of the Chamber to the President of the JAC[16] that the Chamber has determined to treat the motion as a request to disqualify all judges now, and urge the Special Panel to initiate all necessary actions to resolve the request as expeditiously as possible.

### c. Disqualification is not warranted

10. The starting point for any determination of whether there are grounds to disqualify a judge from a case is the presumption of judicial impartiality.[17] This presumption attaches to the Judges of the ECCC by virtue of their oath of office and the qualifications for their appointment.[18] The moving Party bears the burden of displacing the presumption, which imposes a high threshold.[19] To substantiate an allegation of bias on the basis of a Judge's decisions, it must be shown that the rulings are, or would reasonably be perceived to be, attributable to a pre-disposition against the applicant, and not genuinely related to the application of law or the assessment of the relevant facts.[20] The Trial Chamber has applied the test used by other international tribunals,[21] under which the requirement of impartiality is violated not only where a Judge is actually biased ('subjective bias'), but also where there exists an appearance of bias ('objective bias').[22]

11. An appearance of bias is established if, *inter alia*, the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[23] The 'reasonable observer' is a hypothetical fair-minded person with sufficient knowledge of all of the relevant

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16 **E314/2** Memorandum from the President of the Trial Chamber to the President of the Judicial Administration Committee, "Notice of application by the Khieu Samphan Defence to disqualify trial Chamber judges as an alternative form of relief", 29 August 2014.

17 **E55/4** 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, para 12 ("Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications").

18 *Ibid*. at para 12.

19 *Ibid*.

20 *Ibid*. at para 13.

21 See, e.g., *Prosecutor v. Anto Furundžija,* Case No. IT -95-17/I-A, Judgment (ICTY Appeals Chamber), 21 July 2000 ("*Furundžija* Appeals Chamber Judgment") at para. 189.

22 **E55/4** Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications, *supra* note 17 at para 11.

23 *Furundžija* Appeals Chamber Judgment, *supra* note 21 at para. 189.

circumstances to make a reasonable judgment as to whether the impugned judge might not bring an impartial and unprejudiced mind to the issues arising in the case.[24] As part of this knowledge the reasonable observer is deemed to be aware of the traditions of judicial integrity and impartiality and of the fact that impartiality is one of the duties that Judges swear to uphold.[25]

12. International jurisprudence has also consistently recognised that the reasonable observer understands that judges decide cases based solely on the evidence presented at trial. For example, the ICTY Trial Chamber has noted that "[the reasonable observer] would know that the judges of this Tribunal are professional judges, who are called upon to try a number of cases arising out of the same events, and that they may be relied upon to apply their mind to the evidence in the particular case before them."[26] Similarly, the ICC held, in the case of *Banda and Jerbo*:

> *When assessing the appearance of bias in the eyes of the reasonable observer, unless rebutted, it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case.*[27]

13. The European Court of Human Rights has held that judges are permitted to preside over two criminal cases arising from the same set of facts unless earlier judgments contain findings that "actually prejudge the question of the guilt of an accused".[28] To establish grounds for disqualification, such prejudgment would need to have involved a determination "of all the relevant criteria necessary to constitute a criminal offence and [...] whether the applicant was guilty, beyond reasonable doubt, of having committed such an offence".[29] Where a court

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24 *Prosecutor v. Radoslav Brđanin and Momir Talić,* Case No. IT-99-36-PT, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, 18 May 2000 ("*Talić* Decision") at para. 15.

25 *Furundžija* Appeals Chamber Judgment, *supra* note 21 at para. 190.

26 *Talić* Decision, *supra* note 24 at para. 17 [emphasis added].

27 *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09-344-Anx, Decision of the plenary of the judges on the "Defence Request for the Disqualification of a Judge of 2 April 2012" (Plenary of ICC judges), 5 June 2012 at para. 14 [emphasis added].

28 *Poppe v. The Netherlands,* Judgment, ECHR *(32271/04),* 24 March 2009, para. 26 [emphasis added] ("*Poppe* Decision").

29 *Ibid*. at para. 28 [emphasis added].

understands that it is not pronouncing on the guilt of an accused, an appearance of bias is not established.[30]

14. None of the submissions in the Request disclose grounds for disqualification on the basis of prior findings of criminal responsibility of Khieu Samphan. Nowhere in Case 002/01 are there any findings that Khieu Samphan is criminally responsible for any of the charges that remain for Case 002/02. There is, for example, no finding that it was proven beyond a reasonable doubt that Khieu Samphan is responsible for the thousands of persons tortured and killed at S-21 or any other security center, that he is guilty of the crimes of forced marriage or rapes committed within those marriages, or that he, personally, is criminally responsible for genocide or any of the remaining charges the subject of Case 002/02.

15. The Chamber has not made findings either as to the elements of crimes relating to any of the Case 002/02 crimes sites or the specific roles of the Co-Accused and the implementation of related policies of Democratic Kampuchea at the relevant time. It has made no rulings as to whether and how the Accused satisfied "all" [31] "relevant criteria necessary to constitute a criminal offence"[32] in relation to the crimes charged in Case 002/02, and certainly cannot be claimed to have found Khieu Samphan "guilty beyond reasonable doubt"[33] for such offences.

16. Furthermore, as the Khieu Samphan Defence acknowledges, all of the passages it has impugned in the Case 002/01 Judgment are contained in a section of the judgment entitled "Historical Background". This Chamber explained that "[t]he evidence discussed in this section is for the purpose of establishing the historical and factual context of events within the temporal jurisdiction of the ECCC."[34] It also stated that "[t]he existence of each of these policies is examined in this section in order to provide a full picture of the situation prior to 17 April 1975."[35] The Khieu Samphan Defence claims that only two of the policies of Democratic Kampuchea could properly be considered within the scope Case 002/01. However, this overlooks the Chamber's clear explanation that:

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30 *Schwarzenberger v. Germany,* Judgment, ECHR *(75737/01),* 10 August 2006 at para 43.
31 *Poppe* Decision, *supra* note 28 at para. 28.
32 *Ibid.*
33 *Ibid.*
34 **E313** Case 002/01 Judgement, 7 August 2014 at fn 195.
35 *Ibid.* at para. 79.

> *[f]rom the outset of Case 002/01, the Chamber informed the parties that they could lead evidence in relation to all five policies as background, but that the Chamber would examine the implementation of only those policies relevant to Case 002/01 (i.e. forced movement and execution of purported enemies of the regime).*[36]

None of the passages cited by the Khieu Samphan Defence makes any determination of the criminal responsibility of *any* individual for *any* of the charges in either Case 002/01 or Case 002/02. As the Chamber stated and the Khieu Samphan Defence has acknowledged, they merely provide historical background and context.

17. The severance of Case 002 has created a unique situation in international criminal law. Never before have accused persons at an international or internationalized criminal tribunal been subject to a second trial based on separate factual allegations that are part of the same charging document. As a result, international jurisprudence provides limited guidance as to whether an accused can be tried by the same judges in both trial proceedings.

18. However, at the national level, it is routine practice for the same judge to hear multiple cases against a single defendant. The United States, in particular, offers extensive jurisprudence on this precise point. As the Supreme Court held in *Liteky et al v United States*, "[i]t has long been regarded as normal and proper for a judge to sit in […] successive trials involving the same defendant."[37] Thus the prior findings of a judge in a separate, albeit related, case against the same accused do not give rise to an appearance of bias such as to necessitate the disqualification of the judge.[38]

19. Similarly, it has been held that it is not a ground for disqualification that a judge heard a case upon its remand. The US Court of Appeals for the Ninth Circuit has held that "[t]he fact that

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36 *Ibid*. at fn 287. The Chamber informed the Parties of the inclusion of the five policies for background and contextual purposes as early as 8 October 2011: see **E124/7** Decision on Co-Prosecutors' Request for Reconsideration of the Terms of the Trial Chamber's Severance Order (E124/2) and Related Motions and Annexes, 8 October 2011 at para. 11. ["[i]t follows that the Chamber during the early trial segments will give consideration to the roles and responsibilities of the Accused in relation to all policies relevant to the entire Indictment"].

37 *Liteky et al. v. United States,* 510 U.S. 540 at 551.

38 See also *State of Connecticut v. Daniel Webb,* 238 Conn. 389 at 461 (1996).

the trial judge in the original trial was also the trial judge in the second trial is insufficient to establish bias and prejudice."[39]

20. It is not disputed that the judgment in Case 002/01 contains findings on issues that will certainly reappear in Case 002/02. For example, findings as to the contextual elements of crimes against humanity, such as the fact that during the DK period there was part of a widespread and systematic attack on a civilian population, will certainly again be relevant to the pending charges. Similarly, evidence as to the positions held by Khieu Samphan, his authority, how decisions were made in Democratic Kampuchea, how directions were communicated from the Party Centre and reports received by the Party Centre, and Khieu Samphan's participation in a common plan are all certain to reappear in Case 002/02.

21. It is clear that the Khieu Samphan Defence does not approve of many of the findings of this Chamber in the Case 002/01 Judgment, just as the Co-Prosecutors were disappointed with certain findings. But the Chamber made these findings after applying the law to evidence presented during a trial at which Khieu Samphan was present and represented by experienced counsel who vigorously challenged the prosecution case. The fact that the Chamber, having heard the evidence and considered all arguments, made findings that a Party does not like, does not demonstrate bias or even the appearance thereof. Judges make rulings on the evidence before them. This is their function. A trial is not a sporting event in which the objective is to provide each side with an equal chance to win. Rather, the goal of a trial is to reach a just verdict that applies the law properly and consistently to the evidence presented. .

22. Thus, the fact that a judge has made prior legal or factual findings against either Party to a proceeding does not disqualify that judge from hearing trial or appellate proceedings at which the same issues may arise. For example, in the *Brđanin and Talić case*, the Talić Defence moved to disqualify Judge Mumba from an ICTY Trial Chamber on the grounds that she formed part of the Appeals Chamber bench in the earlier *Tadić* case, which had held that the war in Bosnia and Herzegovina in 1992 was an international armed conflict. The Defence motion was rejected even though the factual basis for an international armed conflict was being challenged by the Defence. The Trial Chamber cited domestic case law to support the

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[39] *Poland v Stewart*, [1997] 117 F.3d 1094, 97 Cal. Daily Op. Serv. 4854, 97, D.A.R. 7958. at para. 65.

principle that judges will not be biased merely because they have ruled upon or faced similar factual or legal issues in factually-related cases:

> *"There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established' […]. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."*[40]

23. The same principle operates here. The Supreme Court Chamber has established that Cases 002/01 and 002/02 are distinct cases, though factually- and legally-related. This Chamber has made certain findings against the Khieu Samphan Defence position in Case 002/01. However, international jurisprudence is clear. Mere proximity of cases cannot disqualify the Judges of the Chamber from hearing Case 002/02.

## III. REQUESTED RELIEF

24. In order to assure the expeditious conduct of proceedings, the Co-Prosecutors request the Chamber to:

    a. **Confirm** their prior decision **E301/5/5/1** and deny the request of the Khieu Samphan Defence to delay the start of case 02/02 until after the issuance of the final appeal judgment in Case 02/01;

[40] *Talić* Decision, *supra* note 24 at 18, quoting from J. Mason of the High Court of Australia in *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352. The same passage was quoted with approval in *Prosecutor v Vojislav Šešelj*, Case No. IT-03-67-R77.3, Decision on Motion by Professor Vojislav Šešelj for the Disqualification of Judges O-Gon Kwon and Kevin Parker, 19 November 2010, para. 28.

b. **Declare** the remaining part of the motion as a request under Rule 34 to disqualify the entire Trial Chamber and immediately refer the Motion and this Response to the Special Panel constituted for this purpose by the JAC; and

c. **Confirm** that, in accordance with Rule 34(5), the Chamber will proceed with all pre-trial and trial matters in Case 002/02 pending a final determination of the request for disqualification by the Special Panel.

Respectfully submitted,

| Date | Name | Place | Signature |
|---|---|---|---|
| 4 September 2014 | CHEA Leang<br>Co-Prosecutor | Phnom Penh | |
| | Nicholas KOUMJIAN<br>Co-Prosecutor | | |