BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case no: 002/19-09-2007-ECCC/TC
Filing party: Nuon Chea Defence Team
Filed to: Trial Chamber
Original language: English
Date of document: 29 September 2014

CLASSIFICATION

Classification suggested by the filing party: PUBLIC
Classification of the Trial Chamber: សម្ងាត់/Confidential
Classification status:
Review of interim classification: Public
Records officer name:
Signature:

NUON CHEA APPLICATION FOR DISQUALIFICATION OF JUDGES NIL NONN, YA SOKHAN, JEAN-MARC LAVERGNE, AND YOU OTTARA

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I. INTRODUCTION

1. Pursuant to ECCC Internal Rule 34, the Co-Lawyers for Mr. Nuon Chea (the "Defence") submit this application to disqualify Judges Nil Nonn, Ya Sokhan, You Ottara (the "National Judges") and Jean-Marc Lavergne (together, the "Judges") from Case 002/02 and all further proceedings in the case of Nuon Chea (the "Application").

2. For the reasons elaborated below, the Defence requests that: **(i)** the Chamber admit this Application; **(ii)** all of the Judges be disqualified from any further proceedings against Nuon Chea; **(iii)** the Judges step down voluntarily while this Application is determined; **(iv)** the start of the evidentiary hearings in Case 002/02 be postponed until this Application is determined; and **(v)** this Application be treated as a matter of urgency given its nature.

II. BACKGROUND

A. The Judges

3. A Trial Chamber panel composed of national judges Nil Nonn, Ya Sokhan and Thou Mony and international judges Silvia Cartwright and Jean-Marc Lavergne presided over the entire Case 001 trial and issued the Case 001 judgement (the "Duch Judgement") on 26 July 2010.[1]

4. The Trial Chamber severed Case 002 in September 2011.[2] The panel that presided over what became the Case 002/01 trial was identical to the Case 001 panel except that Judge You Ottara replaced Judge Thou Mony on the active bench. That panel issued the Case 002/01 Judgement on 7 August 2014.[3] On 1 September 2014, the ECCC announced that Judge Claudia Fenz would replace Judge Silvia Cartwright on the Case 002/02 panel.[4]

B. Procedural History

5. In February 2011, the Defence and the Co-Lawyers for Ieng Sary and Ieng Thirith each

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1 Case No. 001/18-07-2007/ECCC/TC, Document No. **E188**, 26 Jul 2010 ("Duch Judgement").
2 Doc. No. **E124**, 'Severance Order Pursuant to Internal Rule 89*ter*', 22 Sep 2011; Doc. No. **E163**, 'Notification of Decision on Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of the Trial in Case 002/01, 8 Oct 2012.
3 Doc. No. **E313**, 'Case 002/01 Judgement', 8 Aug 2014.
4 ECCC, 'Claudia Fenz appointed as new international judge in the Trial Chamber', 1 Sep 2014, http://www.eccc.gov.kh/en/articles/claudia-fenz-appointed-new-international-judge-trial-chamber; as Judge Cartwright will not preside over the Case 002/02 trial, this Application does not seek her disqualification.

filed applications to disqualify the full Trial Chamber panel seized of Case 002.[5]

6. On 23 March 2011, a specially-composed bench ("Special Bench") dismissed all three applications on the basis that the defence teams failed to substantiate a reasonable apprehension that the judges would not bring an impartial mind to the Case 002 trial.[6] The Special Bench also held that conclusions made by the Case 001 judges concerning Nuon Chea did not amount to a disqualifiable prejudgement of his guilt as they concerned only some, not all, elements of crimes with which he is charged in Case 002.

7. On 25 August 2014, the Co-Lawyers for Khieu Samphan filed a request ("Khieu Samphan Request") to stay proceedings in Case 002/02 until the rendering of the Case 002/01 Judgement or, in the alternative, to disqualify all Trial Chamber judges.[7]

8. On 4 September 2014, the ECCC Judicial Administration Committee appointed Trial Chamber Judge Thou Mony (presiding), and Pre-Trial Chamber Judges Rowan Downing, Chang-ho Chung, Huot Vuthy, and Pen Pichsaly to constitute a bench to hear this Application and the Khieu Samphan Request.[8]

9. On 19 September 2014, the Trial Chamber rejected the Co-Lawyers for Khieu Samphan's request to stay proceedings.[9] That same day, the Trial Chamber issued a scheduling order for substantive hearings in Case 002/02, which are set to begin in under three weeks on 17 October 2014.

10. On 29 September 2014, the Defence filed its notice of appeal of the Case 002/01 Judgement, detailing 223 grounds of appeal.[10]

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5 Doc. No. **E28**, 'IENG Thirith Defence Application for Disqualification of Judges NIL Nonn, Sylvia [sic] CARTWRIGHT, YA Sokhan, Jean-Marc LAVERGNE and THOU Mony', 1 Feb 2011 ("Ieng Thirith Disqualification Application"); Doc. No. **E53**, 'IENG Sary's Motion to Support IENG Thirith and NUON Chea's Applications for Disqualification of the Trial Chamber Judges', 17 Feb 2011 ("Ieng Sary Disqualification Application"); Doc. No. **E54**, 'Urgent Application for Disqualification of the Trial Chamber Judges', 24 Feb 2011 ("Defence First Trial Chamber Disqualification Application").

6 Doc. No. **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 Mar 2011 ("First Disqualification Decision").

7 Doc. No. **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 Aug 2014.

8 Doc. No. **E314/4**, 'Decision of the JAC regarding the constitution of the bench following disqualification motions', 4 Sep 2014, p. 1.

9 Doc. No. **E314/5**, 'Decision on KHIEU Samphan's Request to Postpone the Commencement of Case 002/02', 19 Sep 2014.

10 'Notice of Appeal Against the Case 002/01 Judgement', 29 Sep 2014 (ECCC document number pending).

C. Publication of Marcel Lemonde's Book

11. In January 2013, former International Co-Investigating Judge Marcel Lemonde published an account of his tenure at the ECCC entitled *Un Juge en Face aux Khmers Rouges* (the "Lemonde Book"), including certain comments regarding national judges that will be discussed in this Application.

D. Public Speech of Judge Silvia Cartwright at the Aspen Institute

12. On 7 November 2013, a week after the Case 002/01 hearings concluded, Judge Cartwright gave a public speech at the Aspen Institute commenting on the ECCC trials (the "Aspen Speech"), a video of which was posted online.[11] In her speech, Judge Cartwright discussed several matters to be addressed in this Application, including the National Judges' experiences during Democratic Kampuchea ("DK") and reactions to evidence in the Case 002/01 trial, as well as opinions concerning the accused and Case 002 generally.

E. Case 002/01 Judgement and Final Witnesses Decision

13. On 7 August 2014, the Trial Chamber issued the Case 002/01 Judgement and the related final decision on witnesses to be heard in Case 002/01 ("Final Witnesses Decision").[12]

14. In the Final Witnesses Decision, the Trial Chamber refused Nuon Chea's request to summons the third-ranked member of Cambodia's government – National Assembly president and former CPK military commander Heng Samrin (then, with the trial alias TCW-223) – to testify as it could not achieve the requisite majority. The National Judges voted against summonsing him while the two international judges voted in favour. The National Judges stated, *inter alia*, that summonsing senior members of the government, like Heng Samrin, as witnesses would "lead to [...] difficulties" that the National Judges were "not prepared" "to face".[13]

III. APPLICABLE LAW

A. Impartiality and Independence of the Judiciary

15. The right to be tried by an impartial and independent tribunal is at the heart of an

[11] Doc. No. **E305/12.38R**, 'Trying Atrocity Crimes: The Khmer Rouge Trials, Transitional Justice, and the Rule of Law' ("Aspen Speech"), 2013. This video is also publicly available at: http://www.aspeninstitute.org/video/trying-atrocity-crimes-khmer-rouge-trials-transitional-justice-rule-law.

[12] Doc. No. **E312**, 'Final Decision on Witnesses, Experts and Civil Parties to Be Heard in Case 002/01', 7 Aug 2014 ("Final Witnesses Decision").

[13] **E312**, Final Witnesses Decision, paras. 97, 103.

accused's right to a fair trial.[14] It is "an *absolute right* that may suffer no exception".[15] That is, it applies "in all circumstances and to all courts, whether ordinary or special".[16]

16. Impartiality is one of the most fundamental qualities a judge must possess. Echoing the statutes of various international criminal tribunals,[17] the ECCC Agreement and the ECCC Law stipulate that ECCC judges must be persons possessing "high moral character, impartiality, and integrity".[18]

17. ECCC judges must also be "independent in the performance of their functions" and not "accept or seek any instructions from any government or any other source".[19] The ICTR Appeals Chamber has described judicial independence as a "functional attribute which implies that the institution or individual possessing it is not subject to external authority and has complete freedom in decision-making".[20] When evaluating the independence of a court or tribunal, the ECtHR has long considered "the manner of appointment of its members and their term of office, the existence of safeguards against external pressure and the question whether the body presents an *appearance* of independence".[21]

B. Disqualification of Judges

18. Under Rule 34(2) of the ECCC Internal Rules (the "Rules"), the test for disqualifying ECCC judges is as follows:

> Any party may file an application for disqualification of a judge in any case in which 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.

(i) Actual Bias vs. Appearance of Bias

19. The ECCC has previously dealt with (and dismissed) 14 applications for disqualification of judges in Case 002. Its jurisprudence has consistently held that the test for

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[14] UDHR, Art. 10; ICCPR, Art. 14(1); ECHR, Art. 6(1); ACHR, Art. 8(1); AfCHPR, Art. 7(1); *see, also*, *Prosecutor v. Furundžija*, Appeal Judgement, Case No. IT-95-17/1-A, 21 Jul 2000 ("Furundžija Judgement"), para. 177; *Prosecutor v. Nahimana et al.*, 'Judgement', Case No. ICTR-99-52-A, 28 Nov 2007 ("Nahimana Judgement"), paras. 28, 47.

[15] *González del Río v. Peru*, UN HRC, Comm. No. 263/1987, UN Doc. No. CCPR/C/46/D/263/1987, 28 Oct 1992, para. 5.2 (emphasis added).

[16] Office of the High Commissioner for Human Rights in cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, UN Doc. No. HR/P/PT/9, 2003, p. 118.

[17] *See, e.g.*, Rome Statute, Art. 36(3)(a); ICTY Statute, Art. 13; ICTR Statute, Art. 12; STL Statute, Art. 9(1).

[18] ECCC Agreement, Art. 3(3); *see, also*, ECCC Law, Art. 10 new.

[19] ECCC Law, Art. 10 new; *see, also*, Rome Statute, Art. 40; STL Statute, Art. 9(1).

[20] *Prosecutor v. Nahimana et al.*, Appeal Judgement, Case No. ICTR-99-52-A, 28 Nov 2007, para. 19.

[21] *See, e.g.*, *Volkov v. Ukraine*, 'Judgement', ECtHR, App. No. 21722/11, 27 May 2013 ("Volkov Judgement"), para. 103, *Findlay v. UK*, 'Judgement', ECtHR, App. No 22107/93, 27 Feb 1997, para. 73 (emphasis added).

disqualifying judges embraces both a judge's actual bias and his or her appearance of bias, and that when interpreting the test in this respect, the ICTY jurisprudence as reflected in *Furundžija* applies.[22] To establish actual bias, the party has to rebut the presumption of impartiality of a judge.[23] However, the Defence submits that such rebuttal is unnecessary when arguing appearance of bias, as rightly pointed out by the SCSL Appeals Chamber in *RUF*.[24]

(ii) Types of Appearance of Bias

20. According to the ICTY Appeals Chamber in *Furundžija*, an "unacceptable appearance of bias" arises if:

> i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is *automatic*; or
>
> ii) the circumstances would lead to a reasonable observer, properly informed, to reasonably apprehend bias.[25]

21. It follows that there are two types of unacceptable appearance of bias, consistent with the observation of the House of Lords in *Pinochet*.[26] The first arises when a judge is a party to a case or otherwise has financial or personal interest in it. In such a situation, disqualification of the judge is automatic and there is no need to further discuss whether a reasonable observer could apprehend bias. The reasonable observer's perspective need only be considered for the determination of the second type of appearance of bias; that is, when there is no obvious personal or financial interest involved and the party is relying on the circumstances to argue that a reasonable observer would apprehend an appearance of bias.

22. To establish the second type of appearance of bias, the party may rely as evidence not only upon a judge's opinions expressed outside the courtroom, such as speeches,

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[22] *See, e.g.*, Doc. No. **C11/29**, '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 Feb 2008, paras. 12, 20; First Disqualification Decision, para. 11.

[23] *See*, *Prosecutor v. Sesay et al.*, 'Decision on Sesay, Kallon and Gbao Appeal against Decision on Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case', Case No. SCSL-04-15-T, 24 Jan 2008 ("RUF Appeal Decision"), para. 9.

[24] *See*, RUF Appeal Decision, para. 9; *see*, *also*, paras. 2, 12-13, in which the Appeals Chamber found finding that "some indicia of bias" was not sufficient for disqualification simply because the indicia did not rebut the presumption of impartiality; the Appeals Chamber emphasised that "the threshold for an appearance of bias does not require proof of actual bias" and it is the proof of actual bias that requires rebutting the presumption of impartiality.

[25] Furundžija Judgement, para. 189 (emphasis added).

[26] *In Re Pinochet*, 'Judgement', House of Lords, UK, 15 Jan 1999 ("Pinochet Judgement").

writings or correspondence, but also upon a judge's judicial rulings, either issued in the present case or in other cases.[27]

23. When judicial rulings are relied on as evidence of bias, a distinction must be made between the situation where the judicial rulings are alleged to be the result of an already existing bias,[28] and the situation where the judicial rulings are alleged to be the reasons leading to future bias.[29]

24. When judicial rulings are relied on as evidence of an already existing bias, what must be shown is 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, [...] or to the assessment of the relevant facts".[30] This process is *not* to show whether the findings "could constitute an error of law" (which would be the subject of an appeal), *but* to show whether the erroneous findings "could reasonably be perceived as creating an appearance of bias".[31] It must be noted that proof of errors not genuinely linked to law or facts is *only* needed when the judicial rulings in question are alleged to be the result of an already existing bias, *not* when the findings are used to justify a fear of future bias.

25. If the judicial rulings are the ones issued in the present case, the allegation could only be that the rulings are the result of an already existing bias. However, if the judicial rulings are from other cases, the allegation could point to either already existing bias or to future bias. In this Application, the Defence is relying on, *inter alia*, the Judges' judicial rulings in Case 002/01 to seek disqualification of the Judges from Case 002/02. The Defence submits, as set out in relevant sections below, that some of these Case 002/01 rulings give rise to an appearance of bias that already existed in Case 002/01, while others justify a fear of future bias in Case 002/02.

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[27] **E55/4**, First Disqualification Decision, para. 13; *Prosecutor v. Karemera et al.*, 'Decision on Motion by Karemera for Disqualification of Trial Judges', Case No. ICTR-98-44-T, 17 May 2004 ("Karemera Decision"), para. 13; *Prosecutor v. Sesay et al.*, 'Decision on Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case', Case No. SCSL-04-15-T, 6 Dec 2007 ("RUF Trial Decision"), paras. 61-63.

[28] *See, e.g.*, Karemera Decision, para. 13, where the question at issue is whether "the rulings [...] are *attributable to* a pre-disposition" (emphasis added).

[29] E.g., allegations that focus *not* on the validity of the judicial findings (i.e., whether they resulted from bias), *but* on the fact that these findings as such amount to predetermination of issues in subsequent cases.

[30] **E55/4**, First Disqualification Decision, para. 13; *Prosecutor v. Karemera et al.*, 'Decision on Motion by Karemera for Disqualification of Trial Judges', Case No. ICTR-98-44-T, 17 May 2004, para. 13; *Prosecutor v. Sesay et al.*, 'Decision on Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case', Case No. SCSL-04-15-T, 6 Dec 2007 ("RUF Trial Decision"), paras. 61-63.

[31] RUF Trial Decision, para. 63.

(iii) "Overlapping" Cases

26. In a recent decision, the Supreme Court Chamber noted that the jurisprudence of other international tribunals recognises "a strong presumption of impartiality of professional judges, even in cases that have overlapping evidence or fact patterns", and that challenges to a judge's impartiality on the basis that he or she will take part in "*repeated* adjudication on contextual elements of crimes against humanity, [and] on other factual elements of events" are thus often dismissed.[32] The Supreme Court Chamber remarked, however, that this body of jurisprudence on overlapping cases is based on situations where the overlapping cases concern different accused persons and where each case has a separate and autonomous body of evidence, whereas Case 002/01 and Case 002/02 share the same accused persons and the same case file.[33] According to the Supreme Court Chamber, when the overlapping cases share a common accused and common evidence, the requirement of impartiality dictates that either the prejudicial evidence already heard by the judges must be excluded from later cases or the judges themselves must be excluded.[34] This essential distinction must be taken into account when applying the above jurisprudence on overlapping cases.

27. In its recent response to the Khieu Samphan Request, the OCP submitted that US jurisprudence establishes that a judge's participation in successive trials against the same accused do not necessarily give rise to an appearance of bias.[35] However, that same jurisprudence holds that such participation *may* give rise to an appearance of bias if the judge in question was found to hold opinions that "display clear inability to render fair judg[e]ment".[36] US courts would also take into account the passage of time since the prior appearance, with greater time correlating to less possibility of bias.[37]

28. Similarly, this Court and international tribunals have held that in the situation of overlapping cases, the test for appearance of bias of a judge is whether he or she "might not bring an *impartial* and *unprejudiced* mind to the issues in the present case";[38] and

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[32] Doc. No. **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 Jul 2014 ("SCC Decision on KS Appeal"), para. 83 (emphasis added).
[33] **E301/9/1/1/3**, SCC Decision on KS Appeal, para. 83.
[34] **E301/9/1/1/3**, SCC Decision on KS Appeal, para. 83.
[35] Doc. No. **E314/3**, 'Co-Prosecutors' Response to Khieu Samphan's Request For Stay of Proceedings or Disqualification of Judges', 4 Sep 2014, paras. 18-19.
[36] *Liteky et al. v. United States*, 510 U.S. 540 at 551 (1994).
[37] *State of Connecticut v. Daniel Webb*, 238 Conn. 389 at 461 (1996).
[38] **E55/4**, First Disqualification Decision, para. 15; *Prosecutor v. Brđanin & Talić*, 'Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge', Case No. IT-99-36-PT, 18 May 2000 ("Brđanin Decision"), paras. 18-19 (emphasis added).

that in this regard, consideration shall be given, *inter alia*, to whether the judge would hold an open mind to evidence and submissions advanced in the present case and decide the case "*fairly* […], relying *solely* and *exclusively* on the evidence adduced in the particular case".[39]

(iv) Manifestations of Lacking an "Impartial and Unprejudiced Mind"

29. The jurisprudence shows that close-mindedness and bias often, but not exclusively, manifest in *prejudgement* of the subject matter of a case, *predetermination* of one or more issues bearing on the subject matter, or *preformation* of an unfavourable view of a party's case.

30. ***Prejudgement*:** Prejudgement of "the guilt of a person" (that is, the subject matter of a criminal case) would warrant disqualification of a judge from a criminal case.[40] However, contrary to the Special Bench's earlier interpretation of "prejudgement of guilt",[41] it is not necessary for a judge to prejudge each and every element of a crime of which the accused is charged. Rather, it is sufficient if the judge had preformed a general view of the "*qualification* of the *involvement* of the applicant […], *criminal or otherwise*".[42] Indeed, in *Ferrantelli and Santangelo*, the ECtHR found that there was a justified fear of bias when the judge in question had, in a previous judgement of a related case, referred to the two accused persons in the present case as "co-perpetrators" – one having participated in carrying out a murder and the other having helped – even though there was no predetermination of their *mens rea* or other elements of crime.[43]

31. ***Predetermination*:** Prejudgement of the subject matter as such is by no means the only scenario where a reasonable observer could apprehend bias. Indeed, predetermination of issues bearing on the subject matter could also give rise to an appearance of bias. As Justice Buergenthal explained in his minority opinion in the *Palestinian Wall* case, even when a judge has not expressed any views on the subject matter *per se*, the judge's impartiality is called into question if he or she "may be deemed to have prejudged one or

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[39] *Prosecutor v. Akayesu*, Appeal Judgement, Case No. ICTR-96-4-A, 1 Jun 2001 ("Akayesu Appeal Judgement"), para. 269, Nahimana Judgement, para. 78 (emphasis added).
[40] *Poppe v. The Netherlands*, 'Judgement', ECtHR, App. No. 32271/04, 24 Mar 2009 ("Poppe Judgement"), para. 26.
[41] *See*, **E55/4**, First Disqualification Decision, paras. 21, 24.
[42] Poppe Judgement, para. 28 (emphasis added).
[43] *Ferrantelli and Santangelo v. Italy*, 'Judgement', ECtHR, App. No. 19874/92, 7 Aug 1996, paras. 59-60.

more issues bearing on the subject matter".[44] The "issues" in this regard may include, *inter alia*, the "context" of a dispute and the "arguments" that might be advanced by the parties, in particular the "*validity* and *credibility* of these arguments" of the parties.[45]

32. ***Preformation*:** Preformation of an "unfavourable view of [a party's] case" would give rise to a justified fear of bias.[46] Such an unfavourable view might be, for instance, that a party's argument or account of events is "inaccurate",[47] deceptive,[48] or rooted in strategy.[49]

C. Timeliness of a Motion for Disqualification

33. Rule 34(3) requires disqualification applications to be filed "as soon as the party becomes aware of the grounds in question". Under Rule 34(4), applications to disqualify Trial Chamber judges must be filed "concerning matters arising before the trial, at the latest at the initial hearing; or concerning matters arising during trial or of which the parties were unaware before the trial, before the final judgement in the case."

34. In this regard, the Pre-Trial Chamber has previously held that a party may present past evidence to "further elaborate or support" new evidence if the past evidence becomes contextually relevant as a result of recent events.[50]

IV. SUBMISSIONS

A. The Application is Timely and Admissible

35. The Defence seeks to disqualify the Judges from Case 002/02 and further trials of Nuon Chea on the basis of matters arising from the Case 002/01 Judgement and the Final Witnesses Decision. Both were issued on 7 August 2014, a week after the initial

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[44] *See*, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ("Palestinian Wall"), Diss. Op. of Judge Buergenthal on 'Order of 30 January 2004', 2004 ICJ Rep. 7, 30 Jan 2004 ("Buergenthal Opinion"), paras. 11, 13.

[45] Buergenthal Opinion, para. 13 (emphasis added).

[46] *Buscemi v. Italy*, 'Judgement', ECtHR, App. No. 29569/95, 16 Sep 1999 ("Buscemi Judgement"), para. 68; *Kyprianou v. Cyprus*, ECtHR, App. No. 73797/01, 15 Dec 2005 ("Kyprianou Judgement"), para. 120; *see*, *also*, Buergenthal Opinion, para. 13. It must be noted that the majority differed from Justice Buergenthal only because they took a very restrictive and literal view on how to interpret Art. 17(2) of the ICJ Statute which limits the disqualification of a judge to situations where he or she "has previously taken part in" the same case in whatever capacity (*see*, para. 9), whereas Justice Buergenthal took a broader view and believed that disqualification extends to all kinds of violation of "judicial ethics" (*see*, paras. 9, 14). His approach is the same as that taken by the ECCC and other international tribunals.

[47] Buscemi Judgement, para. 40.

[48] Buscemi Judgement, para. 41, where the judge in question called the applicant a "liar".

[49] *See*, Buergenthal Opinion, para. 8: Judge Elaraby publicly expressed views that Israel was using strategies to "marginalise the crux of the Arab Israeli conflict".

[50] Doc. No. 7, 'Decision on Khieu Samphan's Application to Disqualify Co-Investigating Judge Marcel Lemonde', 14 Dec 2009 ("Khieu Samphan Lemonde Disqualification Decision"), para. 20.

hearing in Case 002/02 on 30 July 2014. On 11 August 2014, after initially reviewing the two decisions, the Defence informed the Trial Chamber that it intended to file this Application. It thereafter undertook every effort to file this Application expediently, while devoting resources simultaneously to preparing its notice of appeal against the Case 002/01 Judgement in which it identified 223 separate grounds of appeal which it filed the same day as this Application.

36. Based on the above, the Defence submits that since the matters giving rise to this Application only arose after the Case 002/02 initial hearing, pursuant to Rule 34(3) and (4)(c), the Application shall be deemed timely and admissible as it was filed as soon as the Defence became aware of the matters and before the final judgement in Case 002/02.

37. Furthermore, the Defence is entitled to present past evidence, such as the Lemonde Book and the Aspen Speech, to "further elaborate and support" new evidence when past evidence only becomes contextually relevant to the Application as a result of recent events[51] (here, the delivery of the Case 002/01 Judgement and the Final Witnesses Decision).

B. The National Judges' Refusal to Summons Heng Samrin Extinguishes an Appearance of Independence or Gives Rise to an Appearance of Bias

38. In the Final Witnesses Decision, the National Judges refused to summons Heng Samrin in Case 002/01, citing likely "difficulties"[52] triggered by a hypothetical delay-inducing invocation of "immunity",[53] the "repetitiveness" of his fact testimony,[54] and the Defence's implicit bad faith in requesting him as Nuon Chea's only character witness as a matter of "trial tactics [...] to generate controversy".[55]

39. In Case 002/01, Heng Samrin would have been not only the most important fact and only character witness for Nuon Chea but the single most important witness overall.[56] He could have offered unique, direct evidence as likely the most senior surviving CPK military officer to participate in the evacuation of Phnom Penh. He could thereby have significantly advanced the Tribunal's understanding of matters including the evacuation of Phnom Penh and alleged CPK extermination and persecution policies associated with it,

[51] **7**, Khieu Samphan Lemonde Disqualification Decision, para. 20.
[52] **E312**, Final Witnesses Decision, para. 97.
[53] **E312**, Final Witnesses Decision, para. 97.
[54] **E312**, Final Witnesses Decision, para. 93.
[55] **E312**, Final Witnesses Decision, para. 117.
[56] The Defence has stressed this position at length; *see*, *e.g.*, Doc. No. **E236/5/1/1**, 'Sixth and Final Request to Summons TCW-223', 22 Jul 2013 (Sixth Heng Samrin Request) and Doc. No. **E295/6/3**, 'Nuon Chea's Closing Submissions in Case 002/01', 26 Sep 2013 ("Defence Case 002/01 Closing Brief").

most importantly the alleged CPK policy to execute Khmer Republic soldiers and officials in general and at Tuol Po Chrey in particular. Instead, the Case 002/01 Judgement relied for these matters on the testimony of lowest ranking soldiers[57] and experts, while the National Judges concluded that it was sufficient to rely on academics' published interviews of Heng Samrin without affording the parties an opportunity to examine him.[58] The consequence of such a situation aptly fits the description Judge Christine Van den Wyngaert offered in her minority opinion concerning the ICC's *Katanga* case:

> [T]he complete absence of evidence from *those who were really at the centre of things* at the time inevitably creates the impression that *essential information* is missing from the record [...and may lead one to] wonder whether it is at all possible to reach the required threshold [...] where it is obvious that *more and better evidence* might very well have led to *significantly different answers*.[59]

40. Heng Samrin remains, without a shadow of a doubt, the most important witness in Case 002/02 and Case 002 generally. Indeed, having been a senior figure in the Vietnam-backed CPK faction which worked against and ultimately overthrew the faction led by Pol Pot and Nuon Chea, in Case 002/02, Heng Samrin will be able to offer unique, direct evidence on, *inter alia*, internal divisions within the CPK and internal purges in the East Zone; armed conflict with Vietnam and a Vietnam-backed, substantial, defecting CPK faction; and the alleged genocide of the Vietnamese and the Cham in the East Zone.

(i) Extinguishment of an Appearance of Independence

41. It is because of Heng Samrin's singular importance as a witness that the Defence has consistently and repeatedly requested to summons him or investigate related matters at the pre-trial stage[60] and (six times) at the trial stage.[61] Each and every international judge seized of these requests has found them to be compelling.[62] In 2009, Judge Lemonde

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[57] Two examples are the witness Sum Chea, who apparently held the lowest non-commissioned military rank (as an ordinary soldier), and the witness Kung Kim, who held the next lowest rank of squad leader.

[58] **E312**, Final Witnesses Decision, paras. 98, 102.

[59] *Prosecution v. Katanga*, Case No. ICC-01/04-01/07, 'Minority Opinion of Judge Christine Van den Wyngaert', 7 Mar 2014 ("Van den Wyngaert Katanga Opinion"), paras. 148-149 (emphasis added).

[60] *See, e.g.*, Doc. No. **E314/2/7**, 'Decision on NUON Chea's and IENG Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses', 8 Jun 2010, *cited in* **E312**, Final Witnesses Decision, fn. 158.

[61] For a summary of the procedural history of these requests, *see*, Sixth Heng Samrin Request, paras. 3-8.

[62] Regarding CIJ Lemonde, *see, e.g.*, **E312**, Final Witnesses Decision, para. 90, and Doc. No. **189/3/1/7.1.3**, 'Un Juge Face aux Khmers Rouges', p. 172 (in which Judge Lemonde referred to Heng Samrin as "qu'il nous fallait absolument interroger", *cited in* Sixth Heng Samrin Request, fn. 10). Regarding PTC Judges Downing and Marchi-Uhel, *see, e.g.*, Doc. No. **D314/1/12**, 'Second Decision on Nuon Chea's and Ieng Sary's Appeal against OCIJ Order on Requests to Summons Witnesses' ("Second PTC Decision on Witnesses"), 9 Sep 2010 (while the public redacted version of this decision does not refer to the witnesses' identities, but the Final Witnesses Decision effectively does: *see*, **E312**, Final Witnesses Decision, para. 91 and fn. 158). Regarding TC Judges Cartwright and Lavergne, *see*, **E312**, Final Witnesses Decision, paras. 104-111 and 119-120.

summonsed Heng Samrin to interview, advising that interviewing him would be "conducive to ascertaining the truth".[63] In 2010, Judges Downing and Marchi-Uhel opined that "[p]reventing testimony from witnesses that have been deemed conducive to establishing the truth may infringe upon the fairness of the trial."[64] Most recently, in 2014, Judges Cartwright and Lavergne considered that Heng Samrin's potential testimony was "*prima facie* relevant and could assist the Chamber in ascertaining the truth" and might contain "information [not] accessible to other proposed witnesses in Case 002/01".[65]

42. In contrast with the position of the international judges, each and every national judge seized of the Defence requests has dismissed them: investigating, pre-trial and trial judges alike.[66] In light of this procedural history, the Trial Chamber's split in the Final Witnesses Decision on summonsing Heng Samrin confirms the existence of a stark and persistent divide between national and international judges on this issue. Moreover, the Defence submits that when considered alongside the following matters, the decision demonstrates that the National Judges lack the requisite "appearance of independence" to remain on the bench in Case 002/02.[67]

43. Cambodia's Supreme Council of the Magistracy (the "SCM") appoints all national judges, including to the ECCC, and is responsible for their discipline, dismissal, and promotion.[68] Its members include four executive appointees,[69] as well as the General Prosecutor of the Supreme Court and President of the Court of Appeal, Chea Leang and You Bunleng, who are cross-appointed to the ECCC as the National Co-Prosecutor and National Co-Investigating Judge. The National Judges are also cross-appointed, with Judges Nonn, Sokhan and Ottara continuing to maintain their respective roles as President of the Siem Reap Provincial Court and Supreme Court judges[70] alongside their ECCC roles, and drawing separate full-time salaries for each role.

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63 Doc. No. **E136/3/1**, 'Letter to Samdech Heng Samrin', 25 Sep 2009, p. 1.
64 **E314/1/12**, Second PTC Decision on Witnesses, para. 12 (of the minority opinion).
65 **E312**, Final Witnesses Decision, para. 108.
66 Regarding Investigating Judge Bunleng, *see, e.g.*, **D314/1/12**, Second PTC Decision on Witnesses, para. 9, and **E312**, Final Witnesses Decision, paras. 90-91. Regarding Pre-Trial Chamber Judges Kimsan, Thol and Vuthy, *see, e.g.*, **D314/1/12**, Second PTC Decision on Witnesses. Regarding Trial Chamber Judges Nonn, Sokhan, and Ottara, *see*, **E312**, Final Witnesses Decision, paras. 87-98, 101-103, and 116-120.
67 Volkov Judgement, para. 103.
68 Law on the Organisation and Functioning of the Supreme Council of the Magistracy, 1994, Arts. 1, 11.
69 The Minister for Justice and three judges he appoints: *see*, Cambodian Center for Human Rights, 'Fact Sheet: Law on the Organization and Functioning of the Supreme Council of the Magistracy', Feb 2012, p. 1.
70 ECCC, 'Who's Who in the Courtroom' ("Who's Who"), 2014, http://www.eccc.gov.kh/en/who-is-who.

44. More broadly, Cambodia's judges lack security of tenure, are poorly paid, and, according to widespread reports by the UN and NGO observers, are plagued by allegations of corruption,[71] limited independence and domination by the executive.[72] Concerning corruption in particular, Transparency International ("TI") this month released its report on corruption in Cambodia's governance system, which assessed the *integrity* of 13 core governance institutions (including, *inter alia*, the executive, legislature, judiciary, public sector and political parties) and found that of all 13 pillars, Cambodia's judiciary is *the weakest*, scoring only 16 out of a possible 100 points.[73] This finding was made within a broader context in which TI's famed Corruption Perceptions Index found that Cambodia is currently perceived as the most corrupt country in ASEAN and the 17th-most corrupt country in the world.[74]

45. Concerning domination of the judiciary by the executive, the UN Special Rapporteur on the situation of human rights in Cambodia has opined that Cambodian judges seem to operate "to a greater or lesser extent in a *climate of fear* in which they are careful not to take steps which might attract criticism from people in power and in prominent positions".[75] Similarly, in the Lemonde Book, Judge Lemonde recounted how a Cambodian judge at the ECCC had advised that *all* national judges feared or were closely connected to the government and in each case, were neither reliable nor independent.[76] In addition, several reports, including by the former International Reserve Co-Investigating Judge Laurent Kasper-Ansermet, indicate that the broad challenges for the Cambodian

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[71] *See*, *e.g.*, Transparency International Cambodia, 'Corruption and Cambodia's Governance System: The Need for Reform', 9 Sep 2014 ("Transparency International Cambodia Corruption Report"), pp. 52-67. Indeed, the Co-Lawyers for Ieng Sary once applied unsuccessfully to disqualify Judge Nonn on the basis of an admission he made into accepting bribes in previous cases: *see*, Doc. No. **E5/3**, 'Decision on Ieng Sary's Application to Disqualify Judge Nil Nonn and Related Requests', 28 Jan 2011 ("Nil Nonn Disqualification Decision").

[72] *See*, *e.g.*, UN Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: Surya P. Subedi' ("Special Rapporteur Judicial Independence Report"), UN Doc. No. A/HRC/15/46, 16 Sep 2010, paras. 40, 41, 44, 48-50, 52-56; UN Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: Surya P. Subedi', UN Doc. No. A/HRC/24/36, 5 Aug 2013, 16, 19, 20; Cambodian Human Rights Action Committee, 'NGOs' Joint Submission to the Universal Periodic Review of the United Nations Human Rights Council', 2013, paras. 7, 10, 14-17; Human Rights Watch, 'Cambodia Universal Periodic Review Submission 2013', 2013. *See*, *also*, Doc. No. **1**, 'IENG Thirith Application to Disqualify Judge SOM Sereyvuth from the Supreme Court Chamber for Lack of Independence', 14 Mar 2011, in which the Co-Lawyers for Ieng Thirith sought to disqualify Judge Sereyvuth from sitting as a judge in the ECCC on the basis of his participation, as a judge of the Supreme Court of Cambodia, in a (widely regarded as politically-motivated) decision to dismiss an appeal by the opposition politician Mu Sochua against her conviction for defaming Prime Minister Hun Sen.

[73] Transparency International Cambodia Corruption Report, p. 52.

[74] Transparency International, Corruption Perceptions Index 2013, 2013 (Cambodia ranked 160th out of 177 countries).

[75] Special Rapporteur Judicial Independence Report, para. 44 (emphasis added).

[76] Doc. No. **E189/3/1/7.1.2**, 'Un Juge Face aux Khmers Rouges' (excerpt), 2013, p. 51 ("Poursuivant sa description de la société locale, ce juge ajouta que je devais me méfier de *tous* le magistrats cambodgiens ou bien ils vivaient dans la peur du pouvoir en place ou bien ils en étaient proche mais, dans tous les cas, aucun n'était fiable ni indépendant" (emphasis in the original)).

judiciary continue to affect national judges within the ECCC.[77] Most notably, Judge Lemonde revealed that he believed that ECCC national judges were effectively puppets whose strings were being pulled by people from the government.[78]

46. The appointment of the National Judges would fail the ECtHR test for independence of a court, tribunal or its constituent judges. For instance, the ECtHR noted in *Volkov* that:

> The presence of the Prosecutor General on a body concerned with the appointment, disciplining and removal of judges creates a risk that judges will not act impartially in such cases or that the Prosecutor General will not act impartially towards judges of whose decisions he disapproves.[79]

47. The present case is more extreme than that in *Volkov*. In this case, the Prosecutor General of the Supreme Court Chea Leang is not only a member of the body appointing, disciplining and removing judges but also the ECCC's National Co-Prosecutor, in which capacity she has previously strenuously objected to Defence requests to summons Heng Samrin as a witness.[80] Fellow SCM member and National Co-Investigating Judge You Bunleng also objected to having Heng Samrin testify.[81] Members of the executive, including Prime Minister Hun Sen,[82] have voiced their objections as well.[83]

48. In her March 2011 objection to Heng Samrin being summonsed as a witness for (the not yet severed) Case 002, National Co-Prosecutor Chea Leang submitted that the Trial Chamber could "admit [Heng Samrin's] statements of interview into the court's record" in lieu of his live testimony and that his testimony was "already addressed by other witnesses on the Case File".[84] All of the same arguments would appear in the National Judges' decision in the Final Witnesses Decision not to summons Heng Samrin. While it goes without saying that judges can render decisions with reasoning consistent with arguments advanced by prosecutors, this situation is distinguished by the possible role that this

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[77] *See*, *e.g.*, Case Files No. 003/07-09-2009-ECCC-OCIJ and 004/07-09-2009-ECCC-OCIJ, Doc. No. **D38**, 'Note of the International Reserve Co-Investigating Judge to the Parties on the Egregious Dysfunctions within the ECCC Impeding the Proper Conduct of Investigations in Cases 003 and 004', 21 Mar 2012; Mark S. Ellis, 'Safeguarding Judicial Independence in Mixed Tribunals: Lessons from the ECCC and Best Practices for the Future', International Bar Association, Sep 2011; Open Society Justice Initiative, 'Political Interference at the Extraordinary Chambers in the Courts of Cambodia', Jul 2010.

[78] Doc. No. **E189/3/1/7.1.1**, 'Un Juge Face aux Khmers Rouges' (excerpt), 2013, p. 32 ("Il est évident que, derrière les juges cambodgiens, il y a des gens qui tirent les ficelles au sein du gouvernement").

[79] Volkov Judgement, para. 113.

[80] Doc. No. **E9/14/1/1/1**, 'Co-Prosecutors' Further Objections and Observation to the Witnesses and Experts Proposed by the Other Parties' ("National Co-Prosecutor First Objection"), 11 Mar 2011 (classified as confidential despite the Co-Prosecutors' own request that it bear a public classification).

[81] **D314/1/12**, Second PTC Decision on Witnesses, para. 9, and **E312**, Final Witnesses Decision, paras. 90-91.

[82] *See*, Doc. No. **D254**, 'Request for Investigation', 30 Nov 2009, para. 6, which quotes a 9 September 2009 comment by Hun Sen that "Once, they wanted to call some people to testify. I said no and don't be so annoyance [sic]".

[83] *See*, *e.g.*, **D314/1/12**, Second PTC Decision on Witnesses, paras. 40(c) and (d).

[84] **E9/14/1/1/1**, National Co-Prosecutor First Objection, 11 Mar 2011, para. 4.

prosecutor can play in the professional fate of the three judges at issue here. In this regard, the Defence further note that the National Co-Prosecutor has recently publicly announced her continued objection to Heng Samrin's testimony in Case 002/02, once again on the basis that it would be repetitive, irrelevant, and unduly time-consuming.[85]

49. The National Judges' receipt of double salaries and their maintenance of permanent roles in the general Cambodian court system alongside temporary ECCC roles would also fail the ECtHR test. In *Volkov*, the ECtHR held that such a situation would mean that a judge would inevitably have "material, hierarchical and administrative dependence on their primary employers and [endanger] both their independence and impartiality".[86] In this case, the National Judges' possible independence is arguably further endangered by their lack of security of tenure and the influence of the SCM and the executive over their professional fate. Thus, the judges do not possess sufficient "safeguards against external pressure", as required by the ECtHR test.

50. It is not for this Application to make arguments as to the legality in terms of fairness of the proceedings of the National Judges' decision not to summons Heng Samrin in Case 002/01, as this will be done in the Defence's appeal of the Case 002/01 Judgement. Thus, the Defence instead briefly notes that the decision was consistent with the position stated by members of the SCM and the executive, and exactly opposite to that of the international judges.

51. In a case concerning the controversial Dutch politician Geert Wilders, the Amsterdam District Court held that a judge's decision not to grant a defence witness request would not amount to bias unless the reason offered was so incomprehensible as to leave open no other conclusion but that it amounted from actual bias or would give rise to an apprehension of bias.[87] That case is apposite here: the National Judges' decision was so unreasonable,[88] and was made in a context featuring so many other departures from

[85] Doc. No. **E1/240.1**, 'Transcript of Proceedings', 30 July 2014, p. 114, lns. 7-17.
[86] Volkov Judgement, para. 113.
[87] Rechtbank Amsterdam, 22 Oct 2010, NS 2010, 329, HA RK 10.1128; Geert Wilders is a member of Dutch parliament who was prosecuted for inciting hatred against the Dutch Muslim population.
[88] As it is not for this Application to so argue, the Defence merely notes briefly that, in citing hypothetical problems including invocations of immunity and delays that might be caused by summonsing Heng Samrin to testify, the National Judges have improperly "given weight to extraneous or irrelevant considerations" and failed to give "sufficient weight to relevant considerations" (*Prosecutor v. Prlić et al.*, Decision on Prosecution Appeal of Decision on Provisional Release of Jadranko Prlić, Case No. IT-04-74-AR65.26, 15 Dec 2011, para. 4; *Prosecutor v. Lukić & Lukić*, Appeal Judgement, Case No. IT-98-3211-A, 4 Dec 2012, para. 17). These irrelevant factors included hypothetical problems including delays that might be caused by summonsing Heng Samrin to testify: **E312**, Final Witnesses Decision, para. 97. Judges Cartwright and Lavergne heavily criticised this position: *see*, **E312**, Final Witnesses Decision, paras. 107, 108, 110.

established standards for independence,[89] that the cumulative effect is to extinguish any appearance of independence on the National Judges' part. This flagrantly violates Nuon Chea's right to a fair trial. As the National Judges lack an appearance of independence, they therefore lack the relevant qualifications to maintain their positions on the ECCC judiciary and should accordingly be disqualified.

(ii) Unacceptable Appearance of Bias

52. In the alternative – and particularly if the Chamber holds that it cannot confront questions of judicial independence directly[90] – the Defence argues that the National Judges' decision not to summons Heng Samrin in Case 002/01 gives rise to an unacceptable appearance of bias. Their decision not to summons Heng Samrin was on the one hand based on matters other than a genuine assessment of the relevant law and facts, as argued in paragraph 50 above. It therefore demonstrates that the National Judges possess an already-existing appearance of bias for which they should be disqualified. On the other hand, the National Judges' decision not to summons Heng Samrin makes it clear that, with respect to Case 002/02, the judges have *predetermined* the (lack of) credibility of arguments the Defence would seek to make through Heng Samrin's unique testimony[91] and *preformed* a view that the Defence's request for Heng Samrin as Nuon Chea's sole character witness was a bad faith matter of "trial tactics" designed to "generate controversy".[92] This gives rise to an appearance of their bias in Case 002/02 for which they should be disqualified.

C. The National Judges Have a Personal Interest in the Case against Nuon Chea Giving Rise to an Unacceptable Appearance of Bias

53. In her Aspen Speech, Judge Cartwright stated that one of the National Judges had allegedly once been mistakenly arrested as a Lon Nol soldier when Phnom Penh was evacuated but was later released; used to work on a dam site the head of which was later allegedly killed at S-21; and is in a marriage which had allegedly been arranged by the

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89 *See*, arguments at paragraphs 43 to 48 above.

90 The Trial Chamber previously made such a finding in January 2011 (*see*, **E5/3**, Nil Nonn Disqualification Decision, para. 15, although it also held that "it can ensure that Accused in proceedings before it benefit from proceedings that are fair and conducted in accordance with international standards"). It appears, however, that the SCC disagreed with the TC; in June 2011, the SCC appeared willing to entertain on its substance an application to disqualify Judge Som Sereyvuth pursuant to Rule 34 on the basis of his lack of independence (*see*, Doc. No. **1/4**, 'Decision on Ieng Thirith's Application to Disqualify Judge Som Sereyvuth for Lack of Independence', 3 Jun 2011).

91 Buergenthal Opinion, para. 13 (emphasis added).

92 Regarding the quoted portions of the National Judges' findings, *see*, *E312*, Final Witnesses Decision, para. 117; regarding findings as to strategy amounting to preformation of a view giving rise to an unacceptable appearance of bias, *see*, Buergenthal Opinion, para. 8.

CPK. Another of the National Judges was allegedly made to work in a children's brigade during the DK period. Further, Judge Cartwright observed that the National Judges – "all of whom lived through this regime" – would often seem to make "very rude comments" about or be "growling in antagonism" at exculpatory evidence or arguments presented in court.[93]

54. The mere fact that the National Judges apparently have direct experience of matters at issue in Case 002 does not automatically lead to their disqualification. It is a core duty of professional judges to be able to sit impartially in judgement. As the District Court of Jerusalem's judges explained in the *Eichmann* case, while sitting in judgement, judges are required to "subdue [their] emotions and impulses, for otherwise a judge will never be fit to consider a criminal charge which arouses feelings of revulsion, such as treason, murder, or any other grave crime".[94] Thus, although hearing the contents of the Aspen Speech gave rise to immediate concern on the Defence's part, the Defence nevertheless refrained from reacting by immediately seeking the disqualification of the National Judges. This was because the Defence considered it important to respect the presumed professionalism and impartiality of the National Judges and not presume bias without further substantiating evidence.

55. Having reviewed the Case 002/01 Judgement and the Final Witnesses Decision, however, the Defence has since been forced to conclude that in Case 002/01, it was not in fact possible for the National Judges to fulfill their duty of impartiality in this regard. In that judgement, all of the Judges appeared to lack open-mindedness towards various Defence evidence and submissions as demonstrated through the use of different language techniques, [95] dismissed Defence arguments concerning the existence of destabilising internal CPK divisions,[96] made premature findings as to the existence of a CPK policy to regulate marriage[97] and inappropriate findings in relation to demographic evidence,[98] and improperly referenced the Duch Judgement in order to define "smash"[99] – all of which establish that the Judges have an already-existing appearance of bias.

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93 **E305/12.38R**, Aspen Speech, timeline 54:41-59:01.
94 *Attorney-General of the Government of Israel v. Eichmann*, Dist. Ct. of Jerusalem, Decn. 6, Sessn. 3, Vol. 1, 17 Apr 1961, cited with approval in *Attorney-General of the Government of Israel v. Eichmann* (Israel Sup. Ct. 1962), 29 May 1962.
95 *See*, detailed Defence submissions in this regard from paragraph 61 *et seq.*
96 *See*, detailed Defence submissions in this regard from paragraph 73 *et seq.*
97 *See*, detailed Defence submissions in this regard from paragraph 81 *et seq.*
98 *See*, detailed Defence submissions in this regard from paragraph 86 *et seq.*
99 *See*, detailed Defence submissions in this regard from paragraph 90 *et seq.*

56. In *Kyprianou*, the ECtHR found that there was an unacceptable fear of non-conformity with the "principle that *no one should be a judge in his or her own cause*"[100], and thus an unacceptable appearance of bias, when judges offended by a lawyer's conduct instantly tried and imprisoned him for contempt. The Court also found actual bias, noting that the judges' personal offence "indicate[d] [their] *personal involvement*",[101] an impression reinforced by their use of language conveying "a sense of indignation and shock, which runs counter to the detached approach expected of pronouncements," and by their premature conclusion as to the lawyer's guilt.[102] The Court further held that the same conduct of a judge may establish both an appearance of, and actual, bias.[103] Similarly, during trial proceedings before the Tokyo International Military Tribunal for the Far East, the Filipino judge, Delfin Jaranilla, recused himself from hearing evidence concerning the 'Bataan death march' in 1942, a forcible transfer he experienced as an alleged victim.[104] Even this was deemed insufficient by critics, who thought that "a personal history of direct involvement in the matter at issue [...] would necessitate the recusal of any judge at the domestic or international level."[105]

57. In the present case, the National Judges have all "lived through [the] regime" according to Judge Cartwright's Aspen Speech.[106] At least two of them have direct experiences of matters at issue in Case 002/02. This indicates their personal involvement in the case against Nuon Chea. Indeed, during the 2004 Cambodian National Assembly debate to approve the ECCC Agreement and establish the ECCC, Cambodian Members of Parliament expressed concern that appointing those who had "lived through the regime" might result in unacceptable judicial partiality. Deputy Prime Minister Sok An, who led Cambodia's negotiations with the UN to establish the ECCC, commented on this point as follows:

> *[I]n the framework of our law, if a judge is linked to the targets to be prosecuted, that judge cannot do that work, for the accused will counterclaim against that judge. According to the law, that person shall not be appointed to act as judge for the case because the judgment might be partial.* However, this case is considered to be special. In trying to establish this law, we also considered this point. Those who came to talk to us about this law are not stupid; they are very clever. During the discussion, we also noticed that judges from foreign countries don't know about Pol Pot. They have never known the [regime's] crimes, and they never experienced the 3-year, 8-month, 20-day regime. But, *Cambodian judges have experienced the pain of this regime and were angry with it, so the*

[100] Kyprianou Judgement, para. 127.
[101] Kyprianou Judgement, para. 130 (emphasis added).
[102] Kyprianou Judgement, para. 130.
[103] Kyprianou Judgement, para. 119.
[104] Neil Boister and Robert Cryer, eds., 'Documents on the Tokyo International Military Tribunal', 2008, p. lv.
[105] Neil Boister and Robert Cryer, eds., 'Documents on the Tokyo International Military Tribunal', 2008, p. lv.
[106] **E305/12.38R**, Aspen Speech, timeline 54:41-54:49.

> *trial, according to our law, might be unfair and partial, and they should not be involved in this job.* However, there is another point of view: foreign lawyers don't know this regime or its nature. Thus, the Cambodian judges' awareness of the regime is a positive point because those who were its victims can understand the nature of the crimes. So, there are both positive and negative points. *What I have said doesn't mean that we have to appoint those judges who lived during the regime, but as we see it, there are both positive and negative points.*[107]

58. These comments link to broader concerns over whether judges' nationalities may give rise to an appearance of bias in light of the historical and geopolitical context in which cases are situated. For example, at the ICTY's first judicial election, Russia's nominee to the ICTY bench was not appointed "because a majority of the Security Council apparently feared that he would be partial to Serbia".[108] Indeed, Deputy Prime Minister Sok An's comments reveal that the Cambodian government itself appeared to fear that Cambodian judges' nationality and possible DK experiences might interfere with their ability to maintain impartiality. Unfortunately, those fears were ultimately realised.

59. In this case, the indication of the National Judges' personal involvement through their having "lived through [the] regime" is significantly exacerbated by reports that they expressed *Kyprianou*-like "indignation" throughout the Case 002/01 trial by making "very rude comments" and "growling in antagonism" and lacking open-mindedness towards certain evidence and submissions.[109] The Defence therefore submits that the totality of these circumstances give rise to an unacceptable appearance of bias on the part of the National Judges on the basis that they have a personal interest in the case against Nuon Chea and are thereby improperly serving as judges in their own cause.

60. The National Judges' appearance of bias fits the first type of appearance of bias established in *Furundžija*[110] and explained in *Pinochet*:[111] it is clear evidence of personal

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[107] Cambodian National Assembly, 'The First Session of the Third Term of the Cambodian National Assembly, October 4-5, 2004: Debate and Approval of the Agreement between the United Nations and the Royal Government of Cambodia and Debate and Approval of Amendments to the Law on Trying Khmer Rouge Leaders', 5 Oct 2004, pp. 25-26.

[108] Milan Markovic, 'International Criminal Trials and the Disqualification of Judges on the Basis of Nationality', *Washington University Global Studies Law Review*, 13(1), 2014, fn. 246.

[109] International criminal courts and tribunals have previously disqualified judges for having an unacceptable appearance of bias effectively arising out of an apparent lack of open-mindedness. At the ICTY, Judge Harhoff was recently disqualified from Šešelj on the basis of comments he made in a private letter that it was a "more or less set practice" at the ICTY to (rightfully, in the Judge's view) convict military commanders for their subordinates' crimes: *see*, *Prosecutor v. Šešelj*, 'Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President', Case No. IT-03-67-T, 28 Aug 2013, paras. 10-11, 13. At the SCSL, Judge Robertson was disqualified from the *RUF* case on the basis of various impassioned statements he made in his book *Crimes Against Humanity: The Struggle for Global Justice* concerning the RUF and events within the jurisdiction of the SCSL: *see*, *Prosecutor v. Sesay et al.*, 'Decision on Defence Motion Seeking Disqualification of Justice Robertson from the Appeals Chamber, Case No. SCSL-04-15-AR15, 13 Mar 2004.

[110] Furundžija Judgement, para. 189.

bias and should accordingly lead to the *automatic* disqualification of the National Judges without a need to consider the perspective of a reasonable observer. Furthermore, if it is disputed that the National Judges' personal interest amounts to the first type of appearance of bias in *Furundžija*, the Defence would then submit that the National Judges' personal interest clearly fits the second type of appearance of bias in *Furundžija* as "the circumstances would lead to a reasonable observer, properly informed, to reasonably apprehend bias"[112] as discussed from paragraphs 53 to 58 above. Indeed, the National Judges' personal interest may even amount to actual bias, for if *Kyprianou* is followed,[113] then the Defence's submissions at paragraphs 57 to 58 also serve to rebut the presumption of the National Judges' impartiality[114] and establish actual bias. Whether it is an appearance of bias, or actual bias, the consequence that should follow is identical: the National Judges should be disqualified from any further proceedings in the case of Nuon Chea.

D. The Judges' Use of Particular Language in the Case 002/01 Judgement Gives Rise to an Unacceptable Appearance of Bias

61. In this Section, the Defence alleges a ground of disqualification applicable to all of the Judges and not just the National Judges. Specifically, it submits that in the Case 002/01 Judgement, the Judges conveyed a fundamental lack of open-mindedness towards evidence or submissions on a range of issues,[115] amounting to an appearance of existing bias for which they should be disqualified. As these issues have bearing on the subject matter for Case 002/02,[116] the Judges' lack of open-mindedness also gives rise to an appearance of future bias in Case 002/02 for which they should also be disqualified. The issues on which the Judges demonstrated a lack of openness are the threat from internal and external enemies, CPK policies and actions, the actions and politics of the Lon Nol regime, and the role of King Father Sihanouk.

62. The Judges' lack of open-mindedness can be seen their through the use of four language techniques: **(i)** skeptical adjectives such as *purported* or *perceived* to describe evidence; **(ii)** ironic quotation marks indicating that the Judges disagreed with the literal meaning of a word they used, such as "enemies"; **(iii)** selective use of quotation marks to signal skepticism towards evidence, for example in finding that "Districts reported to Sectors on

[111] Pinochet Judgement.
[112] Furundžija Judgement, para. 189.
[113] Kyprianou Judgement, para. 130.
[114] RUF Appeal Decision, para. 9.
[115] Akayesu Appeal Judgement, para. 269; Nahimana Judgement, para. 78.
[116] Buergenthal Opinion, paras. 11, 13.

matters such as the construction of dams and canals, agriculture, health and *"good or bad elements'"*"[117]; and **(iv)** pejorative nouns, such as *façade.*

63. ***Threat from internal and external enemies*:** Most notably, the Case 002/01 Judgement reveals the Judges' disbelief that the CPK faced a real threat from internal and external enemies – an issue going to the heart of Nuon Chea's case[118] overall and to Case 002/02 in particular. In the Case 002/01 Judgement, the Judges referred 10 times to the CPK's *purported* or *perceived* internal and external enemies.[119] The Judges used ironic quotation marks nine times to refer to "enemies", "bad elements", "agents", "traitors", or "aggression".[120] Four times, the Judges used selective quotation marks to indicate skepticism for evidence.[121] In addition to the example referred to at paragraph 62 above, the Judges on one occasion summarised a witness's evidence concerning reports she received as detailing "agriculture, construction projects, achievement of targets, the *"wrongdoings of some people"*, food shortages and the number of sick people".[122]

64. The Judges' disbelief that the CPK faced real threats from enemies is most notable in the Case 002/01 Judgement's dismissal of the possibility of any real threats from Vietnam. This is despite not only Defence arguments[123] and extensive discussion in literature put before the Chamber[124] about the real threat of Vietnamese aggression, but also the opinion of the international community.[125] For example, the Judges used ironic quotation marks to refer to "Vietnamese 'aggression'"[126] and described Vietnam as a state which the CPK

[117] **E313**, Case 002/01 Judgement, para. 284 (emphasis added).
[118] **E295/6/3**, Defence Case 002/01 Closing Brief, paras 8, 200; Doc. No. **E1/232.1**, 'Transcript of Trial Proceedings: Trial Day 219', 22 Oct 2013 ("Defence Oral Closing Submissions Day 1"), p. 24 lns. 7, 21-25, p. 26 ln. 15, p. 28 lns. 3-11.
[119] **E313**, Case 002/01 Judgement, paras. 117, 118, 195, 199, 256, 278, 526, 795, and fns. 287, 1579. However, the Defence notes that it identified at least one exception to this: *see*, para. 298.
[120] **E313**, Case 002/01 Judgement, paras. 117, 121, 221, 253, 383, 908 (twice), 1062, 1093.
[121] **E313**, Case 002/01 Judgement, paras. 284, 288, 383, 998.
[122] **E313**, Case 002/01 Judgement, para. 288 (emphasis added).
[123] *See, e.g.*, **E295/6/3**, Defence Case 002/01 Closing Brief, paras. 20, 26, 183-188.
[124] *See, e.g.*, **E3/2376**, Brother Enemy; **E3/1684**, Voices from S-21.
[125] *See, e.g.*, **E307/5.2.2**, UN Security Council Official Records, 'Meeting, 11 January 1979', UN Doc. No. S/PV.2108, in which the Vietnamese invasion of DK in January 1979 was variously described by the international community, including two permanent UN Security Council members, as a "large-scale naked armed aggression" (by the Chinese Ambassador at para. 18), an "invasion" (by the Australian Prime Minister and a US State Department spokesperson, at para. 88), and as a "menace to peace" (by the Colombian Minister for External Relations, at para. 88). Indeed, no participant in this meeting was more scathing than King Father Sihanouk, who lamented the "large-scale act of flagrant aggression by the Socialist Republic of Viet Nam [...] whose ultimate goal was nothing less than to swallow up little Kampuchea just as a starving boa constrictor would fling itself upon an innocent animal." *See, id.*, paras. 73, 75, 80-87.
[126] **E313**, Case 002/01 Judgement, para. 383.

"*considered* [...] a rival and threat insofar as [it] *purportedly* sought to extend [its] own communist interests in Cambodia".[127]

65. ***CPK policies and actions*:** The Case 002/01 Judgement also reveals the Judges' general disdain for CPK policies and actions. For instance, four references to CPK liberation of cities and towns were presented in ironic quotation marks as "liberation".[128] In fact, the Judges expressly explained that they did not endorse the CPK's meaning for this term.[129] The Judges also undermined the CPK's claimed successes, twice referring to "*purported* achievements" of the CPK [130] including in "nation-building and improvements in living conditions".[131]

66. ***Actions and politics of the Lon Nol regime*:** The Judges also appeared determined to minimise the actions and politics of the Lon Nol regime and, to that end, marginalise the relevance of the civil war context to the case – matters that have enduring relevance for Case 002/02. In the Case 002/01 Judgement, the Judges sought to achieve this through use of ironic quotation marks. For instance, it twice referred to Sihanouk's call for the arrest of the Lon Nol leadership as "war criminals"[132] when this was a potentially valid description in light of the civil war context, and twice to refer to the CPK's "success" at Oudong, which was indeed, a classic military success.[133]

67. ***Role of Sihanouk*:** It is clear from the language of the Case 002/01 Judgement that the Judges dismissed any possibility that the late King Father Norodom Sihanouk and his supporters had a more significant role during the initial stages of the DK period, or that the DK executive branch was more than a façade. As elaborated more fully here, the existence of multiple competing factions within the CPK is a critical component of Nuon Chea's defence in Case 002/02. One of these factions was loyal to King Father Sihanouk. Yet, on five occasions, the Judges referred to the GRUNK administration as mere *façades*.[134] They also described a FUNK National Congress as having been "purportedly held on 24 and 25 February" 1975.[135] If the Judges believe that GRUNK

[127] **E313**, Case 002/01 Judgement, fn. 1579 (emphasis added).
[128] **E313**, Case 002/01 Judgement, para. 288 (emphasis added).
[129] **E313**, Case 002/01 Judgement, fn. 384.
[130] **E313**, Case 002/01 Judgement, paras. 265, 383 (emphasis added).
[131] **E313**, Case 002/01 Judgement, para. 383.
[132] **E313**, Case 002/01 Judgement, paras. 821, 824.
[133] **E313**, Case 002/01 Judgement, paras. 879, 999.
[134] **E313**, Case 002/01 Judgement, para. 230, 234, 320, 731, 732. However, a exception to this can be found at para. 371 when the Judges appear to refer without irony to the "CPK/FUNK/CPNLAF forces".
[135] **E313**, Case 002/01 Judgement, paras. 370, 377.

was a façade, then the notion that a substantial component of the CPK was loyal to it has already been adjudicated and dismissed.

68. In view of these aspects of the Case 002/01 Judgement, the Defence submits that additional portions of Judge Cartwright's Aspen Speech now become relevant. Specifically, in the Aspen Speech, Judge Cartwright likened Nuon Chea and Khieu Samphan to "tyrants";[136] dismissed as "nonsense" the accused persons' argument that their decisions were made out of love for their people, saying that those decisions evidenced the accused persons' "terrible philosophy", "bad thinking", "ideology" and "lack of care for their people";[137] dismissed information and evidence that might corroborate the accused persons' case as either "not heard of" or given by a witness "who was clearly ideologically on the side of the accused";[138] and ultimately and concerningly described the ECCC proceedings as having been "*fairish*", saying that "it's really difficult in this environment to achieve a "totally fair trial".[139]

69. Given the consistency between these opinions and the various Case 002/01 Judgement findings detailed at paragraphs 63 to 67 above, any reasonable observer would conclude that Judge Cartwright's comments reflect the views of all of the Judges. Thus, they further reinforce the Judges' lack of open-mindedness regarding certain evidence and submissions and their total disdain for Nuon Chea and for his ideology. Taken together, this amounts to an existing appearance of bias for which the Judges should be disqualified.

70. The Judges' lack of open-mindedness regarding certain evidence and submissions may even indicate that the Judges had already improperly *preformed* their view of Nuon Chea's case in general,[140] in addition to clearly *predetermining* issues pertaining to the subject matter of Case 002/02.[141] A reasonable observer would conclude that these matters give rise to an unacceptable appearance of bias on the Judges' part in Case 002/02 for which, again, they should accordingly be disqualified.

E. Certain Errors in the Case 002/01 Judgement Demonstrate an Existing, Unacceptable Appearance of Bias Which Would Have an Impact on Case 002/02

71. In this Section, the Defence submits that certain errors in this Judgement reveal an existing appearance of bias of all the Judges. Given that this bias relates to matters that

[136] **E305/12.38R**, Aspen Speech, timeline 50:10-51.16.
[137] **E305/12.38R**, Aspen Speech, timeline 52:16-52:43.
[138] **E305/12.38R**, Aspen Speech, timeline 57:39-58:07, 56:10-56:38.
[139] **E305/12.38R**, Aspen Speech (emphasis added).
[140] Buscemi Judgement, para. 68.
[141] Buergenthal Opinion, para. 13.

will be contested in Case 002/02, the Judges should accordingly be disqualified from Case 002/02. It will be alleged that the Judges revealed this bias by: (i) unreasonably and erroneously omitting to address Defence submissions as to the existence of internal CPK divisions; (ii) unreasonably and unnecessarily finding the CPK had a policy to regulate marriage; (iii) lacking open-mindedness towards evidence and submissions concerning demographic evidence; and (iv) relying on the Duch Judgement in order to define "smash".

72. As argued above, when judicial rulings are relied on as evidence of an already existing bias, what must be shown is 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, [...] or to the assessment of the relevant facts".[142] This process is *not* to show whether the findings "could constitute an error of law" (which would be the subject of an appeal), *but* to show whether the erroneous findings "could reasonably be perceived as creating an appearance of bias".[143]

(i) Structure of the CPK

73. The most egregious error evidencing an already existing bias is the Judges' dismissal of Defence evidence and submissions that within the DK, Zones were able to and did act autonomously. The next-most significant error is the Judges' related failure to address Defence arguments concerning the existence of distinct and destabilising internal divisions within the CPK – matters which will be the heart of the Defence's case in Case 002/02 but were already highlighted during Case 002/01.[144]

74. In Case 002/01, the Defence argued that Nuon Chea could not be held to have acted in a JCE with the perpetrators of the crimes alleged in Case 002/01, because the perpetrators "were either independent actors, or were under the command of zone leaders beyond Nuon Chea's control".[145] The Defence Case 002/01 Closing Brief already presented detailed supporting evidence demonstrating zonal autonomy in relation to the crimes

[142] **E55/4**, First Disqualification Decision, para. 13; Karemera Decision, para. 13; RUF Trial Decision, paras. 61-63.
[143] RUF Trial Decision, para. 63.
[144] **E295/6/3**, Defence Case 002/01 Closing Brief, paras. 8, 200; **E1/232.1**, Defence Oral Closing Submissions Day 1, p. 24 lns. 7, 21-25, p. 26 ln. 15, p. 28 lns. 3-11.
[145] **E295/6/3**, Defence Case 002/01 Closing Brief, para. 305.

alleged in Case 002/01, including, *inter alia*, witness testimony and the statements of experts otherwise cited approvingly by the Chamber.[146]

75. For example, during the Defence's public oral closing submissions in Case 002/01, the Defence presented part of this argument as follows:

> *[L]ikely from even before April '75, there were at least two equally powerful factions within the CPK.* [Sao] Phim and Ros Nhim led a movement opposing the Party Centre, a movement which was *actively seeking to sabotage CPK policies from the moment the evacuation of the cities was complete*. The full extent of the treason of these Standing Committee members, [Sao] Phim, Ros Nhim, Vorn Vet, and Koy Thuon, backed by the Vietnamese and supported by the first, second and third-ranking members of the present Cambodian government, would not become known until 1977 or 1978, but it began long before that.[147] […]
>
> It is certainly true that the *zone leaders acted autonomously* and with wide discretion, but that is not the most important fact about Ros Nhim and [Sao] Phim. The most important fact about Ros Nhim and [Sao] Phim is that they were leading and founding members of the CPK and yet *actively opposed to Pol Pot and Nuon Chea*, first secretly and later openly. The most important fact about Ros Nhim and [Sao] Phim is that *the CPK was not, at its core, a unified entity.*[148]

76. The Defence also made arguments about the direct relevance of zonal autonomy and CPK internal divisions to, for example, the alleged crimes at Tuol Po Chrey.[149] These matters are also extensively discussed in documents cited approvingly by the Judges.[150] The Judges failed to even address the possibility of internal CPK divisions in the Case 002/01 Judgement.

77. Instead, the Judges found that Nuon Chea participated together with Sao Phim, Ros Nhim, Vorn Vet and Koy Thuon – the very same individuals the Defence identified as key members of a rival internal CPK faction – in a joint criminal enterprise ("JCE")[151] to "implement rapid socialist revolution through a 'great leap forward' and defend the Party against internal and external enemies, by whatever means necessary".[152] The Judges also found that Sao Phim, Ros Nhim and others reported to and followed orders and instructions from Nuon Chea,[153] all within the context of a CPK that the Judges considered to possess a highly centralised, pyramidal[154] and "strict"[155] structure. Within

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[146] *See, e.g.*, **E295/6/3**, Defence Case 002/01 Closing Brief, paras. 307-309, 435, 437.
[147] **E1/232.1**, Defence Oral Closing Submissions Day 1, p. 24 lns. 6-16 (emphasis added).
[148] **E1/232.1**, Defence Oral Closing Submissions Day 1, p. 25 lns. 11-17 (emphasis added).
[149] **E295/6/3**, Defence Case 002/01 Closing Brief, paras. 48, 413, 436-437.
[150] *See, e.g.*, Doc. No. **E3/2376**, Nayan Chanda, 'Brother Enemy: The War After the War' ("Brother Enemy"), 1986; Doc. No. **E3/1684**, David Chandler, 'Voices from S-21: Terror and History in Pol Pot's Secret Prison' ("Voices from S-21").
[151] **E313**, Case 002/01 Judgement, paras. 777, 836, 869.
[152] **E313**, Case 002/01 Judgement, para. 777.
[153] **E313**, Case 002/01 Judgement, paras. 739, 773, 807, 848, 913, 933, 934, fn. 1760.
[154] **E313**, Case 002/01 Judgement, para. 223.

this structure, Nuon Chea apparently "exercised *de facto* authority over all Khmer Rouge cadres"[156] and, according to the Judges, specifically "exercised *de facto* authority over Ros Nhim" and Sao Phim.[157]

78. All of these erroneous findings were furthermore made notwithstanding the Trial Chamber's failure to summons the person most directly able to speak to them – Heng Samrin. As a deputy division commander in the East Zone, Heng Samrin's direct superior was Chan Chakrei, whom the evidence shows unequivocally was plotting actively against the Party center in 1975, if not earlier.[158] Chakrei's direct superior was, of course, Sao Phim. It would be a remarkable thing indeed if Chakrei's failed rebellion in 1975, Phim's ultimate defeat in 1978, and the Vietnamese decision to finally make use of their own forces with Samrin as a spearhead, were unrelated. It is thus only in the context of this (non) finding that the reason for the National Judges' obstinacy in the face of the overwhelming importance of hearing Heng Samrin's testimony becomes apparent: it is precisely in order to ensure that the fiction of the unified, strictly hierarchical CPK pyramid can sustain itself so that the faction led first by Sao Phim and later Heng Samrin can continue to shift responsibility for its heinous criminal acts to Pol Pot and Nuon Chea (including those committed against Khmer Republic soldiers and the Cham) while obscuring the "dream of regional hegemony" of their Vietnamese benefactors.[159]

79. In omitting to address (and evidently, to consider) Defence evidence and submissions concerning CPK internal divisions, the Judges clearly demonstrate a lack of open-mindedness on this issue of critical importance. The only conclusion open to a reasonable observer is that this amounts to an already existing appearance of bias on this issue of continuing relevance for which the Judges should be disqualified.

80. Moreover, the Judges' unreasonable omission to address the Defence's argument as to the existence of CPK internal divisions demonstrates their *preformed* and unfavourable view of the Defence case and argument central to Case 002/02. It relates, for example, to the existence and character of armed conflict within the DK; factual findings of JCE relating to internal purges and security centres; and S-21 Security Centre. Therefore, the Judges should be disqualified from Case 002/02.

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[155] **E313**, Case 002/01 Judgement, para. 913.
[156] **E313**, Case 002/01 Judgement, para. 913.
[157] **E313**, Case 002/01 Judgement, paras. 934, 739, 741, 773, 807.
[158] **E295/6/3**, Defence Case 002/01 Closing Brief, para. 186.
[159] **E307/5.2.2**, UN Security Council Official Records, 'Meeting, 11 January 1979', para. 102 (speech of the Chinese Ambassador).

(ii) Existence of a Policy to Regulate Marriage

81. One of the unique consequences of the Trial Chamber severing Case 002 in the way that it did was to separate establishment of the existence of certain policies and their implementation, even though implementation evidence is typically critical to the establishment of a policy's very existence. In the Case 002/01 Judgement, this resulted in an unnecessary and unreasonable finding that "regulation of marriage was a CPK policy"[160] on the basis of witness evidence that their marriages were regulated. If the Judges were going to find the existence of a policy to regulate marriage on evidence of its occurrence at the crime base, then they should not have made this finding at all until after the relevant crime base evidence was tested – which will only happen at a future point during the Case 002/02 trial. The Judges could and should have refrained from concluding on making this finding, just as they did correctly with respect to the issue of the existence of policies targeting the Cham, Buddhist and Vietnamese.[161]

82. Among the evidence relied upon by the Judges in making their findings on the existence of a regulation of marriage policy, there is not a single CPK document stating that such a policy existed.[162] The existence of a policy to increase population[163] by no means whatsoever equates inevitably to the existence of a policy to regulate marriage.

83. The only evidence appearing to link the population policy to regulation of marriage is the testimony of witness Chuon Thi (a former CPK battalion commander), and the expert opinion of Philip Short.[164] Short's opinion did not refer to any direct evidence as authority.[165] Moreover, his evidence is equivocal on whether the arrangement of marriage was a policy from the CPK Centre, or simply a practice adopted by *some* local authorities to implement the party's population policy. In fact, Short testified in court that family situations differed greatly "depending on where you lived in Cambodia, and what policies were followed by the *local* officials".[166] Chuon Thi's testimony on what he heard from Pol Pot, meanwhile, is mere hearsay.[167]

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[160] **E313**, Case 002/01 Judgement, para. 130.
[161] **E313**, Case 002/01 Judgement, para. 119.
[162] **E313**, Case 002/01 Judgement, paras. 128-129, fn. 371-374.
[163] **E313**, Case 002/01 Judgement, para. 128, fn. 371.
[164] **E313**, Case 002/01 Judgement, para. 128, fn. 371.
[165] Doc. No. **E1/192.1**, Transcript, 9 May 2013, p. 119; Doc. No. **E3/9**, 'Pol Pot: The History of a Nightmare', pp. 325-326.
[166] Doc. No. **E1/190.1**, Transcript, 7 May 2013, pp. 9-10 (emphasis added).
[167] Doc. No. **E3/4593**, 'Written Record of Witness Interview', 2 March 2010, ERN 00513314 (emphasis added).

84. The Judges also indicated that their finding was based on the existence of "*some* evidence of arranged and involuntary marriages".[168] However, the existence of "some" instances on the ground is irrelevant to a purported policy from the Party Centre. This is especially so given Short's evidence – which formed the basis of the Chamber's conclusion – that the situation varied depending on local authorities.

85. The Defence accordingly submits that the Judges' finding on the existence of a regulation of marriage policy was erroneous as it was unnecessary and unreasonable. Furthermore, the Defence further submits that making such a finding demonstrates that the finding was not "genuinely related to the application of law, […] or to the assessment of the relevant facts"[169], since the Judges have yet to hear essential implementation evidence in relation to either matter. Although it is not for the Defence to so speculate, it appears that the Judges may instead have been motivated by a fear that no other judgements would ever be rendered in connection with the events alleged to have occurred during the DK. Whatever the motivation, however, the finding in the Case 002/01 Judgement that there was a CPK policy to regulate marriage gives rise to an appearance of bias on the part of the Judges. Considering that regulation of marriage will form an important part of Case 002/02, the Judges should be disqualified from Case 002/02 to safeguard the impartiality of the trial.

(iii) Reference to Demographic Analyses

86. In the Case 002/01 Judgement, the Judges considered and affirmed certain demographic analyses of the DK:

> By 2008, the Documentation Center of Cambodia […] had identified an estimated 1.3 million human remains in in 390 mass grave sites spread throughout Cambodia. *Experts suggest that there is a high probability that those mass grave sites contain the remains of only a sample of those who died as a result of Khmer Rouge policies and actions* during the DK era […]. Overall, estimates indicate that between 600,000 and 3 million died as a result of Khmer Rouge policies and actions. *Within this range, experts accept estimates falling between 1.5 and 2 million excess deaths as the most accurate.*[170]

87. The Defence submits that this reference to demographic analyses of the DK effectively amounts to a finding by the Judges that "between 1.5 and 2 million" deaths occurred during the DK era. This is because the Judges state with a definitive, affirming air that

[168] **E313**, Case 002/01 Judgement, para. 130.
[169] **E55/4**, First Disqualification Decision, para. 13; Karemera Judgement, para. 13; RUF Trial Decision, paras. 61-63.
[170] **E313**, Case 002/01 Judgement, para. 174 (footnotes omitted, emphasis added).

"experts accept" the accuracy of 1.5 to 2 million deaths, and then do not dispute the accuracy of this suggestion at any other point in the Judgement.

88. At the same time, the Judges omitted to discuss contrary arguments put forward by the Defence during Case 002/01 that many deaths put forward as attributable to the CPK may in fact have occurred before or after the DK period and were a result, for instance, of the K-5 forced labour program.[171] Nor did the Judges adequately address the widely known and striking fact, which they themselves mention, that estimates of deaths during the DK era vary substantially, with a preposterous margin of approximately 2.4 million deaths between the lowest and highest estimates.

89. As such, the Defence submits that this finding and associated discussion on demographic evidence demonstrates that the Judges have an existing appearance of bias which also has an impact on Case 002/02 and for which they should accordingly be disqualified. In the alternative, even if it is not accepted that this reference to demographic analyses amounts to a judicial finding, at the very least, it does demonstrate a lack of open-mindedness of the Judges towards the evidence on an issue of great significance for Case 002/02, including, *inter alia*, in relation to genocide and security centres. The Defence submits that this amounts to an improperly *preformed* view of an aspect of Nuon Chea's case in Case 002/02, for which the Judges should, again, be disqualified.

(iv) Reliance on the Duch Judgement in Order to Define "Smash"

90. In the Case 002/01 Judgement, the Judges observed that "[t]here is *evidence* to suggest that the CPK established a further policy of reeducation of "bad elements" and "smashing" those who had been found to be enemies".[172] The footnote for this sentence listed Duch Judgement as one of the pieces of "evidence".[173] Similarly, in the same paragraph, the Judges again referred to the Duch Judgement as one of the elements of evidence when defining the word "smash".[174]

91. The reluctance of the current jurisprudence to allow the disqualification of a judge simply because the judge has heard multiple overlapping cases is largely based on the belief that a professional judge would "rule fairly on the issues before them, relying *solely* and *exclusively* on the evidence adduced *in the particular case*".[175] The fact that the Judges

[171] *See, e.g.*, **E295/6/3**, Defence Case 002/01 Closing Brief, para. 58.
[172] **E313**, Case 002/01 Judgement, para. 117 (emphasis added).
[173] **E313**, Case 002/01 Judgement, fn. 326.
[174] **E313**, Case 002/01 Judgement, fn. 330.
[175] Akayesu Judgement, para. 269; Nahimana Judgement, para. 78 (emphasis added).

referred to factual findings in the earlier Duch Judgement as if it constitutes evidence in the present case – despite the unequivocal jurisprudence that factual findings on a previous case are not automatically binding on subsequent cases[176] – shows that the Judges were not able to make sure that they at all times "bring an impartial and unprejudiced mind" to the present case.[177]

92. Given the failure of the Judges to rely solely and exclusively on the evidence in Case 002/01 to make the Case 002/01 Judgement, it is justifiable to fear that the Judges might not bring an impartial and unprejudiced mind to the trial of Case 002/02. Furthermore, considering that, as will be set out below, many findings of the Judges in the Case 002/01 Judgement amount to predetermination on significant issues bearing on the alleged guilt of the accused in Case 002/02, the Defence submits that there will be an unacceptable appearance of bias if the Judges continue to sit in the trial of Case 002/02.

F. The Judges' Findings in the Case 002/01 Judgement on Factual Issues Relevant to Case 002/02 Give Rise to Their Appearance of Bias with Respect to Case 002/02

93. The jurisprudence establishes that a judge's *predetermination* of one or more issues bearing on the alleged guilt of the accused or *preformation* of an unfavourable view of a party's case, in particular views on the validity and credibility of a party's arguments, could warrant disqualification of the judge from that case. Numerous findings made in the Case 002/01 Judgement amount to either predetermination of issues bearing on the alleged guilt of the accused in Case 002/02, or a preformed unfavourable view of the Defence case. Thus, they give rise to an appearance of the Judges' bias with respect to Case 002/02.

94. It must be reiterated in this regard that, as observed by the Supreme Court Chamber, the requirement of impartiality, seen in the context of the manner in which Case 002 has been severed, dictates that either prejudicial evidence already heard by the judges be excluded from later trials or the judges themselves be excluded.[178] The Defence submits that this must be taken into account when the Chamber decides whether to disqualify the Judges.

(i) Effect of Factual Findings in Case 002/01 and the Scope of Case 002/02

95. The Closing Order alleged that to achieve the JCE's common purpose, the CPK leaders designed five policies ("five alleged CPK policies" or "five policies"): repeated movement

[176] *See, e.g.*, Brđanin Decision, para. 6.
[177] First TC Disqualification Motion, para. 15; Brđanin Decision, paras. 18-19.
[178] **E301/9/1/1/3**, SCC Decision on KS Appeal, para. 83.

of population; creation of cooperatives and worksites; re-education of "bad elements" and killing of "enemies"; targeting specific groups; and regulation of marriage.[179]

96. The Trial Chamber issued a decision on 4 April 2014, listing in detail the scope of Case 002/02.[180] In this Case 002/02 Scope, some topics, including the five alleged CPK policies and the role of the accused, are followed by an ambiguous qualification remark suggesting that discussions on those topics are to be "limited to relevant underlying offen[c]es".[181] There also seems to be a suggestion in the Case 002/01 Judgement that since the "existence" of the five CPK policies has already been examined in Case 002/01, it is only the "implementation" of the policies that is still open to discussion in future trials.[182]

97. During the Case 002/01 trial, the Trial Chamber examined all five alleged CPK policies, even though only two of them fall into the scope of Case 002/01.[183] In response to the parties' concerns as to whether and to what extent the Trial Chamber's findings in Case 002/01 on issues such as the five alleged CPK policies would have definitive effect for future cases, the Trial Chamber explained that the purpose of including "reference" to all five CPK policies in the first trial was merely to "enable the manner in which policy was developed to be established".[184] The Supreme Court Chamber later held unequivocally that there was no "commonality" among findings in each sub-case severed from Case 002, and that "common factual elements in all cases resulting from Case 002 *must be established anew*".[185]

98. It is the Defence's submission, therefore, that notwithstanding the ambiguous qualification in the Trial Chamber's List of Case 002/02 Scope and the aforementioned indication in the Case 002/01 Judgement, factual issues relevant to Case 002/02 – including the existence of the relevant policies and the specific roles of the accused in relation to the relevant charges – *must be established anew* in the Case 002/02 trial.

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[179] Doc. No. **D427**, 'Closing Order', 15 Sep 2010, paras. 156-159.
[180] Doc. No. **E301/9/1.1**, 'Annex: List of Paragraphs and Portions of the Closing Order Relevant to Case 002/02', 4 Apr 2014 ("Case 002/02 Scope").
[181] **E301/9/1.1**, Case 002/02 Scope, pp. 1, 2.
[182] *See*, **E313**, Case 002/01 Judgement, fn. 287.
[183] Doc. No. **E124/7.3**, 'Annex: List of Paragraphs and Portions of the Closing Order Relevant to Case 002/01', 18 Oct 2012 ("Case 002/01 Scope"); *see also*, **E313**, Case 002/01 Judgement, fn. 287.
[184] Doc. No. **E141**, 'Response to Issues Raised by Parties in Advance of Trial and Scheduling of Informal Meeting with Senior Legal Officer on 18 November 2011', 17 Nov 2011, p. 2 ("17 Nov 2011 TC Memo").
[185] **E301/9/1/1/3**, SCC Decision on KS Appeal, para. 85 (emphasis added).

(ii) Existence of All Five Alleged CPK Policies

99. Unlike Case 002/01, where the relevant charges are related only to two policies, Case 002/02 involves charges linked to all five policies.[186] Almost all of the Closing Order sections regarding the general existence of the five policies and their relation to the alleged JCE,[187] as well as the specific facts in relation to the establishment and development of each policy,[188] fall into the scope of Case 002/02.[189] Thus, the facts alleged in these portions, as far as they are relevant to Case 002/02, must be established anew.

100. In the Case 002/01 Judgement, the Judges found themselves satisfied with the existence of all five CPK policies,[190] which they held to have been created in order to achieve the common purpose of the JCE. In Case 002/02, JCE is the main mode of liability of which Nuon Chea is charged. Thus, findings as to the existence, the establishment and development of the policies are critical issues bearing on the alleged guilt of Nuon Chea in Case 002/02. Since these factual issues must be established anew in Case 002/02, the Defence submits that the Judges' predetermination of these issues as demonstrated by the Case 002/01 Judgement gives rise to an unacceptable appearance of bias if they continue to sit in the trial of Case 002/02.

(iii) Policy of Targeting "Enemies", in Particular the "New People" and Former Khmer Republic Officials

101. The Closing Order alleges that: one aspect of the common purpose of the JCE was to defend the CPK against external and internal enemies;[191] the CPK identified several groups as "enemies", including the "new people" (evacuated city dwellers, also called "17 April people" or "depositee people"[192]) and Khmer Republic officials;[193] these people were targeted in population movements, in cooperatives and worksites, and were re-

[186] **E124/7.3**, List of Case 002/01 Scope.
[187] **D427**, Closing Order, paras. 156-159.
[188] **D427**, Closing Order, paras. 160-167; 168-177; 178-204; 205-215; 216-220.
[189] **E301/9/1.1**, List of Case 002/02 Scope, pp. 1-2, referring to Closing Order, paras. 156-159, 160-163, 165, 167, 168-177, 178-203, 205-215, 216-220. The qualifications in this part of the List in relation to some aspects of the movement of population policy, the education and killing policy, and the targeting policy are due to the limitation of the charges to be tried in Case 002/02.
[190] **E313**, Case 002/01 Judgement, paras. 112, 116, 118, 127, 130, the finding in relation to the targeting policy was limited to the targeting of Khmer Republic soldiers and officials – a topic also relevant to Case 002/02.
[191] **D427**, Closing Order, para. 156.
[192] **D427**, Closing Order, para. 227.
[193] **D427**, Closing Order, para. 1417.

educated or killed in security centres,[194] amounting to murder, extermination, political persecution and other charged crimes.[195] Large parts of the Closing Order portions relating to the targeting of the "new people" and Khmer Republic officials fall within the scope of Case 002/02.[196]

102. In the Case 002/01 Judgement, the Judges found themselves satisfied with the existence of a CPK policy of re-educating "bad elements" and killing enemies[197] as well as the CPK policies targeting the "new people" and the Khmer Republic officials.[198]

103. As to targeting the "new people", the Judges found that: **(i)** "[p]rior to the DK period, the Khmer Rouge built up a huge reservoir of hatred of city people among their followers" and this "hatred and distrust" of city people lasted "throughout the DK era";[199] **(ii)** the CPK differentiated between the "base people" (peasants) and the "new people" (city dwellers), treated the latter "as political and social enemies of the revolution and the collective system", carried out "class struggle" against them, and endeavoured to re-educate them;[200] and **(iii)** that the "new people" were discriminated on "political grounds"[201] and targeted during the movement of population and in the cooperatives and worksites.[202]

104. As to targeting former Khmer Republic soldiers and officials, the Judges found that: **(i)** Lon Nol soldiers and officers were "identified as the key enemies" and "a CPK policy targeting soldiers and officers of the Khmer Republic existed prior to 1975" and "continued throughout the DK era";[203] **(ii)** this policy became increasingly radical over time and led to several mass killings of Khmer Republic soldiers after their capture, including their execution *en masse* after the seizure of Oudong;[204] and **(iii)** during the DK

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[194] *See*, e.g., **D427**, Closing Order, paras. 227, 234-235, 265, 305-306, 319, 343, 346, 360, 366, 432, 479, 498, 500, 523-524, 541, 576, 653, 673, 694-697, 705-713.
[195] *See*, **D427**, Closing Order, paras. 1373-1478, in particular, para. 1417 (political persecution).
[196] **E301/9/1.1**, List of Case 002/02 Scope, pp. 1-4, referring to Closing Order, paras. 156-159, 305-306, 319, 343, 346, 360, 366, 432, 498, 500, 1373-1478.
[197] **E313**, Case 002/01 Judgement, paras. 117-118.
[198] The Judges generally found that both former officials and soldiers of the Khmer Republic and the "new people" were identified as enemies of the CPK: *see*, **E313**, Case 002/01 Judgement, para. 569.
[199] **E313**, Case 002/01 Judgement, paras. 112, 787; for findings on the hatred and suspicion of "city people", *see also*, paras. 111, 517, 571, 873.
[200] **E313**, Case 002/01 Judgement, paras. 195, 613-616, 621, 653, 783-784, 788, 795, 805, 873, 903.
[201] **E313**, Case 002/01 Judgement, paras. 571, 805.
[202] **E313**, Case 002/01 Judgement, paras. 517, 571, 613-616, 621, 634-635, 653, 947.
[203] **E313**, Case 002/01 Judgement, paras. 118, 120, 127, 814.
[204] **E313**, Case 002/01 Judgement, para. 127.

era, former Khmer Republic officials were identified as the "main enemies", targeted on political grounds, subjected to "class struggle", and re-educated or eliminated.[205]

105. The alleged discriminatory policies targeting the "new people" and the Khmer Republic soldiers and officials do not only directly relate to the crime of persecution on political grounds, of which the accused are charged in Case 002/02. They also closely intertwine with four of the five CPK policies allegedly forming the instruments for achieving the common purpose of the JCE (which, again, is the main mode of liability of which Nuon Chea is charged in Case 002/02). It follows that the alleged existence of CPK policies targeting the "new people" and the Khmer Republic officials are significant issues bearing on the alleged guilt of the accused in Case 002/02. The Defence submits that the Judges' predetermination of these issues will give rise to their appearance of bias if they continue to sit in the trial of Case 002/02.

(iv) Nuon Chea's Role in Formulating and Implementing CPK Policies

106. The Closing Order alleged that Nuon Chea held senior positions in the CPK and DK, was responsible for propaganda and education issues, and had authority over security and military affairs. As a result, he allegedly participated in formulating and promoting CPK policies and was responsible for crimes related to relevant security or military operations.[206] All but one paragraph of the Closing Order portions relating to the roles of Nuon Chea fall within the scope of Case 002/02.[207]

107. In the Case 002/01 Judgement, the Judges found that: **(i)** In general, "[d]ue to his seniority within the leadership of the CPK, Nuon Chea enjoyed *oversight of all* Party activities extending beyond the roles and responsibilities formally entrusted to him"; **(ii)** Nuon Chea and Pol Pot "exercised the *ultimate decision-making power* of the Party"; and **(iii)** "Nuon Chea held and exercised the power to *make and implement* CPK policies and decisions".[208]

108. In addition, despite finding that Nuon Chea was not a member of the Military Committee, the Judges nevertheless concluded that "[a]ctual membership of the Military Committee was of little significance due to Nuon Chea's very senior positions within the Party"[209]

[205] **E313**, Case 002/01 Judgement, paras. 169, 613, 634, 805, 814-815, 817-818, 828, 831, 833-834, 903.
[206] **D427**, Closing Order, paras. 862-993.
[207] **E301/9/1.1**, List of Case 002/02 Scope, p. 2, referring to Closing Order, paras. 862-901, 903-993.
[208] **E313**, Case 002/01 Judgement, paras. 348, 847, 861, 884, 893 (emphasis added).
[209] **E313**, Case 002/01 Judgement, paras. 333, 341.

and found that Nuon Chea's power and control extended extensively to security, military and discipline matters and that he was involved in the purges and discipline of cadres.[210]

109. In the Case 002/01 Judgement, the Judges also found that: **(i)** Nuon Chea had a "long-held belief" that urban people were corrupt,[211] and that he was "a strong proponent of waging 'class struggle'"; **(ii)** through his responsibility for propaganda and education, Nuon Chea "promoted the Party line of vigilance against internal and external enemies" and indoctrinated the base people to hate the identified enemies including the "new people" and Khmer Republic officials; and **(iii)** Nuon Chea "*knew* that such indoctrination to hate would inevitably lead to violence" and "*knew* that there was a substantial likelihood that crimes would be committed".[212]

110. The roles of Nuon Chea, both in general and in particular with regard to the formulation and promotion of policies targeting enemies (including the "new people" and Khmer Republic officials) as well as the involvement in military and security affairs, are highly relevant to Case 002/02, and are essential issues bearing on Nuon Chea's alleged guilt in Case 002/02. This includes, in particular, his responsibility for the alleged genocide of the Vietnamese and Cham; the execution of detainees at S-21 Security Centre; and internal purges.

111. The Judges' above findings not only constitute *predetermination* of issues bearing on Nuon Chea's alleged guilt in Case 002/02, but also amount to *preformed* views unfavourable to the potential Defence case in Case 002/02. The Defence submits, therefore, that these findings will give rise to an unacceptable appearance of bias if the Judges continue to sit in the trial of Case 002/02.

(v) View of the Accused and the Defence Case

112. In the Case 002/01 Judgement, the Judges found that: **(i)** the majority of the DK "new ruling class" (that is, the "peasants of the lowest classes") "had very little formal education" and "[a]ll were strictly disciplined, indoctrinated, and taught to *deceive* people and behave in accordance with the principle of *secrecy*";[213] **(ii)** the CPK used the idea of US bombing as a "pretext" to "deceive" the city population to evacuate Phnom Penh; **(iii)** the CPK later justified its mass relocations of people "on the *pretext* of caring for the population"; **(iv)** the CPK similarly assembled Khmer Republic soldiers by "deceptive"

[210] **E313**, Case 002/01 Judgement, paras. 329, 340, 341, 893-896.
[211] **E313**, Case 002/01 Judgement, paras. 111, 873.
[212] **E313**, Case 002/01 Judgement, paras. 840, 873, 887, 919, 926 (emphasis added).

means before executing them; and **(v)** "that lies used to control the situation and the people, were the 'very fabric' of the regime."[214]

113. According to the jurisprudence set out above, *preformation* of an unfavourable view of a party's case, such as views on the validity and credibility of a party's arguments and strategies, could give rise to a justified fear of bias. In *Buscemi v. Italy*, the ECtHR found that there was a justified fear of bias as the judge in question had already expressed views that the applicant's narrative of the events was "inaccurate" and that he was a liar, "before presiding over the court".[215]

114. The Defence submits that the Judges' findings as set out above clearly show that the Judges had already formed an unfavourable view of the CPK and some key arguments of the accused, describing them as deceptive or mere pretext; and that considering that the basic background and potential arguments of the accused will be essentially the same in Case 002/02, the Judges should be disqualified from Case 002/02 for lacking an acceptable appearance of impartiality.

G. The Findings of Judges Nonn, Sokhan and Lavergne in the Duch Judgement on Factual Issues Relevant to Case 002/02 Give Rise to Their Appearance of Bias with Respect to Case 002/02[216]

115. In this Section, the Defence makes analogous submissions to those made in Section E above; namely, that the Judges made findings in the Case 001 Judgement on factual issues which are relevant to Case 002/02. However, the arguments in this section relate only to Judges Nonn, Sokhan and Lavergne, as they sat on the Case 001 and Case 002/01 active benches, whereas Judge Ottara sat on the reserve bench in Case 001.

116. In its First Disqualification Decision, the Special Bench held that conclusions made by the Case 001 judges concerning Nuon Chea did not amount to a disqualifiable predetermination of his guilt as they concerned only some elements of crimes with which he is charged in Case 002.[217] However, as the Defence has submitted above, this reflects an erroneous interpretation of "prejudgement of guilt".[218] It is not necessary for a judge to prejudge each and every element of a crime of which the accused is charged. Rather, it is sufficient if the judge had preformed a general view of the "*qualification* of the *involvement* of the applicant [...], *criminal or otherwise*".[219] Further, and as Justice

[213] **E313**, Case 002/01 Judgement, para. 840 (emphasis added).
[214] **E313**, Case 002/01 Judgement, paras. 120, 511, 530, 548, 634, 803, 834, 853, 954, 987, 1010, 1048.
[215] Buscemi Judgement, paras. 40-41, 68.

Buergenthal argued, it is sufficient for a judge to be found to have an appearance of bias if he or she "prejudged *one or more issues* bearing on the subject matter".[220]

117. The Defence therefore submits that findings made in the Duch Judgement may indeed go towards the establishment of an unacceptable appearance of bias even if they do not demonstrate a prejudgement of each and every element of a charged crime. The Defence further submits that such an argument is timely and therefore admissible. Given the reliance in the Case 002/01 Judgement of the testimony of Kaing Guek Eav *alias* Duch and also of factual findings made in the Duch Judgement,[221] the Defence is permitted to present such past evidence to "further elaborate or support" new evidence as this past evidence is now contextually relevant as a result of the findings in the Case 002/01 Judgement.[222] In addition, it was only after the Case 002/02 Scope was definitively notified to the parties on 4 April 2014 that the Defence could identify with certainty which Closing Order paragraphs relating to S-21 Security Centre would be contested in the Case 002/02 trial.[223]

118. In relation to S-21 Security Centre, the Closing Order alleges, *inter alia*, that "more than 12,273 S-21 detainees were executed";[224] in a direct quote from the Duch Judgement, "none of the detainees held within the S-21 complex were to be released as they were all due to be executed in accordance with the CPK policy to "smash" all enemies";[225] "[t]he 'truth' that these confessions were supposed to reveal was, in many respects, defined beforehand, since the interrogators … forced detainees to provide pre-determined answers";[226] "the interrogators used several forms of torture"[227], including rape;[228] and (closely paraphrasing the Duch Judgement), "[s]ome of the children who were taken to S-21 were executed on its premises. Young children were generally executed

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[216] This section of this Application relates only to the three judges who were part of the active bench in Case 001 and does not apply to Judge Ottara, who was on reserve bench in that case.
[217] *See*, para. 6 above.
[218] *See*, **E55/4**, First Disqualification Decision, paras. 21, 24.
[219] Poppe Judgement, para. 28 (emphasis added).
[220] Buergenthal Opinion, para. 11.
[221] *See*, **E313**, Case 002/01 Judgement, as discussed at para. 90 *et seq.*
[222] **7**, Khieu Samphan Lemonde Disqualification Decision, para. 20.
[223] **E301/9/1.1**, Case 002/02 Scope.
[224] **D427**, Closing Order, para. 460.
[225] **D427**, Closing Order, para. 461.
[226] **D427**, Closing Order, para. 455.
[227] **D427**, Closing Order, para. 452.
[228] **D427**, Closing Order, para. 457-459.

immediately after they were separated from their parents, although some of them were allowed a brief respite before their execution".[229]

119. The Defence notes that in the First Defence Trial Chamber Disqualification Application it filed in February 2011, the Defence focused on findings made in the Duch Judgement establishing chapeaux elements of and particular crimes against humanity and grave breaches of the Geneva Conventions. While the Defence again cites those findings in support of this Application (at paragraph 121 below), the Defence has a new focus in this Application, on factual findings in the Duch Judgement.

120. Several factual findings in the Duch Judgement demonstrate that Judges Nonn, Sokhan and Lavergne have *predetermined* certain issues which must be established anew in Case 002/02. Examples of such findings are: **(i)** ***on executions at S-21***, that while "it is not possible to quantify the precise number of the detainees who died and were executed, [...] the Chamber quantifies this number to be no fewer than 12,272 detainees";[230] **(ii)** ***on the possibility of release from S-21***, that "[e]very individual detained within the S-21 complex was destined for execution"[231] and that "[n]one of the detainees held within the S-21 complex were to be released as they were all due to be executed in accordance with the CPK policy to "smash" all enemies";[232] **(iii)** ***on the alleged "smashing policy"***, that this policy "stood "for S-21, for the entire party, the military, the State authority in the bases, and the Police Offices throughout the country" and "involved not merely a physical smashing but also a psychological smashing [...] smash means something more than merely kill";[233] **(iv)** ***on interrogations***, that "[g]iven that detainees were considered guilty by reason of their presence at S-21, the role of interrogators was simply to "validate the Party's verdict by extracting full confessions."";[234] **(v)** ***on torture***, that threats were "routinely put into practice", and that at least one instance of rape occurred;[235] and **(vi)** ***On the execution of children***, that "[c]hildren of a young age were typically executed immediately after being separated from their parents, though some were kept for a short

[229] **D427**, Closing Order, para. 471.
[230] Case No. 001/18-07-2007/ECCC/TC, **E188**, Duch Judgement, para. 340; *see*, *also*, paras. 141, 208.
[231] Case No. 001/18-07-2007/ECCC/TC, **E188**, Duch Judgement, para. 180.
[232] Case No. 001/18-07-2007/ECCC/TC, **E188**, Duch Judgement, para. 206; as mentioned above, this finding is directly quoted in the Case 002 Closing Order.
[233] Case No. 001/18-07-2007/ECCC/TC, **E188**, Duch Judgement, para. 100.
[234] Case No. 001/18-07-2007/ECCC/TC, **E188**, Duch Judgement, para. 155.
[235] Case No. 001/18-07-2007/ECCC/TC, **E188**, Duch Judgement, paras. 359, 366.

period of time before being executed";[236] (as mentioned above, this finding is closely paraphrased in the Case 002 Closing Order).

121. In addition, in the Duch Judgement, Judges Nonn, Sokhan and Lavergne have already predetermined that the chapeaux for crimes against humanity and grave breaches at S-21 have been established beyond reasonable doubt.[237] In a similar vein, Judges Nonn, Sokhan and Lavergne have already established, beyond a reasonable doubt, that *particular* crimes against humanity and grave breaches were in fact committed at S-21.[238] Accordingly, apart from the aforementioned issues that the Judges have already *predetermined*, all that remains for the OCP to prove Nuon Chea guilty in Case 002/02 is to link him to this "system of ill-treatment" of S-21.[239] It is the Defence's submission, therefore, that these findings in Duch Judgement amount to a *predetermination* on issues of such significant importance to the determination of the alleged guilt of Nuon Chea in Case 002/02 that it would cause a reasonable observer to apprehend an unacceptable appearance of bias which warrants the disqualification of Judges Nonn, Sokhan and Lavergne from sitting in judgement in the Case 002/02 trial.

H. The Findings in the Case 002/01 and Duch Judgements Amount to a Reversal of the Burden of Proof

122. Not only do the Judges' findings in the Case 002/01 and Duch Judgements lead to an unacceptable appearance of bias on their part, the Defence further submits that those findings also effectively result in reversing the burden of proof. Pleading the charges in Case 002/02 before a panel of judges who have already made so many centrally important findings will require the Defence to persuade those judges that they were in error, instead of merely demonstrating that the Co-Prosecutors have failed to meet their burden of proof. If the Judges remain on the Case 002/02 bench, this will amount to an

[236] Case No. 001/18-07-2007/ECCC/TC, **E188**, Duch Judgement, para. 214.
[237] Poppe Judgement, paras. 3-6; Case No. 001/18-07-2007/ECCC/TC, **E188**, Duch Judgement, paras. 320-321, 325, 327 (on crimes against humanity) and 432-426 (on grave breaches of the Geneva Conventions).
[238] Poppe Judgement, paras. 7-8; Case No. 001/18-07-2007/ECCC/TC, **E188**, Duch Judgement: on *crimes against humanity*, paras. 339-341 (murder and extermination), 346 (enslavement), 351 (intentional and arbitrary imprisonment), 359-360 (torture), 372-373 (other inhumane acts), 381-390 (persecution on political grounds); on *grave breaches of the Geneva Conventions*, 437 (wilful killing), 448 (torture), 449 (inhumane treatment), 457 (wilful suffering), 462-463 (deprivation of fair trial rights), 468-469 (arbitrary or illegal imprisonment).
[239] Case No. 001/18-07-2007/ECCC/TC, **E188**, Duch Judgement, para. 514 ("[Duch] acted [...] to operate the S-21 complex, a facility dedicated to the unlawful detention, interrogation and execution of perceived enemies of the CPK, both domestic and foreign. A concerted system of ill-treatment and torture was purposefully implemented in order to subjugate detainees and obtain their confessions during interrogations".)

egregious breach of the fundamental and inviolable fair trial right of Nuon Chea "to be presumed innocent until proved guilty according to law".[240]

I. The Judges Have Demonstrated an Unacceptable Lack of Professional Integrity

123. The Defence has thus far made wide-ranging allegations that the Judges have an existing or future appearance of bias, and additionally, in the case of the National Judges, lack (an appearance of) independence. These allegations have referred to a similarly wide range of supporting evidence, including various findings in the Case 002/01 Judgement (some of which have also been alleged to be erroneous); findings in the Duch Judgement; data on the troubling nature of the national judicial context; and concerning statements by two former international ECCC judges, in the Aspen Speech and Lemonde Book which strike at the very heart of this institution. Indeed, and to echo that last point, it is the Defence's final and most significant submission that the totality of the Judges' alleged appearances of bias, taken together, not only demonstrate that the Judges lack the necessary professional integrity to serve in the ECCC Trial Chamber but undermine the very legitimacy of the ECCC overall.

124. In the ICC's *Katanga* case, Judge Van den Wyngaert offered an astute observation of the challenges judges face and the duty they bear when sitting in judgement on cases concerning alleged mass atrocity crimes. The Defence considers her observation to be wholly applicable to the ECCC context and has therefore set it out in full below:

> Trials like these are difficult and complex matters, both from a legal and evidentiary point of view. Moreover, they are challenging on the human level. *Sympathy for the victims' plight and an urgent awareness that this Court is called upon to "end impunity" are powerful stimuli. Yet, the Court's success or failure cannot be measured just in terms of "bad guys" being convicted and innocent victims receiving reparation. Success or failure is determined first and foremost by whether or not the proceedings, as a whole, have been fair and just.*
>
> My view is that *the trial must be first and foremost fair towards the accused. Considerations about procedural fairness for the Prosecutor and the victims and their Legal Representatives, while certainly relevant, cannot trump the rights of the accused.* After all, when all is said and done, it is the accused – and only the accused – who stands trial and risks losing his freedom and property. In order for a court of law to have the legal and moral authority to pass legal and moral judgment on someone, especially when it relates to such serious allegations as international crimes, it is essential, in my view, to scrupulously observe the fairness of the proceedings and to apply the standard of proof consistently and rigorously. *It is not good enough that most of the trial has been fair. All of it must be fair.*[241]

[240] Constitution of Cambodia, Art. 38; ECCC Law, Art. 35 new; UDHR, Art. 11(1); ICCPR, Art. 14.
[241] Van den Wyngaert Katanga Opinion, paras. 310, 311 (emphases added).

125. In the Defence's submissions, at the ECCC, the challenges that Judge Van den Wyngaert highlights – namely, sympathy for victims and an aim to end impunity – operate so as to apply significant pressure on one of the most fundamental qualities judges should possess: their judicial moral integrity.[242]

126. Judicial moral integrity[243] has been defined by Professor Hans Kelsen, and cited with approval in Justice Radhabinod Pal's renowned dissenting opinion at the Tokyo International Military Tribunal for the Far East, as:

> [A] measure of freedom from prepossessions, a readiness to face the consequences of views which may not be shared, a devotion to judicial processes, and a willingness to make the sacrifices which the performance of judicial duties may involve.[244]

127. The Defence submits that in the Case 002/01 Judgement and related Final Witnesses Decision, the Judges have fallen far short of the requisite standard of judicial moral integrity required of judges at tribunals generally. This Application has alleged multiple grounds of alleged appearance of bias that, when viewed in totality, clearly demonstrate that the Judges have failed to demonstrate a "freedom from prepossessions". On the contrary, the Judges have appeared completely unwilling to "face the consequences of views which may not be shared" and thereby "make the sacrifices which the performance of judicial duties may involve", for instance by arriving at premature and sweeping conclusions as to the non-existence of CPK internal divisions and a policy to regulate marriage. Most troublingly, the Judges appear to have demonstrated a clear lack of "devotion to judicial processes", including by failing to even address certain Defence submissions and, in the case of the National Judges, refusing to summons the most important witness in all of Case 002. Indeed, while sitting in judgement on Case 002/01 and before the judgement was rendered, Judge Cartwright described Case 002/01 as having been merely a "fairish" trial in her Aspen Speech. It changes nothing – indeed, it is irrelevant, if not incorrect – that Judge Cartwright also suggested that such

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[242] ECCC Agreement, Art. 3(3); *see*, *also*, ECCC Law, Art. 10 new.

[243] In that judgement, the concept was referred to as "moral integrity".

[244] *The United States of America et al. v. Araki et al.*, 'Dissentient Judgement of Judge Pal', IMTFE, 12 Nov 1948, p. 10. In more recent years, a UN and TI-commissioned group of experts produced the *Bangalore Principles of Judicial Conduct*, which identify integrity as one of six fundamental principles which should guide judicial conduct: *see*, *Bangalore Principles of Judicial Conduct*, 2002, available online at: http://www.unodc.org/pdf/corruption/corruption_judicial_rcs_e.pdf. In addition, the UN General Assembly in 1985 endorsed the *Basic Principles on the Independence of the Judiciary*, which not only cite integrity as a necessary quality of judges (Principle 10) but also state at Principle 2 that "[t]he judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or influences, direct or indirect, from any quarter or for any reason": *see*, *e.g.* UN General Assembly, 'Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders', UN Doc. No. A/RES/40/32, 29 Nov 1985.

substandard conditions exist at other international courts and tribunals.[245] As Judge Van den Wyngaert puts it, "[I]t is not good enough that most of the trial has been fair. *All of it must be fair.*"[246]

128. In addition to generally submitting that the totality of the Judges' decisions and conduct demonstrate their lack of the necessary professional integrity to serve in the ECCC Trial Chamber but undermine the very legitimacy of the ECCC overall, the Defence also makes two additional specific submissions in connection with the notion of integrity.

129. First, the Defence submits that in the Case 002/01 Judgement, the Judges heavily over-relied on the testimony of so-called experts as pivotal evidence, most particularly Philip Short, David Chandler, Ben Kiernan, Elizabeth Becker, Stephen Heder, François Ponchaud, Craig Etcheson, and Henri Locard.[247] For instance, according to an approximate count by the Defence, it appears that in the Case 002/01 Judgement, these eight Anglo-French experts/quasi-experts are referred to a total of 791 times;[248] more times than for most other witnesses, experts or civil parties who testified in Case 002/01 other than Duch. It is not this Application's place to assess the legal merits of such extensive use of expert evidence. However, the Defence submits that such reliance on scholars coming from countries understandably perceived by Nuon Chea as colonialist and imperialist calls into question the Judges' true "devotion to judicial processes" and willingness to consider the facts and issues in the case on their true merits, rather than through an ideological prism. It may even suggest that the Judges had always been convinced by the theory of events suggested in a few books[249] published before the ECCC even commenced operations and that Judges Cartwright and Lavergne's positions were inescapably ideological, given they and the eight "experts" are from countries sharing the same ideological tradition. Indeed, this would mean that the Judges have effectively rendered the seven year-long, in excess of US$200 million process to reach a trial judgement in Case 002/01 into a mere farce.

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[245] The OCP recently argued this position: *see*, Doc. No. **F2/2**, 'Co-Prosecutors' Response to Nuon Chea Defence First and Second Requests to Obtain and Consider Additional Evidence in Connection with the Appeal agains the Trial Judg[e]ment in Case 002/01', 16 September 2014, para. 18.

[246] Van den Wyngaert Katanga Opinion, para. 311 (emphasis added).

[247] The latter two persons, while formally summonsed as witnesses, effectively provided expert testimony.

[248] According to the Defence's initial, approximate review of the evidence cited in Case 002/01, it appears that Philip Short was cited 266 times, David Chandler 117 times, Ben Kiernan 46 times, Elizabeth Becker 69 times, Stephen Heder 149 times, François Ponchaud 123 times, Craig Etcheson 12 times, and Henri Locard 9 times. *See*, **E313**, Case 002/01 Judgement.

[249] **E3/1684**, Voices from S-21; Doc. No. **E3/9**, Philip Short, 'Pol Pot: The History of a Nightmare', 2004; **E3/20**, 'When the War Was Over'; **E3/1593**, 'The Pol Pot Regime'; **E3/1815**, 'How Pol Pot Came to Power'; **E243.1**, 'Cambodia: Year Zero'.

130. Second, the Defence submits that Judge Lavergne's appearance of integrity manifested in the issuance of a minority opinion (together with Judge Cartwright) in the Final Witnesses Decision has not lasted to the end. Indeed, the Defence fails to understand how, having found in that minority opinion that Heng Samrin's testimony would not only have been "*prima facie* relevant" but could have contained "information [not] accessible to other proposed witnesses in Case 002/01",[250] Judge Lavergne could nevertheless have determined that the evidence presented in Case 002/01 satisfied him beyond reasonable doubt.[251] Here, again comments made by Judge Van den Wyngaert in her minority opinion in Katanga ring true:

> It is odd, in my view, to recognise that important evidence is missing from the case record, but to nevertheless make a string of *findings beyond reasonable doubt on precisely those points on which the missing evidence could have cast a significantly different light*. […] It is important to consider the significance of so much missing evidence for the standard of proof. Indeed, one may wonder whether it is at all possible to reach the required threshold when so many questions remain and where it is obvious that having more and better evidence might very well have led to significantly different answers.[252]

131. Two months ago, the ICC Plenary of Judges gave as an example of judicial integrity the possibility of judges rendering a minority opinion, which the Plenary considered approvingly as a mechanism which:

> [allows] judges to maintain their intellectual *integrity* … protect[s] judicial proceedings from the influence of forced uniformity, afford[s] necessary impetus for the development of the law and prevent stagnation in decision making […] and demonstrate[s] to the parties, participants and public at large that a case has been thoroughly assessed.[253]

132. If Judge Lavergne had acted with judicial moral integrity, the Defence submits that the failure to summons Heng Samrin should have led him to acquit Nuon Chea altogether. If he acted with judicial moral integrity, he should never have simultaneously acknowledged that there was a clear unwillingness to summons Heng Samrin on the national side and at the same time reach the cowardly conclusion that:

> We have borne in mind that should there be an appeal, this issue can be resolved given that *the Supreme Court Chamber has the power to summons witnesses*, and the responsibility to determine finally any impact arising from failure to summons them. In

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[250] **E312**, Final Witnesses Decision, para. 108.
[251] As Judge Van den Wyngaert suggests, the absence of evidence of such nature may call into question whether the required threshold of proof has even been met: *see*, Van den Wyngaert Katanga Opinion, para. 148.
[252] Van den Wyngaert Katanga Opinion, paras. 148-149.
[253] *Prosecution v. Katanga*, Case No. ICC-01/04-01/07, 'Decision of the Plenary of Judges on the Application of the Legal Representative of Victims for the Disqualification of Judge Christine Van den Wyngaert from the Case of *The Prosecution v. Katanga*', 22 Jul 2014, para. 51.

> the light of this outcome, *we express no view as to the issue of fairness of the trial proceedings raised by our colleagues*.[254]

133. Furthermore, if he acted with judicial moral integrity, Judge Lavergne would not have buried his dissenting opinion whether to summons Heng Samrin in a separate decision but within the Case 002/01 Judgement, where it properly belongs. In the case of Judge Lavergne, therefore, the failure to "face the consequences of views which may not be shared" and "make the sacrifices which the performance of judicial duties may involve" – for instance, by having the courage to arrive at an unpopular, but truthful, ruling – is most acute, although it is also shared among all of the Judges. It should also lead to Judge Lavergne's disqualification, at the very least, for lack of open-mindedness as to the most significant of all matters which will be within the scope of Case 002/02 – the criminal responsibility of Nuon Chea for the crimes with which he is charged.

V. CONCLUSION

134. In her seminal account of the *Eichmann* trial, Hannah Arendt wrote that:

> The purpose of the [*Eichmann*] trial is *to render justice, and nothing else*; even the noblest ulterior purposes – 'the making of a record of the Hitler regime…' can only *detract* from the law's main business: *to weigh the charges brought against the accused, to render judgement and to mete out due punishment*.[255]

135. The Defence submits that this was all that the Judges *should have done* and *needed to do* in Case 002/01. These days, however, Hannah Arendt's view of the purpose of such trials must compete with the popular notion that in cases such as these, tribunals have a special mandate arising from the fact that their cases do not concern mere bicycle thefts but allegations of mass atrocity crimes. It is apparent that the Trial Chamber conceives of the ECCC in these terms, and sought to use the Case 002/01 Judgement to leave a legacy which speaks to the Cambodian public. Yet, if this weighty goal *was* an appropriate one for this five-judge bench, the present case is one which requires critical scrutiny as to the fairness of the proceedings and historical truthfulness of its outcomes. This is not only because of the severity of the alleged crimes and the magnitude of the allegedly resultant victimhood, but because of the *demonstration effect* that tribunals like this one should have in the specific context in which they are established as well as in the broader international context. The ECCC *should* demonstrate that no one is above

[254] **E312**, Final Witnesses Decision, para. 111.
[255] Hannah Arendt, 'Eichmann in Jerusalem: A Report on the Banality of Evil', 1963, p. 253.

the law, but it should also demonstrate that the law has integrity and seeks to find truth, not vengeance, if it is to truly be, as the Trial Chamber described it, a "*model court*".[256]

136. However this Tribunal's purpose is defined, if the Judges continue to sit in judgement in Case 002/02, this will flagrantly violate Nuon Chea's *fundamental right to a fair trial* by an independent and impartial tribunal and undermine the value of "justice" rendered at this Tribunal. It would also do a grave and lasting disservice to the rule of law in Cambodia by further eroding any faith that may exist in the judiciary, and further reinforcing preexisting notions that certain institutions operate only as manifestations of power – manifestations of power intended to achieve nothing more than victor's justice and to reinforce the highly politicised, ideological narrative those victors, such as Heng Samrin, who King Father Sihanouk once called the "pitiful puppet of the Vietnamese"[257] and ideologically-biased Anglo-French scholars, have crafted. History will not look kindly on any judgement rendered under such circumstances.

137. However, while the Judges' conduct and findings in Case 002/01 have been extremely damaging, the Defence continues to believe that the situation is nevertheless reparable, and there is still a chance to ensure that this Tribunal renders true justice, leaves a positive and enduring legacy for the rule of law in Cambodia, and ultimately speaks truth to power. Disqualifying the Judges from any further proceedings against Nuon Chea would be a very important step in the right direction.

VI. RELIEF

138. For the reasons stated above, the Defence requests that: **(i)** the Chamber admit this Application; **(ii)** all of the Judges be permanently disqualified from any further proceedings against Nuon Chea; **(iii)** the Judges step down voluntarily pursuant to Rule 34(5) while this Application is determined; **(iv)** the start of the evidentiary hearings in Case 002/02 be postponed until this Application is determined; and **(v)** the Chamber treat this Application as a matter of urgency given its nature.

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SON Arun

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[256] **E5/3**, Nil Nonn Disqualification Decision, para. 14.
[257] **E307/5.2.2**, UN Security Council Official Records, 'Meeting, 11 January 1979', para. 85.